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Federal Register

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2009–1107; Directorate Identifier 2009–NM–138–AD; Amendment 39–16202; AD 2010–04–09]**

**RIN 2120–AA64**

### Airworthiness Directives; Airbus Model A330–200 Series Airplanes and Model A340–200 and –300 Series Airplanes

*Correction*

In rule document 2010–3119 beginning on page 7940 in the issue of February 23, 2010, make the following correction:

On page 7941, in the second column, under the header "**Applicability**," item (1) should read: "(1) Airbus Model A330–201, –202, –203, –223, and –243 airplanes, all manufacturer serial numbers."

[FR Doc. C1–2010–3119 Filed 3–2–10; 8:45 am]

**BILLING CODE 1505–01–D**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2008–0545; Directorate Identifier 2008–NE–16–AD; Amendment 39–16219; AD 2010–05–09]**

**RIN 2120–AA64**

### Airworthiness Directives; Dowty Propellers Models R354/4–123–F/13, R354/4–123–F/20, R375/4–123–F/21, R389/4–123–F/25, R389/4–123–F/26, and R390/4–123–F/27 Propellers

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued 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:

A number of propeller blade outer sleeves have been found with cracks since 1996. Testing has shown that blade retention integrity is not affected by this cracking. However, this condition, if not detected and corrected, can lead to blade counterweight release, possibly resulting in damage to the aircraft and injury to occupants or persons on the ground.

We are issuing this AD to prevent blade counterweight release, which could result in injury or damage to the airplane.

**DATES:** This AD becomes effective April 7, 2010.

**ADDRESSES:** The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

**FOR FURTHER INFORMATION CONTACT:** Terry Fahr, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: terry.fahr@faa.gov;* telephone (781) 238–7155; fax (781) 238–7170.

**SUPPLEMENTARY INFORMATION:**

#### Discussion

We issued a notice of proposed rulemaking (NPRM) and a supplemental NPRM to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on June 30, 2008 (73 FR 36819), and the supplemental NPRM was published in the **Federal Register** on May 18, 2009 (74 FR 23131). Those NPRMs proposed to correct an unsafe condition for the specified products. The MCAI states that:

A number of propeller blade outer sleeves have been found with cracks since 1996. Testing has shown that blade retention integrity is not affected by this cracking. However, this condition, if not detected and corrected, can lead to blade counterweight release, possibly resulting in damage to the aircraft and injury to occupants or persons on the ground.

#### Comments

We gave the public the opportunity to participate in developing this AD. We responded to the comments received on the NPRM, in the supplemental NPRM. We considered the one comment received on the supplemental NPRM, as follows:

#### Claim That Tracking of Individual Propeller Blades Is Not Required

One commenter, a private citizen, states that if the proposed AD was rewritten against the propeller assembly, instead of the propeller blades, then all four propeller blades are inspected at the same time, and tracking of individual propeller blades is not required. Also, because the propeller blades could be moved from propeller to propeller, a requirement to inspect all four propeller blades at the time the propeller is assembled, "zeroing out" the inspection, would prevent any propeller blade in the assembly from exceeding its inspection interval.

We do not agree. Since the propeller blade log cards are with the propeller blades, it is appropriate in writing the AD against the propeller blades; not the propeller assembly. Also, since the AD is related to propeller blade inspections, and propeller assembly total time is independent of propeller blade total time, tracking propeller assembly time could result in a propeller blade exceeding the 1,600 flight hour or 15,000 flight hour time-in-service inspection interval. We did not change the AD.

#### Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD as proposed.

#### Costs of Compliance

Based on the service information, we estimate that this AD will affect about 292 propellers installed on airplanes of U.S. registry. We also estimate that it will take 0.5 work-hour per propeller to visually inspect for cracks. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the AD on U.S. operators to be $11,680.

### 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 AD will not have federalism implications under Executive Order 13132. This AD will 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 AD:*

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 AD and placed it in the AD docket.

### 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 AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

### Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

**2010–05–09 Dowty Propellers:** Amendment 39–16219. Docket No. FAA–2008–0545; Directorate Identifier 2008–NE–16–AD.

#### Effective Date

(a) This airworthiness directive (AD) becomes effective April 7, 2010.

#### Affected ADs

(b) None.

(c) This AD applies to Dowty Propellers Models R354/4–123–F/13, R354/4–123–F/20, R375/4–123–F/21, R389/4–123–F/25, R389/4–123–F/26, and R390/4–123–F/27 propellers. These propellers are installed on, but not limited to, Saab AB, Saab Aerosystems SF340A and SAAB SF340B airplanes.

#### Reason

(d) European Aviation Safety Agency (EASA) AD No. 2008–0033, dated February 19, 2008, states:

A number of propeller blade outer sleeves have been found with cracks since 1996. Testing has shown that blade retention integrity is not affected by this cracking. However, this condition, if not detected and corrected, can lead to blade counterweight release, possibly resulting in damage to the aircraft and injury to occupants or persons on the ground.

This AD requires initial and repetitive visual inspections of propeller blade root outer sleeves for cracks, and removal before further flight of propeller blades with cracked blade root outer sleeves. We are issuing this AD to prevent blade counterweight release, which could result in injury or damage to the airplane.

#### Actions and Compliance

(e) Unless already done, do the following actions.

#### Propeller Blade Root Outer Sleeve Visual Inspections

(1) At the next 1,600 flight hours (FH) aircraft check after the effective date of this AD, or, after any blade accumulates 15,000 FH time-in-service, whichever occurs later, visually inspect all propeller blade root outer sleeves for cracks.

(2) Thereafter, at intervals not to exceed 1,600 FH, visually inspect all propeller blade root outer sleeves for cracks.

(3) Before further flight, remove any propeller blades found with cracked root outer sleeves during the visual inspections in paragraphs (e)(1) and (e)(2) of this AD.

#### FAA AD Differences

(f) None.

#### Alternative Methods of Compliance (AMOCs)

(g) The Manager, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

#### Related Information

(h) Refer to European Aviation Safety Agency AD 2008–0033, dated February 19, 2008, and Dowty Propellers Alert Service Bulletin No. SF340–61–A106, Revision 1, dated March 20, 2008, for related information.

(i) Contact Terry Fahr, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: terry.fahr@faa.gov;* telephone (781) 238–7155; fax (781) 238–7170, for more information about this AD.

#### Material Incorporated by Reference

(j) None.

Issued in Burlington, Massachusetts, on February 23, 2010.

**Francis A. Favara,**

*Manager, Engine and Propeller Directorate, Aircraft Certification Service.*

[FR Doc. 2010–4219 Filed 3–2–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF JUSTICE

## Parole Commission

## 28 CFR Part 2

## Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes

**AGENCY:** United States Parole Commission, Justice.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Parole Commission is promulgating final rules to implement the District of Columbia Equitable Street Time Credit Amendment Act of 2008. This Act modifies parole laws for District of Columbia offenders by allowing the Parole Commission to terminate the supervision and legal custody of a parolee before the expiration of the parolee's sentence. The Act also modifies the requirement that a parolee lose credit for all time spent

on parole when the Commission revokes the parolee's release for violating parole conditions. With these modifications, parole laws for DC offenders are more consistent with similar parole laws governing U.S. Code parole-eligible offenders. The Commission is also making a number of conforming amendments to regulations for both DC and U.S. Code offenders.

**DATES:** *Effective date:* April 12, 2010.

**FOR FURTHER INFORMATION CONTACT:** Rockne Chickinell, Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815, telephone (301) 492–5959. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

**SUPPLEMENTARY INFORMATION:**

## Legislation and Interim Rules

The Parole Commission described the provisions of the Equitable Street Time Credit Amendment Act of 2008, DC Law 17–389 (hereinafter "the Act") in its June 17, 2009 publication of interim rules implementing the Act. 74 FR 28602–06. When it became effective May 20, 2009, the Act made two significant changes in parole laws for DC offenders. First, Section 3(a) of the Act amended DC Code 24–404 to provide that the Commission may terminate a DC parolee from supervision, and legal custody of the parolee, before the expiration date of the sentence. Before this change, the Commission could only transfer a parolee to inactive supervision for good behavior on parole. Second, Section 3(b) of the Act amended DC Code 24–406 to limit the forfeiture of parole time to those revoked parolees who have incurred a new conviction for an offense punishable by imprisonment, or who have intentionally refused or failed to respond to a request or order of the Commission. The legislation provided for mandatory forfeiture of the parole period if the parolee is convicted of a crime punishable by a prison term of more than one year. If the new conviction carries a possible jail term of one year or less, the Commission has discretion to allow sentence credit if the Commission decides that forfeiture is not necessary to protect the public welfare. This change in forfeiture law brings DC parole laws more in line with the forfeiture provisions for federal parolees found at 18 U.S.C. 4210(b) and (c), which require parole time forfeiture for a revoked parolee who is convicted of a crime punishable by imprisonment, and permit forfeiture of a period while the parolee absconded from supervision or willfully disobeyed a Commission direction.

The Commission's interim rules for the procedures governing early termination from supervision for DC parolees are almost identical to the rules governing early termination decisions for federal parolees. The interim rules for street time forfeiture largely follow the statutory language. The final rules are virtually identical to the interim rules, with several changes resulting from the public comment submitted in response to the interim rules. These comments and the Commission's responses are summarized below. The Commission is also amending the rules at 28 CFR 2.43 (for federal parolees) and § 2.208 (for DC supervised releasees) to conform with the final rules on DC parolees.

## Public Comment on Interim Rules Regarding Early Termination From Supervision

The Commission received public comment on the interim rules from the District of Columbia Public Defender Service ("PDS") and the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC"). First, PDS asked that the Commission amend 28 CFR § 2.95(c) to specify the procedures that apply to a five-year hearing on early termination from supervision. Unlike the federal statute for early termination hearings at 18 U.S.C. 4211(c), the new DC law does not specify these procedures. In conducting early termination hearings for DC offenders, the Commission has always intended to use the same procedures that apply to federal early termination hearings. The Commission is amending the interim rule at § 2.95(c) to add a cross-reference to 18 U.S.C. 4214(a)(2) (the statute describing procedures that apply to federal revocation and early termination hearings). The rule at § 2.43(c) for federal parolees is similarly amended.

Second, PDS suggested that the Commission require notice to parolees and supervised releasees of early termination denials and reasons for the termination denials. Among other reasons, PDS contended that these requirements would safeguard the offender's liberty interest in early termination from supervision, and equip the offender with the tools needed to achieve early termination at the next review. Under its practice for federal parolees, the Commission sends a notice of the early termination decision when the Commission: (1) Grants early termination from supervision; (2) denies early termination at the five-year mark or thereafter; and (3) denies early termination in disagreement with the supervision officer's recommendation in favor of early termination. Notice of the decision is not required by 18 U.S.C. 4211, or the Commission's rule at 28 CFR 2.43. The Commission disagrees with the contention that a parolee, whether serving a federal or DC Code sentence, has a liberty interest in early termination of parole that is protected by the Due Process Clause. (Under case precedent, a DC Code prisoner does not have a liberty interest in parole release.) Finally, in cases where the offender may benefit from some direction on improvement, it is likely that the offender is already on notice from the supervision officer of deficient behavior that requires correction.

Third, PDS recommended that the rules be modified to state that after five years on supervision, there is a presumption that the parolee must be terminated from supervision unless the Commission finds that the parolee is a risk to the public safety. The rules fully implement the directives of federal and DC statutes. The related request for a new rule requiring the parolee's termination from supervision if a hearing is not held within sixty days of the five-year mark is contrary to established case precedent from the federal circuits.

Finally, PDS recommended amending the early termination guidelines and expanding the examples of case-specific factors for departing from the guidelines. In particular, PDS objects to the use of the salient factor score in making early termination decisions. The Commission continues to explore the use of an alternative risk prediction device for reparole decisions for DC offenders. Until this investigation results in proposed rulemaking, the Commission will continue to use the early termination guidelines.

WLC asked the Commission for more formal procedures in conducting case reviews before the five-year point of the parolee's supervision term. WLC also recommended that the Commission enhance the statutory presumption for termination from supervision at the five-year mark by adopting a policy that a parolee must be released from further supervision at that point if he had not been convicted of a new crime or had his parole revoked. Finally, WLC echoed the comments of PDS on the Commission's use of the salient factor score.

WLC's recommendations concerning the case review process for early termination decisions are again founded upon the supposition that the parolee has a constitutionally-protected liberty interest in being discharged early from parole supervision. As noted earlier, a

parolee does not possess such a liberty interest. There does not appear to be a compelling need for the Commission to adopt more complex procedures or more restrictive evidentiary standards for early termination decisions. If the Commission chose to establish more complex procedures for this function, it would likely have to add more personnel to accommodate the increased workload.

In reviewing the interim rules, the Commission discovered a mistake in the rule governing appeals for early termination denials for federal parolees (28 CFR 2.43(e)). When the Commission promulgated the interim rule, it mistakenly referred to adverse decisions under paragraph (b) of revised § 2.43, rather than paragraph (c), as subject to appeal. Paragraph (b) covers adverse decisions before the parolee has served five years on supervision, while paragraph (c) covers adverse decisions at the five-year mark and thereafter. The statute establishing an administrative appeal remedy for federal parole-eligible offenders only specifies an administrative appeal for offenders who are denied early termination from supervision "under section 4211(c) [of Title 18, U.S.C.]," the provision for early termination of parole supervision after service of five years on parole. The Commission has never extended an administrative appeal for early termination denials to parolees before the five-year mark (see 28 CFR § 2.43(c)(3) (2008)), and did not intend to do so in its interim rule. The final rule corrects this mistake and provides that only federal parolees who have been denied early termination of parole after serving five years on supervision have the opportunity to appeal the denial to the Commission.

**Public Comment on Interim Rules Regarding Forfeiture of Time Spent on Parole**

Regarding the rules governing forfeiture of street time for parole violators, PDS suggested that the Commission amend 28 CFR 2.105(d) to provide that all street time can be forfeited only when the parolee has been convicted of: (1) A crime punishable by more than one year of imprisonment; or (2) a crime punishable by a maximum prison term of one year and the Commission finds the parolee is a risk to the public safety. PDS contended that this change would bring the rule in line with the new law at DC Code 24–406(c)(2). However, the Commission's rule already directs that the Commission must forfeit street time for a parolee convicted of a crime punishable by more than one year in prison. 28 CFR 2.105(d)(2)(A). Regarding a parolee convicted of a crime punishable by a lesser term of incarceration, the wording of § 2.105(d)(2)(B) is more consistent with the new law than the proposed wording sought by PDS. The statute directs the Commission to forfeit street time for a parolee convicted of a new offense punishable by "one year or less" of imprisonment. DC Code 24–406(c)(2)(B). Therefore, a parolee convicted of a crime punishable by a maximum jail term of less than one year (*e.g.*, 90 days or 6 months, common statutory penalties for misdemeanors) is subject to street time forfeiture under the statute. Finally, the new statute does not require that, before taking away a misdemeanant's street time, the Commission must find that the street time forfeiture is necessary to protect the public safety. Instead, DC Code 24–406(c)(2)(B) directs the Commission to forfeit the street time for the misdemeanant "unless the Commission determines that such forfeiture of credit is not necessary to protect the public welfare." Therefore, the misdemeanant avoids the street time forfeiture only if the Commission finds that forfeiture is *not* needed to protect the public. If the Commission refrains from making the finding, the statutory command controls and requires the forfeiture.

PDS recommended that the Commission add other examples to the list of information the Commission considers in making a determination that street time forfeiture is not warranted for a parolee convicted of a new misdemeanor. Several examples proposed by PDS are incorporated in the final rule. The Commission decided to forego promulgating guidelines for evaluating whether street time forfeiture is not necessary to protect the public welfare, and instead continue to make these decisions on a case-by-case basis.

PDS also recommended that 28 CFR 2.105(d)(3) provide that "[t]he parolee shall receive credit for the remainder of the time on parole" if the Commission partially forfeits street time for the parolee who loses contact with the supervision officer or violates an order. This recommended amendment is unnecessary because § 2.105(d) begins with the instruction "[e]xcept as otherwise provided in paragraphs (d)(2) and (d)(3), the Commission shall grant a revoked parolee credit toward completion of the sentence for all time served on parole." In addition, paragraph (d)(3) clearly states that the forfeiture allowed under that paragraph is "for the period of time that the Commission determines that the parolee failed or refused to respond to such a request, order, summons, or warrant."

WLC feared that through the interim rules Commission sought to expand its authority to forfeit street time for a parolee who had committed only administrative violations. This fear is groundless. WLC suggested that the Commission specify those misdemeanor crimes that shall lead to street time forfeiture. This suggestion shares the same underlying flaw as found in the comments of PDS, *i.e.*, that the new law requires that the Commission must find that the parolee presents a danger to the public safety before it can forfeit street time for a new misdemeanor conviction.

WLC also recommended that the Commission provide notice to the parolee of those "reasonable requests or orders" that may result in street time forfeiture under § 2.105(d)(3) if the parolee refuses to obey the request or order. Neither due process nor the terms of the new law require the notice suggested by WLC. Given the variety of situations that could lead to a partial street time forfeiture under paragraph (d)(3), and the infrequency of street time forfeitures outside the absconder situation, the Commission sees no reason to undertake the difficult task of preparing a rule or other notice that seeks to give a parolee warning of requests or orders that may lead to the forfeiture of street time if the parolee disobeys the request or order.

**Implementation**

The regulations set forth below will be made effective on April 12, 2010. The Commission earlier implemented the Act's provisions with the interim rules made effective June 17, 2009. The Act does not disturb the street time forfeiture decisions for DC offenders issued by the Commission before May 20, 2009 (the effective date of the Act), and it allows the Commission a period of one year to implement the provisions on early termination of supervision for those DC parolees who were released before the Act's effective date.

**Executive Order 12866**

The U.S. Parole Commission has determined that these final rules do not constitute significant rules within the meaning of Executive Order 12866.

**Executive Order 13132**

These regulations will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, these rules do not have

sufficient federalism implications requiring a Federalism Assessment.

**Regulatory Flexibility Act**

The final rules will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

**Unfunded Mandates Reform Act of 1995**

The rules will not cause State, local, or tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

**Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act)**

These rules are not "major rules" as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 Subtitle E—Congressional Review Act), now codified at 5 U.S.C. 804(2). The rules will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, these are rules of agency practice or procedure that do not substantially affect the rights or obligations of non-agency parties, and do not come within the meaning of the term "rule" as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

**List of Subjects in 28 CFR Part 2**

Administrative practice and procedure, Prisoners, Probation and Parole.

**The Final Rule**

■ Accordingly, the U. S. Parole Commission is adopting the following amendments to 28 CFR Part 2.

## PART 2—[AMENDED]

■ 1. The authority citation for 28 CFR Part 2 continues to read as follows:

**Authority:** 18 U.S.C. 4203(a)(1) and 4204(a)(6).

■ 2. Section 2.43 is revised to read as follows:

### § 2.43 Early termination.

(a)(1) Upon its own motion or upon request of a parolee, the Commission may terminate a parolee's supervision, and legal custody over the parolee, before the sentence expires.

(2) The Commission may terminate supervision of a committed youth offender after the offender serves one year on supervision. Upon terminating supervision before the sentence expires, the Commission shall set aside the committed youth offender's conviction and issue a certificate setting aside the conviction instead of a certificate of termination.

(b) Two years after releasing a prisoner on supervision, and at least annually thereafter, the Commission shall review the status of the parolee to determine the need for continued supervision. The Commission shall also conduct a status review whenever the supervision officer recommends early termination of the parolee's supervision.

(c) Five years after releasing a prisoner on supervision, the Commission shall terminate supervision over the parolee unless the Commission determines, after a hearing conducted in accordance with the procedures prescribed in 18 U.S.C. 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law. If the Commission does not terminate supervision under this paragraph, the parolee may request a hearing annually thereafter, and the Commission shall conduct an early termination hearing at least every two years.

(d) In calculating the two-year and five-year periods provided in paragraphs (b) and (c) of this section, the Commission shall not include any period of parole before the most recent release, or any period served in confinement on any other sentence.

(e) A parolee may appeal an adverse decision under paragraph (c) of this section under § 2.26 or § 2.27 as applicable.

(f) If the case is designated for the original jurisdiction of the Commission, a decision to terminate supervision under paragraphs (a)(2) and (b) of this section, or a decision to terminate or continue supervision under paragraph (c) of this section shall be made under the provisions of § 2.17.

(g)(1) In determining whether to grant early termination from supervision, the Commission shall consider the guidelines of this paragraph. The guidelines are advisory and the Commission may disregard the outcome indicated by the guidelines based on case-specific factors. Termination of supervision is indicated if the parolee:

(i) Has a salient factor score in the very good risk category and has completed two continuous years of supervision free from an incident of new criminal behavior or serious parole violation; or

(ii) Has a salient factor score in a risk category other than very good and has completed three continuous years of supervision free from an incident of new criminal behavior or serious parole violation.

(2) As used in this paragraph (g), the term "an incident of new criminal behavior or serious parole violation" includes a new arrest or report of a parole violation if supported by substantial evidence of guilt, even if no conviction or parole revocation results. The Commission shall not terminate supervision of a parolee until it determines the disposition of a pending criminal charge.

(h) Case-specific factors that may justify a departure either above or below the early termination guidelines may relate to the current behavior of the parolee, or to the parolee's background and criminal history.

■ 3. Section 2.65 is amended by revising paragraph (i) to read as follows:

### § 2.65 Paroling policy for prisoners serving aggregate U.S. and DC Code sentences.

* * * * *

(i) *Forfeiture of parole time.* All time on parole shall be forfeited if required under § 2.52(c) and § 2.105(d) of this part. If not, the Commission shall divide the total time on parole according to the proportional relationship of the DC sentence to the U.S. sentence, and shall order the forfeiture of the portion corresponding to the DC sentence pursuant to § 2.105(d). For example, if the parolee is serving a two-year DC Code sentence and a three-year U.S. Code sentence, the DC sentence is two fifths, or 40 percent, of the aggregate sentence (five years). If the parolee was on parole 100 days and parole is revoked for a misdemeanor conviction, a period of 40 days is subject to possible forfeiture under § 2.105(d).

■ 4. Section 2.74 is amended by revising the third sentence of paragraph (c) to read as follows:

### § 2.74 Decision of the Commission.

* * * * *

(c) * * * A decision terminating a parolee early from supervision shall also be based on the concurrence of two Commissioners. * * *

■ 5. Section 2.92 is amended by revising paragraphs (a), (c), and (d) to read as follows:

### § 2.92 Jurisdiction of the Commission.

(a) The jurisdiction of the Commission over a parolee shall expire

on the date of expiration of the maximum term or terms for which he was sentenced, or upon the early termination of supervision as provided in § 2.95, subject to the provisions of this subpart relating to warrant issuance, time in absconder status, and the forfeiture of time on parole in the case of revocation.

* * * * *

(c) When the parolee's sentence expires, the supervision officer shall issue a certificate of discharge to the parolee and to such other agencies as may be appropriate. If the Commission terminates the parolee's supervision early under § 2.95, the Commission shall issue a certificate of discharge for delivery to the parolee by the supervision officer.

(d) An order of revocation shall not affect the Commission's jurisdiction to grant and enforce any further periods of parole, up to the date of expiration of the offender's maximum term, or upon the early termination of supervision under § 2.95.

■ 6. Section 2.95 is revised to read as follows:

**§ 2.95 Early termination from supervision.**

(a)(1) Upon its own motion or upon request of a parolee, the Commission may terminate a parolee's supervision, and legal custody over the parolee, before the sentence expires.

(2) The Commission may terminate supervision of a committed youth offender after the offender serves one year on supervision. Upon terminating supervision before the sentence expires, the Commission shall set aside the committed youth offender's conviction and issue a certificate setting aside the conviction instead of a certificate of termination.

(b) Two years after releasing a prisoner on supervision, and at least annually thereafter, the Commission shall review the status of the parolee to determine the need for continued supervision. The Commission shall also conduct a status review whenever the supervision officer recommends early termination of the parolee's supervision.

(c) Five years after releasing a prisoner on supervision, the Commission shall terminate supervision over the parolee unless the Commission determines, after a hearing conducted in accordance with the procedures prescribed in 18 U.S.C. 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law. If the Commission does not terminate supervision under this paragraph, the parolee may request a hearing annually thereafter, and the Commission shall conduct an early termination hearing at least every two years.

(d) In calculating the two-year and five-year periods provided in paragraphs (b) and (c) of this section, the Commission shall not include any period of parole before the most recent release, or any period the parolee served in confinement on any other sentence.

(e)(1) In determining whether to grant early termination from supervision, the Commission shall consider the guidelines of this paragraph (e). The guidelines are advisory and the Commission may disregard the outcome indicated by the guidelines based on case-specific factors. Termination of supervision is indicated if the parolee:

(i) Has a salient factor score in the very good risk category and has completed two continuous years of supervision free from an incident of new criminal behavior or serious parole violation; or

(ii) Has a salient factor score in a risk category other than very good and has completed three continuous years of supervision free from an incident of new criminal behavior or serious parole violation.

(2) As used in this paragraph (e), the term "an incident of new criminal behavior or serious parole violation" includes a new arrest or report of a parole violation if supported by substantial evidence of guilt, even if no conviction or parole revocation results. The Commission shall not terminate supervision of a parolee until it determines the disposition of a pending criminal charge.

(3) Case-specific factors that may justify a departure either above or below the early termination guidelines may relate to the current behavior of the parolee, or to the parolee's background and criminal history.

■ 7. Section 2.96 is revised to read as follows:

**§ 2.96 Order of early termination.**

When the Commission orders early termination from supervision, the Commission shall issue a certificate to the parolee granting a full discharge from the sentence. The termination and discharge shall take effect only upon the actual delivery of the certificate of discharge to the parolee by the supervision officer, and may be rescinded for good cause at any time before such delivery.

■ 8. Section 2.97 is amended by revising the introductory text to read as follows:

**§ 2.97 Withdrawal of order of release.**

If, after an order for release from active supervision under former § 2.95 has been issued by the Commission, and prior to the expiration date of the sentence(s) being served, the parolee commits any new criminal offense or engages in any conduct that might bring discredit to the parole system, the Commission may, in its discretion, do any of the following:

* * * * *

■ 9. Section 2.98 is amended in paragraph (e) by removing "DC Code 24–406(a)" and adding in its place "DC Code 24–406(c)."

■ 10. Section 2.100 is amended in paragraph (d)(2) by removing "DC Code 24–406(a)" and adding in its place "DC Code 24–406(c)."

■ 11. Section § 2.105 is amended by revising paragraphs (b), (d), and (e) to read as follows:

**§ 2.105 Revocation decisions.**

* * * * *

(b) If parole is revoked under this section, the Commission shall determine whether immediate reparole is warranted or whether the parolee should be returned to prison. If the parolee is returned to prison, the Commission shall also determine whether to set a presumptive release date pursuant to § 2.81.

* * * * *

(d)(1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, the Commission shall grant a revoked parolee credit toward completion of the sentence for all time served on parole.

(2)(i) The Commission shall forfeit credit for the period of parole if a parolee is convicted of a crime committed during a period of parole and that is punishable by a term of imprisonment of more than one year.

(ii) If the crime is punishable by any other term of imprisonment, the Commission shall forfeit credit for the period of parole unless the Commission determines that such forfeiture is not necessary to protect the public welfare. In making this decision, the Commission shall consider the nature and circumstances of the violation behavior, the history and characteristics of the offender, including the offender's supervision history, family support and stability, employment record, participation in applicable treatment programs, and other available and relevant information.

(3) If, during the period of parole, a parolee intentionally refuses or fails to respond to any reasonable request, order, summons, or warrant of the

Commission or any member or agent of the Commission, the Commission may order that the parolee not receive credit for the period of time that the Commission determines that the parolee failed or refused to respond to such a request, order, summons, or warrant.

(4) The provisions of this paragraph (e) shall apply only to any period of parole that is being served on or after May 20, 2009, and shall not apply to any period of parole that was revoked before that date.

(e) Notwithstanding paragraphs (a) through (d) of this section, prisoners committed under the Federal Youth Corrections Act shall not be subject to forfeiture of time on parole, but shall serve uninterrupted sentences from the date of conviction except as provided in § 2.10(b) and (c). DC Code 24–406(c) and paragraphs (a) through (d) of this section are fully applicable to prisoners serving sentences under the DC Youth Rehabilitation Act.

* * * * *

■ 12. Section § 2.208 is revised to read as follows:

**§ 2.208 Termination of a term of supervised release.**

(a)(1) The Commission may terminate a term of supervised release and discharge the releasee from supervision after the expiration of one year of supervised release, if the Commission is satisfied that such action is warranted by the conduct of the releasee and the interest of justice.

(2) Upon terminating supervision of a committed youth offender before the sentence expires, the Commission shall set aside the committed youth offender's conviction and issue a certificate setting aside the conviction instead of a certificate of discharge.

(b) Two years after a prisoner is released on supervision, and at least annually thereafter, the Commission shall review the status of the releasee to determine the need for continued supervision. The Commission shall also conduct a status review whenever the supervision officer recommends termination of the supervised release term. If the term of supervised release imposed by the court is two years or less, the Commission shall consider termination of supervision only if recommended by the releasee's supervision officer.

(c) In calculating the two-year period provided in paragraph (b) of this section, the Commission shall not include any period of release before the most recent release, or any period served in confinement on any other sentence.

(d)(1) In deciding whether to terminate supervised release, the Commission shall consider the guidelines of this paragraph (d). The guidelines are advisory and the Commission may disregard the outcome indicated by the guidelines based on case-specific factors. Termination of supervision is indicated if the releasee:

(i) Has a salient factor score in the very good risk category and has completed two continuous years of supervision free from an incident of new criminal behavior or serious release violation; or

(ii) Has a salient factor score in a risk category other than very good and has completed three continuous years of supervision free from an incident of new criminal behavior or serious release violation.

(2) As used in this paragraph (d), the term "an incident of new criminal behavior or serious release violation" includes a new arrest or report of a release violation if supported by substantial evidence of guilt, even if no conviction or release revocation results. The Commission shall not terminate supervision of a releasee until it determines the disposition of a pending criminal charge.

(3) Case-specific factors that may justify a departure either above or below the early termination guidelines may relate to the current behavior of the releasee, or to the releasee's background and criminal history.

Dated: February 24, 2010.

**Isaac Fulwood,**

*Chairman, U.S. Parole Commission.*

[FR Doc. 2010–4270 Filed 3–2–10; 8:45 am]

BILLING CODE 4410–31–P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[Docket No. USCG–2010–0083]**

## Drawbridge Operation Regulations; Elizabeth River, Eastern Branch, VA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary deviation from regulations; request for comments.

**SUMMARY:** The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Berkley Bridge across the Eastern Branch of the Elizabeth River, mile 0.4, at Norfolk, Virginia. This deviation is necessary to test another change in the drawbridge operation schedule based on comments received from the first test deviation published on October 9, 2009.

**DATES:** This deviation is effective from 9 a.m. on March 10, 2010 through 2:30 p.m. on September 3, 2010.

Comments and related material must be received by the Coast Guard on or before July 1, 2010.

**ADDRESSES:** You may submit comments identified by docket number USCG–2010–0083 using any one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.*
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.
- *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

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

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or e-mail Terrance A. Knowles, Environmental Protection Specialist, Fifth Coast Guard District, telephone 757–398–6587, e-mail *Terrance.A.Knowles@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Public Participation and Request for Comments

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

### Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2010–0083), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (*http://*

*www.regulations.gov*), or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand delivery, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–0083," click "Search," and then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

**Viewing Comments and Documents**

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–0083" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

**Regulatory Information**

On October 9, 2009, we published a notice of temporary deviation request for comments entitled; "Drawbridge Operation Regulations; Elizabeth River, Eastern Branch, Norfolk, VA, in the **Federal Register** (74 FR 52143) and a notice of proposed rulemaking (NPRM) entitled "Drawbridge Operation Regulations; Elizabeth River, Eastern Branch, Norfolk, VA, in the **Federal Register** (74 FR 52158). We received 861 comments for both the temporary deviation and NPRM. No public meeting was requested, and none was held.

**Privacy Act**

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

**Public Meeting**

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

**Background and Purpose**

On behalf of the Cities of Chesapeake and Norfolk Virginia, the Virginia Department of Transportation (VDOT), who owns and operates the lift-type Berkley Bridge, requested a temporary change to the existing bridge regulations. The normal operating schedule allows the Berkley Bridge, mile 0.4, with a vertical clearance of 48 feet at mean high tide in Norfolk, VA, to remain closed one hour prior to the published start of a scheduled marine event regulated under § 100.501, and remain closed until one hour following the completion of the event unless the Patrol Commander designated under § 100.501 allows the bridge to open for commercial vessel traffic. In addition, the bridge shall open on signal any time except from 5 a.m. to 9 a.m. and from 3 p.m. to 7 p.m., Monday through Friday, except Federal holidays, and shall open at any time for vessels with a draft of 18 feet or more, provided that at least 6 hours advance notice has been given to the Berkley Bridge Traffic Control Room at (757) 494–2490 as required by 33 CFR 117.1007(b) and (c). Vessel traffic on this waterway consists of pleasure craft, tug and barge traffic, and ships with assist tugs seeking repairs. There is no alternate waterway route around the bridge.

Due to the temporary closure of two area bridges, this bridge and its approaches has experienced vehicular back-ups, delays, and congestion. During this test deviation, VDOT will gather data from the scheduled openings, along with vessel counts, to compare, evaluate, and monitor both the old and new traffic patterns in hope of reducing roadway congestion on the bridge and local commuting area by adjusting bridge openings to ensure any future regulation will not have a significant impact on navigation.

The Berkley Bridge is the principle arterial route in and out of the City of Norfolk and serves as the major evacuation highway in the event of emergencies. The monthly vehicular traffic counts submitted by VDOT for the last quarter of calendar year 2008 show the average daily traffic volumes at the Berkley Bridge as shown below:

October 2008—83,296 vehicles
November 2008—99,643 vehicles
December 2008—106,856 vehicles

The traffic counts revealed that from October 2008 to December 2008, the Berkley Bridge has experienced a seven percent (or 23,560-car) increase in traffic flow. The Coast Guard anticipates a continued increase in vehicular traffic over the Berkley Bridge.

The Coast Guard received 861 comments on both the temporary deviation and NPRM. A large majority of the responses from commuters approved the scheduled opening set-up. However, the local maritime community expressed objections to the schedule change to vessels. After review of all of the comments and bridge-related data received, the Coast Guard has determined that an alternative proposal should be considered.

A Supplemental Proposed Rulemaking, [USCG–2009–0754], is being issued in conjunction with this Temporary Deviation to obtain additional public comments.

The Coast Guard will evaluate public comments from this Temporary Deviation and the above-referenced Supplemental Proposed Rulemaking to determine if a proposed temporary change to the drawbridge operating regulation is warranted for the duration of the project.

**The Test Schedule**

From March 10, 2010, to September 3, 2010, the draw of the Berkley Bridge, mile 0.4, at Norfolk, shall operate as follows:

(1) The draw shall remain closed one hour prior to the published start of a scheduled marine event regulated under § 100.501, and shall remain closed until one hour following the completion of the event unless the Patrol Commander designated under § 100.501 allows the bridge to open for commercial vessel traffic.

(2) The draw shall open on signal at any time for vessels carrying, in bulk,

cargoes regulated by 46 CFR subchapters D or O, or Certain Dangerous Cargoes as defined in 33 CFR 160.204.

(3) For all other vessels, the draw shall open on signal at any time, except from 5 a.m. to 7 p.m., Monday through Friday, except Federal holidays. During these times, the draw shall:

(i) Open for commercial vessels with a draft of 18 feet or more, provided at least 6 hours notice was given to the Berkley Bridge Traffic Control room at (757) 494–2490.

(ii) Open on signal at 9 a.m., 11 a.m., 1 p.m. and 2:30 p.m.

(4) If the bridge is not opened during a particular scheduled opening per subparagraph (b)(3)(ii) and a vessel has made prior arrangements for a delayed opening, the draw tender may provide a single opening up to 30 minutes past that scheduled opening time for that signaling vessel, except at 2:30 p.m. The draw tender may provide a single opening up to 20 minutes past the 2:30 p.m. scheduled opening time for a signaling vessel that made prior arrangements for a delayed opening. A vessel may make prior arrangements for a delayed opening by contacting the Berkley Bridge Traffic Control room at (757) 494–2490.

During this test deviation, VDOT will continue to gather data from the scheduled openings, along with vessel counts, to compare, evaluate, and monitor both old and new traffic patterns in hope of reducing roadway congestion on the bridge and local commuting area by adjusting bridge openings to ensure a future regulation will not have a significant impact on navigation.

## Additional Information

This deviation has been coordinated with the main commercial waterway user group that has vessels transiting in this area and there is no expectation of any significant impacts on navigation. Vessels with mast heights of less than 48 feet, above mean high water, can pass underneath the bridge in the closed position. There are no alternate waterway routes.

This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: February 11, 2010.

**Wayne E. Justice,**

*Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.*

[FR Doc. 2010–4365 Filed 3–2–10; 8:45 am]

BILLING CODE 9110–04–P

## POSTAL REGULATORY COMMISSION

## 39 CFR Part 3020

**[Docket Nos. MC2010–17 and CP2010–18; Order No. 386]**

## New Postal Product

**AGENCY:** Postal Regulatory Commission

**ACTION:** Final rule.

**SUMMARY:** The Commission is adding Global Direct Contracts 1 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 a statutory requirement.

**DATES:** Effective April 2, 2010 and is applicable beginning January 11, 2010.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov.*

**SUPPLEMENTARY INFORMATION:** *Regulatory History,* 75 FR 471 (January 5, 2010).

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I. Introduction
II. Background
III. Comments
IV. Commission Analysis
V. Ordering Paragraphs

### I. Introduction

The Postal Service seeks to add a new product identified as Global Direct Contracts 1 to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

### II. Background

On December 23, 2009, the Postal Service filed a request seeking to add a new product, Global Direct Contracts 1, to the Global Direct Contracts product.[1] The Global Direct product provides a rate for mail acceptance within the United States, transportation to a receiving country of mail that bears the destination country's indicia, and payment by the Postal Service of the appropriate settlement charges to the receiving country. In support of its Request, the Postal Service incorporates by reference the Statement of Supporting Justification of Frank Cebello, Executive Director, Global Business Management, initially filed with its request in Docket Nos. MC2009–9, CP2009–10 and CP2009–11.[2] The Request has been assigned Docket No. MC2010–17.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 CFR 3015.5. The contract has been assigned Docket No. CP2010–18 and is the successor to the contract approved in Docket No. CP2009–11. *See* Order No. 153. The Postal Service states that the instant contract is functionally equivalent to previously submitted Global Direct Contracts and is supported by Governors' Decision No. 08–10, which establishes prices and classifications not of general applicability for Global Direct Contracts.[3] In addition, the Postal Service contends that the contract is in accordance with Order No. 153.

The contract term is 1 year from the effective date and may be automatically renewed unless the parties agree otherwise. *Id.* at 3–4.

In support of its Request, the Postal Service filed the following five attachments:

1. Attachment 1–a redacted copy of the contract;
2. Attachment 2–a certified statement required by 39 CFR 3015.5(c)(2);
3. Attachment 3–an application for non-public treatment of materials to maintain the contract and supporting documents under seal;
4. Attachment 4–a redacted copy of Governors' Decision No. 08–10, which establishes prices and classifications for Global Direct, Global Bulk Economy, and Global Plus Contracts; and
5. Attachment 5–a statement of supporting justification from Docket No. CP2009–11, which is included by reference for the instant contract to satisfy 39 CFR 3020.32.

The Postal Service will notify the customer of the effective date of the contract within 30 days after receiving all regulatory approvals. *Id.* at 3–4. The related contract at issue under Docket No. CP2009–11 expires on January 11,

[1] Notice of the United States Postal Service of Filing of Functionally Equivalent Global Direct Contracts Negotiated Service Agreement, and Request to Add Global Direct Contracts 1 to the Competitive Products List, December 23, 2009 (Request).

[2] Docket Nos. MC2009–9, CP2009–10 and CP2009–11, Order Concerning Global Direct Contracts Negotiated Service Agreements, December 19, 2008 (Order No. 153).

[3] Governors' Decision No. 08–10, July 16, 2008, filed in Docket No. MC2008–7, establishes prices and classifications not of general applicability for Global Direct and Global Bulk Economy Contracts, as well as for Global Plus Contracts 2, which combines Global Direct and Global Bulk Economy services. As part of Governors' Decision No. 08–10, the Postal Service submitted a description of Global Direct Contracts which it describes as "contracts giving a rate for mail acceptance within the United States and transportation to a receiving country with the addition by the customer of appropriate foreign postage charged by the receiving country." Request, Attachment 4; *see also* Request at 2, n.3, citing PRC Order No. 153 at 9 (regarding indirect postage payment).

2010. *Id.* at 2. The Postal Service also explains that a redacted version of the supporting financial documentation is included with this filing as a separate Excel file. *Id.* at 3.

The Postal Service asserts that the instant Global Direct contract is functionally equivalent with the previous Global Direct Contracts because it shares "similar, if not the same..." cost and market characteristics and therefore the contracts should be classified as a single product. *Id.* at 5. Further, it contends that the contract fits within the Mail Classification Schedule (MCS) language for Global Direct Contracts included with Governors' Decision No. 08–10, since "these agreements are 'functionally equivalent in all pertinent respects.'" *Id.* at 5, citing Order No. 85 at 8.

The Postal Service asserts that the instant Global Direct Contract is fundamentally similar" to that in Docket No. CP2009–11, but notes that many of the terms and conditions have changed, including the following: (a) Allowing mailers to use Canada Post's domestic Incentive Lettermail Service;[4] (b) notice of confidentiality rules; (c) modifying the term to a full year; (d) clarifying locations for tendering qualifying items; explaining the availability of pickup service; and (e) reflecting the price changes of Canada Post. *Id.* at 5. The Postal Service maintains that the differences do not affect the fundamental service being offered or the essential structure of the contracts. *Id.* It also states that the proposed MCS language included with the Request presents a modification proposed by the Commission to reflect the actual payment practice.[5]

The Postal Service requests that the instant contract be considered the baseline contract for functional equivalency comparisons of future Global Direct contracts, indicating that future Global Direct Contracts will be based upon the instant contract's provisions rather than those in Docket No. CP2009–10 and CP2009–11. Request at 2. It further requests that Global Direct Contracts 1 be added to the Competitive Product List, particularly as future Global Direct contracts are more likely to resemble this contract. *Id.*

In Order No. 373, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.[6]

## III. Comments

Comments were filed by the Public Representative.[7] No other interested person submitted comments. The Public Representative states that it appears that the contract complies with 39 U.S.C. 3633(a) and 39 CFR 3015.5. *Id.* He observes that the pricing structure and certification indicate that this contract meets its attributable costs and there is no cross-subsidization of this competitive product by market dominant products. *Id.* at 2–3. He notes that while some of the terms of the instant contract are different than previous Global Direct contracts this does not alter its functional equivalency. *Id.* at 3. He affirms that his review of the contract and supporting materials filed under seal indicates that the instant contract complies with the pricing formula established in Governors' Decision No. 08–10, is functionally equivalent to the other contracts within the Global Directs Contracts classification, and is appropriately established as a competitive product. *Id.* at 2–3.

The Public Representative concludes that the instant contract's terms are in compliance with statutory requirements for a competitive product and are beneficial to the general public. *Id.* at 4.

## IV. Commission Analysis

The Postal Service's filing presents several issues for the Commission to consider: (1) The addition of a new product to the MCS in accordance with 39 U.S.C. 3642; (2) whether the agreement satisfies 39 U.S.C. 3633; and (3) the treatment of Global Contracts 1 as the baseline agreement as requested by the Postal Service. In reaching its conclusions, the Commission has reviewed the Request, the agreement and the financial analyses provided under seal, and the Public Representative's comments.

*Product classification.* The Postal Service notes that the Commission has had the opportunity to review the Global Directs Contracts product in Order No. 153 and found that those contracts were properly classified as competitive. In lieu of a separate statement relative to the instant contract, it incorporates by reference its supporting justification for the contracts in Dockets Nos. CP2009–9, CP2009–6 and CP2009–11 as Attachment 5 to the Request. The Commission finds this an acceptable method for the Postal Service to support its Request.

*Cost considerations.* The Postal Service contends that the instant contract and supporting documents filed in this docket establish compliance with the statutory provisions applicable to rates for competitive products (39 U.S.C. 3633). Request at 3. It asserts that the Governors' Decision (No. 08–10) supporting this agreement establishes a pricing formula and classification that ensures each contract meets the criteria of 39 U.S.C. 3633 and the regulations promulgated thereunder. Request, Attachment 4, Attachment D.

The Public Representative concurs that the agreement appears to satisfy section 3633 of title 39. Public Representative Comments at 1.

Based on the data submitted and the Commission's analysis, the Commission finds that the agreement 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 the proposed agreement indicates that it comports with the provisions applicable to rates for competitive products.

*Baseline agreement.* The Postal Service seeks to add a new product, Global Direct Contracts 1, to the Competitive Product List. It contends that the instant contract is functionally equivalent to previously reviewed Global Direct Contracts. At the same time, it asks that the instant contract be considered a new baseline for future Global Direct Contracts. Request at 2. The Postal Service indicates that future Global Direct Contracts are likely to resemble this one. Because Global Direct Contracts 1 is being added as a new product, the Commission finds it unnecessary to address the issue of functional equivalency with previous contracts.

The Postal Service notes that the Global Direct Contracts 1 contract differs from previously submitted Global Direct contracts, *e.g.,* pertaining to the treatment of confidential information, the availability of domestic Incentive Lettermail Service, and more detail in descriptions for penalties and

[4] The Postal Service states that Incentive Lettermail is the same as Canada Post's Lettermail in terms of size, shape, and content. A mailer performs certain preparation tasks dictated by Canada Post to qualify for Incentive Lettermail pricing, just as a Canadian domestic mailer might.

[5] *See* Order No. 153 at 9 in which the Commission reviewed the language of the actual agreements compared to the language proposed by the Postal Service to modify the MCS and determined the language proposed for inclusion in the MCS should reflect the actual payment practice under these agreements.

[6] Notice and Order Concerning Filing of Functionally Equivalent Global Direct Contracts Negotiated Service Agreement, December 30, 2009 (Order No. 373).

[7] Public Representative Comments in Response to Order No. 373, January 6, 2010 (Public Representative Comments).

postage due assessed by Canada Post. It also cites new provisions that add clarity or update terms, but contends that they do not alter the essential service being offered. *Id.* at 5. Finally, it asserts that the cost and market characteristics of the instant contract are fundamentally similar to those of the prior Global Direct contracts. *Id.*

Having evaluated the instant Global Direct contract along with the supporting financial analyses, the Commission finds that Global Direct Contracts 1 is properly included as a new product to the Competitive Product List.

Following the current practice, the Postal Service shall identify all significant differences between any new Global Direct contract and the Global Direct Contracts 1 product. Such differences would include terms and conditions that impose new obligations or new requirements on any party to the contract. The docket referenced in the caption should be Docket No. MC2010–17. In conformity with the current practice, a redacted copy of Governors' Decision 08–10 should be included in the new filing along with an electronic link to it.

The Postal Service shall inform the Commission of the effective dates of the contract and promptly notify the Commission if the contract terminates earlier than scheduled.

In conclusion, the Commission adds Global Direct Contracts 1 to the Competitive Product List and finds that the negotiated service agreement submitted in Docket No. CP2010–18 is appropriately included within the Global Direct Contracts 1 product.

## V. Ordering Paragraphs

*It is ordered:*

1. Global Direct Contracts 1 (MC2010–17 and CP2010–18) is added to the Competitive Product List as a new product, under Negotiated Service Agreements, International.

2. The Postal Service shall inform the Commission of the effective dates of the contract and notify it if the contract terminates earlier than scheduled, as discussed in this order.

3. The Secretary shall arrange for 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.

**Shoshana M. Grove,**

*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 (MC2010-12 and R2010-2)

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)
Inbound International Expedited Services 3 (MC2010–13 and CP2010–12)
Priority Mail
Priority Mail
Outbound Priority Mail International
Inbound Air Parcel Post (at non-UPU rates)
Royal Mail Group Inbound Air Parcel Post Agreement
Inbound Air Parcel Post (at UPU rates)
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 (MC2010–14 and CP2010–13—Inbound Surface Parcel post at Non-UPU Rates and Xpresspost-USA)
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 Contract 8 (MC2010–16 and CP2010–16)
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)
Priority Mail Contract 24 (MC2010–15 and CP2010–15)
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 Direct Contracts 1 (MC2010–17 and CP2010–18)
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. 2010–4410 Filed 3–2–10; 8:45 am]
BILLING CODE 7710–FW–S

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2008–0750; FRL–8800–9]**

## Trichoderma asperellum strain ICC 012; Exemption from the Requirement of a Tolerance

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

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of the *Trichoderma asperellum* strain ICC 012 on all food/feed commodities when applied pre-harvest in accordance with good agricultural practices. Isagro, S.p.A. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Trichoderma asperellum* strain ICC 012.

**DATES:** This regulation is effective March 3, 2010. Objections and requests for hearings must be received on or before May 3, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0750. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Susanne Cerrelli, Biopesticides and Pollution Prevention Division (7511P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8077; e-mail address: *cerrelli.susanne@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Access Electronic Copies of this Document?*

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr*.

*C. Can I File an Objection or Hearing Request?*

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure

proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0750 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before May 3, 2010.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2008–0750, by one of the following methods.

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

## II. Background and Statutory Findings

In the **Federal Register** of November 12, 2008 (73 FR 66897) (FRL–8386–8), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 8F7326) by Isagro, S.p.A., Via Caldera 21, fabbricato D, la 3, 20153 Milano, Italy. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of *Trichoderma asperellum* strain ICC 012 (originally classified as *Trichoderma harzianum*). The docket for this notice (EPA–HQ–OPP–2008–0750) included a summary of the petition prepared by the petitioner Isagro, S.p.A. An anonymous American citizen commented that only zero residue should be allowed and expressed concern about toxic chemicals found in the bodies of Americans. Pursuant to its authority under FIFRA, the Agency conducted a rigorous assessment of *Trichoderma asperellum* strain ICC 012 and concluded that it is not expected to cause any unreasonable adverse effects to human health or the environment. The Agency is establishing an exemption from the requirement of a tolerance for this active ingredient, as neither toxicity nor pathogenicity were observed for this active ingredient in submitted laboratory studies.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is "safe." Section 408(c)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to section 408(c)(2)(B) of FFDCA, in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in sections 408(b)(2)(C) and (D) of FFDCA, which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ." Additionally, section 408(b)(2)(D) of FFDCA requires that the Agency consider "available information concerning the cumulative effects" of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

## III. Toxicological Profile

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

*Trichoderma asperellum* strain ICC 012 was isolated from a suppressive soil in central Italy. *Trichoderma asperellum* strain ICC 012 is used for control of many soil borne fungal plant pathogens i.e., *Pythium* species (spp.), *Phytophthora* spp., *Sclerotinia* spp., *Sclerotium* spp., *Thielaviopsis basicola, Rhizoctonia* spp., *Verticillium* spp. *Trichoderma asperellum* strain ICC 012 acts as a pathogen antagonist, colonizing in soil and roots to compete with plant pathogenic fungi for space and nutrients. Moreover, *Trichoderma asperellum* strain ICC 012 also attacks the cell walls of pathogens with enzymes.

Toxicological data on the active ingredient, submitted by the manufacturer, Isagro, S.p.A., has been accepted to support the current exemption from the requirement of a tolerance for residues and various registrations.

EPA review of these studies indicated that the active ingredient was not toxic to test animals when administered via the oral, dermal, intraperitoneal or pulmonary routes of exposure. The active ingredient was not infective or pathogenic to test animals when administered via the pulmonary route. This pulmonary clearance is enough evidence to demonstrate no infectivity. No reports of hypersensitivity have been recorded from personnel working with this organism. Based on these data, the Agency has concluded that there is a reasonable certainty that no harm will result from aggregate exposure to residues of *Trichoderma asperellum* strain ICC 012, including all anticipated dietary exposures and all other exposures for which there is reliable information. Thus, under the standard in section 408(c)(2) of FFDCA, an exemption from the requirement for a tolerance is appropriate. Studies on the active ingredient include the following:

In an acute oral toxicity study Master Record Identification Number (MRID 47345901), groups of fasted, 6-7 week old rats (5/sex) were given a single oral dose of *Trichoderma asperellum* strain ICC 012 (*Trichoderma asperellum* conidia 4.2 x $10^9$ CFU/g) in 0.9% NaCl solution at a dose of 2,000 milligrams/kilograms (mg/kg) of body weight (bw) in a limit test. The animals were then observed for a period of 14 days. The following Oral lethal dose $(LD)_{50}$ findings for males, females, and combined were reported: Males > 2,000 mg/kg of bw, females > 2,000 mg/kg of bw, combined > 2,000 mg/kg of bw. No mortality occurred during the study. Based on the results of this study,

*Trichoderma asperellum* strain ICC 012 was not toxic at 2,000 mg/kg of bw.

In an acute intraperitoneal injection toxicity study (MRID 47345902), groups of fasted, 6-7 week old rats (3/sex) were injected with *Trichoderma asperellum* strain ICC 012 (*Trichoderma asperellum* conidia 4.2 x $10^9$ CFU/g) in 0.9% NaCl solution at a dose of 1 x $10^8$ CFU/g in a limit test. Animals were then observed for up to 21 days. Control animals were injected with 0.9% NaCl solution only. *Trichoderma asperellum* strain ICC 012 is not toxic based on these results.

In an acute pulmonary toxicity/pathogenicity study (MRID's 47345903, 47345904), groups of fasted, 44-55 day old rats (31/sex) were exposed by the intratracheal route to *Trichoderma asperellum* strain ICC 012 (*Trichoderma asperellum* conidia 4.2 x $10^9$ CFU/g) in a 0.1% solution of Tween 20 in water for injection at a dose of 1 x $10^8$ CFU/animal. Animals were then observed for up to 22 days. Rats in the control group were administered the vehicle only. Rats in the reference groups were administered inactivated test item. There were no treatment related clinical signs or changes in bw. Samples of feces, lungs, lymph nodes, kidneys, brain, liver, spleen, and blood were taken for the determination of microbial enumeration. The viable count was 4.2 x $10^9$ CFU/g and the greatest density was detected in lung tissue. The pulmonary $LD_{50}$ observed was: Males > 1 x $10^7$ CFU/animal, females > 1 x $10^7$ CFU/animal, combined > 1 x $10^7$ CFU/animal. No mortalities occurred during the study. Based on these results, *Trichoderma asperellum* strain ICC 012 is of low toxicity and is not infective or pathogenic in the rat.

## IV. Aggregate Exposures

In examining aggregate exposure, section 408 of FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

### *A. Dietary Exposure*

Dietary exposure to the microbial pesticide is likely to occur. However, the lack of acute oral toxicity, infectivity, and pathogenicity support the establishment of an exemption from the requirement of a tolerance for *Trichoderma asperellum* strain ICC 012.

1. *Food*. Dietary exposure to the microbe is expected to be minimal. The product is typically applied to soil and sometimes may be applied when the crops are growing in the field, resulting in residues on the crops. The Agency expects residues on food to be minimal because this pesticide is typically applied to soil, rather than crops. Moreover, *Trichoderma* lives in soils and is unlikely to live on the plants because any spores that do end up on the plant due to application will likely decrease over time due to weathering, desiccation and ultraviolet radiation which can kill even quiescent forms of the fungus. In the unlikely event that the applied fungus can grow on edible portions of the treated crop, there is no hazard present in these residues, as demonstrated by the results of testing which show no toxicity or pathogenicity in treated animals when dosed with the fungus at orders of magnitude above any expected exposure to the microbial pesticide.

2. *Drinking water exposure*. Drinking water exposure is expected to be negligible because *Trichoderma asperellum* strain ICC 012 is not applied to water, nor is it expected to proliferate in aquatic environments because *Trichoderma asperellum* lives in soil. Moreover, the Agency believes that *Trichoderma* within the soil will not likely percolate into water because of the large size of the fungal spores and the fact that they adhere to soil particles. Even if oral exposure should occur through drinking water, the Agency concludes that there is a reasonable certainty that no harm will result from the exposure to the residues of *Trichoderma asperellum* in all the anticipated drinking water exposures because of the lack of acute oral toxicity/pathogenicity to mammals, as previously described.

### *B. Other Non-Occupational Exposure*

*Trichoderma asperellum* strain ICC 012 is a naturally occurring microbe and is ubiquitous in the environment. *Trichoderma asperellum* strain ICC 012 will be applied to substrate mixes, ornamental plants, agricultural fields, turf, and various plants grown in greenhouses. Although some applications to turf or ornamental plants may be in residential areas, non-dietary exposure would be expected to be below the Agency's level of concern because of its low toxicity classification, and because the lab results indicate *Trichoderma asperellum* strain ICC 012 is not pathogenic to mammals.

## V. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires the Agency to consider the cumulative effect of exposure to *Trichoderma asperellum* strain ICC 012 and to other substances that have a common mechanism of toxicity. These considerations include the possible cumulative effects of such residues on infants and children. Based on tests in mammalian systems, *Trichoderma asperellum* strain ICC 012 does not appear to be toxic to humans via dietary and pulmonary exposure. Therefore, the requirement to consider cumulative effects does not apply.

## VI. Determination of Safety for U.S. Population, Infants and Children

Section 408(b)(2)(C) of FFDCA, as amended by the Food Quality Protection Act (FQPA) of 1996, provides that EPA shall assess the available information about consumption patterns among infants and children, special susceptibility of infants and children to pesticide chemical residues, and the cumulative effects on infants and children of the residues and other substances with a common mechanism of toxicity. In addition, section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children.

Based on the acute toxicity information discussed in this unit, EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to the United States population, including infants and children, to residues of *Trichoderma asperellum* strain ICC 012. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. The Agency has arrived at this conclusion because the data available on *Trichoderma asperellum* strain ICC 012 demonstrate a low toxicity/pathogenicity potential. *Trichoderma asperellum* strain ICC 012 is not a human pathogen and has not been implicated in human disease. Thus, there are no threshold effects of concern and, as a result, the provision requiring an additional margin of safety does not apply.

## VII. Other Considerations

### *A. Endocrine Disruptors*

The Agency has no information to suggest that *Trichoderma asperellum* strain ICC 012 has an effect on the endocrine system. No specific tests have been conducted with *Trichoderma asperellum* strain ICC 012 to determine such effects. However, the submitted

toxicity/pathogenicity studies in rodents indicated that following several routes of exposure, the immune system is still intact and able to process and clear the active ingredient. *Trichoderma asperellum* strain ICC 012 is a ubiquitous organism in the environment and there have been no reports of the organism affecting endocrine systems. Therefore, it is unlikely that this organism would have estrogenic or endocrine effects, and it is practically non-toxic to mammals.

*B. Analytical Method*

The Agency proposes to establish an exemption from the requirement of a tolerance without any numerical limitation; therefore, the Agency has concluded that an analytical method is not required for enforcement purposes for *Trichoderma asperellum* strain ICC 012.

*C. Codex Maximum Residue Level*

No Codex maximum residue level exists for *Trichoderma asperellum*.

**VIII. Conclusions**

There is a reasonable certainty that no harm will result from aggregate exposure to the U.S. population, including infants and children, to residues of *Trichoderma asperellum* strain ICC 012 in or on all food and feed commodities. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. The Agency has arrived at this conclusion because, as discussed in Unit III. no toxicity or pathogenicity to mammals has been observed in test animals.

**IX. Statutory and Executive Order Reviews**

This final rule establishes an exemption from the requirement of a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

**X. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report 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 this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 4, 2010.

**Steven Bradbury,**

*Acting Director, Office of Pesticide Programs.*

■ Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.1294 is added to subpart D to read as follows:

**§ 180.1294 Trichoderma asperellum strain ICC 012; exemption from the requirement of a tolerance.**

*Trichoderma asperellum* strain ICC 012 is exempted from the requirement of a tolerance in or on all food and feed commodities when applied pre-harvest and used in accordance with good agricultural practices.

[FR Doc. 2010–3854 Filed 3–2–10; 8:45 am]

BILLING CODE 6560–50–S

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 73

**[DA 10–196, MB Docket No. 07–296, RM–11412]**

## FM TABLE OF ALLOTMENTS, French Lick, Indiana, and Irvington, Kentucky.

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The staff grants a rulemaking petition filed by L. Dean Spencer to allot FM Channel 261A at Irvington, Kentucky, as a first local service. To accommodate this new allotment, the staff modifies the license of Station WFLQ(FM), French Lick, Indiana, to specify operation on Channel 229A in lieu of Channel 261A.

**DATES:** Effective March 15, 2010.

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

**FOR FURTHER INFORMATION CONTACT:** Andrew J. Rhodes, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report and Order, MB Docket No. 07–296, adopted January 27, 2010, and released January 29, 2010. The full text of this Commission document is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC.

The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW, Room CY–B402, Washington, DC 20554, 800–378–3160 or via the company's website, <http://www.bcpiweb.com>.

The Notice of Proposed Rule Making also included an Order to Show Cause directed to the licensee of Station WFLQ(FM), French Lick, Indiana, to show cause why its license should not be modified to specify operation on Channel 229A in lieu of Channel 261A. See 73 FR 50296, published August 26, 2008. Although Station WFLQ(FM) argued that it should not be required to change channels, the Report and Order found that the station had not raised a substantial and material question of fact that would warrant a hearing on this issue. The document also states that the ultimate permittee of Channel 261A at Irvington, Kentucky, will be required to reimburse Station WFLQ(FM), French Lick, Indiana, for its reasonable and prudent costs associated with the involuntary channel change at French Lick. The reference coordinates for Channel 261A at Irvington are 37–56–52 NL and 86–24–54 WL. The reference coordinates for Channel 229A at French Lick are 38–35–41 NL and 86–36–48 WL. Finally, because Station WFLQ(FM) is a licensed station, the channel substitution at French Lick will be updated in the Commission's Consolidated Data Base System [CDBS].

This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

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

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ As stated in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

## PART 73—RADIO BRAODCAST SERVICES

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

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

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Kentucky, is amended by adding Irvington, Channel 261A.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief,*

*Audio Division,*

*Media Bureau.*

[FR Doc. 2010–4364 Filed 3–2–10; 8:45 am]

**BILLING CODE 6712–01–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 600

**[Docket No. 071220872–0093–04]**

**RINs 0648–AS71 and 0648–AU71**

### Magnuson-Stevens Act Provisions; Correction

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

**ACTION:** Final rule; correcting amendment.

**SUMMARY:** This rule amends general provisions for domestic fisheries in the western Pacific to correct errors that resulted from two recent rules. This action is necessary to remedy missing information, out of date administrative references, and a misspelling.

**DATES:** Effective March 3, 2010.

**FOR FURTHER INFORMATION CONTACT:** Bob Harman, Pacific Islands Region, NMFS, 808 944–2271.

**SUPPLEMENTARY INFORMATION:** On November 21, 2008, NMFS published in the **Federal Register** a final rule (73 FR 70600) designating three species of pelagic squid as management unit species under the Fishery Management Plan for Pelagic Species of the Western Pacific Region (FMP). That rule also established permitting and reporting requirements, and authorization for NMFS to place observers on squid fishing vessels. This final rule was effective December 22, 2008, except for the collection-of-information requirements, which were effective October 5, 2009 (74 FR 45756, September 4, 2009).

The final rule that included squid jig fishing in the FMP inadvertently omitted an instruction to revise the table of authorized fishing gear at 50 CFR 600.725(v). The rule established squid as management unit species in the definition of western Pacific pelagic management unit species (50 CFR 665.800). The rule authorized squid jig fishing (50 CFR 665.801(g)), and defined squid jig gear (50 CFR 665.800). The rule also set restrictions on the use of squid jig gear (50 CFR 665.14(b), 665.808, and 665.802(zz)). By these actions, squid jig gear and fishing are authorized and managed. However, the rule did not include this authorized fishing gear in the table at 50 CFR 600.725(v), which provides a complete list of all authorized fishing gear in the FEPs. The rule should have added an entry to include squid jig as an authorized gear in the squid jig fishery in item 7 (western Pacific pelagic fisheries in the FMP) of section VIII (fisheries under the jurisdiction of the Western Pacific Fishery Management Council) in that table. This final rule corrects that error, and no substantive changes are made to the regulations.

Additionally, on January 14, 2010, NMFS published in the **Federal Register** a final rule (75 FR 2198) restructuring western Pacific fishery regulations at 50 CFR part 665 to be consistent with five new area-specific fishery ecosystem plans (FEP). The FEPs were established as FMPs, consistent with the Magnuson-Stevens Fishery Conservation and Management Act. In that rule, no substantive changes were made to the regulations. NMFS also restructured western Pacific regulations to be consistent with the area-specific organization of the FEPs, and changed administrative references in western Pacific regulations from "FMP" to "FEP." That final rule was effective February 16, 2010.

That final rule inadvertently omitted an instruction to revise the table of authorized fishing gear at 600.725(v) to change references from "FMP" to "FEP" in section VIII (fisheries under the jurisdiction of the Western Pacific Fishery Management Council). This final rule corrects those administrative references; no substantive changes are made to the regulations.

This rule also corrects the spelling of the word "fishery," which was misspelled as "fisher" in item 7.A of section VIII of the table.

**Classification**

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive prior notice and opportunity for public comment, as such notice and comment would be unnecessary. These procedures are unnecessary because the regulations were subject to notice and comment when originally implemented, and no substantive changes are being made pursuant to this final rule. The only actions currently being taken are to remedy missing or incorrect administrative information. Pursuant to 5 U.S.C. 553(d), the 30–day delay in effectiveness does not apply to this rule because it is not a substantive rule.

Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act are inapplicable. Therefore, a final regulatory flexibility analysis is not required and one has not been prepared. This rule is exempt from review under Executive Order 12866.

**List of Subjects in 50 CFR Part 600**

Authorized fishing gear, Fisheries, Fishing, Western Pacific.

Dated: February 25, 2010.

**Eric C. Schwaab,**

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

■ For the reasons set out in the preamble, 50 CFR part 600 is correctly amended as follows:

## PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

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

■ 2. In the table at § 600.725(v), revise the entries in section VIII for western Pacific Fisheries to read as follows:

**§ 600.725. General prohibitions.**

* * * * *

(v) * * *

| Fishery | Authorized gear types |
|---|---|
| | |
| * * * * *<br>VIII. Western Pacific Fishery Management Council | |
| 1. Western Pacific Crustacean Fishery (FMP) (Fishery Ecosystem Plan, FEP) | Trap, hand harvest, hoop net. |
| 2. Western Pacific Crustacean Fishery (Non-FEP): | |
| A. Commercial fishery | A. Gillnet, hand harvest, hoop net, spear, snare, trap, trawl. |
| B. Recreational fishery | B. Gillnet, hand harvest, hoop net, spear, snare, trap. |
| C. Charter fishery | C. Hand harvest, spear. |
| 3. Western Pacific Precious Corals Fishery (FEP): | |
| A. Tangle net dredge fishery | A. Tangle net dredge. |
| B. Submersible fishery | B. Submersible. |
| C. Dive fishery | C. Hand harvest. |
| D. Recreational fishery | D. Hand harvest. |
| 4. Western Pacific Precious Corals Fishery (Non-FEP) | Hand harvest, submersible, tangle net dredge. |
| 5. Western Pacific Bottomfish and Seamount Groundfish Fishery (FEP): | |
| A. Bottomfish hook-and-line fishery | A. Bandit gear, buoy gear, handline, hook and line, rod and reel, hand harvest. |
| B. Seamount groundfish fishery | B. Longline, trawl. |
| C. Bottom longline fishery | C. Longline, hook and line. |
| D. Trap fishery | D. Trap. |
| E. Spear fishery | E. Spear, powerhead. |
| 6. Western Pacific Bottomfish and Seamount Groundfish Fishery (Non-FEP): | |
| A. Commercial fishery | A. Bandit gear, buoy gear, gillnet, handline, hook-and-line, longline, rod and reel, spear, trap. |

| Fishery | Authorized gear types |
|---|---|
| B. Recreational fishery | B. Bandit gear, buoy gear, Gillnet, handline, hook and line, longline, rod and reel, spear, trap, slurp gun, hand harvest. |
| C. Charter fishery | C. Bandit gear, buoy gear, handline, hook-and-line, rod and reel, spear. |
| 7. Western Pacific Pelagics Fishery (FEP): | |
| A. Longline Fishery | A. Longline. |
| B. Hook and line fishery | B. Bandit gear, buoy gear, handline, hook and line, rod and reel. |
| C. Purse seine fishery | C. Lampara net, purse seine. |
| D. Spear fishery | D. Spear, powerhead. |
| E. Squid jig fishery | E. Squid jig. |
| 8. Western Pacific Pelagics Fishery (Non-FEP): | |
| A. Recreational fishery | A. Bandit gear, buoy gear, dip net, handline, hook and line, hoop net, powerhead, rod and real, spear. |
| B. Commercial fishery | B. Bandit gear, buoy gear, dip net, handline, hook and line, hoop net, powerhead, rod and reel, spear. |
| C. Charter fishery | C. Bandit gear, buoy gear, dip net, handline, hook and line, hoop net, powerhead, rod and reel, spear. |
| 9. Western Pacific Coastal Pelagics Fishery (Non-FEP) | Bandit gear, buoy gear, dip net, gillnet, handline, hook and line, hoop net, lampara net, purse seine, rod and reel, spear. |
| 10. Western Pacific Squid and Octopus Fishery (Non-FEP) | Bandit gear, hand harvest, hook and line, rod and reel, spear, trap. |
| 11. Western Pacific Coral Reef Fishery (Non-FEP) | Allowable chemical, barrier net, dip net, gillnet, hand harvest, seine, slurp gun, trap, spear, rod and reel, hook and line. |
| 12. Recreational Fishery (Non-FEP) | Rod and reel, hook and line, handline, hand harvest, spear. |
| 13. Commercial Fishery (Non-FEP) | Trawl, gillnet, hook and line, longline, handline, rod and reel, bandit gear, cast net, spear. |
| * * * * * | |

[FR Doc. 2010–4397 Filed 2–26–10; 4:15 pm]
BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 0910091344–9056–02]**

**RIN 0648–XU73**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 630 in the Gulf of Alaska

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

**ACTION:** Temporary rule; modification of a closure.

**SUMMARY:** NMFS is opening directed fishing for pollock in Statistical Area 630 of the Gulf of Alaska (GOA). This action is necessary to fully use the A season allowance of the 2010 total allowable catch (TAC) of pollock in Statistical Area 630 of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), February 28, 2010, through 1200 hrs, A.l.t., March 2, 2010. Comments must be received at the following address no later than 4:30 p.m., A.l.t., March 15, 2010.

**ADDRESSES:** Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–XU73, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Fax: (907) 586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comment will generally be posted 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:** Josh Keaton, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed directed fishing for pollock in Statistical Area 630 of the GOA under § 679.20(d)(1)(iii) on February 5, 2010 (75 FR 6589 February 10, 2010).

As of February 24, 2010, NMFS has determined that approximately 3,659 metric tons of pollock remain in the directed fishing allowance for pollock in Statistical Area 630 of the GOA. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the A season allowance of the 2010 TAC of pollock in Statistical Area 630 of the GOA, NMFS is terminating the previous closure and is reopening directed fishing pollock in Statistical Area 630 of the GOA. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: (1) the current catch of pollock in Statistical Area 630 of the GOA and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached after 48 hours. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 630 of the GOA effective 1200 hrs, A.l.t., March 2, 2010.

### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of pollock in Statistical Area 630 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 24, 2010.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow the fishery for pollock in Statistical Area 630 of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until March 15, 2010.

This action is required by § 679.20 and § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: February 25, 2010.

**James P. Burgess,**

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

[FR Doc. 2010–4392 Filed 2–26–10; 4:15 pm]
BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 0910091344–9056–02]**

**RIN 0648–XU79**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 in the Gulf of Alaska

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for pollock in Statistical Area 610 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2010 total allowable catch (TAC) of pollock for Statistical Area 610 in the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), February 27, 2010, through 1200 hrs, A.l.t., March 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Josh Keaton, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of the 2010 TAC of pollock in Statistical Area 610 of the GOA is 5,551 metric tons (mt) as established by the final 2009 and 2010 harvest specifications for groundfish of the GOA (74 FR 7333, February 17, 2009) and inseason adjustment (74 FR 68713, December 29, 2009).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the A season allowance of the 2010 TAC of pollock in Statistical Area 610 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 5,501 mt, and is setting aside the remaining 50 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

## Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 610 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 25, 2010.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: February 26, 2010.

**James P. Burgess,**

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

[FR Doc. 2010–4395 Filed 2–26–10; 4:15 pm]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 75, No. 41
Wednesday, March 3, 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 AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 932

**[Doc. No. AMS–FV–09–0089; FV10–932–1 PR]**

### Olives Grown in California; Increased Assessment Rate

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This rule would increase the assessment rate established for the California Olive Committee (Committee) for the 2010 and subsequent fiscal years from $28.63 to $44.72 per assessable ton of olives handled. The Committee locally administers the marketing order which regulates the handling of olives grown in California. Assessments upon olive handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal year began January 1 and ends December 31. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Comments must be received by April 2, 2010.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or *Internet: http://www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey S. Smutny, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (559) 487–5901, *Fax:* (559) 487–5906; or *E-mail: Jeffrey.Smutny@ams.usda.gov* or *Kurt.Kimmel@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Antoinette Carter, 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: Antoinette.Carter@ams.usda.gov.*

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 148 and Order No. 932, both as amended (7 CFR part 932), regulating the handling of olives grown in California, 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California olive handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable olives beginning on January 1, 2010, and continue until amended, suspended, or terminated.

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. Such 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 rule would increase the assessment rate established for the Committee for the 2010 and subsequent fiscal years from $28.63 to $44.72 per ton of olives.

The California olive marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California olives. They are familiar with the Committee's needs and with costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2009 and subsequent fiscal years, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal year to fiscal year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on December 15, 2009, and unanimously recommended 2010 fiscal year expenditures of $929,923 and an assessment rate of $44.72 per ton of olives. In comparison, last year's budgeted expenditures were $1,482,349. The assessment rate of $44.72 is $16.09 higher than the rate currently in effect. The Committee recommended the higher assessment rate because the 2009–10 assessable olive receipts as reported by the California Agricultural Statistics Service (CASS) are only 22,150 tons, which compares to 49,067 tons in 2008–09. Unusual weather conditions, including untimely temperatures that fell below freezing, contributed to a substantially smaller crop. The Committee also plans

to use available reserve funds to help meet its 2010 expenses.

The major expenditures recommended by the Committee for the 2010 fiscal year include $300,000 for research, $255,000 for marketing activities, and $324,923 for administration. Budgeted expenditures for these items in 2009 were $495,000, $627,800, and $359,549, respectively.

The assessment rate recommended by the Committee was derived by considering anticipated fiscal year expenses, actual olive tonnage received by handlers during the 2009–10 crop year, and additional pertinent factors. Actual assessable tonnage for the 2010 fiscal year is expected to be lower than the 2009–10 crop receipts of 22,150 tons reported by the CASS because some olives may be diverted by handlers to uses that are exempt from marketing order requirements. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, would be adequate to cover budgeted expenses. Funds in the reserve would be kept within the maximum permitted by the order of approximately one fiscal year's expenses (§ 932.40).

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each fiscal year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2010 budget and those for subsequent fiscal years would be reviewed and, as appropriate, approved by USDA.

**Initial Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–602), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial 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 the 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 1000 producers of olives in the production area and 2 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,000,000.

Based upon information from the Committee, the majority of olive producers may be classified as small entities. Both of the handlers may be classified as large entities.

This rule would increase the assessment rate established for the Committee and collected from handlers for the 2010 and subsequent fiscal years from $28.63 to $44.72 per ton of assessable olives. The Committee unanimously recommended 2010 expenditures of $929,923 and an assessment rate of $44.72 per ton. The proposed assessment rate of $44.72 is $16.09 higher than the 2009 rate. The higher assessment rate is necessary because assessable olive receipts for the 2009–10 crop year were reported by the CASS to be 22,150 tons, compared to 49,067 tons for the 2008–09 crop year. Actual assessable tonnage for the 2010 fiscal year is expected to be lower because some of the receipts may be diverted by handlers to exempt outlets on which assessments are not paid.

Income generated from the $44.72 per ton assessment rate should be adequate to meet this year's expenses when combined with funds from the authorized reserve and interest income. Funds in the reserve would be kept within the maximum permitted by the order of about one fiscal year's expenses (§ 932.40).

The major expenditures recommended by the Committee for the 2010 fiscal year include $300,000 for research, $255,000 for marketing activities, and $324,923 for administration. Budgeted expenses for these items in 2009 were $495,000, $627,800, and $359,549 respectively. The Committee recommended decreases in all major expense categories due to the huge decrease in assessable crop volume as reported by the CASS.

Prior to arriving at this budget, the Committee considered information from various sources, such as the Committee's Executive, Market Development, and Research Subcommittees. Alternate spending levels were discussed by these groups, based upon the relative value of various research and marketing projects to the olive industry and the reduced olive production. The assessment rate of $44.72 per ton of assessable olives was derived by considering anticipated expenses, the volume of assessable olives and additional pertinent factors.

A review of historical information and preliminary information pertaining to the upcoming fiscal year indicates that the grower price for the 2009–10 crop year was approximately $1,193.94 per ton for canning fruit and $375.01 per ton for limited-use sizes, leaving the balance as unusable cull fruit. Approximately 91 percent of a ton of olives are canning fruit sizes and 5 percent are limited use sizes, leaving the balance as unusable cull fruit. Grower revenue on 22,150 total tons of canning and limited-use sizes would be $24,321,145 given the current grower prices for those sizes. Therefore, with an assessment rate increased from $28.63 to $44.72, the estimated assessment revenue is expected to be approximately 4 percent of grower revenue.

This action would increase the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the California olive industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the December 15, 2009, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large California olive 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.

The 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.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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 Antoinette Carter at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. Thirty days is deemed appropriate because: (1) The 2010 fiscal year began on January 1, 2010, and the marketing order requires that the rate of assessment for each fiscal year apply to all assessable olives handled during such fiscal year; (2) the Committee needs sufficient funds to pay its expenses, which are incurred on a continuous basis; and (3) handlers are aware of this action, which was discussed by the Committee and unanimously recommended at a public meeting, and is similar to other assessment rate actions issued in past years.

### List of Subjects in 7 CFR Part 932

Olives, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 932 is proposed to be amended as follows:

## PART 932—OLIVES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 932 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Section 932.230 is revised to read as follows:

**§ 932.230 Assessment rate.**

On and after January 1, 2010, an assessment rate of $44.72 per ton is established for California olives.

Dated: February 25, 2010.

**David R. Shipman,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 2010–4338 Filed 3–2–10; 8:45 am]

**BILLING CODE 3410–02–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No Docket No. FAA–2010–0049; Airspace Docket No. 08–AWA–1]**

**RIN 2120–AA66**

## Proposed Modification of Class B Airspace; Charlotte, NC

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to modify the Charlotte, NC, Class B airspace area to ensure the containment of aircraft, accommodate the implementation of area navigation (RNAV) departure procedures, and to support operations of the third parallel runway planned for commissioning in early 2010. The FAA is proposing this action to improve the flow of air traffic, enhance safety, and reduce the potential for midair collision in the Charlotte terminal area.

**DATES:** Comments must be received on or before May 3, 2010.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue, SE., West Building Ground Floor, RoomW12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2010–0049 and Airspace Docket No. 08–AWA–1, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Paul Gallant, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2010–0049 and Airspace Docket No. 08–AWA–1) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Nos. FAA–2010–0049 and Airspace Docket No.08–AWA–1." The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

### Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/regulations_policies/rulemaking/recently_published/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA 30337.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed

Rulemaking Distribution System, which describes the application procedure.

**Background**

In 1989, the FAA issued a final rule which established the Charlotte, NC, Terminal Control Area (TCA) to replace the Charlotte Airport Radar Service Area (ARSA) (54 FR 32604). As a result of the Airspace Reclassification Final Rule (56 FR 65638), which became effective in 1993, the terms "terminal control area" and "airport radar service area" were replaced by "Class B airspace area," and "Class C airspace area," respectively. The primary purpose of a Class B airspace area is to reduce the potential for midair collisions in the airspace surrounding airports with high density air traffic operations by providing an area in which all aircraft are subject to certain operating rules and equipment requirements.

The Charlotte Class B airspace area was last modified in 1995 (60 FR 26594). Only minor changes were made at that time. Since that modification, the Charlotte/Douglas International Airport (CLT) has experienced significant growth in operations. For calendar year 2008, CLT was ranked number 8 in the list of the "50 Busiest FAA Airport Traffic Control Towers" and number 14 in the list of the "50 Busiest Radar Approach Control Facilities." Calendar year 2008 passenger enplanement data list Charlotte as number 13 among Commercial Service Airports. Enplanements at CLT in 2008 grew just over four percent compared to calendar year 2007 figures.

Several factors point to a need to modify the Charlotte Class B airspace area. Experience has shown that, with the current Class B airspace configuration, aircraft routinely enter, exit, and then reenter Class B while flying published instrument approach procedures, contrary to FAA directives. Modeling of projected traffic flows shows that future traffic also would not be fully contained within the existing Class B airspace structure. In addition, expanded Class B airspace will be needed to accommodate operations of a third parallel runway (36L/18R) now under construction and planned for commissioning in early 2010. The proposed Class B airspace modifications described in this NPRM are intended to address these issues.

**Pre-NPRM Public Input**

In February 2008, an ad hoc committee was formed to develop recommendations for the FAA to consider in designing a proposed modification of the Charlotte/Douglas International Airport Class B airspace area. The ad hoc committee membership consisted of representatives from the North Carolina Department of Transportation, Division of Aviation; South Carolina Department of Commerce, Division of Aeronautics; Aircraft Owners and Pilots Association (AOPA); and representatives of the following airports: Concord Regional, NC (JQF); Lincolnton-Lincoln County Regional, NC (IPJ); Monroe Regional, NC (EQY); Wilgrove Airpark, NC (8A6): Chester-Catawba Regional, SC (DCM); Lancaster County-McWhirter Field, SC (LKR); and Rock Hill (York County) Airport-Bryant Field, SC (UZA).

On October 7, 2008, a meeting was held in Charlotte to discuss parachute operations at Chester-Catawba Regional Airport (DCM). Attending the meeting were representatives of the FAA, the ad hoc committee, South Carolina Department of Transportation, and Skydive Carolina.

As announced in the **Federal Register** (73 FR 63407), informal airspace meetings were held on January 7, 2009, at the Concord Regional Airport, Concord, NC; and on January 8, 2009, at the Rock Hill (York County) Airport-Bryant Field, Rock Hill, SC. The purpose of the meetings was to provide interested airspace users an opportunity to present their views and offer suggestions regarding planned modifications to the Charlotte Class B airspace area.

**Discussion of Recommendations and Comments**

*Ad hoc Committee Recommendations*

The ad hoc committee recommended that the radius of the Class B 1,800 foot floor area (Area B) be kept at 11 nautical miles (NM) from the point where it intersects I–77 clockwise around to the cutout for Gastonia Airport instead of the proposed expansion to a full 14 NM radius. The FAA adopted this recommendation. The expansion of Area B to a 14 NM radius will be limited to an area north of CLT from a point where the 14 NM arc intersects Highway 321 then clockwise to intersect the Charlotte VOR/DME 029° (M) radial. Three ad hoc committee recommendations were not adopted. These recommendations were: (1) A cutout over the Chester-Catawba Regional Airport (DCM); (2) a cutout over the Lancaster County-McWhirter Field (LKR); and (3) that the floor of Class B airspace over Lincolnton-Lincoln County Regional Airport (IPJ) be raised from the current 4,600 feet to 6,000 feet. The request for a cut-out over DCM was not adopted because a large number of turbine powered aircraft arriving at CLT via the UNARM ONE and ADENA TWO Standard Terminal Arrival Routes (STAR) overfly DCM enroute to the runways 36L and 36R final approach courses. This path makes up the base leg when CLT is on a north operation. The request for a cutout over LKR was not adopted because the base leg for arrivals from the southeast on the CHESTERFIELD THREE or HUSTN ONE STARs overflies LKR. Arriving aircraft in this area need to be descended to 4,000 feet in order to be vertically separated from aircraft approaching the final approach course from the west at 5,000 feet. Since the proposed Class B floor over LKR is 4,000 feet, aircraft will still be able to transition into and out of LKR without entering Class B airspace if they so desire. The recommendation to raise the floor of Class B airspace over Lincolnton-Lincoln County Regional Airport (IPJ) from the current 4,600 feet to 6,000 feet was also not adopted. Initially, the FAA considered lowering the floor of Class B airspace in that area from 4,600 feet to 3,600 feet. However, after further review, it was determined that lowering the floor from 4,600 feet to 4,000 feet (instead of 3,600 feet) would be sufficient to protect aircraft that are transitioning from the west to runway 18L at the initial approach fix altitude of 4,000 feet mean sea level (MSL).

*Informal Airspace Meeting Comments*

*Comment:* The cutout surrounding the Gastonia Municipal Airport (AKH) should be changed from a "C" shape to a more open shape. This would help prevent pilots from "clipping" the edges of the cutout when operating to or from AKH.

*Response:* The FAA agrees and proposes a modified cutout. Opening the width of the cutout should reduce the chances of inadvertent Class B incursions.

*Comment:* The "new" Highway 321 should be used as the source for the north-south boundary that lies west of AKH. The new Highway 321 is easier to distinguish from the air.

*Response:* The FAA agrees and will use "new" Highway 321 to define the boundary as suggested.

*Comment:* The diagonal line that originates west of AKH and extends southwesterly should be adjusted to follow the power lines depicted on the Charlotte Terminal Area Chart that roughly coincide with the line. This will give pilots a good visual reference to use.

*Response:* Adjusting the line to coincide with the power lines will still contain runway 5 traffic within Class B

airspace, therefore, the FAA concurs with this comment.

*Comment:* The short line in the north-northwest section of the proposed Class B airspace (north of Lincolnton-Lincoln County Regional Airport) should be extended to the proposed outer limit of the Class B airspace area to simplify the airspace for pilots.

*Response:* The FAA is unable to adopt this suggestion. The proposed line terminates prior to the Class B outer limit due to the Charlotte ATCT/Atlanta Center airspace boundary. At the altitudes involved, extending the line as suggested would place part of the Class B area in Atlanta Center's airspace.

*Comment:* The slides shown during the [informal airspace meeting] presentation did not show aircraft overflying the Lancaster County, SC airport. Therefore, the proposed design should not include the airspace over that airport.

*Response:* Under current procedures, it is uncommon for arriving traffic to overfly the Lancaster Airport. However, once the new runway is operational at CLT, the Instrument Landing System (ILS) initial approach fixes for all runways will be located further from CLT in order to accommodate the 8,000 foot turn on altitude for runway 36C/18C. Therefore, it is anticipated that traffic will overfly the Lancaster Airport at 8,000 feet enroute to runway 36C. Additionally, traffic assigned to runway 36R will be descended to 4,000 feet, and will have to be vectored over the Lancaster Airport to join the runway 36R final approach course. As a result, the floor of the Class B airspace in this area is proposed to be established at 4,000 feet. In addition, modeling of anticipated aircraft operations indicate that the area between the 25 mile and 30 mile rings of the proposed Class B airspace may be needed for vectoring and sequencing traffic assigned both runways 36C and 36R. During certain operations, particularly the north triple ILS operation, aircraft would overfly the Lancaster Airport while enroute to CLT. For those reasons, the FAA did not adopt this suggestion.

*Comment:* The floor of the proposed Class B airspace at the northern boundary should be set at 6,000 feet instead of 4,000 feet. The concern is that lowering the floor to 4,000 feet in this area would negatively impact IFR operations at the Statesville Regional Airport, NC (SVH).

*Response:* The floor was proposed at 4,000 feet in this area because the initial approach altitude for traffic assigned runway 18L from both the west and the east is 4,000 feet. IFR operations at SVH are not affected by the Class B airspace boundaries. SVH IFR operations are and will remain under the jurisdiction of Atlanta Center. The airport will not be placed within or under the Class B airspace area by the proposed modifications. The distance between SVH and the proposed outer limit of the Class B airspace will decrease, however, from 9.1 miles to 4.4 miles which will allow room for VFR operations at the airport as well. Therefore, the FAA did not concur with this comment.

*Comment:* AOPA suggested that arrival routes be modified to allow aircraft to remain at a higher altitude and descend at a constant rate; that arrival routes be redesigned to avoid areas that would impact aviation businesses that rely on airspace availability; and that the FAA should modify procedures so that aircraft do not enter, exit, and then reenter the class B airspace. Additionally, AOPA said that the FAA should reduce the ceiling of the Charlotte Class B airspace from 10,000 feet to 8,500 feet.

*Response:* Modifying arrival routes to allow arriving aircraft to remain at higher altitudes and descend at a constant rate would create a confliction with other traffic. Specifically, arriving aircraft must be descended so that departures can be climbed above this traffic. If arriving aircraft are not descended as they are now, then departures would have to be held down below 10,000 feet for an extended period of time. This creates conflictions between departure aircraft and arrival aircraft and does not allow departures to vertically exit the ceiling of class B airspace. The Standard Terminal Arrival Routes (STARs) at Charlotte have been in place for over 20 years. The design of these routes is based on other airport locations, airspace design, and traffic flows in the entire southeastern U.S. Changing these routes would have a major impact on arrival routes (and departure and overflight routes) to and from the Atlanta Airport, as well as other airports in the southeast. The proposed Class B modifications are intended, in part, to reduce the potential for IFR aircraft to enter, exit and then reenter the Charlotte Class B airspace area. Modifying facility procedures to keep aircraft within the current class B airspace boundaries would create bottlenecks and "choke points" and would reduce arrival capacity. Extensive vectoring would also be required, leading to increased controller workload, increased flying mileage, and added frequency congestion. The FAA is not aware of data that supports lowering the Charlotte Class B airspace ceiling to 8,500 feet.

*Comment:* Skydive Carolina expressed concerns about the impact that the proposed expansion of Class B airspace to overlie the Chester-Catawba Regional airport (DCM) might have on its parachute jump activities, safety and on the future growth and expansion of its operations at DCM. Skydive Carolina also expressed concern that the heavy traffic projected in the future would increase the probability of "go arounds" wherein the jump aircraft is instructed by ATC to withhold jumpers due to traffic, fly beyond the drop point and then restart the pattern to let jumpers out. Skydive Carolina indicated that this maneuver would result in greater fuel consumption, more airframe time on the aircraft and longer time at jump altitude (*i.e.,* 13,500 feet MSL) for jumpers that are not equipped with supplemental oxygen.

*Response:* Although DCM now lies outside the boundary of Class B airspace, arrivals currently overfly DCM when CLT is on a north operation. Modeling of various traffic scenarios indicates that this situation will continue to exist after the third parallel runway is opened. Designing a "cutout" to exclude the area around DCM from the Class B airspace would require controllers to employ extensive vectoring to avoid the airspace over DCM. This would lead to increased controller workload, frequency congestion and decreased system efficiency. Regarding the concerns about "go arounds," even though Skydive Carolina does not currently operate in Class B airspace, there are still instances in which pilots are instructed to withhold the release of jumpers due to traffic. It is anticipated that these instances would not significantly increase if the skydive area is placed within Class B airspace. The FAA believes that the inclusion of the area above DCM in Class B airspace can be mitigated and parachute operations can be accommodated through a Letter of Agreement (LOA) between Charlotte Airport Traffic Control Tower and Skydive Carolina. LOAs have been used successfully to accommodate parachute activities at other Class B airspace locations.

**The Proposal**

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify the Charlotte, NC Class B airspace area. This action (depicted on the attached chart) proposes to expand the lateral and vertical limits of the Charlotte Class B airspace area to provide the additional airspace needed to support operations of a third parallel runway and the

implementation of RNAV departure procedures; contain ILS approach procedures for runways 23, 18L, 18C (formerly 18R but redesignated November 20, 2008) and the new runway (18R); and contain aircraft being vectored to a base leg from the west when CLT is on a north operation. The proposed revisions to the Charlotte Class B airspace area are discussed below.

Except for Area A, which extends upward from the surface to and including 10,000 feet MSL within a 7 NM radius of the CLT VOR/DME, the proposed descriptions of all other subareas that make up the Charlotte Class B airspace area would be reconfigured, redescribed and realigned by geographic position in relation to the airport rather than the current practice of combining all areas that share a common altitude floor into one large, complex subarea description. The current Charlotte Class B airspace area consists of six subareas (A through F) while the proposed configuration would consist of 11 subareas (A through K).

Based on modeling of future traffic flows, there is a need to expand the lateral limits of Class B airspace to the north and south of CLT from the current 25 NM arc out to the 30 NM arc, and to set the floor of Class B airspace in those sections at 4,000 feet MSL. The extensions to 30 NM are required to provide adequate vectoring areas for controllers to vector arrivals to the appropriate final approach course. A 4,000 foot MSL floor is needed out to the 30 NM arc to provide sufficient airspace to separate aircraft assigned to different runways and to comply with simultaneous ILS procedures. Additionally, a review of radar data has revealed that, when CLT is on a north operation, a significant number of aircraft inbound from the southwest on either the UNARM ONE or ADENA TWO standard terminal arrival routes exit and reenter Class B airspace between the existing 6,000 foot MSL Class B airspace floor and the 4,600 foot MSL floor to the south-southwest of CLT. Lowering the Class B airspace floor to 4,000 feet MSL in that area will prevent these excursions.

Another problem exists with aircraft established on the ILS approaches to runways 18L and 18C dropping below the floor of Class B airspace north of the airport with the existing Class B airspace configuration. These excursions occur prior to the point where the floor of Class B airspace drops from 3,600 feet MSL to 1,800 feet MSL. Consequently, aircraft are exiting and reentering Class B airspace while flying the published ILS procedures. To correct this situation, the FAA proposes to move the 1,800 foot MSL floor (Area B) from the current 11 NM arc outward to the 14 NM arc. This extension to the 14 NM arc would only be made to the north of CLT (from the intersection of the 14 NM arc with new Highway 321 northwest of the airport, then clockwise along the arc to the CLT 024°T/029°M radial). The remaining portion of Area B would continue to follow the 11 NM arc clockwise to the cutout for the AKH. This change would ensure that arrivals to runways 18L and 18C/36C, and the new runway (18R/36L), are retained within Class B airspace throughout the approach. In addition, in response to comments from the Informal Airspace Meetings, the FAA is proposing to widen the cutout in Area B around AKH to facilitate better access to and from that airport.

With the implementation of RNAV departure procedures at CLT, the floor of Class B airspace to the east and west of the airport needs to be lowered. Departures on easterly and westerly tracks from the airport often exit and then reenter Class B airspace as they continue their climbs. To preclude this, the FAA proposes to lower the existing 6,000 foot MSL floor (current Area E) to 5,000 feet MSL and to lower the existing 8,000 foot MSL floor (current Area F) to 6,000 feet MSL. The existing area designations would be changed from the current Areas E and F to a new Area G (extending upward from 5,000 feet MSL) and a new Area K (extending upward from 6,000 feet MSL) west of CLT; and a new Area D (extending upward from 5,000 feet MSL) and a new Area I (extending upward from 6,000 feet MSL) east of CLT (see attached chart).

To provide an adequate vector area for runway 5 arrivals, it is necessary to lower the Class B airspace floor from 6,000 feet MSL to 4,000 feet MSL floor in an area to the southwest of AKH. This new Area, designated Area F, would be bounded on the east by new Highway 321, on the west by the 20 NM arc of the CLT VOR/DME and on the north by the power lines that extend in a southwesterly direction west of AKH.

A further review of radar data revealed a need to lower the floor of Class B airspace to the northeast of CLT. Due to vectoring patterns and the descent profile of aircraft conducting the ILS RWY 23 approach, it is necessary to slightly extend the 3,600 foot Class B airspace floor to the northeast of CLT. This would be accomplished by extending the lateral limits of the existing Area C from the current 20 NM arc out to the 23 NM arc.

Finally, the Charlotte/Douglas International Airport reference point coordinates in the Class B airspace legal description would be updated to reflect current National Airspace System data.

These changes are being proposed to ensure the containment of IFR aircraft within Class B airspace as required by FAA directives; accommodate the implementation of RNAV departure procedures; and support operations of a third parallel runway.

All radials listed in the Charlotte Class B airspace description in this NPRM are stated in degrees relative to both True North and Magnetic North.

Class B airspace areas are published in paragraph 3000 of FAA Order 7400.9T, dated August 27, 2009 and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class B airspace area proposed in this document would be published subsequently in the Order.

**Regulatory Evaluation Summary**

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the U.S. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared.

Such a determination has been made for this proposed rule. The reasoning for this determination follows:

After consultation with airports that participated in the Charlotte airport ad hoc advisory committee, the FAA expects the proposed modifications of the Class B airspace to result in minimal cost. One representative said the proposed changes would have "absolutely no effect" on his airport and the pilots who use his airport reported that the changes were "negligible." Another manager of an airport potentially affected by this proposed rulemaking reported that having the Class B airspace modified is not the ideal situation, his airport would not experience adverse changes to instrument approaches and therefore expected minimal, if any, economic impact.

Of the six airports that participated in ad hoc advisory committee and that provided comments two expressed concerns of a possible economic impact. One airport reported that airplanes may to stop at other airports but this economic impact would be "hard to quantify" which the FAA deems as minimal cost. The other reported that most of its revenue is generated from a skydiving school that leases trailers and hangers from the airport in addition to the purchase of fuel. The airport manager reported that the skydiving classes go up to 14,500 feet and under this proposed rule change the class would have to coordinate their scheduling of flights with Charlotte. The FAA believes, however, that such flight coordination would result in only minimal costs. In sum the FAA believes the proposed rule would result in minimal costs.

The benefits of this proposed rule are substantial resulting from the increased utilization of a new 9,000 feet runway. This runway will allow more commercial flights to efficiently land at Charlotte-Douglas International Airport.

**Initial Regulatory Flexibility Determination**

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The FAA believes the proposal would not have a significant economic impact on a substantial number of small entities as the economic impact is expected to be minimal. Based on the Small Business Administration small entity criterion for small government jurisdictions the rule would impact a substantial number of small entities. At least two of the regional airports are owned by governments with populations less than 50,000. We were unable to obtain publicly available revenue data. As the proposed rule would simply change the takeoff and landing patterns to these airports, we believe these changed patterns result in a minimal economic impact. Therefore the FAA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. We request comments from the potentially affected entities which would include estimated compliance cost and airport revenue, such that we could provide a measure of economic impact.

**International Trade Impact Assessment**

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the U.S. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the U.S., so long as the standard has a legitimate domestic objective, such the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule to change the airspace classification for Charlotte airport in North Carolina and determined that it would not have a potential effect on trade-sensitive activities as discussed above.

**Unfunded Mandates Assessment**

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of $136.1 million in lieu of $100 million. This proposed rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

**Conclusion**

FAA has, therefore, determined that this proposed rule is a minimal cost rule with substantial benefits and is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures.

FAA has, therefore, determined that this proposed rule is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation

Administration Order 7400.9T, Airspace Designations and Reporting Points, dated August 27, 2009, and effective September 15, 2009, is amended as follows:

*Paragraph 3000 Subpart B—Class B Airspace.*

* * * * *

**ASO NC B Charlotte, NC**

Charlotte/Douglas International Airport (Primary Airport)
(Lat. 35°12′50″ N., long. 80°56′35″ W.)
Charlotte VOR/DME
(Lat. 35°11′25″ N., long. 80°57′06″ W.)
Gastonia Municipal Airport
(Lat. 35°12′10″ N., long. 81°09′00″ W.)

**Boundaries**

Area A. That airspace extending upward from the surface to and including 10,000 feet MSL within a 7-mile radius of the Charlotte VOR/DME.

Area B. That airspace extending upward from 1,800 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the Charlotte VOR/DME 024°T/029°M radial 14-mile fix; thence direct to the Charlotte VOR/DME 032°T/037°M radial 11-mile fix, thence clockwise via the 11-mile arc of the Charlotte VOR/DME to lat. 35°09′37″ N., long. 81°10′21″ W.; thence east to lat. 35°10′17″ N., long. 81°08′10″ W.; thence counterclockwise around a 2-mile radius of the Gastonia Municipal Airport to lat. 35°14′02″ N., long. 81°08′10″ W.; thence west to intersect U.S. Highway 321 at lat. 35°15′00″ N., long. 81°11′21″ W.; thence north along U.S. Highway 321 to the 14-mile arc of the Charlotte VOR/DME at lat. 35°19′20″ N., long. 81°11′13″ W.; thence clockwise via the 14-mile arc to the point of beginning, excluding that airspace within Area A described above.

Area C. That airspace extending upward from 3,600 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the intersection of U.S. Highway 321 and the Charlotte VOR/DME 20-mile arc at lat. 35°26′49″ N., long. 81°12′44″ W.; thence clockwise along the 20-mile arc to intersect the Marshall Steam Plant Rail Spur at lat. 35°31′14″ N., long. 81°00′42″ W.; thence north along the Rail Spur to the Charlotte VOR/DME 25-mile arc at lat. 35°36′25″ N., long. 80°58′57″ W.; thence clockwise along the 25-mile arc to long. 80°46′00″ W.; thence south along long. 80°46′00″ W., to the Charlotte VOR/DME 23-mile arc; thence clockwise along the 23-mile arc to the Charlotte VOR/DME 067°T/072°M radial; thence southwest along the 067°T/072°M radial to the Charlotte VOR/DME 20-mile arc; thence clockwise along the 20-mile arc to the Charlotte VOR/DME 081°T/086°M radial; thence west along the 081°T/086°M radial to the Charlotte VOR/DME 11-mile arc; thence counterclockwise along the 11-mile arc to the Charlotte VOR/DME 032°T/037°M radial, 11-mile fix; thence direct to the Charlotte VOR/DME 024°T/029°M radial, 14-mile fix; thence counterclockwise along the 14-mile arc of the Charlotte VOR/DME to intersect U.S. Highway 321 at lat. 35°19′20″ N., long. 81°11′13″ W., thence north along U.S. Highway 321 to the point of beginning.

Area D. That airspace extending upward from 5,000 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the Charlotte VOR/DME 081°T/086°M radial 11-mile fix; thence east along the 081°T/086°M radial to the 20-mile fix; thence clockwise along the 20-mile arc of the Charlotte VOR/DME to lat. 34°56′07″ N., long. 80°41′23″ W.; thence north to the point of beginning.

Area E. That airspace extending upward from 3,600 feet MSL to and including 10,000 feet MSL bounded by a line beginning at lat. 35°15′00″ N., long. 81°11′21″ W., thence east to lat. 35°14′02″ N., long. 81°08′10″ W.; thence clockwise along a 2-mile radius of the Gastonia Municipal Airport to lat. 35°10′17″ N., long. 81°08′10″ W.; thence west to intersect the Charlotte VOR/DME 11-mile arc at lat. 35°09′37″ N., long. 81°10′21″ W.; thence counterclockwise along the 11-mile arc to the Charlotte VOR/DME 081°T/86°M radial 11-mile fix; thence south direct to the Charlotte VOR/DME 147°T/152°M radial 25-mile fix; thence clockwise along the 25-mile arc of the Charlotte VOR/DME to lat. 34°49′37″ N., long. 81°12′05″ W.; thence north to the Charlotte VOR/DME 218°T/223°M radial 20-mile fix, thence clockwise along the 20-mile arc of the Charlotte VOR/DME, to intersect U.S. Highway 321 at lat. 34°57′21″ N., long. 81°14′28″ W.; thence north along U.S. Highway 321 to the point of beginning.

Area F. That airspace extending upward from 4,000 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the intersection of the power lines and the Charlotte VOR/DME 20-mile arc at lat. 35°08′08″ N., long. 81°21′10″ W.; thence east along the power lines to intersect U.S. Highway 321 at lat. 35°11′52″ N., long. 81°12′41″ W.; thence south along U.S. Highway 321 to intersect the Charlotte VOR/DME 20-mile arc at lat. 34°57′21″ N., long. 81°14′28″ W.; thence clockwise along the 20-mile arc to the point of beginning.

Area G. That airspace extending upward from 5,000 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the intersection of the power lines and the Charlotte VOR/DME 20-mile arc at lat. 35°08′08″ N., long. 81°21′10″ W.; thence clockwise along the 20-mile arc to intersect U.S. Highway 321 at lat. 35°26′49″ N., long. 81°12′44″ W.; thence south along U.S. Highway 321 to intersect the power lines at lat. 35°11′52″ N., long. 81°12′41″ W.; thence west along the power lines to the point of beginning.

Area H. That airspace extending upward from 4,000 feet MSL to and including 10,000 feet MSL bounded by a line beginning at lat. 35°37′15″ N., long. 81°10′32″ W.; thence direct to intersect the Charlotte VOR/DME 30-mile arc at lat. 35°41′30″ N., long. 80°57′40″ W.; thence clockwise along the 30-mile arc to long. 80°46′00″ W.; thence south along long. 80°46′00″ W., to intersect the Charlotte VOR/DME 25-mile arc; thence counterclockwise along the 25-mile arc to intersect the Marshall Steam Plant Rail Spur at lat. 35°36′25″ N., long. 80°58′57″ W.; thence south along the Rail Spur to intersect the Charlotte VOR/DME 20-mile arc at lat. 35°31′14″ N., long. 81°00′42″ W.; thence counterclockwise along the 20-mile arc to intersect U.S. Highway 321 at lat. 35°26′49″ N., long. 81°12′44″ W.; thence north along U.S. Highway 321 to intersect the Charlotte VOR/DME 25-mile arc at lat. 35°32′26″ N., long. 81°13′44″ W.; thence clockwise along the 25-mile arc to intersect the Charlotte VOR/DME 337°T/342°M radial; thence northwest along the 337°T/342°M radial to the point of beginning.

Area I. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the Charlotte VOR/DME 062°T/067°M radial, 30-mile fix, thence southwest along the 062°T/067°M radial to the 25-mile fix; thence clockwise along the Charlotte VOR/DME 25-mile arc to the Charlotte VOR/DME 120°T/125°M radial; thence southeast along the 120°T/125°M radial to the 30-mile fix; thence clockwise along the Charlotte VOR/DME 30-mile arc to lat. 34°44′58″ N., long. 80°39′47″ W.; thence north direct to intersect the Charlotte VOR/DME 20-mile arc at lat. 34°56′07″ N., long. 80°41′23″ W.;, thence counterclockwise along the 20-mile arc to the Charlotte VOR/DME 067°T/072°M radial; thence northeast along the 067°T/072°M radial to the 23-mile arc; thence counterclockwise along the 23-mile arc to long. 80°46′00″ W.; thence north along long. 80°46′00″ W., to the Charlotte VOR/DME 30-mile arc; thence clockwise along the 30-mile arc to the point of beginning.

Area J. That airspace extending upward from 4,000 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the Charlotte VOR/DME 147° radial 25-mile fix; thence direct to intersect the Charlotte VOR/DME 30-mile arc at lat. 34°44′58″ N., long. 80°39′47″ W.; thence clockwise along the Charlotte VOR/DME 30-mile arc to lat. 34°44′01″ N., long. 81°12′05″ W.; thence north to intersect the Charlotte VOR/DME 25-mile arc at lat. 34°49′37″ N., long. 81°12′05″ W.; thence counterclockwise along the Charlotte VOR/DME 25-mile arc to the point of beginning.

Area K. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL bounded by a line beginning at the Charlotte VOR/DME 293°T/298°M radial, 30-mile fix; thence clockwise along the Charlotte VOR/DME 30-mile arc to lat. 35°41′30″ N., long. 80°57′40″ W.; thence southwest direct to intersect the Charlotte VOR/DME 337°(T)/342°(M) at lat. 35°37′15″ N., long. 81°10′32″ W.; thence southeast along the 337°T/342°M radial to the Charlotte VOR/DME 25-mile arc; thence counterclockwise along the 25-mile arc to intersect U.S. Highway 321 at lat. 35°32′26″ N., long. 81°13′44″ W., thence south along new Highway 321 to intersect the Charlotte VOR/DME 20-mile arc at lat. 35°26′49″ N., long. 81°12′44″ W.; thence counterclockwise along the 20-mile arc to the Charlotte VOR/DME 218°T/223°M radial; thence south to intersect the Charlotte VOR/DME 30-mile arc at lat. 34°44′01″ N., long. 81°12′05″ W.; thence clockwise along the 30-mile arc to the Charlotte VOR/DME 242°T/247°M radial, thence northeast along the 242°T/247°M radial to the Charlotte VOR/DME 25-mile arc; thence clockwise along the 25-mile arc to the Charlotte VOR/DME 293°T/298°M radial; thence northwest along

the 293°T/298°M radial to the point of beginning.

* * * * *

Issued in Washington, DC, on February 23, 2010.

**Edith V. Parish,**

*Manager, Airspace and Rules Group.*

[FR Doc. 2010–4377 Filed 3–2–10; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF JUSTICE

### Bureau of Prisons

### 28 CFR Part 545

**[BOP Docket No. BOP 1152–P]**

**RIN 1120–AB52**

## Inmate Work and Performance Pay Program

**AGENCY:** Bureau of Prisons, Justice.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Bureau of Prisons (Bureau) proposes to streamline regulations on inmate work and performance pay by removing redundant language and provisions that relate solely to staff guidance.

**DATES:** Written comments must be postmarked and electronic comments must be submitted on or before May 3, 2010. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

**ADDRESSES:** Comments should be submitted to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534. You may view an electronic version of this rule at *http://www.regulations.gov.* You may also comment on this regulation via the Internet at *BOPRULES@BOP.GOV* or by using the *http://www.regulations.gov* comment form for this regulation. When submitting comments electronically you must include the BOP Docket No. in the subject box.

**FOR FURTHER INFORMATION CONTACT:** Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307–2105.

**SUPPLEMENTARY INFORMATION:**

### Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment contains so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http://www.regulations.gov.*

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "For Additional Information" paragraph.

The reason that the Bureau is requesting electronic comments before Midnight Eastern Time on the day the comment period closes is because the inter-agency Regulations.gov/Federal Docket Management System (FDMS) which receives electronic comments terminates the public's ability to submit comments at Midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov/FDMS system do not apply to U.S. postal comments which will be considered as timely filed if they are postmarked before Midnight on the day the comment period closes.

### Discussion

In this document, the Bureau proposes to streamline regulations on inmate work and performance pay by deleting redundant language and provisions that relate solely to staff guidance. Below is a section-by-section explanation of the proposed revisions.

*Section 545.20 Purpose and scope.* This section describes the purpose of the Inmate Work and Performance Pay (IPP) program of the Bureau of Prisons (Bureau). This section is derived from current § 545.20(a). The second sentence of current subparagraph (a), regarding the requirement for physically and mentally able sentenced inmates to participate in the work program, is deleted because the concept is repeated in the subsequent regulation. Current paragraph (b), regarding the Warden's ability to grant performance pay to qualified inmates, is deleted because the concept is later repeated in a regulation exclusively devoted to performance pay.

*Section 545.21 Definitions.* This section derives almost verbatim from the current § 545.21, and defines terms used in the rest of the subpart, including "physically and mentally able," "institution work assignment," "industry assignment," "commissary assignment," and other terms.

*Deleted § 545.22.* This section, regarding the institution work and performance pay committee, has been deleted because it is guidance to staff that need not be in regulation text. This current regulation explains that the Warden at each Bureau facility establishes an Institution Inmate Work and Performance Pay Committee to administer the institution's work and performance pay program, comprised of an Associate Warden, the Inmate Performance Pay Coordinator, and any other member(s) the Warden considers appropriate. The Committee is responsible for approving various aspects of the inmate work and performance pay program specific to that Committee's facility, including the number of inmates and pay grades for each work detail, job descriptions, performance standards, budgeting issues, and other such administrative concerns. We will retain this language in implementing text in the relevant Bureau policy.

*Section 545.22 Inmate work/program assignment.* This section derives from current § 545.23. It explains that each sentenced inmate who is physically and mentally able must participate in an institutional, industrial, or commissary work program unless an exception applies. An inmate may be authorized to not participate in IPP if the inmate instead participates in an education, vocational, or drug abuse treatment program, on either a full or part-time basis, if it is required by Bureau policy or statute (for example, the Literacy Program) or with the approval of the Warden or designee. An inmate may also be excepted from IPP participation if the inmate is a pretrial

inmate, is otherwise unsentenced or not serving a term of imprisonment, or is a medically unassigned inmate.

Paragraph (d) of the current § 545.23 has been deleted because it relates solely to guidance to staff. Paragraph (d) describes the factors that staff will consider when making work and/or program assignments. This language will be retained in the relevant Bureau policy, which is a more appropriate vehicle for guidance to staff.

*Section 545.23 Inmate work conditions.* This section derives, almost verbatim, from current § 545.24. This regulation describes inmate work conditions, such as the length of the work day, rules regarding reporting for work, work performance, health and safety standards, and work-related injuries.

*Section 545.24 Eligibility for performance pay.* This section derives from current § 545.25, and describes how an inmate may receive performance pay. Paragraph (a) explains that an inmate may receive performance pay for accomplishments in his/her institution work assignment, literacy program (GED) participation, apprenticeship training, and approved vocational training courses.

Paragraph (b) describes how the amount of performance pay to be awarded is calculated. Generally, an inmate is eligible for performance pay from the date of work or program assignment for each month that the inmate's performance justifies such payment. Specific provisions regarding portion of the month or hours worked and absences are derived from current § 545.26(d) and (d). Provisions regarding vesting and notification of performance pay status derive from current § 545.26(h) and (i).

Paragraph (c) delineates exceptions to eligibility for performance pay. Inmates will not be eligible to receive performance pay if they refuse to participate in the financial responsibility program; refuse participation, withdraw, are expelled, or otherwise fail attendance or examination requirements of the drug abuse education course; or if they commit a level 100 or 200 series drug- or alcohol-related prohibited act.

*Removed § 545.26 Performance pay provisions.* Current § 545.26 has been removed. Paragraph (a) of the current regulation contains guidance to staff that is more appropriately retained in Bureau policy. This subparagraph explains that the Warden or designee will ensure that all institution work assignments have standardized work descriptions, describes the four pay grade levels that inmates may be assigned to, and lists factors to consider in assigning a grade level to a specific work position.

Paragraph (b) allots a percentage of inmates in each Bureau facility to each of the four pay grade levels. The vast differences among Bureau facilities in size, population, work needs, and security levels, make such a mandatory allotment impracticable. We will retain recommended allotment levels in Bureau implementing text, but have deleted this subparagraph from regulation text in recognition of the differing needs and resources of each facility.

Paragraphs (c) and (d), regarding calculation of performance pay based on portion of the month and hours worked, have been moved to proposed § 545.24(b). Paragraph (e), regarding work evaluation, has been revised as proposed § 545.25, described below.

*Section 545.25 Work evaluation.* This section derives from current § 545.26(e). Provisions regarding work evaluation have been moved from that regulation because inmates' work will be evaluated regardless of whether they are being considered for performance pay, and therefore is not appropriate in § 545.26, entitled "Performance pay provisions."

This section explains when, how, and what work will be evaluated. Every six months, the work detail/program supervisor will evaluate each inmate and will document in writing only those inmates who show skills below satisfactory level. This is a change from current regulations, which state that an evaluation will be conducted every month. This change is being made to emulate the community standard of biannual work performance evaluations and to more efficiently allocate staff time. Under the current regulations, each staff member conducting evaluations spends approximately two to three hours per month to assess and re-assess inmate performance when there have been few changes from month to month. The new regulation would save approximately 20 to 30 hours a year of each evaluator's time. Further, up-to-date information regarding an inmate's work performance may be input in the computer system at any time (more frequently than monthly, if warranted), and is regularly checked and taken into account by staff responsible for evaluating inmate work performance.

The evaluation will be based on only those hours during which the inmate actively participated in a work assignment or an education/vocational program. The work detail/program supervisor will rate the inmate's performance in each of several categories, including, but not limited to quality and quantity of work, initiative, ability to learn, dependability, response to supervision and instruction, safety and care of equipment, ability to work with others, and overall job proficiency.

A provision at the end of current § 545.26(e) states that exceptions to the work performance evaluation procedures require approval of the Assistant Director, Correctional Programs Division, Central Office. This provision also provides guidance to the work detail/program supervisor regarding how to review the evaluation with the inmate. Because this section contains guidance to staff, we propose to delete it and retain it in implementing text in Bureau policy.

*Section 541.26 Bonus pay.* This section derives from § 545.26(f) and (g). This regulation explains that if the supervisor determines that an inmate has made exceptional accomplishments or appreciably contributed to the work assignment, the supervisor may recommend that the inmate receive bonus pay or special bonus pay (if the work assignment was previously identified by the Warden or designee, and approved by the Regional Director, as critical to the institution).

Language instructing work supervisors to forward bonus pay and special bonus pay recommendations to the facility's relevant department head has been deleted from the proposed rule because this language is guidance to staff that is more appropriately retained in Bureau policy.

*Section 545.27 Inmate vacations.* This section derives from current § 545.27. It explains that if an inmate has worked full-time for 12 consecutive months on an institution work assignment, and the work supervisor so recommends, the inmate may take a five-day paid vacation at the inmate's prevailing hourly rate.

Again, language instructing work supervisors to forward inmate vacation recommendations to the facility's relevant department head have been deleted from the proposed rule because this language is guidance to staff that is more appropriately retained in Bureau policy. Also deleted as staff guidance is an administrative provision instructing work supervisors to schedule inmate vacations compatible with the facility's work needs.

*Section 545.28 Achievement awards.* This section derives, almost verbatim, from current § 545.28. It explains that inmates may receive achievement awards for completion of various approved education programs or for

completion or satisfactory progress in an approved drug treatment program.

*Section 545.29 Special awards.* This section derives from current § 545.29. Paragraph (a) states that inmates who perform exceptional services not ordinarily a part of the inmate's regular assignment may be granted a special award regardless of the inmate's work or program status.

The proposed rule deletes language in paragraph (a) giving examples of "exceptional services" that may warrant a special award. This language has been deleted because these examples do not reflect the broad possibilities for services that may deserve special awards, but instead have the practical effect of limiting special awards to the given examples.

Paragraph (b) states that the special award may be in the form of a monetary payment in addition to any other award (e.g., extra good time) given.

Paragraph (c) of the current regulation states that the Warden or designee of each institution is empowered to approve special awards not exceeding $150, and that awards in excess of this amount may not be made unless approved by the Regional Director. This subparagraph has been removed from the proposed rule because it is specific guidance to the Warden and is more appropriate to retain in Bureau policy.

*Section 545.30 Funds due deceased inmates.* This section derives from current § 545.30, explaining that the Bureau will make unpaid performance pay payments due a deceased inmate to a legal representative of the inmate's estate or in accordance with the laws of descent and distribution of the state of domicile (most recent legal residence). This does not change the substance of current § 545.30.

*Deleted § 545.31 Training.* Current regulation § 545.31 provides guidance to the Warden regarding training facility staff on the operation of the work and performance pay program and informing inmates of the program and pay rates. This section has been deleted because it is guidance to Bureau staff, but will be retained in Bureau policy.

**Executive Order 12866**

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined not to constitute "significant regulatory actions" under section 3(f) of Executive Order 12866 and, accordingly, it was not reviewed by OMB.

The Bureau has assessed the costs and benefits of this rule as required by Executive Order 12866 Section 1(b)(6) and has made a reasoned determination that the benefits of this rule justify its costs. There will be no new costs associated with this rulemaking.

**Executive Order 13132**

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, we determine that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

**Regulatory Flexibility Act**

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**List of Subjects in 28 CFR Part 545**

Prisoners.

**Kathleen M. Kenney,**

*Assistant Director/General Counsel, Bureau of Prisons.*

Under rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we propose to amend 28 CFR part 545 as set forth below.

**SUBCHAPTER C—INSTITUTIONAL MANAGEMENT**

## PART 545—WORK AND COMPENSATION

1. The authority citation for 28 CFR part 545 continues to read as follows:

**Authority:** 5 U.S.C. 301; 18 U.S.C. 3013, 3571, 3572, 3621, 3622, 3624, 3663, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4126, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

2. Revise part 545 to read as follows:

Sec.
545.20 Purpose and scope.
545.21 Definitions.
545.22 Inmate work/program assignment.
545.23 Inmate work conditions.
545.24 Eligibility for performance pay.
545.25 Work evaluation.
541.26 Bonus pay.
545.27 Inmate vacations.
545.28 Achievement awards.
545.29 Special awards.
545.30 Funds due deceased inmates.

**§ 545.20 Purpose and scope.**

The purpose of this subpart is to explain the Inmate Work and Performance Pay (IPP) program of the Bureau of Prisons (Bureau). The purpose of this program is to:

(a) Reduce inmate idleness, while allowing the inmate to improve and/or develop useful job skills, work habits, and experiences that will assist in post-release employment; and

(b) Ensure completion of activities necessary for the day-to-day operation of the institution.

**§ 545.21 Definitions.**

(a) *Physically and mentally able.* For purposes of this rule, this term includes inmates with disabilities who, with reasonable accommodation, can perform the essential function of the work assignment.

(b) *Institution work assignment.* A work assignment which contributes to the day-to-day operation of the institution (e.g., carpentry, plumbing, food service).

(c) *Industry assignment.* A Federal Prison Industries (FPI) work assignment.

(d) *Commissary assignment.* A Trust Fund work assignment.

(e) *Full-time work assignment.* A work assignment to which an inmate is assigned for the entire scheduled work day.

(f) *Part-time work assignment.* A work assignment to which an inmate is assigned for only a part of the scheduled work day.

(g) *Medically unassigned.* An inmate who, because of medical restrictions, cannot be assigned to any work program.

(h) *Light duty work assignment.* A work assignment in which an inmate may, because of physical limitations, temporary or otherwise, only perform limited work functions, e.g., sedentary work, no prolonged standing, no lifting over 25 lbs.

**§ 545.22 Inmate work/program assignment.**

(a) Each sentenced inmate who is physically and mentally able must participate in an institutional, industrial, or commissary work program unless one of the exceptions in (b) applies.

(b) *Exceptions.* An inmate may be excused from participation in IPP if:

(1) The inmate instead participates in an education, vocational, or drug abuse treatment program, on either a full or part-time basis, if it is required by Bureau policy or statute (for example, the Literacy Program) or with approval by the Warden or designee.

(2) The inmate is a pretrial inmate, or is otherwise unsentenced or not serving a term of imprisonment, in which case the inmate may only be assigned housekeeping tasks in his/her cell and in the community living area. If such an inmate waives his/her right not to work, that inmate may be allowed to participate in the IPP.

(3) The inmate is a medically unassigned inmate, in which case the inmate may be required to perform housekeeping tasks in his/her cell and in the community living area, to the extent medically possible.

**§ 545.23 Inmate work conditions.**

(a) *Work day:* The scheduled work day is ordinarily at least seven hours.

(b) *Reporting for work:* Inmates must report to the place of assignment at the required time, and may not leave an assignment without permission.

(c) *Work performance:* Regardless of assignment, the inmate must perform all assigned tasks diligently and conscientiously. Inmates may be subject to disciplinary action for refusing to work, not showing up for work, working poorly, or encouraging others to do so.

(d) *Health and safety standards:* Inmates will only participate in work, vocational, and education programs that meet the appropriate minimum standards for health and safety. Inmates will be provided safety equipment as needed.

(e) *Work-related injuries.* Inmates must work safely, using safety equipment as instructed by the work supervisor. If an inmate has a work-related injury, he/she must notify the work supervisor so that appropriate action (for example, medical attention, and submission of necessary reports) may be taken.

**§ 545.24 Eligibility for performance pay.**

(a) *Performance pay for accomplishments.* An inmate may receive performance pay for accomplishments in one or more of the following areas:

(1) Institution work assignment;

(2) Literacy program (GED) participation;

(3) Apprenticeship training; and

(4) Vocational training courses (approved by the Bureau as certified vocational training).

(b) *Calculating amount of performance pay to be awarded.* (1) *Date of work/program assignment.* An inmate is eligible for performance pay from the date of work or program assignment for each month that the inmate's performance justifies such payment.

(2) *Portion of month worked.* An inmate may receive performance pay only for that portion of the month that the inmate was working. Performance pay may not be awarded retroactively.

(3) *Hours worked.* An inmate is eligible to receive performance pay only for those hours during which the inmate is actually performing satisfactory work or actively participating in an education or vocational training program.

(4) *Absences.* Absences from an inmate's scheduled assignment for such reasons as call-outs, visits, sick call, interviews, or making telephone calls, will be deducted from the monthly number of hours worked and will accordingly reduce the amount of pay received by the inmate.

(5) *Vesting.* An inmate's performance pay, once earned, becomes vested.

(6) *Notification.* Each inmate in performance pay status shall be notified of monthly earnings.

(c) *Exceptions to eligibility for performance pay*—(1) *Refusal to participate in the financial responsibility program.* An inmate who refuses to participate in the financial responsibility program will not ordinarily receive performance pay above the maintenance pay level, or bonus pay, or vacation pay in accordance with 28 CFR part 545, subpart B.

(d) *Failure to comply with requirements of the drug abuse education course.* An inmate who refuses participation, withdraws, is expelled, or otherwise fails attendance or examination requirements of the drug abuse education course or the RDAP is subject to the limitations specified in § 550.51(e) or § 550.53(g) of this chapter.

(e) *Commission of a level 100 or 200 series drug- or alcohol-related prohibited act.* Inmates receiving performance pay who are found through the disciplinary process (Part 541 of this subchapter) to have committed a level 100 or 200 series drug- or alcohol-related prohibited act will automatically have their performance pay reduced to maintenance pay level and will be removed from any assigned work detail outside the secure perimeter of the institution. This reduction to maintenance pay level will ordinarily remain in effect for one year, unless otherwise authorized by the Warden or designee.

**§ 545.25 Work evaluation.**

(a) *When work will be evaluated:* The work detail/program supervisor will evaluate each inmate at a minimum of every six months.

(b) *What work will be evaluated:* The evaluation will be based on only those hours during which the inmate actively participated in a work assignment or an education/vocational program.

(c) *How work will be evaluated:* The work detail/program supervisor will rate the inmate's performance in each of several categories, including, but not limited to the following: quality and quantity of work, initiative, ability to learn, dependability, response to supervision and instruction, safety and care of equipment, ability to work with others, and overall job proficiency.

**§ 541.26 Bonus pay.**

(a) *Bonus pay.* If the supervisor determines that an inmate has made exceptional accomplishments or appreciably contributed to the work assignment, the supervisor may recommend that the inmate receive bonus pay.

(b) *Special bonus pay.* An inmate may be recommended to receive special bonus pay based on exceptional work in a temporary job assignment if the assignment was previously identified by the Warden or designee, and approved by the Regional Director, as critical to the institution.

**§ 545.27 Inmate vacations.**

(a) *Eligibility for a vacation:* If an inmate has worked full-time for 12 consecutive months on an institution work assignment, and the work supervisor so recommends, the inmate may take a five-day paid vacation at the inmate's prevailing hourly rate.

(b) *Accumulation of vacation credit.* The Warden or designee may authorize

an inmate to accumulate vacation credit when:

(1) The inmate is transferred to another institution for the benefit of the government or because of the inmate's favorable adjustment (custody reduction); or

(2) The inmate is placed in a new work assignment in the institution for the benefit of the government or institution, rather than solely at the inmate's request or because of the inmate's poor performance or adverse behavior.

**§ 545.28 Achievement awards.**

Inmates may receive achievement awards in the following manner:

(a) *Education program completion.* With prior approval of the Education Department, each inmate who completes the Literacy program, Vocational Training, or related trades classroom work that is part of a certified apprenticeship program may be granted an achievement award from performance pay funds.

(b) *Drug treatment satisfactory progress/completion.* With prior approval of the Psychology Services Department, each inmate who is making satisfactory progress or completes a residential drug treatment program may also be granted an achievement award from performance pay funds.

**§ 545.29 Special awards.**

Inmates who perform exceptional services not ordinarily a part of the inmate's regular assignment may be granted a special award regardless of the inmate's work or program status. The special award may be in the form of a monetary payment in addition to any other award (e.g., extra good time) given.

**§ 545.30 Funds due deceased inmates.**

If performance pay is due to a deceased inmate for work performed and not yet paid, the Bureau will make the payment to a legal representative of the inmate's estate or in accordance with the laws of descent and distribution of the state of domicile (most recent legal residence).

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

### 32 CFR Part 157

**[DoD–2008–OS–0075; RIN 0790–AI33]**

### Reduction of Use of Social Security Numbers (SSN) in the Department of Defense (DoD)

**AGENCY:** Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule establishes policy and assigns responsibilities for social security number (SSN) reduction in DoD. It incorporates Office of the Under Secretary of Defense for Personnel and Readiness Directive-type Memorandum titled "DoD Social Security Number (SSN) Reduction Plan."

**DATES:** Comments must be received by May 3, 2010.

**ADDRESSES:** You may submit comments, identified by docket number and/or the Regulatory Information Number (RIN) number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Andrew Uscher, 703–696–0109.

**SUPPLEMENTARY INFORMATION:**

**Executive Order 12866, "Regulatory Planning and Review"**

It has been certified that 32 CFR part 157 does not:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribunal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

**Section 202, Public Law 104–4, "Unfunded Mandates Reform Act"**

It has been certified that 32 CFR part 157 does not contain a Federal mandate that may result in the expenditure by State, local and tribunal governments, in aggregate, or by the private sector, of $100 million or more in any 1 year.

**Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. 601)**

It has been certified that 32 CFR part 157 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule establishes policy and assigns responsibilities for SSN reduction in DoD.

**Public Law 96–511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)**

It has been certified that 32 CFR part 157 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

**Executive Order 13132, "Federalism"**

It has been certified that 32 CFR part 157 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

**List of Subjects in 32 CFR Part 157**

Privacy, Security measures, Social Security numbers.

Accordingly, 32 CFR part 157 is proposed to be added to read as follows:

## PART 157—REDUCTION OF USE OF SOCIAL SECURITY NUMBERS (SSN) IN THE DEPARTMENT OF DEFENSE (DOD)

Sec.

157.1 Purpose.
157.2 Applicability.
157.3 Definitions.
157.4 Policy.
157.5 Responsibilities.
157.6. Guidance on the use of the SSN by the DoD.
157.7. DoD SSN reduction in forms and systems.
157.8. Approval for use of the SSN.
157.9 Information requirements.

Appendix A to Part 157—Sample SSN Justification Memorandum
Appendix B to Part 157—Sample SSN Elimination Plan

**Authority:** 5 U.S.C. 301.

**§ 157.1 Purpose.**

This part establishes policy and assign responsibilities for social security number (SSN) reduction in the Department of Defense (DoD). It establishes a DoD SSN Reduction Plan.

**§ 157.2 Applicability.**

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within DoD (hereafter referred to collectively as the "DoD Components").

(b) Covers all uses of SSNs within DoD, to include DoD data managed or retained in contractor-owned, -managed, or -operated systems according to section 552a of title 5, United States Code.

**§ 157.3 Definitions.**

These terms and their definitions are for the purpose of this part.

*Application.* Software program that performs a specific function directly for a user and can be executed without access to system control, monitoring, or administrative privileges. Examples include office automation, electronic mail, Web services, and major functional or mission software programs.

*Authentication.* The process of establishing that an individual, previously identified and with whom a business relationship has been established, is the same as the individual who initially created the relationship. This is generally done by presenting information that is known only to the individual and the organization. Authentication is also a security measure designed to establish the validity of a transmission, message, or originator, or a means of verifying an individual's authorization to receive specific categories of information.

*Computer network.* The constituent element of an enclave responsible for connecting computing environments by providing short-haul data transport capabilities such as local or campus area networks, or long-haul data transport capabilities such as operational, metropolitan, or wide area and backbone networks.

*DoD information system.* Set of information resources organized for the collection, storage, processing, maintenance, use, sharing, dissemination, disposition, display, or transmission of information. Includes automated information system applications, enclaves, outsourced information technology (IT)-based processes, and platform IT interconnections.

*Electronic form.* An officially prescribed set of data residing in an electronic medium that is used to produce as near to a mirror-like image as the creation software will allow of the officially prescribed form. An electronic form can also be one in which prescribed fields for collecting data can be integrated, managed, processed, and/or transmitted through an organization's IT system. There are two types of electronic forms: One that is part of an automated transaction, and one whose image and/or data elements reside on a computer.

*Form.* A fixed arrangement of captioned spaces designed for entering and extracting prescribed information. Forms may be preprinted paper forms or electronic forms.

*Identification.* The act of establishing who a person is. This is generally done by the collection and review of certain identity attributes, including but not limited to: Name, SSN, address, and date of birth. Identification is generally associated with a business process and includes establishing the relationship based on the need or desire of an individual to participate in the given business process.

*Privacy Impact Assessment (PIA).* An analysis of how information is handled: To ensure handling conforms to applicable legal, regulatory, and policy requirements regarding privacy; to determine the risks and effects of collecting, maintaining, and disseminating Personally Identifiable Information (PII) information in an electronic information system; and to examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks.

*Record.* All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the information value of the data in them.

*Survey.* An instrument designed to gather data or attitudes by polling a section of the population.

*System.* See definition of DoD Information System.

*System identifiers.* Identifiers used for system-to-system electronic communications across the enterprise. They are not to be declared by, nor in fact generally known to, the person they are assigned to. Their primary purpose is to limit the ambiguity in identity caused by human entry of declarative identifiers (e.g., transpositions and typographical errors that occur when entering SSNs). Once they are assigned they are used only for technology-to-technology communications and never printed on any media. Their scope is only for use within DoD.

*System of records.* A group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

**§ 157.4 Policy.**

It is DoD policy that:

(a) All DoD personnel and contractors shall reduce or eliminate the use of SSNs wherever possible.

(b) Use of the SSN includes the SSN in any form, including, but not limited to, truncated, masked, partially masked, encrypted, or disguised SSNs.

(c) SSNs will not be used in surveys, spreadsheets, or hard copy lists. The policy that SSNs will not be used in surveys only includes survey responses.

(d) SSNs will be used only in approved forms and systems when they meet one or more of the acceptable use criteria in § 157.6(b) of this part.

(e) Specific reviews of forms and systems will be conducted to reduce SSN use. Follow guidance in § 157.7 and § 157.8 of this part.

**§ 157.5 Responsibilities.**

(a) The Under Secretary of Defense for Personnel and Readiness (USD (P&R)) shall establish a SSN Reduction Plan for DoD and shall monitor its execution.

(b) The Director of Administration and Management shall ensure that the DoD Forms Management Officer and the Director, Defense Privacy Office (DPO) fulfill their responsibilities related to the SSN Reduction Plan.

(1) The DoD Forms Management Officer shall review SSN use and justifications on new and existing Department of Defense (DD) and Secretary of Defense (SD) forms and produce an annual report on results.

(2) The Director, DPO, shall:

(i) Provide the final approval authority for SSN use and justification. The authorization for use of personally identifiable information (PII) is governed through the DoD Privacy Program.

(ii) Review SSN use and justifications on the DoD Information Technology Portfolio Repository (DITPR) as part of the Biennial Privacy Act System of Records Notices Review and prepare an annual report on results (see § 157.7(b)(2)(iii) of this part).

(iii) Submit the Privacy Section of the annual Federal Information Security Management Act (FISMA) Report. This report requires agencies to review and update their progress on the reduction of holdings of PII. Provide specific guidance annually to reflect the reporting elements. FISMA elements are subject to change. The DoD Component Privacy Act offices are responsible for providing input to the Defense Privacy Office for inclusion in the report.

(c) The Heads of the DoD Components shall review, or delegate responsibility for review within their Component SSN use and justifications for new and existing Component-wide forms, and produce an annual report on results in accordance with the process described in § 157.8(b)(2)(i) of this part. New and existing command and installation level forms also will be reviewed with limited reporting in accordance with the process described in § 157.8(b)(2)(ii) of this part.

(d) The Commanders of the Combatant Commands, through the Chairman of the Joint Chiefs of Staff, shall review and approve uses of the SSN that are required as a result of operational necessity.

(e) The IG, DoD, is requested to review the implementation of the DoD SSN Reduction Plan at key milestones as reflected in § 157.7(c) of this part.

**§ 157.6 Guidance on the use of the SSN by DoD.**

(a) *Overview.* (1) The SSN has been used as a means to efficiently identify and authenticate individuals. Expanded use of the SSN has increased efficiency, enabling DoD information systems and processes to interoperate and transfer information with a greatly reduced chance of errors. However, the threat of identity theft has rendered this wide-spread use unacceptable, resulting in the requirement that all Federal agencies evaluate how the SSN is used and eliminate its unnecessary use (President's Task Force on Identity Theft Strategic Plan [1] and Office of Management and Budget (OMB) Memo M–07–16 [2]).

(2) This guidance identifies the acceptable uses of the SSN, describes how authorized uses shall be documented, presents alternatives to using the SSN, and explains the role Privacy Act training plays in protecting privacy information within DoD. Any uses of the SSN not provided for in this guidance are considered to be unnecessary and shall be eliminated. Use of the SSN includes the SSN in any form, including, but not limited to, truncated (last four digits), masked, partially masked, encrypted, or disguised SSNs.

(b) *Acceptable uses.* (1) The acceptable uses of the SSN are those that are provided for by law, require interoperability with organizations beyond DoD, or are required by operational necessities. Such operational necessities may be the result of the inability to alter systems, processes, or forms due to cost or unacceptable levels of risk. Those systems, processes, or forms that claim "operational necessity" shall be closely scrutinized. Ease of use or unwillingness to change are not acceptable justifications for this case.

(2) Executive Order 9397 required all federal agencies to use the SSN as a primary means of identification for individuals working for, with, or conducting business with their agency. The requirement for the use of the SSN provided by Executive Order 9397 has been eliminated. Executive Order 9397 may be used to justify the use of the SSN as an interim measure while its use is being eliminated, but shall not, by itself be used to constitute justification for ongoing use of the SSN.

(3) What follows are general categories of use that may continue to be acceptable for the SSN. General coverage of an application by one of the following use cases must also be compared with the particular way in which the SSN is used. The fact that a use case may loosely meet one or more of the justifications does not necessarily mean that a specific justification is acceptable. The specific legislative or regulatory language must be examined to determine if it is applicable. Justification for the use of the SSN to be contained in an application does not constitute authority to use the SSN in every transaction or interaction. Any transaction that includes the display, transfer, or presentation of the SSN should be closely scrutinized to determine if some alternate form of identification or authentication may suffice.

(i) *Geneva Conventions serial number.* As of the late 1960s, the SSN has served as the Geneva Conventions serial number for the Armed Forces of the United States. Many of the systems, processes, and forms used by DoD categorize individuals by their SSNs. In many cases, it is essential to be able to identify individuals for the purpose of the Geneva Conventions. In addition, it may be necessary to access this number at short notice.

(ii) *Law enforcement, national security, credentialing.* Almost every law enforcement application must be able to report and track individuals through the use of the SSN. This includes, but is not limited to, checks of the National Crime Information Center; state criminal histories; and Federal Bureau of Investigation records checks.

(iii) *Security clearance investigation or verification.* The initiation, conduct, or verification of security clearances requires the use of the SSN. The SSN is the single identifier that links all of the aspects of these investigations together. This use case is also linked to other Federal agencies that continue to use the SSN as a primary identifier.

(iv) *Interactions with financial institutions.* Federal law requires that individuals who hold accounts with financial institutions provide the SSN as part of the process to open accounts. It may therefore be required to provide the SSN for systems, processes, or forms that interface with or act on behalf of individuals or organizations in transactions with financial institutions.

(v) *Confirmation of employment eligibility.* Federal statute requires that all persons employed within the United States provide an SSN or comparable identifier to prove that he or she is eligible to work for or with the government of the United States. Any system that deals with employment eligibility may contain the SSN.

(vi) *Administration of Federal Worker's Compensation.* The Federal Worker's Compensation Program continues to track individuals through the use of the SSN. As such, systems, processes, or forms that interact with or provide information for the administration of this system or associated systems may be required to retain the SSN.

(vii) *Federal taxpayer identification number.* The application of Federal and State income tax programs rely on the use of the SSN. As such, systems that have any function that pertains to the collection, payment, or record keeping of this use case may contain the SSN. Additionally, individuals who operate

[1] Available at *http://www.idtheft.gov/reports/strategicplan.pdf.*

[2] Available at *http://www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf.*

business vehicles under their own name may use their SSN as the tax number for that business function.

(viii) *Computer matching.* Systems, processes, or forms that interact with other Government agencies may require the continued use of the SSN as a primary identifier until such time as the applications to which they are linked move to some other identifier as a primary means for transferring, matching, or checking information. These applications shall be rigorously scrutinized to determine the availability of some other means for conducting these transactions.

(ix) *Foreign travel.* DoD personnel are often required to travel beyond the borders of the United States and many members often require official clearance prior to travel. Currently, the SSN is used as the identifier for these purposes.

(x) *Noncombatant evacuation operations (NEOs).* The Department of State requires that all persons repatriated to the United States as part of a NEO present their SSN as part of this process. Any systems, forms, or processes supporting NEOs may be required to process individuals using the SSN as the primary identifier.

(xi) *Legacy system interface.* Many systems, processes, or forms that do not meet the criteria in paragraphs (b)(3)(i) through (b)(3)(x) of this section for the continued use of the SSN may not be able to transition to another identifier in a timely manner due to the excessive cost associated with the change. In these cases, the continued use of the SSN may be acceptable for a specified period of time, provided that plans are in place for the migration away from the SSN in the future. Plans to alter these use cases must take into account interactions with other applications as well as all methods for entry, processing, or transfer of information from said application. It is critical that transfer away from the SSN does not cause unacceptably long interruptions to continued operations.

(xii) *Operational necessity.* It is not the intention of this part to preclude operational capabilities. In austere or tactical environments where continuity of operations requires the use of SSN, to include the use of hard copy lists and spreadsheets, approval can be granted that supersede normal requirements. An example of this may include a system in a tactical environment where hard copies are used in the event of a loss of power to the system. To ensure that this is only used in cases of absolute necessity, justification of this use case must be approved by the Combatant Commander. The higher risk and increased liability to our Service members and the Department should be strongly considered prior to granting approval using this category of justification.

(xiii) *Other cases.* The previous categories may not include all uses of the SSN delineated by law. Should an application owner be able to show sufficient grounds that a use case not specified in paragraphs (b)(3)(i) through (b)(3)(x) of this section is required by law, then that use case may continue to use the SSN. Any application that seeks to use this clause as justification must provide specific documentation in order to continue use under this provision.

(c) *Documenting authorized uses.* (1) Any system, process, or form that collects, transfers, or retains PII must properly document the authority for that use. This includes, but is not limited to, justification for the collection, retention, or use of the SSN. It is unacceptable to collect, retain, or transfer PII without such justification. The authorization for use of PII is governed through 32 CFR part 310. In addition to the documentation required for the use of PII, the use of the SSN as part of any collection, transfer, or retention must be specifically documented and justified. This documentation shall include justification per paragraph (b)(3) of this section as well as any specific legislative requirements for use of the SSN. The method by which this is documented shall be consistent with existing program requirements. Forms, processes, or systems, to include any locally created applications, must be properly documented. Additionally, if the SSN (or other personal identifier) is used to retrieve information, a Privacy Act system of record notice must exist or be established prior to its use per 32 CFR part 310. The Defense Privacy Office will work with the DoD Component privacy official to develop the notice and forward for publication in the Federal Register. Individuals who choose to use PII without proper documentation may be in violation of section 552a of title 5, Unites States Code and may be held accountable to the stated consequences.

(2) Forms used to collect PII shall be coordinated with the DoD Component's Privacy Act officer. The DD Form 67, "Forms Processing Action Request," [3] submitted by the DoD Component to create or revise a form, shall provide the name, initials, office symbol, and telephone number of the coordinating DoD Component Privacy Act officer and the system of records number entered. Copies of the justification to collect PII and systems of records notice are included with the DD Form 67.

(3) Documentation for this justification shall be retained and available upon request.

(d) *Alternatives.* One of the primary reasons that many systems, processes, and forms shifted to use of the SSN is that it provided greater efficiency and required individuals to remember a single identifier. To counteract the vulnerability that this expanded use of the SSN created, alternatives to the SSN shall be used whenever possible. The following list is not meant to be definitive. For assistance in situations which are not specified, contact the Defense Manpower Data Center (*acossntigerteam@osd.pentagon.mil*). Alternatives include:

(1) *Electronic Data Interchange—Personal Identifier (EDI–PI).*

(i) The EDI–PI is a unique system identifier that is used for machine-to-machine transactions by DoD. In the Defense Enrollment Eligibility Reporting System, the central repository for DoD personnel data, the EDI–PI is used as the primary identifier for all individuals. It is not a number that is known to the individuals, and it is never intended that the EDI–PI be used outside of machine-to-machine transactions.

(ii) The EDI–PI is the personal unique identifier used as part of the Cardholder Unique Identifier, which is part of the Homeland Security Presidential Directive-12 [4] solution for DoD. As such, it may be used as an identifier when the CAC is used to electronically authenticate an individual. A greater shift to electronic authentication would reduce the use of the SSN and provide greater security for transactions.

(2) *System-specific identifiers.* In use cases that are linked to a limited number of other applications, the best opportunity may be to create a unique identifier for those uses. In particular, for situations in which members of the public are required to gain access, particularly on a temporary basis, this may solve many privacy concerns.

(3) *Net-centric environment.* A growing number of systems and processes are relying on authentication of individuals with a minimum of collection and storage of PII. These systems and processes rely on an authoritative data source as the storage of this PII, and access to that information is granted on an "as needed" basis.

(4) *Elimination of identifier.* Many instances where the SSN is collected or used may be able to be eliminated. The

[3] Available at *http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0067.pdf.*

[4] Available at *http://www.whitehouse.gov/news/releases/2004/08/20040827-8.html.*

technology associated with newer applications is such that it is possible to specifically identify individuals through other pieces of information, negating the need for a unique identifier. This is particularly true of applications that are finite in scope and do not interoperate with other applications.

(5) *Biometrics.* Biometrics is an enabling tool that can be used as part of a multi-factor authentication process. As an authentication factor, biometrics leverages "something one is" (as opposed to "something one has" (e.g., a CAC with PKI certificates) and "something one knows" (e.g., a PIN)), and it cannot be shared or easily compromised. While biometrics first requires an initial enrollment and thus cannot perform the role of initial identification, it can be used for continuing authentication in circumstances other than network access. (See *http://www.biometrics.dod.mil/*for more information.)

(6) *Situational elimination/protection.* As previously stated, authority to collect, maintain, or use the SSN does not constitute blanket approval to use the SSN throughout the business process. Every report, display, printout, and transaction shall be reviewed to determine the requirement for the use of the SSN. If there is not a requirement for the SSN at that point, an alternative shall be found or the use should be eliminated. If where there is a requirement, determine whether the use can be further protected through truncation or masking.

(e) *Training.* It is vital to DoD that the collection, retention, storage, use, and disposal of PII be handled appropriately and only by individuals who are qualified to do so. To ensure that all personnel are so trained, 32 CFR part 310 requires that, prior to operating systems that contain or use PII, individuals be trained on appropriate handling. In addition to this use-specific training, 32 CFR part 310 requires DoD Components and subordinate organizations to have training programs that promote strong precautions and heightened awareness for the handling of PII. Properly completing and documenting this training is essential to reducing the chance of loss or breach of PII and the consequences thereof.

**§ 157.7 DoD SSN reduction in forms and systems.**

(a) *DoD Forms*—(1) *Use of SSN in DoD forms*—(i) *New forms*—(A) *Action Officer requirements.* (*1*) Provide justification for using SSNs. (See § 157.6(b) for acceptable uses.)

(*2*) If justified, indicate if the SSN can be truncated or masked.

(*3*) Relate the form to a system of records, PIA, and the DoD Information Technology Portfolio Repository (DITPR) ID number, as applicable.

(B) *Signing SSN justifications.* Senior Executive Service (SES) grade official or a general flag officer or equivalent signature is required (see § 157.8(c) of this part).

(C) *Requirement for reviewing SSN justifications.*

(*1*) For DD and SD forms, the justifications shall be reviewed by the DoD Forms Management Officer, who shall consult with the DPO.

(*2*) For DoD Component forms, the justifications shall be reviewed by the Component Forms Management Officer, who shall consult with the DoD Component privacy officials.

(*3*) For command and installation forms, the justifications shall be reviewed at least one administrative level above the senior signing official.

(ii) *Existing forms.*

(A) *One-time review of SSN use and justification.*

(*1*) The DoD Forms Management Officer shall conduct a review of all DD and SD forms to ensure compliance with the guidance in § 157.6 of this part.

(*2*) The DoD Component Forms Management Officers shall conduct reviews of all Component forms to ensure compliance with the guidance in § 157.6 of this part.

(*3*) For command and installation forms, the appropriate forms management officers shall conduct reviews to ensure compliance with the guidance in § 157.6 of this part.

(*4*) Where a justification for SSN use is rejected, the action officer will prepare a plan, to include milestones and a timeline, for the elimination of SSN usage (see § 157.8(d) of this part). The final date for SSN elimination will be provided to the DoD Forms Management Officer.

(B) *Periodic review of SSN use and justification.* SSN use and justification review shall be an added feature of the current periodic review process for all forms. This periodic review should be no less frequent than the Biennial Privacy Act System of Records Review.

(2) *Reporting results*—(i) *New forms.* (A) For DD and SD forms, the DoD Forms Management Officer shall maintain a database to produce an annual report as of July 1. This report shall be an input into the Privacy section of the annual FISMA Report as required by subchapter III, chapter 35 of title 44, United States Code. The annual report shall contain the following elements:

(*1*) Number of forms reviewed.

(*2*) Number of forms requesting SSNs.

(*3*) Number of SSN justifications accepted and rejected.

(*4*) Identify forms where SSNs were not allowed.

(*5*) Identify forms where SSN was masked or truncated.

(B) For DoD Component forms, the Components' forms management officers shall maintain a similar database as the DoD Forms Management Officer and produce the same report for their Components every July 1 for inclusion into the Privacy section of the annual FISMA Report.

(C) For command and installation forms, no database shall be required with the exception of annual reporting on July 1 on success stories for forms where SSNs were requested but rejected. In the case where a DoD Component maintains command and installation data, it can also be reported in its annual report.

(ii) *Existing forms.* (A) For DD and SD forms, the DoD Forms Management Officer shall report the results of both the one-time initial review of existing forms and the periodic reviews for input into the FISMA Report. This report shall include the following elements:

(*1*) Total number of forms in the database.

(*2*) Number of forms reviewed.

(*3*) Number of forms containing SSNs.

(*4*) Number of forms where justifications were questioned.

(*5*) Number of SSN justifications accepted and rejected.

(*6*) Identify forms where SSNs were not allowed.

(*7*) Identify forms where SSN was masked or truncated.

(B) The DoD Component forms management officers shall provide the same information as the DoD Forms Management Officer for their Components as input into the FISMA Report.

(C) At the command and installation levels no reports are required, with the exception of specific examples where SSNs were eliminated or better masked, unless the DoD Component collects data at this level.

(3) *Schedule.* Annually, on July 1, produce all data and reports related to new and existing forms at all levels.

(b) *DoD Systems*—(1) *DITPR.* (i) The DITPR is a key tool in the plan to reduce SSN use in DoD systems.

(ii) All data elements in the DITPR relating to SSNs are mandatory data fields and shall be completely filled out by all DoD Components.

(iii) All automated systems containing SSNs shall be included in the DITPR according to the Chief Information

Officer/Network and Information Integration (CIO/NII) DoD IT Portfolio Repository and DoD Secret Internet Protocol Router Network (SIPRNET) IT Registry Guidance, 2007–2008 [5].

(iv) Two new fields were added in October 2007:

(A) Does this system (or initiative) contain SSNs (full or truncated) or use SSNs in the system?

(B) What is the justification for using SSNs? (This field should be consistent with the categories of acceptable use of SSNs in § 157.6(b) of this part and specific legislative requirements.)

(2) *SSNs in Systems Report review process.* The initial SSNs in Systems Report, prepared by the DPO using the process detailed in paragraphs (b)(2)(i) through (b)(2)(iii)(E) of this section, shall be due with DoD Privacy FISMA reporting requirements. Thereafter, DPO shall submit a report annually for input into the Privacy section of the annual FISMA Report, as part of the Biennial Privacy Act System of Records Review. Since this review is on a biennial review schedule, the DPO shall produce a biennial schedule for the system reviews. The review and reporting process is as follows:

(i) Systems senior official (general flag officer or SES equivalent) signs off on SSN justification (see § 157.8(c) of this part).

(ii) DPO reviews SSN justifications as an extension of the Biennial Privacy Act System of Records Notices Review. Where a justification for SSN use is rejected, the action officer will prepare a plan, to include milestones and a timeline, for the elimination of SSN usage (see § 157.8(d) of this part). The final date for SSN elimination will be provided by the DoD Component Privacy Officials to the DPO.

(iii) DPO prepares its annual report according to the annual FISMA schedule. This report shall include the following elements and include any new elements as required:

(A) Total number of IT systems in DITPR.

(B) Total number of IT systems with SSNs.

(C) Total number of IT systems with SSNs reviewed.

(D) Total number of IT systems with SSNs approved and disapproved.

(E) Identification of IT systems disapproved.

(c) *IG review.* (1) The IG, DoD and the Service audit agencies are requested to review the implementation of the DoD SSN Reduction Plan at key milestones as reflected in this document. The new internal controls established in the DoD SSN Reduction Plan may be considered for review as "Command Interest Items."

(2) For DoD systems, the following issues are requested to be reviewed:

(i) Are all IT systems with SSNs being registered in DITPR?

(ii) Are there SSN justifications for systems in DITPR?

(iii) Are there senior reviews of SSN justifications?

(iv) Have the actual reported results been accurate?

(v) Are Privacy Act system of records reviews conducted quarterly to comply with the Biennial Privacy Act System of Records Notices Review?

(3) For DoD forms, the following issues are requested to be reviewed:

(i) Has every organizational level followed the procedures required in the SSN Reduction Plan?

(ii) Are there SSN justifications for forms?

(iii) Are there senior reviews of SSN justifications?

(iv) Have the actual reported results been accurate?

**§ 157.8 Approval for use of the SSN.**

(a) *Acceptable uses.* (1) The general list of acceptable uses of the SSN is listed in § 157.6(b) of this part as well as specific legislative requirements.

(2) A guide to laws requiring the use of the SSN can be found on the DoD Privacy Office Web site (*http://www.defenselink.mil/privacy/*). This list is merely a guide and may not cover every law.

(3) Another place to locate legal authority that may provide acceptable justification for the use of the SSN may be found in the appropriate System of Records Notice or PIA.

(b) *Documentation*—(1) *DITPR.* (i) The DITPR requires all DoD information systems to state whether or not the system collects SSNs.

(ii) Acceptable justification shall be annotated in the appropriate DITPR field.

(iii) In cases where the justification is "Other Uses," appropriate explanation of the supporting legal authority and the particular use case shall be entered into the Comment field.

(iv) Where continued use of the SSN is rejected by the DPO, a plan will be developed for the removal of the SSN and shall be maintained by the action officer.

(2) *Forms.* (i) Requesting the use of SSNs will be part of the forms approval process, including the use of DD Form 67.

(ii) Requesting the use of SSNs shall include supporting documentation described in paragraph (a) of this section.

(iii) Reviewing of all forms shall be completed in accordance with DoD Instruction 7750.07 [6].

(c) *SES or General Flag Officer concurrence.* (1) Senior official concurrence for the use of the SSN shall be documented in a Memorandum for the Record (MFR). (See Appendix A to this part.)

(2) The MFR shall include the following information:

(i) Name of the DoD information system or name and number of the form which will collect, use, maintain, and or disclose the SSN.

(ii) Specific use case which grants authority for use of the SSN.

(iii) Citation of statutory requirement for the use of the SSN.

(iv) Appropriate system or form supporting documentation, i.e., System of Records Notice or Certification and Accreditation

(v) Security precautions to be taken to reduce exposure of SSN.

(vi) If continued use of the SSN is not justified by legislative requirement, a plan to eliminate the use of the SSN as described in paragraph (d) of this section.

(3) In cases where the justification for the use of SSNs is operational necessity, approval must be from the Combatant Commander. Because this use case is intended for tactical situations, the approval does not need to be documented with an official memorandum. The format of the approval should be consistent with mechanism available and documented as applicable.

(d) *Plan to eliminate use of the SSN.* (1) Any use of the SSN that cannot be justified through appropriate legal authorities must be eliminated.

(2) Elimination of the use of SSN should be completed consistent with the existing life cycle to reduce impact on operations and decrease overall cost.

(3) The plan to eliminate the use of the SSN shall include the following information.

(i) Alternative being used to replace function for which SSNs have been used.

(ii) Associated forms and systems which will be affected by elimination of SSN.

(iii) Mitigation strategy to reduce or eliminate affects of removal of SSN in conjunction with associated forms or systems.

(iv) Timeline, with milestones, for removal of the SSN.

(v) Where elimination is not to occur immediately, include interim measures to provide additional protection of SSN.

[5] Copies of this document are may be obtained by contacting DoD CIO (IT Policy) at 703–601–4729.

[6] Available at *http://www.dtic.mil/whs/directives/corres/pdf/775007p.pdf.*

(vi) Where elimination is dependent on changes to other systems and/or forms, include efforts made to work with owners of those systems and/or forms to collaborate and eliminate the use of SSNs.

(4) An example of an Elimination Plan can be seen in Appendix B to this part.

**§ 157.9 Reporting requirements.**

The FISMA Report has been assigned Report Control Symbol (RCS) DD–NII (Q,A) 2296. The Privacy Act Program reporting requirements have been assigned RCS DD–DA&M(AR) 1379. These reporting requirements have been approved and assigned a RCS number in accordance with DoD 8910.1–M.[7]

**BILLING CODE 5001–06–P**

[7] Available at *http://www.dtic.mil/whs/directives/corres/pdf/891001m.pdf.*

**Appendix A to Part 157—Sample SSN Justification Memorandum**

Sample SSN Justification Memorandum

(Month Day, Year)

MEMORANDUM OR THE RECORD

SUBJECT: Justification for the Use of the Social Security Number (SSN)

The memo should begin by naming and describing the system or form that is the subject of the justification. The description should be sufficiently detailed so that someone unfamiliar with the system should be able to grasp a general understanding of its intent.

The justification for the use of the SSN should include a reference to the SSN Usage Instruction Use Case that is being used to justify the use of the SSN. This shall also include the specific reference to the law or Federal Regulation that requires the use of the SSN and why it is applicable to the use being justified.

Reference should be made to the system or form supporting documentation, including, but not limited to, System of Records Notice (SORN), Privacy Impact Assessment (PIA), Paperwork Reduction Act (PRA) notice, or any other documentation that may be appropriate. If the substance of the documentation is not attached, reference should be made to how the reader may gain access to this documentation.

Justification for the use of the SSN does not constitute blanket permission to use the SSN. Specific reference shall be made to indicate actions being taken to reduce the vulnerability of SSN, which may include indicating where SSNs are being removed from transactions, SSNs are no longer displayed, or any other protections that have been included. It should be obvious to the reader that thorough effort has been made to evaluate the risk associated with the system or form and that every reasonable step has been or is being taken to reduce the use of the SSN and protect it where the use is still required.

If the justification for the use of the SSN falls under the Legacy Use case and is not specifically required by law, reference shall be made to the Plan of Actions and Milestones for the elimination of the use of the SSN and that plan shall be attached.

Senior Official's Name
Title

Attachments:
As Stated

**Appendix B to Part 157—Sample SSN Elimination Plan**

Sample SSN Elimination Plan

System/Form Name: _____

System of Record Notice Number: _____

System/Form Owner: _____

Inputs that use, provide, or are identified by SSN:

Forms:
Form DDXXX – For each form, the plan should include the purpose the SSN serves as well as potential alternatives. Some level of detail regarding the owner of the form and any pertinent details regarding the form owners plan to eliminate the use of the SSN.

Systems:
XXX System – For each system that provides an input to the system or is responsible for generating the form, the plan should discuss the purpose served by the SSN and any potential alternatives. Some level of detail should be included regarding the system owner and any important details regarding their plan to eliminate the use of the SSN.

Outputs that include or are identified by SSN:

Forms:
Form DDXXX – For each form, the plan should include the purpose the SSN serves as well as potential alternatives. Some level of detail regarding the owner of the form and any pertinent details regarding the form owners plan to eliminate the use of the SSN.

Systems:
XXX System – For each system that provides an input to the system or is responsible for generating the form, the plan should discuss the purpose served by the SSN and any potential alternatives. Some level of detail should be included regarding the system owner and any important details regarding their plan to eliminate the use of the SSN.

Elimination Strategy and Timeline:

The strategy should include specific steps that must be accomplished to eliminate the use of the SSN with dates by which these steps will be accomplished. Be sure to include all appropriate references to dependencies such as other forms or systems, availability of resources (manpower, funding, etc.) and dates by which these milestones will be completed.

While it is clear that there may be significant constraints on making these changes, it is not acceptable to avoid activity through mutual dependencies.

Interim Strategy and Timeline:

Dated: February 23, 2010.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2010–4290 Filed 3–2–10; 8:45 am]

**BILLING CODE 5001–06–C**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

**[USCG–2009–0754]**

**RIN 1625–AA09**

## Drawbridge Operation Regulation; Elizabeth River, Eastern Branch, Norfolk, VA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Supplemental notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes a supplemental change to the regulations that govern the operation of the of the Berkley (I–264) Bridge, at mile 0.4, across the Eastern Branch of the Elizabeth River, Norfolk, VA. The new proposal would continue to provide set openings periods for the bridge during the day, relieving vehicular traffic congestion during the weekday daytime hours, while still providing for the reasonable needs of navigation to include new operating procedures for transiting vessels.

**DATES:** Comments and related material must be received by the Coast Guard on or before July 1, 2010.

**ADDRESSES:** You may submit comments identified by docket number USCG–2009–0754 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

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

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or e-mail Terrance A. Knowles, Environmental Protection Specialist, Fifth Coast Guard District, telephone (757) 398–6587, e-mail *terrance.a.knowles@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Public Participation and Request for Comments

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

### Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2009–0754), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (*http://www.regulations.gov*), or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand delivery, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rules" and insert "USCG–2009–0754" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

### Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2009–0754" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

On October 9, 2009, we published a notice of temporary deviation request for comments entitled; "Drawbridge Operation Regulations; Elizabeth River, Eastern Branch, Norfolk, VA, in the **Federal Register** (74 FR 52143) and a notice of proposed rulemaking (NPRM) entitled "Drawbridge Operation Regulations; Elizabeth River, Eastern Branch, Norfolk, VA, in the Federal Register (74 FR 52158). We received 861 comments for both the temporary deviation and NPRM. No public meeting was requested, and none was held.

### Privacy Act

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

### Public Meeting

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

### Background and Purpose

On behalf of the Cities of Chesapeake and Norfolk Virginia, the Virginia Department of Transportation (VDOT), who owns and operates the lift-type Berkley Bridge, requested a temporary change to the existing bridge regulations. In the closed to navigation position, the Berkley Bridge has a vertical clearance of 48 feet above mean

high water. The current regulation set out in Title 33 CFR Part 117.1007 (b) and (c) allows the Berkley Bridge, mile 0.4, in Norfolk, VA, to remain closed one hour prior to the published start of a scheduled marine event regulated under § 100.501, and remain closed until one hour following the completion of the event unless the Patrol Commander designated under § 100.501 allows the bridge to open for commercial vessel traffic. In addition, the bridge shall open on signal any time except from 5 a.m. to 9 a.m. and from 3 p.m. to 7 p.m., Monday through Friday, except Federal holidays, and shall open at any time for vessels with a draft of 18 feet or more, provided that at least 6 hours advance notice has been given to the Berkley Bridge Traffic Control Room at (757) 494–2490 as required by 33 CFR 117.1007(b) and (c). Vessel traffic on this waterway consists of pleasure craft, tug and barge traffic, and ships with assist tugs seeking repairs. There is no alternate waterway route.

Due to the temporary closure of two area bridges, the bridge and approaches experienced increased back-ups, delays, and congestion due to the increase in traffic. The NPRM would allow the draw of the Berkley Bridge to open on signal to vessels at 9 a.m., 11 a.m., 1 p.m., and 2:30 p.m. from October 9, 2009, to October 5, 2012, and it would permit VDOT to monitor, measure, and identify congested roadway locations during heavy traffic periods. By implementing scheduled bridge openings, we anticipated a decrease in traffic congestion during the daylight hours.

Concurrent with the publication of the Notice of Proposed Rulemaking, a Test Deviation [USCG–2009–0754] was issued to allow VDOT to test the proposed schedule and to obtain data and public comments. The test period was in effect during the entire Notice of Proposed Rulemaking comment period. Also, a count of the delayed vessels during the closure periods was taken to ensure a future regulation will not have a significant impact on navigation. The Berkley Bridge is the principle arterial route in and out of the City of Norfolk and serves as the major evacuation highway in the event of emergencies. The monthly vehicular traffic counts submitted by VDOT for the last quarter of calendar year 2008 show the average daily traffic volumes at the Berkley Bridge as shown below:

October, 2008—83,296 vehicles

November, 2008—99,643 vehicles

December, 2008—106,856 vehicles

The traffic counts revealed that from October 2008 to December 2008, the Berkley Bridge has experienced a seven percent (or 23,560-car) increase in traffic flow. The Coast Guard anticipates a continued increase in vehicular traffic over the bridge.

The Coast Guard received 861 comments on both the temporary deviation and NPRM. A large majority of the responses from commuters approved the scheduled opening set-up. However, the local maritime community expressed objections to the schedule change to vessels.

After review of all of the comments and bridge-related data received, the Coast Guard has determined that an alternative proposal should be considered.

By offering an alternative proposal, the changes will allow the draw of the Berkley Bridge to open on signal to the drawbridge operating schedule from September 4, 2010, to October 5, 2012. As a result of the changes, we expect a similar decrease in traffic congestion during the new proposed scheduled openings.

Concurrent with the publication of the Supplemental Proposed Rulemaking, another Test Deviation [USCG–2010–0083] has been issued to allow VDOT to test another proposed schedule and to acquire additional data and public comments.

**Discussion of Comments and Changes**

The Coast Guard received 861 responses to the NPRM. The vast majority of those responses (approximately 850) were supplied from an internet Web site survey posted by VDOT. Of the 850 VDOT-sponsored surveys, 484 had written comments with the remaining 366 remarks to the survey questionnaire. The other responses were supplied by 7 on-paper comments; and 4 e-mails.

An examination of the comments revealed that the vast majority of the responses (all but five) favored the new schedule presented in the temporary deviation and NPRM. Many responses stated travelers could better plan their commutes and allowed them the opportunity to avoid delays.

Four local maritime facilities and the Virginia Maritime Association (VMA), who represents waterborne commerce in the Port of Hampton Roads, responded in writing with their concerns opposing the new schedule. These organizations expressed concerns that the current regulatory actions created unsafe conditions for navigation. The maritime community has offered recommendations for changes to the operating regulations of the Berkley Bridge that they believe will benefit the community and provide a reasonable balance between marine priority and road-based transportation.

The Coast Guard reviewed the bridge data supplied by VDOT. The information indicated that the test deviation reduced the amount of time the bridge opened for vessels. Between October 20, 2009, and December 30, 2009, there were approximately 85 vessel passages requiring 69 bridge openings. Most of these openings were provided for commercial vessels, with a maximum of four vessels transiting through a single bridge opening.

With an average of less than two openings per day (1.23) during the test deviation, VDOT contends that 2009 compared to 2008 in the same months, there was a 30 percent reduction in the number of minutes the bridge was opened for vessels and the number of openings also decreased by 21 percent. In 2009, the Berkley Bridge averaged 97,135 vehicles per day.

VDOT personnel, after consulting with VMA and local maritime facilities, identified a need for mariners to have more access transiting through the Berkley Bridge. The parties agreed to operating procedures for inclusion in the regulatory language.

The suggestions offered by VDOT and VMA were reviewed by the Coast Guard. The VDOT/VMA recommended operating procedures (*in italics*) that were considered and subsequently modified are:

1. *The bridge is to open on signal at any time for vessels carrying hazardous cargo.*

2. *The bridge is to open at any time for vessels with a draft of 18 feet or more, provided that at least 6 hours advance notice has been given to the Berkley Bridge Traffic Control Room.*

VMA stated that certain vessels and conditions make safe bridge transits more difficult and dangerous. VMA/VDOT recommended establishing provisions that would exempt vessels from only transiting at the scheduled opening time.

The Coast Guard proposed the following: The draw shall open on signal at any time for vessels carrying, in bulk, cargoes regulated by 46 CFR subchapters D or O, or Certain Dangerous Cargoes as defined in 33 CFR 160.204; and for all other vessels, the draw shall open on signal at any time, except from 5 a.m. to 7 p.m., Monday through Friday, except Federal holidays. During these times: The draw shall open for commercial vessels with a draft of 18 feet or more, provided at least 6 hours notice was given to the Berkley Bridge Traffic Control Room at (757) 494–2490.

3. *If a vessel has made prior arrangements for a delayed opening, and there are vessels awaiting transit, the opening may be delayed if the master(s) of the waiting vessel(s) agree to a delayed opening to accommodate the delayed vessel. Otherwise the opening will accommodate the waiting vessel(s) only, and close upon their clearing the bridge.*

VMA stated that communication between vessels is important to scheduling a single opening at the Berkley Bridge. The Coast Guard asserts that communication between vessels and the bridge tender should be coordinated to ensure and maintain the safety of navigation. However, specific regulatory language controlling communication between vessels is unwarranted and not within the scope of drawbridge operating regulations.

4. *An opening will be provided to a transiting vessel up to, but no more than, 30 minutes following the scheduled opening time provided the transiting vessel has communicated their estimated time of arrival to the Berkley Bridge tender prior to the scheduled opening time.*

VMA stated that the timing of large vessel movements is affected by a number of uncontrollable and external factors. The effects of winds, currents, and tides have an important impact on safe navigation and those conditions.

In addition, VMA indicated that the current test deviation creates a situation whereby marine traffic will stack up while waiting for an opening, thus creating vessel congestion, a navigational hazard.

For these situations, the Coast Guard proposed the following: If the bridge is not opened during a particular scheduled opening per subparagraph (d)(3)(ii) and a vessel has made prior arrangements for a delayed opening, the draw tender may provide a single opening up to 30 minutes past that scheduled opening time for that signaling vessel, except at 2:30 p.m. The draw tender may provide a single opening up to 20 minutes past the 2:30 p.m. scheduled opening time for a signaling vessel that made prior arrangements for a delayed opening. A vessel may make prior arrangements for a delayed opening by contacting the Berkley Bridge Traffic Control Room at (757) 494–2490.

5. *The bridge is to open at any time if, in the professional judgment of the vessel operator, the environmental or operating conditions compromise navigational safety.*

The Coast Guard responded to this comment by indicating that under 33 CFR 117.31 entitled "Drawbridge operations for emergency vehicles and emergency vessels", paragraphs (b)(2) adequately provide for unscheduled vessel openings of the bridge in the event of a marine emergency.

The supplemental rule was also rephrased to integrate the restricted morning and evening rush hour times (from 5 a.m. to 9 a.m. and from 3 p.m. to 7 p.m.) with the test deviation period from 9 a.m. to 3 p.m. The Coast Guard suggested the following paragraph: For all other vessels, the draw shall open on signal at any time, except from 5 a.m. to 7 p.m., Monday through Friday, except Federal holidays.

Based on all of the comments received, the Coast Guard suggested that a supplemental alternative proposal be further analyzed and reissued.

## Discussion of Rule

From September 4, 2010, to October 5, 2012, the Coast Guard proposes to suspend the regulations at 33 CFR 117.1007 paragraphs (b) and (c) and add a new paragraph (d) to read as follows: The draw of the Berkley Bridge, mile 0.4, at Norfolk, shall operate as follows: (1) The draw shall remain closed one hour prior to the published start of a scheduled marine event regulated under § 100.501, and shall remain closed until one hour following the completion of the event unless the Patrol Commander designated under § 100.501 allows the bridge to open for commercial vessel traffic; (2) The draw shall open on signal at any time for vessels carrying, in bulk, cargoes regulated by 46 CFR subchapters D or O, or Certain Dangerous Cargoes as defined in 33 CFR 160.204; (3) For all other vessels, the draw shall open on signal at any time, except from 5 a.m. to 7 p.m., Monday through Friday, except Federal holidays: (i) During these times, the draw shall open for commercial vessels with a draft of 18 feet or more, provided at least 6 hours notice was given to the Berkley Bridge Traffic Control Room at (757) 494–2490; (ii) The draw shall open on signal at 9 a.m., 11 a.m., 1 p.m. and 2:30 p.m.; (4) If the bridge is not opened during a particular scheduled opening per subparagraph (d)(3)(ii) and a vessel has made prior arrangements for a delayed opening, the draw tender may provide a single opening up to 30 minutes past that scheduled opening time for that signaling vessel, except at 2:30 p.m. The draw tender may provide a single opening up to 20 minutes past the 2:30 p.m. scheduled opening time for a signaling vessel that made prior arrangements for a delayed opening. A vessel may make prior arrangements for a delayed opening by contacting the Berkley Bridge Traffic Control Room at (757) 494–2490.

## 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. We reached this conclusion based on the fact that the proposed changes have only a minimal impact on maritime traffic transiting the bridge. Mariners can plan their trips in accordance with the scheduled bridge openings, and to minimize delays, vessels that can pass under the bridge without a bridge opening may do so at all times.

## 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.

We reached this conclusion based on the fact that the proposed changes have only a minimal impact on maritime traffic transiting the bridge. Mariners can plan their trips in accordance with the scheduled bridge openings, to minimize delays and vessels that can pass under the bridge without a bridge opening may do so at all times.

## Assistance for Small Entities

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

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

This rule will not 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, eliminates 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 would not create an environmental risk to health or risk to safety that might 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 would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**Energy Effects**

We have analyzed this 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 proposed rule under Department of Homeland Security Management Directive 023–01, and Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

**List of Subjects in 33 CFR Part 117**

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

## PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. From September 4, 2010, to October 5, 2012, in § 117.1007, suspend paragraphs (b) and (c) and add new paragraph (d) to read as follows:

**§ 117.1007 Elizabeth River Eastern Branch.**

* * * * *

(d) The draw of the Berkley Bridge, mile 0.4, at Norfolk, shall operate as follows:

(1) The draw shall remain closed one hour prior to the published start of a scheduled marine event regulated under § 100.501, and shall remain closed until one hour following the completion of the event unless the Patrol Commander designated under § 100.501 allows the bridge to open for commercial vessel traffic.

(2) The draw shall open on signal at any time for vessels carrying, in bulk, cargoes regulated by 46 CFR subchapters D or O, or Certain Dangerous Cargoes as defined in 33 CFR 160.204.

(3) For all other vessels, the draw shall open on signal at any time, except from 5 a.m. to 7 p.m., Monday through Friday, except Federal holidays. During these times, the draw shall:

(i) Open for commercial vessels with a draft of 18 feet or more, provided at least 6 hours notice was given to the Berkley Bridge Traffic Control room at (757) 494–2490.

(ii) Open on signal at 9 a.m., 11 a.m., 1 p.m. and 2:30 p.m.

(4) If the bridge is not opened during a particular scheduled opening per paragraph (d)(3)(ii) of this section and a vessel has made prior arrangements for a delayed opening, the draw tender may provide a single opening up to 30 minutes past that scheduled opening time for that signaling vessel, except at 2:30 p.m. The draw tender may provide a single opening up to 20 minutes past the 2:30 p.m. scheduled opening time for a signaling vessel that made prior arrangements for a delayed opening. A vessel may make prior arrangements for a delayed opening by contacting the Berkley Bridge Traffic Control room at (757) 494–2490.

Dated: February 11, 2010.

**Wayne E. Justice,**

*Rear Admiral, United States Coast Guard, Commander, Fifth Coast Guard District.*

[FR Doc. 2010–4362 Filed 3–2–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 67

**[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1106]**

### Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

**DATES:** Comments are to be submitted on or before June 1, 2010.

**ADDRESSES:** The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1106, to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

**FOR FURTHER INFORMATION CONTACT:** Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

*National Environmental Policy Act.* This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

*Regulatory Flexibility Act.* As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

*Executive Order 12866, Regulatory Planning and Review.* This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

*Executive Order 13132, Federalism.* This proposed rule involves no policies that have federalism implications under Executive Order 13132.

*Executive Order 12988, Civil Justice Reform.* This proposed rule meets the applicable standards of Executive Order 12988.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

## PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.4 [Amended]**

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| **Lee County, Iowa, and Incorporated Areas** | | | | |
| Des Moines River (Mississippi River Backwater). | At the confluence with the Mississippi River | +502 | +499 | City of Keokuk. |
| | Approximately 700 feet upstream of Burlington Northern Railroad. | +502 | +499 | |
| Devils Creek (Mississippi River Backwater). | Just upstream of the confluence with the Mississippi River. | +523 | +524 | Unincorporated Areas of Lee County, City of Fort Madison. |
| | Approximately 900 feet downstream of 235th Street | +523 | +524 | |
| Dry Creek | Just upstream of the confluence with the Mississippi River. | +524 | +525 | City of Fort Madison. |
| | Approximately 100 feet downstream of Atchison Topeka and Santa Fe Railway (Southernmost track). | +524 | +525 | |
| Fork Creek | Just upstream of the confluence with the Mississippi River. | +525 | +526 | City of Fort Madison. |
| | Approximately 100 feet downstream of Burlington Northern Railroad. | +525 | +526 | |
| French Creek | Approximately 600 feet upstream of B Avenue | None | +558 | Unincorporated Areas of Lee County. |
| | Approximately 700 feet upstream of B Avenue | None | +558 | |
| Horton Creek | On the downstream side of Burlington Northern Railroad. | +522 | +523 | City of Montrose. |
| | Approximately 200 feet downstream of 2nd Street | +522 | +523 | |
| Jack Creek (Backwater from Mississippi River). | Approximately 1,300 feet upstream of 1st Street | +522 | +523 | City of Montrose. |
| | On the downstream side of Burlington Northern Railroad. | +522 | +523 | |
| Mississippi River | At the confluence with the Des Moines River | +502 | +499 | Unincorporated Areas of Lee County, City of Fort Madison, City of Keokuk, City of Montrose. |
| | Approximately 4.7 miles downstream of the confluence with the Skunk River. | +528 | +529 | |
| Mississippi River Tributary (Backwater from Mississippi River). | Approximately 100 feet upstream of Atchison Topeka and Santa Fe Railway. | +523 | +524 | Unincorporated Areas of Lee County. |
| | Approximately 0.6 mile upstream of Ortho Road | +523 | +524 | |
| Soap Creek | Just upstream of the confluence with the Mississippi River. | +503 | +500 | City of Keokuk. |
| | Approximately 500 feet downstream of 7th Street | +503 | +502 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Fort Madison**
Maps are available for inspection at 811 Avenue East, Fort Madison, IA 52627.

**City of Keokuk**
Maps are available for inspection at 415 Blondeau Street, Keokuk, IA 52632.

**City of Montrose**
Maps are available for inspection at 102 South 2nd Street, Montrose, IA 52639.

**Unincorporated Areas of Lee County**
Maps are available for inspection at 415 Blondeau Street, Keokuk, IA 52632.

| **Clinton County, Missouri, and Incorporated Areas** | | | | |
|---|---|---|---|---|
| Concord Creek | Approximately 30 feet upstream of the confluence with Funkhouser Creek. | None | +879 | City of Plattsburg. |

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| | Approximately 25 feet downstream of East Concord Drive. | None | +901 | |
| Dicks Creek | Approximately 20 feet upstream of the City of Trimble corporate limit. | None | +931 | City of Trimble, Unincorporated Areas of Clinton County. |
| Funkhouser Creek | Approximately 725 feet downstream of the confluence with Concord Creek. | None | +876 | City of Plattsburg. |
| | Approximately 350 feet downstream of the confluence with Concord Creek. | None | +878 | |
| Funkhouser Creek | Approximately 225 feet upstream of Broadway Street | None | +923 | City of Plattsburg, Unincorporated Areas of Clinton County. |
| | Approximately 25 feet downstream of Plotsky Avenue | None | +943 | |
| Smithland Lake | Entire shoreline | None | +876 | City of Trimble, Unincorporated Areas of Clinton County. |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Plattsburg**
Maps are available for inspection at 114 West Maple Street, Plattsburg, MO 64477.

**City of Trimble**
Maps are available for inspection at 201 Port Arthur Road, Trimble, MO 64492.

**Unincorporated Areas of Clinton County**
Maps are available for inspection at 207 North Main Street, Room 3, Plattsburg, MO 64477.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

**Sandra K. Knight,**

*Deputy Assistant Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. 2010–4343 Filed 3–2–10; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF DEFENSE

## Defense Acquisition Regulations System

## 48 CFR Parts 204 and 252

## Defense Federal Acquisition Regulation Supplement; Safeguarding Unclassified Information (DFARS Case 2008–D028)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Advance notice of proposed rulemaking (ANPR) and notice of public meeting.

**SUMMARY:** DoD is seeking comments from Government and industry on potential changes to the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for the safeguarding of unclassified information. The changes would add a new subpart and associated contract clauses for the safeguarding, proper handling, and cyber intrusion reporting of unclassified DoD information within industry.

**DATES:** *Public Meeting:* A public meeting will be held on April 22, 2010, from 8 a.m. to 4 p.m. EST. Attendees should register for the public meeting at least 2 weeks in advance to ensure adequate room accommodations. Registrants will be given priority if room constraints require limits on attendance. Attendees wishing to make a short, issue-based 10-minute presentation on this topic should submit a copy of the presentation to the address shown below.

*Special Accommodations:* The public meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Julian Thrash, telephone 703–602–0310, at least 10 working days prior to the meeting date.

*Submission of Comments:* Comments on this ANPR should be submitted in writing to the address shown below no later than May 3, 2010.

**ADDRESSES:** *Public Meeting:* The public meeting will be held in the National Aeronautics and Space Administration's (NASA) James E. Webb Memorial auditorium, NASA HQ, 300 E Street SW., Washington, DC 20546. Interested parties may register by faxing the following information to DPAP(DARS) at 703–602–0350, or e-mail to *julian.thrash@osd.mil* by April 8, 2010:

(1) Company or organization name;

(2) Names of persons attending;

(3) Identity, if desiring to speak; limit to a 10-minute presentation per company or organization.

Interested parties are encouraged to arrive at least 30 minutes early. If you wish to make a presentation, please contact and submit a copy of your presentation by April 8, 2010, to Mr. Julian Thrash, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20302–3060; Fax: 703–602–0350. Please cite "Public Meeting, DFARS Case 2008–D028" in all correspondence related to this public meeting. The submitted presentations will be the only record of the public meeting. If you intend to have your presentation considered as a public comment for the formation of a proposed rule, the presentation must be submitted separately as a written comment as instructed below.

*Submission of Comments:* You may submit written comments, identified by DFARS Case 2008–D028, using any of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

*E-mail: dfars@osd.mil.* Include DFARS Case 2008–D028 in the subject line of the message.

*Fax:* 703–602–0350.

*Mail:* Defense Acquisition Regulations System, Attn: Mr. Julian Thrash, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

*Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Julian Thrash, 703–602–0310.

**SUPPLEMENTARY INFORMATION:** This ANPR and notice of public meeting is a preliminary step in the rulemaking process for DFARS Case 2008–D028 that may be followed by issuance of a proposed rule in the future. The DFARS presently does not address the safeguarding of unclassified DoD information within industry, nor does it address cyber intrusion reporting for that information. The purpose of the potential DFARS changes addressed in this ANPR is to implement adequate security measures to safeguard DoD information on unclassified industry information systems from unauthorized access and disclosure, and to prescribe reporting to the Government with regard to certain cyber intrusion events that affect DoD information resident or transiting on contractor unclassified information systems. This ANPR does not address procedures for Government sharing of cyber security threat information with industry; this issue will be addressed separately through follow-on rulemaking procedures as appropriate. These changes to the DFARS address requirements for the safeguarding of unclassified information and may be altered as necessary to align with any future direction given in response to on-going efforts currently being led by the National Archives and Records Administration regarding Controlled Unclassified Information (CUI).

This ANPR addresses—

(1) Basic safeguarding requirements that apply to any unclassified DoD information that has not been cleared for public release in accordance with DoD Directive 5230.9, Clearance of DoD Information for Public Release; and

(2) Enhanced safeguarding requirements, including cyber incident reporting, that apply to information subject to the following:

a. Critical Program Information protection.

b. Export control under International Traffic in Arms Regulations and Export Administration Regulations.

c. Withholding from public release under DoD Directive 5400.07, DoD Freedom of Information Act Program, and DoD Regulation 5400.7–R, DoD Freedom of Information Program.

d. Controlled access and dissemination designations (e.g., For Official Use Only, Sensitive But Unclassified, Limited Distribution, Proprietary, Originator Controlled, Law Enforcement Sensitive).

e. Limitations in accordance with DoD Directive 5230.24, Distribution Statements on Technical Documents and DoD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure.

f. Personally Identifiable Information protection including, but not limited to, information protected pursuant to the Privacy Act and the Health Insurance Portability and Accountability Act.

The potential DFARS changes would revise the prescription for the existing clause at DFARS 252.204–7000, Disclosure of Information, and would add two new clauses for DoD information safeguarding requirements: DFARS 252.204–7XXX, Basic Safeguarding of Unclassified DoD Information Within Industry, and DFARS 252.204–7YYY, Enhanced Safeguarding and Cyber Intrusion Reporting of Unclassified DoD Information Within Industry. As the titles imply, DFARS 252.204–7XXX would require contractors to protect DoD information from unauthorized disclosure, loss, or exfiltration by employing basic information technology security measures, while DFARS 252.204–7YYY would require enhanced information technology security measures applicable to encryption of data for storage and transmission, network protection and intrusion detection, and cyber intrusion reporting. Enhanced protection measures are planned for the information specified in paragraph (2) above. A cyber intrusion reporting requirement is contemplated for enhanced protection to assess the impact of loss and to improve protection by better understanding the methods of loss; it is not required to implement the basic information safeguarding requirements at DFARS 252.204–7XXX.

DoD is interested in receiving input regarding "best practices" for protecting networks and data, experience with any of the proposed safeguards, and an evaluation of its value. In particular, DoD invites comments in the following areas:

1. What is not addressed in the draft clauses that could potentially help industry to feasibly comply with the intent of the clauses?

2. What part of the draft clauses are viewed as potentially being the most burdensome?

3. What are the potential ways to mitigate burden?

4. Are there any important information safeguarding aspects that the clauses omit that should be addressed?

5. Do the clauses as written provide clear and adequate guidance to perform safeguarding of DoD information?

6. What impact will the reporting requirement in 252.204–7YYY have on small businesses?

7. In what ways could DoD minimize the burden of the reporting requirements on respondents, including the use of automated collection techniques or other forms of information technology?

8. What are industry best practices for cyber security?

9. Should the Government establish standard information assurance criteria for all contractors as a condition of award (e.g., strong passwords, virus protection)? If so, are there existing international/national standards that should be cited or considered in building the criteria and what impediments exist to achieving this goal?

10. Would it reduce the burden without reducing effectiveness for contractors and subcontractors if the

"basic" clause were replaced with an Online Representations and Certifications Application (ORCA) certification?

11. Would it result in a more accurate cost management strategy if the "enhanced" clause were split into a safeguarding plan/program clause and a reporting clause?

12. If a contractor believes that it would have significant difficulty implementing these requirements in-house, could it out-source its information technology to a firm with specific competency in this area? If not, what are the barriers to doing so?

13. Are there any additional safeguarding or restrictions that should be implemented to protect information reported or otherwise provided to the Government under the "enhanced" clause?

**List of Subjects in 48 CFR Parts 204 and 252**

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, DoD proposes to amend 48 CFR parts 204 and 252 as follows:

1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

## PART 204—ADMINISTRATIVE MATTERS

### 204.404–70 [Amended]

2. Section 204.404–70 is amended by removing paragraph (a) and redesignating paragraphs (b) and (c) as paragraphs (a) and (b) respectively.

3. Subpart 204.7X is added to read as follows:

### Subpart 204.7X—Safeguarding and Cyber Intrusion Reporting of Unclassified DoD Information Within Industry

Sec.
204.7XX0 Scope.
204.7XX1 Definitions.
204.7XX2 Policy.
204.7XX3 Contract clauses.

## Subpart 204.7X—Safeguarding and Cyber Intrusion Reporting of Unclassified DoD Information Within Industry

### 204.7XX0 Scope.

This subpart applies to contracts under which the contractor or a subcontractor may have unclassified DoD information resident on or transiting its unclassified information systems.

### 204.7XX1 Definitions.

As used in this subpart, "adequate security," "cyber," and "DoD information" are defined in the clauses at 252.204–7XXX, Basic Safeguarding of Unclassified DoD Information Within Industry, and 252.204–7YYY, Enhanced Safeguarding and Cyber Intrusion Reporting of Unclassified DoD Information Within Industry.

### 204.7XX2 Policy.

(a) The Government and its contractors and subcontractors will provide adequate security to safeguard DoD information on their unclassified information systems from unauthorized access and disclosure.

(b) Contractors must report to the Government certain cyber intrusion events that affect DoD information resident or transiting on contractor unclassified information systems. Detailed reporting criteria and requirements are set forth in the clause at 252.204–7YYY.

(c) A cyber intrusion event that is properly reported by the Contractor shall not, by itself, be interpreted as evidence that the contractor has failed to provide adequate information safeguards for DoD unclassified information, or has otherwise failed to meet the requirements of the clause at 252.204–7YYY. A cyber intrusion event must be evaluated in context, and such events may occur even in cases when it is determined that adequate safeguards are being used in view of the nature and sensitivity of the DoD unclassified information and the anticipated threats. However, the Government may consider any such cyber intrusion events in the context of an overall assessment of the contractor's compliance with the requirements of the clause at 252.204–7YYY.

(d) DoD information requires a basic level of protection and may require an enhanced level of protection.

(1) Basic safeguarding requirements apply to any DoD information.

(2) Enhanced safeguarding requirements, including cyber incident reporting, apply to DoD information that is—

(i) Designated as Critical Program Information in accordance with DoD Instruction 5200.39, Critical Program Information Protection Within the Department of Defense;

(ii) Subject to export control under International Traffic in Arms Regulations and Export Administration Regulations (see Subpart 204.73);

(iii) Designated for withholding from public release under DoD Directive 5400.07, DoD Freedom of Information Act Program, and DoD Regulation 5400.7–R, DoD Freedom of Information Program;

(iv) Bearing current and prior designations indicating controlled access and dissemination (e.g., For Official Use Only, Sensitive But Unclassified, Limited Distribution, Proprietary, Originator Controlled, Law Enforcement Sensitive);

(v) Technical data, computer software, and any other technical information covered by DoD Directive 5230.24, Distribution Statements on Technical Documents, and DoD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure; or

(vi) Personally identifiable information including, but not limited to, information protected pursuant to the Privacy Act and the Health Insurance Portability and Accountability Act.

### 204.7XX3 Contract clauses.

(a) *Disclosure of information.* (1) Except as provided in paragraph (a)(2) of this section, use the clause at 252.204–7000, Disclosure of Information, in solicitations and contracts when the contractor will have access to or generate DoD information.

(2) Do not use the clause in solicitations and contracts for fundamental research unless the requiring activity has identified a validated requirement for access to or generation of DoD information to perform the fundamental research effort.

(b) *Levels of safeguarding and cyber intrusion reporting*—

(1) *Basic.* In addition to 252.204–7000, Disclosure of Information, use the clause at 252.204–7XXX, Basic Safeguarding of Unclassified DoD Information Within Industry, in solicitations and contracts when the requiring activity has identified that the contractor or a subcontractor at any tier will potentially have DoD information resident on or transiting its unclassified information systems.

(2) *Enhanced.* In addition to the clause at 252.204–7XXX, use the clause at 252.204–7YYY, Enhanced Safeguarding and Cyber Intrusion Reporting of Unclassified DoD Information Within Industry, in solicitations and contracts when the requiring activity has identified that the contractor or a subcontractor at any tier will potentially have DoD information, identified in 204.7XX2(d)(2), resident or transiting its unclassified information systems.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 252.204–7000 [Amended]

4. Section 252.204–7000 is amended in the introductory text by removing "204.404–70(a)" and adding in its place "204.7XX3(a)".

### 252.204–7003 [Amended]

5. Section 252.204–7003 is amended in the introductory text by removing "204.404–70(b)" and adding in its place "204.404–70(a)".

### 252.204–7005 [Amended]

6. Section 252.204–7005 is amended in the introductory text by removing "204.404–70(c)" and adding in its place "204.404–70(b)".

7. Sections 252.204–7XXX and 252.204–7YYY are added to read as follows:

### 252.204–7XXX Basic Safeguarding of Unclassified DoD Information Within Industry.

As prescribed in 204.7XX3(b)(1), use the following clause:

**BASIC SAFEGUARDING OF UNCLASSIFIED DOD INFORMATION WITHIN INDUSTRY (XXX 2010)**

(a) *Definitions.* As used in this clause—

"Adequate security" means that protection measures applied are commensurate with the risks (i.e., consequences and their probability) of loss, misuse, or unauthorized access to or modification of information.

"Cyber" means of, relating to, or involving computers or computer networks.

"Data" means all non-voice information.

"DoD information" means any unclassified information that has not been cleared for public release in accordance with DoD Directive 5230.09, Clearance of DoD Information for Public Release, and that is—

(1) Provided by or on behalf of DoD to the contractor or its subcontractor(s); or

(2) Collected, developed, received, transmitted, used, or stored by the contractor or its subcontractor(s) in support of an official DoD activity.

"Exfiltration" means any unauthorized release of data from within an information system. This includes copying the data through covert network channels or the copying of data to unauthorized media.

"Information" means any communicable knowledge or documentary material, regardless of its physical form or characteristics.

"Information system" means a set of information resources organized for the collection, storage, processing, maintenance, use, sharing, dissemination, disposition, display, or transmission of information.

"Intrusion" means unauthorized access to an information system, such as an act of entering, seizing, or taking possession of another's property to include electromagnetic media.

"Media" means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system.

"Safeguarding" means measures and controls that are used to protect DoD information.

"Threat" means any person or entity that attempts to access or accesses an information system without authority.

"Voice" means all oral information regardless of transmission protocol.

(b) *Basic safeguarding requirements and procedures.* The Contractor shall provide adequate security to safeguard DoD information on its unclassified information systems from unauthorized access and disclosure. The Contractor shall apply the following basic safeguarding requirements to DoD information:

(1) *Designation.* If the official status determination of the level of access and dissemination of the information cannot be determined, the information will be considered DoD information until the official status can be ascertained from the cognizant DoD activity.

(2) *Protecting DoD information on public computers or Web sites:* Do not process DoD information on public computers (*e.g.,* those available for use by the general public in kiosks, hotel business centers) or computers that do not have access control. DoD information shall not be posted on Web sites that are publicly available or have access limited only by domain/IP restriction. Such information may be posted to web pages that control access by user ID/password, user certificates, or other technical means, and that provide protection via use of security technologies. Access control may be provided by the intranet (vice the Web site itself or the application it hosts).

(3) *Transmitting electronic information.* Transmit e-mail, text messages, blogs, and similar communications using technology and processes that provide the best level of security and privacy available, given facilities, conditions, and environment.

(4) *Transmitting voice and fax information.* Transmit voice and fax information only when the sender has a reasonable assurance that access is limited to authorized recipients.

(5) *Physical or electronic barriers.* Protect information by at least one physical or electronic barrier (e.g., locked container or room, login and password) when not under direct individual control.

(6) *Sanitization.* Sanitize media in accordance with National Institute of Standards and Technology (NIST) 800–88, Guidelines for Media Sanitization, at *http://csrc.nist.gov/publications/nistpubs/800-88/NISTSP800-88_rev1.pdf,* before external release or disposal.

(7) *Intrusion protection.* Provide protection against computer intrusions and data exfiltration, minimally including the following:

(i) Current and regularly updated malware protection services, *e.g.,* anti-virus, anti-spyware.

(ii) Prompt application of security-relevant software upgrades, *e.g.,* patches, service-packs, and hot fixes.

(8) Limitations. Transfer DoD information only to those subcontractors that both have a need to know and provide at least the same level of security as specified in this clause.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts under this contract, if the subcontractor will have access to or generate DoD information.

(End of clause)

### 252.204–7YYY Enhanced Safeguarding and Cyber Intrusion Reporting of Unclassified DoD Information Within Industry.

As prescribed in 204.7XX3(b)(2), use the following clause:

**ENHANCED SAFEGUARDING AND CYBER INTRUSION REPORTING OF UNCLASSIFIED DOD INFORMATION WITHIN INDUSTRY (XXX 2010)**

(a) *Definitions.* As used in this clause—

"Adequate security" means that protection measures applied are commensurate with the risks (i.e., consequences and their probability) of loss, misuse, or unauthorized access to or modification of information.

"Advanced persistent threat" means an extremely proficient, patient, determined, and capable adversary, including such adversaries working together.

"Attribution information" means information that identifies the Contractor or its programs, whether directly or indirectly, by the aggregation of information that can be traced back to the Contractor (e.g., program description, facility locations, number of personnel).

"Contractor information system" means an information system belonging to, or operated by or for, the Contractor or a subcontractor.

"Critical Program Information (CPI)" (formerly Essential Program Information, Technologies and/or Systems) means elements or components of a research, development, or acquisition program that, if compromised, could cause significant degradation in mission effectiveness; shorten the expected combat-effective life of the system; reduce technological advantage; significantly alter program direction; or enable an adversary to defeat, counter, copy, or reverse engineer the technology or capability. The term includes information about applications, capabilities, processes, and end items; elements or components critical to a military system or network mission effectiveness; and technology that would reduce the U.S. technological advantage if it came under foreign control.

"Cyber" means of, relating to, or involving computers or computer networks.

"Data" means all non-voice information.

"DoD information" means any unclassified information that—

(1) Has not been cleared for public release in accordance with DoD Directive 5230.09, Clearance of DoD Information for Public Release; and

(2) Is—

(i) Provided by or on behalf of the Department of Defense (DoD) to the Contractor or its subcontractor(s); or

(ii) Collected, developed, received, transmitted, used, or stored by the Contractor or its subcontractor(s) in support of an official DoD activity.

"Encryption" means the protection of data in electronic form, in storage or in transit, using an encryption technology that has been approved the National Institute of Standards and Technology or the National Security Agency.

"Exfiltration" means any unauthorized release of data from within an information system. This includes copying the data through covert network channels or the copying of data to unauthorized media.

"Information" means any communicable knowledge or documentary material, regardless of its physical form or characteristics.

"Information system" means a set of information resources organized for the collection, storage, processing, maintenance, use sharing, dissemination, disposition, display, or transmission of information.

"Intrusion" means unauthorized access to an information system, such as an act of entering, seizing, or taking possession of another's property to include electromagnetic media.

"Media" means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system.

"Safeguarding" means measures and controls that are used to protect DoD information.

"Threat" means any person or entity that attempts to access or accesses an information system without authority.

"Voice" means all oral information regardless of transmission protocol.

(b) *Enhanced safeguarding requirements and procedures*—

(1) *Adequate security.* The Contractor shall—

(i) Provide adequate security to safeguard DoD information on its unclassified information systems from unauthorized access and disclosure;

(ii) Safeguard all DoD information in accordance with the basic requirements set forth in the clause of this contract entitled "Basic Safeguarding of Unclassified DoD Information Within Industry" (DFARS 252.204–7XXX); and

(iii) Safeguard DoD information described in paragraph (b)(2) of this clause in accordance with the requirements in paragraph (b)(3) of this clause.

(2) *DoD information requiring enhanced safeguarding.* Enhanced safeguarding requirements, including cyber incident reporting, apply to DoD information that is—

(i) Designated as Critical Program Information in accordance with DoD Instruction 5200.39, Critical Program Information Protection Within the Department of Defense;

(ii) Subject to export controls under International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR);

(iii) Designated for withholding from public release under DoD Directive 5400.07, DoD Freedom of Information Act Program, and DoD Regulation 5400.7–R, DoD Freedom of Information Program;

(iv) Bearing current and prior designations indicating controlled access and dissemination (*e.g.,* For Official Use Only, Sensitive But Unclassified, Limited Distribution, Proprietary, Originator Controlled, Law Enforcement Sensitive);

(v) Technical data, computer software, and any other technical information covered by DoD Directive 5230.24, Distribution Statements on Technical Documents, and DoD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure; or

(vi) Personally identifiable information (PII) including, but not limited to, information protected pursuant to the Privacy Act and the Health Insurance Portability and Accountability Act (HIPAA).

(3) *Enhanced safeguarding requirements.* The Contractor shall apply the following enhanced safeguarding requirements for DoD information:

(i) *Encryption/Storage.* Encrypt using the Security Controls for Federal Information Systems and Organizations at (*http://csrc.nist.gov/publications/PubsSPs.html*) for both organizational wireless connections, and when traveling use encrypted wireless connections where available. If encrypted wireless is not available, encrypt application files (*e.g.,* spreadsheet and word processing files) using at least application-provided password protection level encryption. Encrypt all information identified in paragraph (b)(2) of this clause when it is stored on mobile computing devices such as laptops and personal digital assistants, or removable storage media such as thumb drives and compact disks, using the best level of encryption technology available, given facilities, conditions, and environment.

(ii) Network intrusion protection. Provide adequate protection against computer network intrusions and data exfiltration, as follows:

(A) Current and regularly updated malware protection services, *e.g.,* anti-virus, anti-spyware.

(B) Monitoring and control of both inbound and outbound network traffic as appropriate (*e.g.,* at the external boundary, sub-networks, individual hosts) to include blocking unauthorized ingress, egress, and exfiltration through technologies such as firewalls and router policies, intrusion prevention or detection services, or host-based security services.

(C) Prompt application of security-relevant software patches, service-packs, and hot fixes.

(iii) The Contractor shall implement information security controls in its project, enterprise, or company-wide unclassified information security program. The information security program shall address the security controls described in the NIST Special Publication 800–53 (Current Version), Recommended Security Controls for Federal Information Systems and Organizations (*http://csrc.nist.gov/publications/PubsSPs.html*), and should be tailored in scope and depth appropriate to the effort and the specific unclassified DoD information.

(4) *Other requirements.* This clause does not relieve the Contractor of the requirements specified by other Federal and DoD safeguarding requirements for specified categories of information (*e.g.,* CPI, PII, For Official Use Only, Privacy Act, ITAR, EAR, and HIPAA), as specified by applicable regulations or directives.

(c) *Cyber intrusion reporting*—

(1) *Reporting requirement.* The Contractor shall report to the Defense Cyber Crime Center's (DC3) DoD–DIB Collaborative Information Sharing Environment (DCISE) (URL to be determined) within 72 hours of discovery of any cyber intrusion events that affect DoD information resident on or transiting the Contractor's unclassified information systems.

(2) *Reportable events.* Reportable cyber intrusion events include the following:

(i) A cyber intrusion event appearing to be an advanced persistent threat.

(ii) A cyber intrusion event involving data exfiltration or manipulation or other loss of any DoD information resident on or transiting its, or its subcontractors', unclassified information systems.

(iii) Intrusion activities not included in paragraph (c)(2)(i) or (ii) of this clause that allow illegitimate access to an unclassified information system on which DoD information is resident or transiting.

(3) *Other reporting requirements.* This reporting in no way abrogates the Contractor's responsibility for additional safeguarding and cyber intrusion reporting requirements pertaining to its unclassified information systems under other clauses that may apply to its contract, or as a result of other U.S. Government legislative and regulatory requirements that may apply (*e.g.,* CPI, PII, Privacy Act, ITAR and EAR, and HIPAA).

(4) *Contents of the incident report.* The incident report shall include, at a minimum, the following information:

(i) Applicable dates (date of compromise and/or date of discovery).

(ii) Threat methodology (all known resources used such a Internet Protocol (IP) addresses, domain names, software tools, etc.).

(iii) An account of what actions the adversary may have taken on the victim system/network, and what information may have been accessed.

(iv) A description of the roles and function of the threat-accessed systems.

(v) Potential impact on DoD programs or an initial list of impacted DoD programs.

(5) *Contractor actions to support forensic analysis and preliminary damage assessment.* In response to the reported cyber incident, the Contractor shall—

(i) Conduct an immediate review of unclassified information systems accessed by a threat to identify specific DoD information files associated with DoD contracts or systems, military applications, and militarily critical technology for evidence of intrusion.

(ii) Preserve and protect images of the known affected systems until DC3 has

received the image and completes its analysis.

(iii) Cooperate with DC3 to ascertain intruder methodology and identify systems compromised as a result of the intrusion. The DCISE Web site will provide detailed guidelines and processes as needed and appropriate.

(iv) As required by the Government and permitted by law, share files on compromised systems that pertain to unclassified DoD information.

(6) *Damage assessment activities.* The DoD Damage Assessment Management Office (DAMO) will conduct an initial damage assessment and notify the Contractor whether a follow-up compromise assessment report is required. If required, the follow-up report shall include at a minimum the following information:

(i) An index of DoD information contained on the affected system.

(ii) An initial list of DoD programs impacted by the compromise.

(iii) The type of DoD information compromised (*e.g.,* CPI, PII, Privacy Act, ITAR, EAR, and HIPAA) and a brief description of the accessed information.

(iv) The Contractor's points of contact to coordinate future damage assessment activities.

(v) The threat methodology.

(vi) Amount of DoD information including files/data bytes exfiltrated or accessed.

(vii) Inventory of DoD IT equipment accessed or from which DoD information has been exfiltrated.

(d) *Protection of reported information.* Except to the extent that such information is publicly available, DoD will protect information reported or otherwise provided to DoD under this clause in accordance with applicable statutes, regulations, and policies (*e.g.,* CPI, PII, FOIA, Trade Secrets Act, Privacy Act, ITAR, EAR, and HIPAA).

(1) The Contractor and its subcontractors shall mark attribution information reported or otherwise provided to the Government. The Government may use attribution information and disclose only to authorized persons for cyber security and related purposes and activities pursuant to this clause (*e.g.,* in support of forensic analysis, incident response, compromise or damage assessments, law enforcement, counterintelligence, threat reporting, trend analyses). Attribution information is shared outside of the DCISE only to authorized entities on a need-to-know basis as required for such Government cyber security and related activities. The Government may disclose attribution information to support contractors that are supporting the Government's cyber security and related activities under this clause only if the support contractor is subject to legal confidentiality requirements that prevent any further use or disclosure of the attribution information.

(2) The Government may use and disclose reported information that does not include attribution information (e.g., information regarding threats, vulnerabilities, incidents, or best practices) at its discretion to assist entities in protecting information or information systems (e.g., threat information products, threat assessment reports); provided that such use or disclosure is otherwise authorized in accordance with applicable statutes, regulations, and policies.

(e) Nothing in this clause limits the Government's ability to conduct law enforcement or counterintelligence activities, or other lawful activities in the interest of national security. The results of the activities described in this clause may be used to support an investigation and prosecution of any person or entity, including those attempting to infiltrate or compromise information on a Contractor information system in violation of any statute.

(f) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts under this contract, if the subcontractor will have access to or generate DoD information. In altering this clause to identify the appropriate parties, the Contractor shall modify the reporting requirements to include notification to the prime contractor or the next higher tier in addition to the reports to the DCISE as required by paragraph (c) of this clause.

(End of clause)

[FR Doc. 2010–4173 Filed 3–2–10; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### 49 CFR Part 71

**[OST Docket No. OST–2010–0046]**

## Standard Time Zone Boundary in the State of North Dakota: Proposed Change for Mercer County, North Dakota, From Mountain to Central Time Zone

**AGENCY:** Office of the Secretary, Department of Transportation (DOT).

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** The Chairman of the Board of County Commissioners for Mercer County, North Dakota, petitioned the U.S. Department of Transportation to move Mercer County from the mountain to the central standard time zone. The Department believes that the petition makes a prima facie case for the proposed time zone change, and we are using this notice to solicit public comment on the proposal.

**DATES:** Public comments to the docket should be submitted by June 14, 2010. Late-filed comments will be considered to the extent practicable. The Department has scheduled a public hearing on this issue from 7–10 p.m. (Mountain Daylight Time) on Friday, May 14, 2010, in the "Large Room" of the City Hall, 146 East Main Street, Hazen, North Dakota.

**ADDRESSES:** You may submit comments (identified by the agency name and DOT Docket ID Number OST–2010–0046) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

*Instructions:* You must include the agency name (Office of the Secretary, DOT) and Docket number (OST–2010-) for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail or courier. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://DocketsInfo.dot.gov.*

*Docket:* For internet access to the docket to read background documents and comments received, go to *http://www.regulations.gov.* Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, Room W94–302, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–9310, *bob.ashby@dot.gov.*

**SUPPLEMENTARY INFORMATION:** For more than a century, time zone boundaries in North Dakota have had an interesting and varied history. Beginning in 1883, mountain time was observed in the southwest portion of the state and a few locations in the northwest, with central time being used elsewhere. In 1929, the Interstate Commerce Commission (ICC), which then had jurisdiction over time zone boundaries, extended central time to cover all but a cluster of counties in

the southwest corner of the state. Congress transferred the ICC's time zone boundary powers to the Department of Transportation (DOT) in 1967. DOT exercises these powers under the provisions of the Uniform Time Act of 1966 (15 U.S.C. 260–64).

The Department has exercised its authority under this statute in several proceedings affecting North Dakota. In 1968, in response to a petition from the Governor of North Dakota, the Department placed 14 counties lying south and west of the Missouri River into mountain time. The change was made to accommodate the historical pattern of time observance in the state. In 1992, in response to a petition from the Board of Commissioners of Oliver County (which is adjacent to Mercer County), the Department moved that county into the central time zone. The Department took similar action with respect to Morton County and a portion of Sioux County in 2003.

In 2000–2003, the Department considered a petition from the Mercer County Commission to move the county to the central time zone. The proposal was controversial in the county. A 2000 referendum favored changing to central time by a vote of 1,180 to 1038. However, a majority of written comments to the Department's docket favored keeping the county in the mountain time zone. After considering the comments, and while acknowledging the reasons supporting a change, the Department decided to deny the petition (68 FR 53082; September 9, 2003). The Department's decision noted that the Commission was free to file a new petition on the subject in the future. In a petition dated October 9, 2009, Mr. Lyle L. Latimer, Chairman of the Mercer County Board of County Commissioners, asked the Department to move the county from the mountain time zone to the central time zone.

Under the Uniform Time Act, the Secretary of Transportation has authority to issue regulations modifying the boundaries between time zones in the United States in order to move an area from one time zone to another. The standard in the statute for such decisions is "regard for the convenience of commerce and the existing junction points and division points of common carriers engaged in interstate or foreign commerce." The principal standard for deciding whether to change a time zone is defined very broadly to include consideration of all the impacts upon a community of a change in its standard of time. DOT has developed a series of questions to assist communities and us in determining the impact of a time zone change on the "convenience of commerce." The Department considers information bearing on these questions in making its decision on a proposed time zone change.

1. From where do businesses in the community get their supplies, and to where do they ship their goods or products?

2. From where does the community receive television and radio broadcasts?

3. Where are the newspapers published that serve the community?

4. From where does the community get its bus and passenger rail services; if there is no scheduled bus or passenger rail service in the community to where must residents go to obtain these services?

5. Where is the nearest airport; if it is a local service airport, to what major airport does it carry passengers?

6. What percentage of residents of the community work outside the community; where do these residents work?

7. What are the major elements of the community's economy; is the community's economy improving or declining; what Federal, State, or local plans, if any, are there for economic development in the community?

8. If residents leave the community for schooling, recreation, health care, or religious worship, what standard of time is observed in the places where they go for these purposes?

The current Mercer County petition stated several reasons for the request, outlining the Commission's view of why the change would meet the "convenience of commerce" standard. The following is a summary of the reasons asserted in support of the request, which facially address several of the Department's questions.

* Almost all supplies for businesses in Mercer County, including the coal and agriculture industries, are shipped from the Bismarck/Mandan area and other points in the central time zone.

* Communications media (newspapers, radio and television stations) serving Mercer County are based in the Bismarck/Mandan area.

* There is no regular passenger transportation serving Mercer County. Residents go to the Bismarck/Mandan area to catch planes, trains, and buses.

* The main offices for several Mercer County energy industry facilities are located in Bismarck.

* Many residents regularly travel to the Bismarck/Mandan area for recreation, health care, and other purposes.

* Geographically, Mercer County is adjacent to the central time zone on the east, north, and south sides of the county, and is therefore well-located for inclusion in the central time zone. The Fort Berthold Indian Reservation, located in Mercer County, is currently in the central time zone.

The current petition represents that local government, industry, and education leaders recently brought the matter to the Commission's attention, requesting that the question of changing the time zone be raised. One change affecting the schools that has been mentioned is that a school in Stanton, in Mercer County, has closed, with Mercer students now being transported to a school in Center, in Oliver County, which is located in the central time zone. In addition, it has been suggested that commuting patterns may be more oriented toward areas in the central time zone than was the case in the 2000–2003 period.

When DOT considers a petition to change a time zone boundary, the Department will generally begin a rulemaking proceeding if the highest elected officials in the area make a *prima facie* case for the proposed change. The Department believes that the Mercer County Commission's petition does make a *prima facie* case to change the time zone of Mercer County from mountain to central. Consequently, we are issuing this notice of proposed rulemaking (NPRM) that would move the county into the central time zone.

The Department is opening a comment period on this matter. The public hearing is scheduled during this comment period, to give interested persons the opportunity to develop their thoughts and comments before the hearing and to respond in writing after the hearing, if they wish, to information presented at the hearing.

The Department wants to make clear that, by issuing this NPRM, we are not taking a position on the merits of the petition. The Department does not have a "going-in position" on whether the county should remain in the mountain time zone or change to the central time zone. The effect of the NPRM is simply to begin a public input process that will include the opportunity for written comments and the opportunity to speak at a public hearing in the county.

In making a decision based on what the Department learns from this process, the Department will focus on matters affecting the "convenience of commerce," which we interpret broadly to encompass matters concerning the effects of a potential change on the economy of the jurisdiction in question, transportation, education and other public institutions, and other factors including the personal views of residents. Our ultimate decision will be based on information provided to the

written docket or at the hearing. Commenters and participants at the public hearing should present all the information they can, in as great detail as possible, relevant to the Department's questions concerning whether the proposal meets the "convenience of commerce" standard. Comments that explain why mountain time or central time is preferable, in terms of the Department's "convenience of commerce" standard, will be of greater use to the Department than unexplained expressions of liking one outcome better than the other.

We believe that the views of community members and leaders is an important part of the Department's decisionmaking process, on the assumption that the people and organizations who would be most affected by a proposed change are in the best position to advise us on the effects of a change. The process is not simply a matter of a vote, however. As in all rulemaking proceedings, the Department's decision is not made solely on the basis of the number of comments that persons favoring one outcome or another sent to us.

If the Department decides to move Mercer County into the central time zone, we would time the decision to be effective on November 7, 2010, to coincide with the change from daylight to standard time. The purpose of this timing would be to minimize disruption from the change.

**Regulatory Analyses and Notices**

*Executive Order 12866 and Regulatory Flexibility Act*

The Department has determined that this action is not a significant regulatory action for purposes of Executive Order 12866 or the Department's regulatory policies and procedures. The rule primarily affects the convenience of individuals in scheduling activities. By itself, it imposes no direct costs. Its impact is localized in nature, affecting only the residents of a single county. We expect the economic impact of this final rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. While some small entities (*i.e.,* small business or governmental entities in Mercer County) would be affected by setting their clocks differently than in the past, the economic effects of doing so would not be significant. Therefore, the Department certifies that the rule would not have a significant economic impact on a substantial number of small entities.

*Federalism*

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). The NPRM does not have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States. Therefore, the consultation requirements of Executive Order 13132 do not apply.

*Unfunded Mandates*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) and E.O. 12875, Enhancing the Intergovernmental Partnership (58 FR 58093; October 28, 1993), govern the issuance of Federal regulations that impose unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those costs. This NPRM would not impose an unfunded mandate.

*Protection of Children*

We have analyzed this NPRM under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. This NPRM is not an economically significant rule and does not concern an environmental risk to health or risk to safety as defined by the Executive Order that may disproportionately affect children. The Department will consider any comments it receives about potential safety effects on children of a time zone change.

*Environment*

This rulemaking is not a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act and, therefore, an environmental impact statement is not required.

*Privacy Act*

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

*Paperwork Reduction Act*

This rule does not create any information collection requirements covered by the Paperwork Reduction Act.

**List of Subjects in 49 CFR Part 71**

Time zones.

**Robert S. Rivkin,**

*General Counsel.*

For reasons discussed in the preamble, the Department of Transportation proposes to amend Title 49 of the Code of Federal Regulations, Part 71, as follows:

## PART 71—STANDARD TIME ZONE BOUNDARIES

1. The authority citation for 49 CFR Part 71 continues to read as follows:

**Authority:** Secs. 1–4, 40 Stat. 450, as amended; sec. 1, 41 Stat. 1446, as amended; secs. 2–7, 80 Stat. 107, as amended; 100 Stat. 764; Act of Mar. 19, 1918, as amended by the Uniform Time Act of 1966 and Pub. L. 97–449, 15 U.S.C. 260–267; Pub. L. 99–359; Pub. L. 106–564, 15 U.S.C. 263, 114 Stat. 2811; 49 CFR 1.59(a), unless otherwise noted.

2. Revise § 71.7 (a) to read as follows:

**§ 71.7 Boundary line between central and mountain zones.**

(a) *Montana-North Dakota.* Beginning at the junction of the Montana-North Dakota boundary with the boundary of the United States and Canada southerly along the Montana-North Dakota boundary to the Missouri River; thence southerly and easterly along the middle of that river to the midpoint of the confluence of the Missouri and Yellowstone Rivers; thence southerly and easterly along the middle of the Yellowstone River to the north boundary of T. 150 N., R. 104 W.; thence east to the northwest corner of T. 150 N., R. 102 W.; thence south to the southwest corner of T. 149 N., R. 102 W.; thence east to the northwest corner of T. 148 N., R. 102 W.; thence south to the northwest corner of 147 N., R. 102 W.; thence east to the southwest corner of T. 148 N., R. 101 W.; thence south to the middle of the Little Missouri; thence easterly and northerly along the middle of that river to the midpoint of its confluence with the Missouri River; thence southerly and easterly along the middle of the Missouri River to the midpoint of its confluence with the western land boundary of Mercer County; thence south along the western county line of Mercer County to the southwest boundary; thence east and south along the southwestern county boundary of Morton County to the intersection with the boundary with Sioux County; thence west and south along the northern boundary of Sioux County to the center of State Highway 31; thence south along the center of

State Highway 31 to the state border with South Dakota; thence east along the southern boundary of Sioux County to the middle of the Missouri River.

* * * * *

[FR Doc. 2010–4372 Filed 3–2–10; 8:45 am]

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# Notices

Federal Register

Vol. 75, No. 41

Wednesday, March 3, 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

### Submission for OMB Review; Comment Request: Correction

February 26, 2010.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. 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; (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: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections 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 (202) 720–8958.

An agency 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.

*Agency:* Food and Nutrition Service.

*Action:* Notice: Correction.

*Summary:* The Department of Agriculture published a document in the **Federal Register** of February 23, 2010 (pg. 8031), concerning a request for comments on the information collection "Worksheet for Supplemental Nutrition Assistance Program Quality Control Reviews" OMB control number 0584–0074. The document contained incorrect burden hours. The total burden hours should be 528,333 not 500,301 as published.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2010–4431 Filed 3–2–10; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Doc. No. AMS–FV–10–011]**

### Notice of Request for Extension and Revision of a Currently Approved Information Collection

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget, for an extension of and revision to the currently approved information collection Regulations Governing Inspection, Certification and Standards for Fresh Fruit, Vegetables and Other Products 7 CFR part 51.

**DATES:** Comments on this notice must be received by May 3, 2010 to be assured of consideration.

**ADDRESSES:** Interested persons are invited to submit written comments on the internet at: *http://www.regulations.gov* or to Michael V. Morrelli, Head, Field Operations Section, Fresh Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 1661 South Building, Stop 0240, Washington, DC, 20250–0240; Phone (202) 2482, Fax (202) 720–0393. Comments should make reference to the dates and page number of this issue of the **Federal Register.** All comments received will be posted without change, including any personal information provided, and will be available for public inspection via the Internet at *http://www.regulations.gov* or at the address cited above during regular business hours.

*Additional Information:* Michael V. Morrelli, Head, Field Operations Section, Fresh Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 1661 South Building, Stop 0240, Washington, DC, 20250–0240; Phone (202) 2482, Fax (202) 720–0393: E-mail *mike.morrelli@ams.usda.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Regulations Governing Inspection, Certification and Standards for Fresh Fruit, Vegetables and Other Products 7 CFR part 51.

*OMB Number:* 0581–0125 .

*Expiration Date of Approval:* August 31, 2010.

*Type of Request:* Extension and revision of a currently approved information collection.

*Abstract:* The Agricultural Marketing Act of 1946, as amended 7 U.S.C., 1621–1627 authorizes the Secretary to inspect and certify the quality of the agricultural products and collect such fees as to reasonable to cover the cost of service rendered, under 7 CFR part 51. The Fresh Products Branch provides a nationwide inspection and grading service for fresh fruit, vegetables and other products to shippers, importers, processors, sellers, buyers, and other financially interested parties on a "user fee" basis. This use of service is voluntary and is made available only upon request or when specified by some special program or contract. Information is needed to carry out the inspection and grading services. Such information includes: the name and location of the person or company requesting the inspection, the type and location of the product to be inspected, the type of inspection being requested and any information that will identify the product.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .03 hours per response.

*Respondents:* Shippers, importers, processors, seller, buyers, and others with a financial interest in the lots of fresh fruit, vegetables and other products.

*Estimated Number of Respondents:* 50100.

*Estimated Total Annual Responses:* 279806.

*Estimated Number of Responses per Respondent:* 5.58.

*Estimated Total Annual Burden on Respondents:* 8502 hr.

*Comments are invited on:* (1) 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) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: February 25, 2010.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 2010–4339 Filed 3–2–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

### Minnkota Power Cooperative, Inc: Bemidji-Grand Rapids 230kV Transmission Project

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice of Availability of a Draft Environmental Impact Statement and Notice of Public Hearing.

**SUMMARY:** Notice is hereby given that the Rural Utilities Service (RUS), has prepared a Draft Environmental Impact Statement (EIS) to meet its responsibilities under the National Environmental Policy Act (NEPA) and 7 CFR 1794 related to possible financial assistance to Minnkota Power Cooperative, Inc (Minnkota) for the construction of a 230 kilovolt (kV) kV transmission line between the Wilton Substation near Bemidji, Minnesota, and the Boswell Substation near Grand Rapids, Minnesota in Beltrami, Hubbard, Itasca, and Cass counties. To minimize duplication of effort pursuant to 40 CFR 1506.2, RUS prepared the Draft EIS jointly with the Minnesota Department of Commerce (Commerce), Office of Energy Security (OES) in compliance with federal responsibilities under NEPA and other federal statutes and regulations, and state responsibilities under the Minnesota Environmental Policy Act and the Minnesota Power Plant Siting Act. The U.S. Army Corps of Engineers and U.S. Forest Service Chippewa National Forest and the Leech Lake Band of Ojibwe are cooperating agencies for this Draft EIS.

The proposed new transmission line is needed to correct local load serving inadequacies for the Bemidji area and west-central Minnesota. Minnkota is also proposing to modify the existing Wilton and Boswell substations, construct a new 115 kV breaker station at Nary Junction and, depending on route alternative selected, upgrade an existing or construct a new substation near Cass Lake, Minnesota. Minnkota is requesting financial assistance from RUS for the proposed action.

**DATES:** Written comments on this Notice must be received on or before April 19, 2010. RUS and OES will jointly conduct the following public meetings March 16 -18, 2010. The first half hour of each meeting will be an open house followed by a formal public information and comment meeting with brief presentations on the DEIS by OES and RUS staff. Members of the public will have an opportunity to ask questions and provide comments on the Draft EIS. A court reporter will transcribe verbal comments from the formal public comment portion of the meeting. Meetings may conclude prior to the listed end time if all attendees have had the opportunity to comment and all other business has been concluded: Tuesday, March 16 from 1p.m.–4p.m. and 6p.m.–9 p.m. at the Hampton Inn, 1019 Paul Bunyan Dr., S. State Hwy 197 in Bemidji, MN 56601; Wednesday, March 17 from 1p.m.–3 p.m. at the American Legion Vets Club, 12 First Street NE., in Deer River, MN 56636; Wednesday, March 17 from 6–9 p.m. at the Senior Center, 24 First Street SE, in Black Duck, MN 56630; and Thursday, March 18 from 6–9 p.m. at the Leech Lake Tribal College, 6945 Little Wolf Road NW., in Cass Lake, MN 56633. Comments regarding the project may be submitted (orally or in writing) to Ms. Stephanie Strength or Ms. Steinhauer at the addresses provided in this Notice or online via the Commission's Web site at: *http://energyfacilities.puc.state.mn.us/publicComments.html.*

**ADDRESSES:** To send comments or to obtain copies of the Draft EIS, or for further information, contact: Stephanie Strength, Environmental Protection Specialist, USDA, Rural Utilities Service, 1400 Independence Avenue, SW., Room 2244, Stop 1571, Washington, DC 20250–1571, e-mail *stephanie.strength@wdc.usda.gov.,* or Suzanne Steinhauer, Project Manager, Minnesota Office of Energy Security, 85 7th Place East, Suite 500, St. Paul, Minnesota, 55101–2198, FAX: (651) 297–7891, e-mail *Suzanne.steinhauer @state.mn.us.* A copy of the Draft EIS may be viewed online at the following Web sites: *http://www.usda.gov/rus/water/ees/eis.htm, http://energyfacilities.puc.state.mn.us/Docket.html?Id=19344,* and at the: Bemidji Public Library, 509 America Ave., NW., Bemidji, MN 56601; Cass Lake Community Library, 223 Cedar Ave. NW., Cass Lake, MN 56633; Grand Rapids Area Library, 140 NE 2nd Street, Grand Rapids, MN 55744; Blackduck Community Library, 72 First St., SE., Blackduck, MN 56630; Margaret Welch Memorial Library, 5051 State 84, Longville, MN 56655; Walker Public Library, 207 4th St., Walker, MN 56484; Bovey Public Library—Village Hall, 402 2nd Street, Bovey, MN 55709–0130; and Coleraine Public Library, Independent Building, 203 Cole Avenue, Coleraine, MN 55722–0225.

**SUPPLEMENTARY INFORMATION:** Minnkota Power Cooperative, Inc (Minnkota), in conjunction with Otter Tail Power Company and Minnesota Power, proposes to construct and operate a 230 kV transmission line between the Wilton substation west of Bemidji and the Boswell Substation west of Grand Rapids, Minnesota. The proposal is designed to correct a local load serving inadequacy for the Bemidji area and west central Minnesota. Three route alternatives are under consideration for the transmission line. The proposed routes for the transmission line primarily follow existing rights-of-way and cross sections of Beltrami, Hubbard, Cass, and Itasca counties. Depending upon the route selected, the Project may also include modifications to the existing Cass Lake Substation, construction of a new substation in the Cass Lake area, and construction of a new 115 kV breaker station near Nary, Minnesota.

The proposed transmission line would be approximately 68 to 116 miles in length with a 125-foot right-of-way. The construction of the proposal is

tentatively scheduled to begin in the fall of 2010 with an estimated duration of construction of 1 year.

RUS is the lead agency for the federal environmental review with Division of Resource Management of the Leech Lake Reservation, the Chippewa National Forest, and U.S. Army Corps of Engineers participating as cooperating agencies. In addition to federal review, the project is subject to Power Plant Siting Act (Minn. Stat. 216E). Accordingly OES and RUS have collaborated to create a joint draft EIS for this project. A Notice of Intent to Prepare an EIS and Hold a Scoping Meeting was published in the **Federal Register** at 73FR41312, on July 18, 2008, and local newspapers. Scoping meetings for the EIS were held in the project area in August, 2008, and public comments were accepted from July 22, 2008, through September 30, 2008. The OES issued an EIS scoping decision on March 31, 2009, and modified it on February 5, 2010. RUS issued a Scoping Decision/Report in December, 2009.

As part of its broad environmental review process, RUS must take into account the effect of the proposal on historic properties in accordance with Section 106 of the National Historic Preservation Act and its implementing regulation, "Protection of Historic Properties" (36 CFR Part 800). Pursuant to 36 CFR § 800.2(d)(3), RUS is using its procedures for public involvement under NEPA to meet its responsibilities to solicit and consider the views of the public during Section 106 review. Accordingly, comments submitted in response to scoping will inform RUS' decision making in Section 106 review. Any party wishing to participate more directly with RUS as a "consulting party" in Section 106 review may submit a written request to the RUS contact provided in this notice.

Alternatives to the proposed project considered by RUS, OES, and Minnkota included (a) no action, (b) generation alternatives, (c) load management, (d) alternative transmission line configurations, and (e) alternative transmission routes. A Draft Environmental Impact Statement (EIS) that describes the proposal in detail and discusses its anticipated environmental impacts has been prepared and is available for public review at the addresses provided in this Notice.

Questions and comments should be sent to RUS or OES at the mailing or e-mail addresses provided in this Notice. RUS should receive comments on the Draft EIS in writing by April 19, 2010 to ensure that they are considered in the Final EIS. Once available, the final EIS will be noticed in the **Federal Register** and local newspapers. The Federal Agencies will then issue a Record of Decision following a 30-day public comment period on the Final EIS.

Any final action by RUS related to the proposal will be subject to, and contingent upon, compliance with all relevant Federal, state and local environmental laws and regulations, and completion of the environmental review requirements as prescribed in RUS' Environmental Policies and Procedures (7 CFR Part 1794).

Dated: February 25, 2010.

**Nivin Elgohary,**

*Acting Assistant Administrator, Electric Program, USDA/Rural Utilities Service.*

[FR Doc. 2010–4342 Filed 3–2–10; 8:45 am]

BILLING CODE 3410–15–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Tehama County Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of Meeting.

**SUMMARY:** The Tehama County Resource Advisory Committee (RAC) will meet in Red Bluff, California. Agenda items to be covered include: (1) Introductions, (2) Approval of Minutes, (3) Public Comment, (4) Chairman's Perspective, (5) Elect Vice Chairmen, (6) Next Agenda.

**DATES:** The meeting will be held on March 25, 2010 from 9 a.m. and end at approximately 12 p.m.

**ADDRESSES:** The meeting will be held at the Lincoln Street School, Pine Room, 1135 Lincoln Street, Red Bluff, CA. Individuals wishing to speak or propose agenda items must send their names and proposals to Randy Jero, Committee Coordinator, 825 N. Humboldt Ave., Willows, CA 95988.

**FOR FURTHER INFORMATION CONTACT:** Randy Jero, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave, Willows, CA 95988. (530) 934–1269; e-mail *rjero@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by March 22, 2010 will have the opportunity to address the committee at those sessions.

**Eduardo Olmedo,**

*Designated Federal Official.*

[FR Doc. 2010–4320 Filed 3–2–10; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Caribbean Trade Mission

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

**ACTION:** Notice.

#### Mission Description

The Commerce Department's International Trade Administration (ITA) and the U.S. Commercial Service (USCS) post in Santo Domingo—Dominican Republic, will organize a matchmaking trade mission in June 2010.

The matchmaking trade mission will include representatives from a variety of U.S. manufacturing companies and service providers. These mission participants will be introduced to international agents, distributors and end-users whose capabilities are targeted to each U.S. participants' needs in that particular market. Mission participants will also meet with key local industry contacts that can advise on local market conditions and opportunities. In addition to the above-mentioned services, the U.S. Commercial Service industry specialist will be on hand to discuss market trends and opportunities in the Dominican Republic and Jamaica.

#### Commercial Setting

The Caribbean is more than just a vacation destination; it is also a steadily growing market full of business opportunities for U.S. companies. The Caribbean Region is a natural commercial partner of the United States, tied closely together by geography, history, and culture. The region as a whole represents a market of about 41 million people who collectively imported over $20.3 billion of U.S. goods in 2008! As a result, the Caribbean Region is the 3rd largest export market for U.S. manufactured goods in Latin America behind only Mexico and Brazil. The United States enjoys a cooperative trading relationship with the region. Agreements such as The Caribbean Basin Initiative (CBI)—launched in 1983 and renewed in 2000 through legislation

enacted by Congress established trade programs to facilitate the economic development and export diversification of the Caribbean Basin economies. U.S. exports to the CBI countries have more than tripled since the CBI's creation, from $6.5 billion in 1984 to over $25 billion in 2000.

Additionally, on August 5, 2004, the United States and the Dominican Republic signed a Free Trade Agreement (CAFTA–DR). The agreement was implemented on March 1, 2007, allowing more than 80% of U.S. manufactured goods enter duty free to the DR. In addition to tariff reduction, CAFTA–DR also provides unprecedented access to government procurement, liberalizes the services sectors, protects U.S. investments, and strengthens protections for U.S. patents, trademarks, and trade secrets in the DR. The U.S. has a 60% market share of Dominican imports. The Dominican Republic is the 7th largest market in the Western Hemisphere for U.S. exports after Canada, Mexico, Brazil, Venezuela, Colombia, and Chile. The United States is also Jamaica's primary trading partner with 40.1% of imports coming from the United States in 2008. Jamaica's GDP is US$12.7 billion, with 20% from tourism and 20% from remittances from Europe and North America. There is a trend of significant investment in the hotel and tourism sector. New highways, increased energy production and port modernization will likely lead to higher GDP growth. Additional development is expected with a new provision in 2008 to allow 3 casinos on the island.

Jamaica's JLP-led government, elected in 2007 on a platform of pro-business and good governance is championing the elimination of corruption, tax reform, and reducing red tape for business. Proximity, quality, and the use of the same language have encouraged Jamaican business people to purchase from the United States.

Companies that intend to export goods and services in Building Products; Hotel & Restaurant Equipment; Medical Equipment & Supplies; Automotive Parts & Accessories; and Renewable Energy possess great potential for success. Other companies will be considered as well based on their market potential in both countries.

**Mission Goals**

The goal of the Caribbean Trade Mission is to facilitate an effective presence for small and medium sized companies to export to companies in the Dominican Republic and Jamaica. The mission will enable U.S. companies to familiarize themselves with these important markets, to conduct market research, and to explore export opportunities through pre-arranged meetings with potential partners. The companies will be able to network with Government and Industry professionals, providing them with an enhanced image and level of engagement. Knowledgeable Commercial Service Specialists who are familiar with the firms' objectives will support the mission participants.

**Mission Scenario**

ITA Trade Specialists will promote the Trade Mission. This promotion will take place nation-wide and will largely be handled by the ITA Southern Network Hub. Companies interested in the mission will apply to the program, and once accepted (see 'Criteria for Participant Selection') will work with the mission leader(s) to develop their business goals in the Dominican Republic and Jamaica.

U.S. Export Assistance Center trade specialists and particularly members of the Southern Network Hub will recruit and counsel prospective participants for the trade mission. Company information and literature will be forwarded by the companies to CS Santo Domingo and its affiliates in Jamaica. The two offices will then begin the partner search, and will provide management and logistical coordination of the program.

The mission leader(s) will use email and conference calls to communicate with U.S. participants prior to the mission. Mission leader(s) will be available for information and assistance throughout the duration of the mission. Prior to the end of the program, CS staff will advise and counsel participants on appropriate follow-up procedures.

*In summary, participation in the Trade Mission includes:*

- Economic/Business briefing in both countries;
- Transportation from airport to hotel in both countries;
- Pre-scheduled meetings with potential partners, distributors, and/or end users as well as with local industry contacts;
- Participation in mission reception at the Ambassadors' residences in both countries;
- U.S. Embassy rates at local hotels in both countries;
- Conference calls with U.S. Embassy staff to review your specific goals/objectives.

PROPOSED MISSION TIMETABLE

| Day of week | Date | Activity |
|---|---|---|
| Sunday | June 13, Santo Domingo | Arrive in Santo Domingo<br>No-host dinner. |
| Monday | June 14, Santo Domingo | Business Breakfast Briefing.<br>One-on-One Business Meetings.<br>Luncheon organized by the American Chamber.<br>Evening Welcome Reception. |
| Tuesday | June 15 | One-on-One Business Meetings.<br>Follow-up meetings or site visits. |
| Wednesday | June 16 | Travel to and arrival in Kingston, Jamaica. |
| Thursday | June 17 | Business Breakfast Briefing.<br>One-on-One Business Meetings.<br>Luncheon organized by the American Chamber.<br>Evening Welcome Reception. |
| Friday | June 18 | One-on-One Business Meetings.<br>Follow-up meetings or site visits. |
| Saturday | June 19 | Check out hotel.<br>Return to the United States. |

**Participation Requirements**

All persons interested in participating in the Caribbean Trade Mission to the Dominican Republic and Jamaica must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. Target recruitment for the Trade Mission is between 12 and 15 companies.

*Fees and Expenses:*

| | | |
|---|---|---|
| Two Stops | SME Company[1] | $3,250 |
| Two Stops | Large Company | 3,800 |
| One Stop | SME Company | 1,950 |
| One Stop | Large Company | 2,250 |
| Participation fee for each additional company representative | | 500 |

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (*see http://www.sba.gov/services/contracting_opportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing schedule reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (for additional information *see http://www.export.gov/newsletter/march2008/initiatives.html*).

Expenses for travel, lodging, most meals, and incidentals will be the responsibility of each mission participant.

*Conditions for Participation:*

An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the U.S. Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.

A company's products or services must be either produced in the United States or, if not, marketed under the name of a U.S. firm and have at least 51% U.S. content of the value of the finished product/service.

*Selection Criteria for Participation:*

Each applicant to the program will be screened for the following:

- Relevance of the company's business line to the mission's goals.
- Timeliness of company's signed application and participation agreement including fees.
- Timely and adequate provision of company and product/service information and literature, in order to enable communication of company's objectives and scheduling of business appointments.
- Provision of adequate information on company's products and/or services, and company's primary market objectives, in order to facilitate appropriate matching with potential business partners.

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

**Timeframe For Recruitment And Applications**

Mission recruitment will be conducted in an open and public manner on a first come first serve basis, including publication in the **Federal Register**, posting on the Commerce Department trade missions calendar—*http://www.ita.doc.gov/doctm/tmcal.html*—and other Internet websites, publication in domestic trade publications and association newsletters, mailings from internal mailing lists, win-faxes to internal database of clients, email to sector distribution lists, through posting in the **Federal Register,** and at industry meetings, symposia, conferences, trade shows, etc. The Trade Mission will also be promoted by USCS and by team members in U.S. Export Assistance Centers.

Recruitment for the mission is to begin immediately and conclude no later than March 19, 2010. The U.S. Department of Commerce will review all applications immediately after the deadline. We will inform applicants of selection decisions as soon as possible after March 19, 2010. Applications received after that date will be considered only if space and scheduling constraints permit.

*Contacts:*

*Southern Network Hub:*

Lesa Forbes, Miami U.S. Export Assistance Center, 5835 Blue Lagoon Drive, Suite 203, Miami, FL 33126, *Tel:* (305) 526–7425 ext 28, *Fax:* (305) 526–7434, *E-mail: Lesa.Forbes@mail.doc.gov;*

Ashley Wilson, Oklahoma U.S. Export Assistance Center, 301 N.W. 63rd Street, Suite 330, Oklahoma City, OK 73116, *Tel:* (405) 608–5302, *Fax:* (405) 608–4211, *E-mail: Ashley.Wilson@mail.doc.gov;*

U.S. Commercial Service in Santo Domingo:

Robert O. Jones, Regional Senior Commercial Officer, Megan Schildgen, Commercial Officer, Maria Elena Portorreal, Senior Commercial Specialist, American Embassy, Ave. Pedro Henriquez Ureña No. 133, Edificio Empresarial Reyna l, 5th floor, La Esperilla, Santo Domingo, Dominican Republic, *Tel:* 1 809–227–2121, *Fax:* 1 809–920–0267, *E-mail: Robert.O.Jones@mail.doc.gov, Megan.Schildgen@mail.doc.gov, Maria.Elenaportorreal@mail.doc.gov.*

**Sean Timmins,**

*Global Trade Programs, Commercial Service Trade Missions Program.*

[FR Doc. 2010–4347 Filed 3–2–10; 8:45 am]

BILLING CODE P

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Civil Nuclear Policy Mission to Central and Eastern Europe

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

**ACTION:** Notice.

**Mission Description**

The United States Department of Commerce, International Trade Administration is organizing a Civil Nuclear Policy Mission to Warsaw, Poland; Prague, Czech Republic and Bratislava, Slovakia from April 18–23, 2010. Led by a senior Department of Commerce official, the mission will focus on: (1) Infrastructure and tender development, to include the safe, secure and proliferation-resistant trade in goods and services; (2) promotion of the Convention on Supplementary Compensation for Nuclear Damages (CSC) nuclear liability regime; (3) bilateral cooperation on civil nuclear commercial opportunities, and (4) ensuring opportunities for U.S. firms. The mission will demonstrate significant U.S. support for its civil nuclear industry and the wide range of

technical and commercial capabilities it possesses. The mission will promote U.S. companies from across the civil nuclear supply chain, including engineering services; fuel providers and processing services; reactor designers and builders; program managers; universities and other nuclear training institutions; and, small modular reactor technologies.

**Commercial Setting**

The Central and Eastern European market offers significant commercial opportunities for the U.S. civil nuclear industry. Increasing energy demands, dependence on Russian fossil fuels, and a small but aging fleet of Russian reactor technologies is colliding with pressure from the EU to meet stricter carbon emissions standards. Competitors of the U.S. civil nuclear sector are predominantly government owned entities and receive major support from their respective governments. Developments in each of the policy mission countries signal an historic opportunity to provide U.S. industry the kinds of government support most foreign companies receive. While there are opportunities in many of the countries in the region, Poland, the Czech Republic, and Slovakia offer near term viable commercial opportunities now.

*Poland* is rapidly moving towards significant developments of its civil nuclear infrastructure and there is momentum within the government to achieve its aggressive goal of having a nuclear reactor online by 2020. In terms of infrastructure development, the Polish government has released an official public declaration of its intentions to develop and support an indigenous civil nuclear industry—the first of many milestones laid out by the International Atomic Energy Agency (IAEA). Poland has expressed great interest in diversifying its energy portfolio, which is now overwhelmingly dominated by coal-based electricity production.

The *Czech Republic* has significant past experience with nuclear energy but is looking to make decisions about a new reactor build at its Temelin site—at the end of the recent preliminary qualification round the U.S. was identified as one of the competing technologies for the nuclear tender to be released later this year.

While *Slovakia* is still a year or more away from releasing a nuclear tender, language included in the Czech Republic's nuclear tender allows for the awarded company to have the opportunity to build reactors wherever CEZ, the managing utility group, has possible sites. This includes one new reactor in Slovakia.

**Mission Goals**

The objective of this policy mission is to leverage U.S. support for its civil nuclear sector, demonstrate technical capabilities in support of the development of upcoming nuclear tenders, and introduce U.S. companies to key government officials and utility executives. The mission will also seek to inform secondary U.S. suppliers—those not directly bidding on the design aspect of nuclear tenders—about the market opportunities available to them.

In addition, mission goals include:

- Encouraging the nuclear industry in participating countries to seek opportunities for new construction;
- Promoting fair, open, and transparent contract bidding processes;
- Advancing the principle that contracts should be awarded based on commercial and technical merits; and,
- Promoting ratification of the Convention on Supplementary Compensation for Nuclear Damage (CSC) as the global nuclear liability regime—the only international instrument that provides the basis for establishing a global regime, including countries with and without nuclear power facilities. Without such a regime, in the unlikely event of a nuclear incident, claims for damage would be the subject of protracted and complicated litigation in the courts of many countries against multiple potential defendants with no guarantee of recovery. The U.S. ratified CSC in 2008.

This mission advances the goals of the Department's Civil Nuclear Trade Initiative, which is aimed at supporting the U.S. nuclear industry's endeavors to rebuild its manufacturing base by capturing opportunities abroad. We believe this will result in important economic gains for the United States in terms of new jobs, technological innovations, specialized manufacturing capabilities, and large-scale trade and investment opportunities.

**Mission Scenario**

Participants will visit capitals in each of the three countries—Warsaw, Prague, and Bratislava.

During the trade mission participants will: (1) Be briefed on the status of the civil nuclear infrastructure in each country; (2) be introduced to government officials and decision makers; and (3) be taken on a site visit to the Temelin reactor.

PROPOSED MISSION TIMETABLE

| Date | Day | Activity |
|---|---|---|
| April 18 | Sunday—Warsaw | • Arrive in Warsaw, Poland.<br>• Reception dinner. |
| April 19 | Monday—Warsaw | • Meetings with Government of Poland officials and decision makers from the Polish utility PGE.<br>• Commercial briefings from Embassy staff and Commerce experts. |
| April 20 | Tuesday—Warsaw/Prague | • Additional meetings with Polish officials and potential private sector partners.<br>• Travel to Prague.<br>• Meetings with Government of Czech Republic officials and decision makers from CEZ.<br>• Reception dinner in Prague. |
| April 21 | Wednesday—Prague | • Meetings with Government of Czech Republic officials and decision makers from CEZ. |
| April 22 | Thursday—Bratislava | • Travel to Temelin for a site visit.<br>• Travel to Bratislava.<br>• Commercial briefings from Embassy staff and Commerce experts.<br>• Reception dinner in Bratislava. |
| April 23 | Friday—Bratislava | • Government and utility meetings. |

PROPOSED MISSION TIMETABLE—Continued

| Date | Day | Activity |
|---|---|---|
| | | • Depart for Vienna and DC. |

**Note:** The final schedule and potential site visits will depend on the availability of local government and business officials, specific goals of mission participants, and air travel schedules.

**Participation Requirements**

All persons interested in participating in the Civil Nuclear Policy Mission must complete and submit an application for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. Approximately 8 to 12 companies will be selected to participate in the mission from the applicant pool. U.S. companies already doing business in the region as well as U.S. companies seeking to enter the region for the first time are encouraged to apply.

*Fees and Expenses*

After a company or trade organization has been selected to participate in the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee, which will cover one representative, will be $4,500.00 for large firms and $3,000.00 for a small or medium-sized enterprise (SME) [1] or non-government organization.[2] The fee for each additional firm representative is $600. Expenses for travel, lodging, most meals, and incidentals will be the responsibility of each mission participant.

*Conditions for Participation*

• An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the U.S. Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating.

• Certify that the products and services the export of which it seeks to promote through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content. Because of the unique nature of the energy sector targeted by this mission, in cases where the U.S. content does not exceed fifty percent, especially where the applicant intends to pursue investment and major project opportunities, the following factors, often associated with U.S. ownership, may be considered in determining whether the applicant's participation in the trade mission is in the U.S. national interest:

—U.S. materials and equipment content;
—U.S. labor content;
—Repatriation of profits to the U.S. economy; and/or
—Potential for follow-on business that would benefit the U.S. economy;

• No applicant may represent a company that is majority owned or controlled by a foreign government entity or entities.

*Selection Criteria for Participation*

Selection will be based on the following criteria:

• Suitability of the company's products or services;

• Applicant's potential for business in Poland, Czech Republic and Slovakia, including likelihood of exports resulting from the mission; and

• Consistency of the applicant's goals and objectives with the stated scope of the mission.

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

*Timeframe for Recruitment and Applications*

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://www.ita.doc.gov/doctm/tmcal.html*) and other Internet Web sites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

Recruitment for the mission will begin immediately and conclude no later than Monday, March 15, 2010. The U.S. Department of Commerce will review all applications after the deadline. We will inform applicants of selection decisions after March 15, 2010. Applications received after the deadline will be considered only if space and scheduling constraints permit.

**Contacts**

David Kincaid, Manufacturing and Services, Office of Energy and Environmental Industries, *Tel:* 202–482–1706, *Fax:* 202–482–5665, *E-mail: David.Kincaid@trade.gov* ;

Reginald Miller, Regional Director for Central/Eastern Europe and Russia, *Tel:* 202–482–5402, *Fax:* 202–482–2456, *E-mail: Reginald.Miller@trade.gov.*

**Sean Timmins,**

*Global Trade Programs, Commercial Service Trade Missions Program.*

[FR Doc. 2010–4349 Filed 3–2–10; 8:45 am]

BILLING CODE 3510–FP–P

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (*see http://www.sba.gov/services/contracting opportunities/sizestandardstopics/index.html*).

[2] Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (*see http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Executive-Led Trade Mission to Colombia and Panama; Change to Mission Dates

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

**ACTION:** Notice.

**Mission Description**

The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service is organizing a Trade Mission to Bogotá and Cartagena, Colombia and Panama City, Panama, September 20–24, 2010, to be led by a senior Commerce official. The mission will focus on helping U.S. companies launch or increase their export business in these promising markets. It will also

help participating firms gain market information, make business and industry contacts, and solidify business strategies, towards the goal of increasing U.S. exports to the two markets. The mission will include business-to-business matchmaking appointments with local companies, as well as market briefings and networking events. The mission will be comprised of U.S. firms representing a cross section of U.S. industries with growing potential in the target markets, including, but not limited to the following sectors: building products; computers; components and peripherals; construction equipment; electrical power systems; security and safety equipment; telecommunications equipment; and travel and tourism services.

**Mission Scenario**

The mission will stop in Bogotá, and Cartagena, Colombia, and Panama City, Panama. In each city, participants will meet with pre-screened potential buyers, agents, distributors, and other business partners. They will also attend market briefings by U.S. Embassy officials, as well as networking events offering further opportunities to speak with local business and industry decision-makers.

**Proposed Mission Timetable**

Monday, September 20, 2010, Panama City, Panama, Market Briefing, Matchmaking appointments, Networking reception.

Tuesday, September 21, 2010, Panama City, Panama and Cartagena, Colombia, Travel to Cartagena, Market Briefing, Matchmaking appointments.

Wednesday, September 22, 2010, Cartagena, Colombia, Matchmaking appointments and/or site visits.

Thursday, September 23, 2010, Cartagena and Bogotá, Colombia, Travel to Bogotá, Market Briefing, Matchmaking appointments, Networking reception.

Friday, September 24, 2010, Bogotá, Colombia, Matchmaking appointments.

**Participation Requirements**

All parties interested in participating in the Executive-led Trade Mission to Colombia and Panama must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of seven U.S. companies and maximum of 15 companies will be selected to participate in the mission from the applicant pool. U.S. companies already doing business with Colombia and Panama as well as U.S. companies seeking to enter these countries for the first time may apply.

*Fees and Expenses:*

After a company has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee will be $4,440 for large firms and $3,550 for a small or medium-sized enterprise (SME).[1] The fee for each additional firm representative (large firm or SME) is $450. Expenses for travel, lodging, most meals, and incidentals will be the responsibility of each mission participant. The same fee structure applies to representatives of U.S.-based firms stationed in Colombia, Panama, or neighboring countries.

*Conditions for Participation:*

- An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.
- Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least 51 percent U.S. content of the value of the finished product or service.

*Selection Criteria for Participation:*

Selection will be based on the following criteria, listed in decreasing order of importance:

- Suitability of the company's products or services for the Colombian and Panamanian markets
- Applicant's potential for business in Colombia and Panama, including likelihood of exports resulting from the mission
- Consistency of the applicant's goals and objectives with the stated scope of the trade mission

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

**Timeframe for Recruitment and Applications**

Mission recruitment will be conducted in an open and public manner. Outreach will include publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://www.ita.doc.gov/doctm/tmcal.html*) and other Internet Web sites, press releases to general and trade media, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

Recruitment will begin immediately and conclude no later than Friday, July 23, 2010. The U.S. Department of Commerce will review all applications immediately after the deadline. We will inform applicants of selection decisions as soon as possible after July 23, 2010. Applications received after the deadline will be considered only if space and scheduling constraints permit.

*Contacts:*

Louis Quay, Commercial Service Trade Missions Program, *Tel:* 202–482–3973, *Fax:* 202–482–9000, *E-mail: Louis.Quay@mail.doc.gov;*

Jessica Arnold, Commercial Service Trade Missions Program, *Tel:* 202–482–2026, *Fax:* 202–482–9000, *E-mail: Jessica.Arnold@trade.gov.*

**Sean Timmins,**

*Global Trade Programs, Commercial Service Trade Missions Program.*

[FR Doc. 2010–4350 Filed 3–2–10; 8:45 am]

BILLING CODE P

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (*see http://www.sba.gov/services/contracting opportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (*see http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–580–807]**

### Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

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

**EFFECTIVE DATE:** March 3, 2010.

**FOR FURTHER INFORMATION CONTACT:** Michael J. Heaney or Robert James, Import Administration, International

Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–4475 and (202) 482–0649, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

At the request of interested parties, on July 29, 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 Deferral of Administrative Review*, 74 FR 39690 (July 29, 2009). The review covers the period June 1, 2008, through May 31, 2009. The preliminary results for this administrative review is currently due no later than March 9, 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. In this case, we note the deadline for completion of this administrative review has been extended by an additional seven days because of hazardous weather. See February 12, 2010 Memorandum, "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm." 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 gather and analyze information relating to Kolon's cost of production, home market sales activities, and U.S. sales activities. Accordingly, the Department is extending the time limits for completion of the preliminary results of this administrative review until no later than July 7, 2010, which is 365 days from the last day of the anniversary month of this order, plus the seven-day extension for hazardous weather. 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.

Dated: February 24,2010.

**John Andersen,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2010–4420 Filed 3–2–10; 8:45 am]

**BILLING CODE 3510–DS–S**

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# DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**RIN 0648–XU70**

## Marine Mammals and Endangered Species; File Nos. 13544 and 14586

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

**ACTION:** Notice; receipt of application for modification and application

**SUMMARY:** Notice is hereby given that Jeffrey Schmid, Ph.D, Conservancy of Southwest Florida, Naples, FL 34102, has requested a modification to scientific research Permit No. 13544 and Jeanette Wyneken, Florida Atlantic University, Boca Raton, FL 33431, has applied in due form to conduct scientific research (File No. 14586).

**DATES:** Written, telefaxed, or e-mail comments must be received on or before April 2, 2010.

**ADDRESSES:** The application documents are available for review by selecting "Records Open for Public Comment" from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/*, and then selecting File No. 13544–01 or 14586 from the list of available applications. These documents are also available upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

Written comments or requests for a public hearing on these requests should be submitted to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on the particular request would be appropriate.

Comments may also be submitted by facsimile at (301) 713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 13544–01 or File No. 14586.

**FOR FURTHER INFORMATION CONTACT:** Kate Swails or Amy Hapeman (File No. 13544–01); Kate Swails or Amy Sloan (File No. 14586) at (301) 713–2289.

**SUPPLEMENTARY INFORMATION:** The modification to Permit No. 13544, issued on April 17, 2009 (74 FR 18354) is requested under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).Permit No. 13544 authorizes the permit holder to characterize the aggregations of sea turtles in the nearshore waters of Lee County in southwest Florida. The permit holder may annually capture 130 Kemp's ridley (*Lepidochelys kempii*), 50 loggerhead (*Caretta caretta*), 20 green (*Chelonia mydas*), and five hawksbill (*Eretmochelys imbricata*) turtles. Turtles are collected using a large-mesh, run-around strike net. Turtles are measured, weighed, and tagged with Inconel and passive integrated transponder tags. Tissue samples are collected for genetic and stable isotope analyses. A subset of Kemp's ridleys are held for 24–48 hours for fecal sample collection. Another subset of Kemp's ridleys receive electronic transmitters to investigate their movements, home range, and habitat associations. The permit expires on April 30, 2014.

The permit holder requests authorization to satellite tag a subset of Kemp's ridley and loggerhead turtles to determine their seasonal distribution and possible migrations in the waters of the southeastern Gulf.

File No. 14586 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et. seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et. seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

File No. 14586 would authorize researchers to conduct aerial and vessel surveys in the Straits of Florida off Florida's southeast coast. The goal of this project would be to collect baseline data regarding the abundance and distribution of marine mammals and sea turtles within the proposed study site. Since this study site is being considered as a testing site for ocean energy technology, researchers would assess the presence of animals before, during, and after the testing.

Abundance surveys could result in the harassment of sea turtles [leatherback (*Dermochelys coriacea*), loggerhead, green, hawksbill, and Kemp's ridley], as well as numerous cetacean species including fin whales (*Balaenoptera physalus*), sperm whales (*Physeter macrocephalus*), humpback whales (*Megaptera novaengliae*), and the North Atlantic right whale (*Eubalaena glacialis*). The permit would be valid for five years from the date of issuance.

Dated: February 25, 2010.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2010–4407 Filed 3–2–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–890]**

### Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review

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

**EFFECTIVE DATE:** March 3, 2010.

**SUMMARY:** On August 20, 2009, the Department of Commerce ("Department") initiated a new shipper review of the antidumping duty order on wooden bedroom furniture from the People's Republic of China ("PRC") covering sales of subject merchandise made by Zhejiang Tianyi Scientific & Educational Equipment Co., Ltd. ("Zhejiang Tianyi") and Rise Furniture Co., Ltd. ("Rise Furniture").[1] On December 29, 2009, the Department rescinded the new shipper review with respect to Rise Furniture.[2]

The Department preliminary determines that Zhejiang Tianyi has not made sales at less than normal value ("NV"). If these preliminary results are adopted in our final results of review, the Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on entries of subject merchandise during the period January 1, 2009 through June 30, 2009 (the period of review or POR), for which the importer–specific assessment rates are above *de minimis*.

**FOR FURTHER INFORMATION CONTACT:** Howard Smith or Rebecca Pandolph, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5193 or (202) 482–3627, respectively.

**SUPPLEMENTARY INFORMATION:** The notice announcing the antidumping duty order on wooden bedroom furniture from the PRC was published on January 4, 2005.[3] On July 31, 2009, the Department received timely requests for new shipper reviews from Rise Furniture and Zhejiang Tianyi. On August 20, 2009, the Department initiated new shipper reviews of Rise Furniture and Zhejiang Tianyi. *See Initiation Notice*.

On August 24, 2009, the Department issued an antidumping duty questionnaire to Rise Furniture and Zhejiang Tianyi. On November 10, 2009, Rise Furniture withdrew its request for a new shipper review and, accordingly, the Department rescinded the new shipper review with respect to Rise Furniture. From September 2009 through January 2010, the Department received timely questionnaire and supplemental questionnaire responses from Zhejiang Tianyi.

On October 28, 2009, the Office of Policy issued a memorandum identifying six countries as being at a level of economic development comparable to the PRC for the instant POR. The countries identified in that memorandum are India, Indonesia, the Philippines, Colombia, Thailand, and Peru.[4] On November 2, 2009, the Department released the Policy Memorandum to interested parties and provided parties with an opportunity to submit comments regarding the selection of a surrogate country in the instant review.[5] On November 16, 2009, the American Furniture Manufacturers Committee for Legal Trade and Vaughan–Bassett Furniture Company, Inc. (collectively, "Petitioners") provided publicly–available information to value factors of production ("FOP").[6] On December 29, 2009, Zhejiang Tianyi provided publicly–available data to value its FOP.[7]

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for the preliminary results of this review is now February 23, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

#### Period of Review

The POR for Zhejiang Tianyi is January 1, 2009 through June 30, 2009.

#### Scope of the Order

The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non–wood

[1] *See Wooden Bedroom Furniture from the People's Republic of China: Initiation of Antidumping New Shipper Reviews*, 74 FR 43096 (August 26, 2009) ("*Initiation Notice*").

[2] *See Wooden Bedroom Furniture from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review*, 75 FR 339 (January 5, 2010).

[3] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 FR 329 (January 4, 2005).

[4] *See* Memorandum entitled, "Request for a List of Surrogate Countries for a New Shipper Review of the Antidumping Duty Order on Wooden Bedroom Furniture ("WBF") from the People's Republic of China ("PRC")," dated October 28, 2009 ("Policy Memorandum").

[5] *See* Letter from Howard Smith, Program Manager, Office 4, to All Interested Parties, "2009 New Shipper Reviews of Wooden Bedroom Furniture from the People's Republic of China (PRC)," dated November 2, 2009.

[6] *See* Letter from Petitioners regarding, "Wooden Bedroom Furniture From the People's Republic of China: Submission of Publicly Available Information to Value the Factors of Production," dated November 16, 2009 ("Petitioners' Surrogate Value Submission").

[7] *See* Letter from Zhejiang Tianyi regarding, "Wooden Bedroom Furniture From the People's Republic of China: Surrogate Value Data ," dated December 29, 2009 ("Zhejiang Tianyi's Surrogate Value Submission").

components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.

The subject merchandise includes the following items: (1) wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand–alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe–type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests–on-chests,[8] highboys,[9] lowboys,[10] chests of drawers,[11] chests,[12] door chests,[13] chiffoniers,[14] hutches,[15] and armoires;[16] (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

The scope of the order excludes the following items: (1) seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand–up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non–bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate;[17] (9) jewelry armories;[18] (10) cheval mirrors;[19] (11) certain metal parts;[20] (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser–mirror set; (13) upholstered beds[21] and (14) toy boxes.[22]

Imports of subject merchandise are classified under subheading 9403.50.9040 of the HTSUS as "wooden . . . beds" and under subheading 9403.50.9080 of the HTSUS as "other . . . wooden furniture of a kind used in the bedroom." In addition, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds may also be entered under subheading 9403.50.9040 of the HTSUS as "parts of wood" and framed glass mirrors may also be entered under subheading 7009.92.5000 of the HTSUS as "glass mirrors . . . framed." This order covers all WBF meeting the above description, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

## Bona Fide Sales Analysis

Consistent with the Department's practice, the Department investigated the *bona fide* nature of the sales made by Zhejiang Tianyi for this review. In evaluating whether or not a single 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)

[8] A chest-on-chest is typically a tall chest-of-drawers in two or more sections (or appearing to be in two or more sections), with one or two sections mounted (or appearing to be mounted) on a slightly larger chest; also known as a tallboy.

[9] A highboy is typically a tall chest of drawers usually composed of a base and a top section with drawers, and supported on four legs or a small chest (often 15 inches or more in height).

[10] A lowboy is typically a short chest of drawers, not more than four feet high, normally set on short legs.

[11] A chest of drawers is typically a case containing drawers for storing clothing.

[12] A chest is typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid.

[13] A door chest is typically a chest with hinged doors to store clothing, whether or not containing drawers. The piece may also include shelves for televisions and other entertainment electronics.

[14] A chiffonier is typically a tall and narrow chest of drawers normally used for storing undergarments and lingerie, often with mirror(s) attached.

[15] A hutch is typically an open case of furniture with shelves that typically sits on another piece of furniture and provides storage for clothes.

[16] An armoire is typically a tall cabinet or wardrobe (typically 50 inches or taller), with doors, and with one or more drawers (either exterior below or above the doors or interior behind the doors), shelves, and/or garment rods or other apparatus for storing clothes. Bedroom armoires may also be used to hold television receivers and/or other audio-visual entertainment systems.

[17] As used herein, bentwood means solid wood made pliable. Bentwood is wood that is brought to a curved shape by bending it while made pliable with moist heat or other agency and then set by cooling or drying. *See* Customs' Headquarters' Ruling Letter 043859, dated May 17, 1976.

[18] Any armoire, cabinet or other accent item for the purpose of storing jewelry, not to exceed 24 in width, 18 in depth, and 49 in height, including a minimum of 5 lined drawers lined with felt or felt-like material, at least one side door (whether or not the door is lined with felt or felt-like material), with necklace hangers, and a flip-top lid with inset mirror. *See* Issues and Decision Memorandum from Laurel LaCivita to Laurie Parkhill, Office Director, Concerning Jewelry Armoires and Cheval Mirrors in the Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China, dated August 31, 2004. *See also Wooden Bedroom Furniture From the People's Republic of China: Final Changed Circumstances Review, and Determination to Revoke Order in Part*,71 FR 38621 (July 7, 2006).

[19] Cheval mirrors are any framed, tiltable mirror with a height in excess of 50 that is mounted on a floor-standing, hinged base. Additionally, the scope of the order excludes combination cheval mirror/jewelry cabinets. The excluded merchandise is an integrated piece consisting of a cheval mirror, *i.e.*, a framed tiltable mirror with a height in excess of 50 inches, mounted on a floor-standing, hinged base, the cheval mirror serving as a door to a cabinet back that is integral to the structure of the mirror and which constitutes a jewelry cabinet line with fabric, having necklace and bracelet hooks, mountings for rings and shelves, with or without a working lock and key to secure the contents of the jewelry cabinet back to the cheval mirror, and no drawers anywhere on the integrated piece. The fully assembled piece must be at least 50 inches in height, 14.5 inches in width, and 3 inches in depth. *See Wooden Bedroom Furniture From the People's Republic of China: Final Changed Circumstances Review and Determination To Revoke Order in Part*, 72 FR 948 (January 9, 2007).

[20] Metal furniture parts and unfinished furniture parts made of wood products (as defined above) that are not otherwise specifically named in this scope (*i.e.*, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds) and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form. Such parts are usually classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9403.90.7000.

[21] Upholstered beds that are completely upholstered, *i.e.*, containing filling material and completely covered in sewn genuine leather, synthetic leather, or natural or synthetic decorative fabric. To be excluded, the entire bed (headboards, footboards, and side rails) must be upholstered except for bed feet, which may be of wood, metal, or any other material and which are no more than nine inches in height from the floor. *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Changed Circumstances Review and Determination to Revoke Order in Part*, 72 FR 7013 (February 14, 2007).

[22] To be excluded the toy box must: (1) Be wider than it is tall; (2) have dimensions within 16 inches to 27 inches in height, 15 inches to 18 inches in depth, and 21 inches to 30 inches in width; (3) have a hinged lid that encompasses the entire top of the box; (4) not incorporate any doors or drawers; (5) have slow-closing safety hinges; (6) have air vents; (7) have no locking mechanism; and (8) comply with American Society for Testing and Materials ("ASTM") standard F963-03. Toy boxes are boxes generally designed for the purpose of storing children's items such as toys, books, and playthings. *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Changed Circumstances Review and Determination to Revoke Order in Part*, 74 FR 8506 (February 25, 2009). Further, as determined in the scope ruling memorandum "Wooden Bedroom Furniture from the People's Republic of China: Scope Ruling on a White Toy Box," dated July 6, 2009, the dimensional ranges used to identify the toy boxes that are excluded from the wooden bedroom furniture order apply to the box itself rather than the lid.

the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arm's–length basis. *See, e.g., Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1250 (CIT 2005). Accordingly, the Department considers a number of factors in its *bona fide* analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise." *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) (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)).

The Department preliminarily finds that the sale of subject merchandise made by Zhejiang Tianyi was made on a *bona fide* basis. Specifically, the Department preliminarily finds that: (1) the timing of the sale by itself does not indicate that the sale might not be *bona fide*; (2) the price and quantity of the sale was within the range of the prices and quantities of other entries of subject merchandise from the PRC into the United States; (3) Zhejiang Tianyi and its customer(s) did not incur any extraordinary expenses arising from the transaction; (4) the new shipper sale was made between unaffiliated parties at arm's length; and (5) the merchandise was resold at a profit.[23] Therefore, the Department has preliminarily found that Zhejiang Tianyi's sale of subject merchandise to the United States was *bona fide* for purposes of this new shipper review.

**Non–Market Economy Country Status**

In every antidumping case conducted by the Department involving the PRC, the PRC has been treated as a non–market economy ("NME") country.[24] In accordance with section 771(18)(C)(i) of the Tariff Act of 1930, as amended (the "Act"), any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. None of the parties to this proceeding has contested such treatment. Accordingly, the Department calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

**Separate Rates**

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. It is the Department's policy to assign all exporters of subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* government control over export activities. The Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 FR 20588 (May 6, 1991) ("*Sparklers*"), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22585, 22586–7 (May 2, 1994) ("*Silicon Carbide*"). However, if the Department determines that a company is wholly foreign–owned or located in a market economy, then a separate rate analysis is not necessary to determine whether it is independent from government control. *See Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China*, 64 FR 71104, 71104–05 (December 20, 1999) (where the respondent was wholly foreign–owned and, thus, qualified for a separate rate).

Zhejiang Tianyi is a wholly Chinese–owned company and is located in the PRC. Therefore, the Department has analyzed whether it has demonstrated the absence of both *de jure* and *de facto* government control over its export activities.

*A. Absence of De Jure Control*

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589.

The evidence provided by Zhejiang Tianyi supports a preliminary finding of *de jure* absence of government control based on the following: (1) an absence of restrictive stipulations associated with Zhejiang Tianyi's business and export licenses; (2) applicable legislative enactments decentralizing control over PRC companies; and (3) formal measures by the government decentralizing control of PRC companies.

*B. Absence of De Facto Control*

The Department considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Silicon Carbide*, 59 FR at 22586–7; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995). The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are subject to a degree of government control which would preclude the Department from assigning separate rates.

The evidence provided by Zhejiang Tianyi supports a preliminary finding of *de facto* absence of government control over its export activities based on the following: (1) Zhejiang Tianyi sets its own export prices independent of the government and without the approval of a government authority; (2) Zhejiang Tianyi's general manager has the authority to negotiate and bind the company in an agreement; (3) Zhejiang Tianyi maintains autonomy from the government in making decisions regarding the selection of management; and (4) Zhejiang Tianyi retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[25]

The evidence placed on the record by Zhejiang Tianyi demonstrates an absence of *de jure* and *de facto* government control, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide*. Accordingly, the

[23] *See* Memorandum to Abdelali Elouaradia, Director, AD/CVD Operations, Office 4, regarding, "Antidumping Duty New Shipper Review of Wooden Bedroom Furniture from the People's Republic of China: *Bona fide* Sales Analysis for Zhejiang Tianyi Scientific & Educational Equipment Co., Ltd.," dated February 23, 2010.

[24] *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Preliminary Results of 2001-2002 Administrative Review and Partial Rescission of Review*, 68 FR 7500(February 14, 2003) (unchanged in the final results).

[25] *See* Section A response at 11-16.

Department has preliminarily granted a separate rate to Zhejiang Tianyi.

**Surrogate Country**

When the Department conducts an antidumping duty new shipper review of imports from an NME country, section 773(c)(1) of the Act directs the Department to base NV, in most circumstances, on the NME producer's FOP valued in a surrogate market–economy country or countries considered appropriate by the Department. In accordance with section 773(c)(4) of the Act, the Department will value FOP using "to the extent possible, the prices or costs of factors of production in one or more market economy countries that are – (A) at a level of economic development comparable to that of the NME country, and (B) significant producers of comparable merchandise." Further, pursuant to 19 CFR 351.408(c)(2), the Department will normally value all FOP in a single country, except for labor.

In the instant review, the Department identified India, Indonesia, the Philippines, Colombia, Thailand, and Peru as being at a level of economic development comparable to the PRC.[26] Neither Petitioners nor Zhejiang Tianyi provided comments on the selection of a surrogate country. However, both parties submitted publicly–available Philippine data for valuing Zhejiang Tianyi's FOP.[27] On January 15, 2010, the Department placed information regarding the selection of a surrogate country on the record.[28]

Based on the information on the record, we find that the Philippines is a significant producer of comparable merchandise. Specifically, *The Furniture Industry in the Philippines* report indicates that in 2006, Philippine manufacturers produced furniture valued at $813 million and the Philippines exported furniture valued at $279 million.[29] The *State of the Sector Report on Philippine Furniture 2006* indicates that wooden furniture has replaced rattan as the most commonly used material and accounted for 51% of all Philippine furniture exports.[30] In addition, both *The Furniture Industry in the Philippines* and *State of the Sector Report on Philippine Furniture 2006* describes the furniture sector as comprised of approximately 15,000 manufacturers and 800,000 workers.[31] Thus, record evidence shows that the Philippines is a significant producer of merchandise that is comparable to the merchandise under review.

With respect to data considerations in selecting a surrogate country, both Petitioners and Zhejiang Tianyi have submitted publicly–available Philippine data for valuing Zhejiang Tianyi's FOP. In addition, the Department used the Philippines as the primary surrogate country in the second and third administrative reviews of this proceeding.[32] Therefore, based on its experience, the Department finds that the Philippines has, in the past, provided reliable, publicly–available data for valuing the FOP.

Thus, the Department has preliminarily selected the Philippines as the surrogate country because the record shows that the Philippines is at a level of economic development comparable to that of the PRC and is a significant producer of merchandise comparable to subject merchandise. Moreover, the record indicates that sufficient, contemporaneous, public Philippine data are readily–available.[33] Accordingly, we have selected the Philippines as the surrogate country and, accordingly, have calculated NV using Philippine prices to value Zhejiang Tianyi's FOP.[34] In accordance with 19 CFR 351.301(c)(3)(ii), interested parties may submit publicly–available information to value the FOP until 20 days after the date of publication of the preliminary results.[35]

**Fair Value Comparisons**

In accordance with section 777(A)(d) of the Act, to determine whether Zhejiang Tianyi sold wooden bedroom furniture to the United States at less than NV, the Department compared Zhejiang Tianyi's export price ("EP") of wooden bedroom furniture to the NV of wooden bedroom furniture, as described in the "Export Price," and "Normal Value" sections of this notice.

**Export Price**

In accordance with section 772(a) of the Act, the Department considered the U.S. prices of sales to the United States made by Zhejiang Tianyi to be EPs because the first sale to an unaffiliated party was made before the date of importation and the use of constructed export price was not otherwise warranted.

The Department calculated EP based on the price to unaffiliated purchaser(s) in the United States. The Department deducted movement expenses from the gross unit U.S. sales price in accordance with section 772(c) of the Act. These movement expenses include foreign inland freight from the plant/warehouse to the port of exit, and foreign brokerage and handling. For a detailed description of these adjustments, *see* the Zhejiang Tianyi analysis memorandum entitled, "Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results Analysis Memorandum for Zhejiang Tianyi Scientific & Educational Equipment Co., Ltd.," ("Zhejiang Tianyi Analysis Memorandum"), dated February 23, 2010.

**Normal Value**

Section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if: (1) the merchandise is exported from an NME country; and (2) the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(e) of the Act. When determining NV in an NME context, the Department will base NV on FOP, because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under our normal methodologies. Under section 773(c)(3)

[26] *See* Policy Memorandum.

[27] *See* Petitioners' Surrogate Value Submission and Zhejiang Tianyi's Surrogate Value Submission.

[28] *See* Memorandum entitled, "2009 New Shipper Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China," dated January 15, 2010.

[29] *See* attachment to the memorandum entitled, "2009 New Shipper Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China," dated January 15, 2010.

[30] *See id.*

[31] *See id.*

[32] *See Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review*, 73 FR 8273, 8277-78 (February 13, 2008) (unchanged in the final results) and *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of Review*, 74 FR 6372, 6376 (February 9, 2009) (unchanged in the final results).

[33] *See Policy Bulletin* at 4.

[34] *See* Memorandum entitled, "2009 New Shipper Review of Wooden Bedroom Furniture from the People's Republic of China: Surrogate Value Memorandum for the Preliminary Results," dated February 23, 2010 ("Factor Valuation Memorandum")

[35] 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 placed on the record. The Department generally will not accept the submission of additional, previously absent-from-the-record alternative surrogate value information pursuant to 19 CFR 351.301(c)(1). *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.

of the Act, FOP include, but are not limited to: (1) hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs. The Department based NV on FOP reported by Zhejiang Tianyi for materials, energy, labor and packing.

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly–available surrogates to value FOP, but when a producer sources an input from a market economy and pays for it in market economy currency, the Department will normally value the factor using the actual price paid for the input. However, when the Department has reason to believe or suspect that such prices may be distorted by subsidies, the Department will disregard the market economy purchase prices and use surrogate values to determine the NV.[36] Where the facts developed in either U.S. or third–country countervailing duty findings include the existence of subsidies that appear to be used generally (in particular, broadly available, non–industry specific export subsidies), the Department will have reason to believe or suspect that prices of the inputs from the country granting the subsidies may be subsidized.[37]

In avoiding the use of prices that may be subsidized, the Department does not conduct a formal investigation to ensure that such prices are not subsidized, but rather relies on information that is generally available at the time of its determination.[38]

**Factor Valuations**

In accordance with section 773(c) of the Act, we calculated NV based on FOP reported by Zhejiang Tianyi for the POR. To calculate NV, the Department multiplied the reported per–unit factor quantities by publicly–available Philippine surrogate values (except as noted below). In selecting the surrogate values, the Department considered the quality, specificity, and contemporaneity of the data. As appropriate, the Department adjusted input prices by including freight costs to make them delivered prices. Specifically, the Department added to Philippine import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the respondent's factory or the distance from the nearest seaport to the respondent's factory where appropriate (*i.e.*, where the sales terms for the market–economy inputs were not delivered to the factory). This adjustment is in accordance with the decision of the Federal Circuit in *Sigma Corp. v. United States*, 117 F.3d 1401, 1407–08 (Fed. Cir. 1997).

We used import values for the POR from the Philippines National Statistics Office ("Philippines NSO") reported in U.S. dollars on a cost, insurance, and freight basis to value the following inputs: abrasive cloth, bolt, drawer guide, glue, leg pad with nail, leveling adjuster, nuts, paints, pine wood, plywood, pull knob for drawer, sandpaper, screw, staple, stopper, washer, wooden pin, non–adjustable wrench, and packing materials (*i.e.*, corrugated paper, polyfoam, EPE sheet, and adhesive tape). The Philippines NSO is the only data source on the record that provides data on a net weight basis, which is the same basis as reported by Zhejiang Tianyi in reporting its FOP. For a detailed description of all surrogate values used to value the reported FOP, *see* Factor Valuation Memorandum.

Where we could not obtain publicly–available information contemporaneous with the POR with which to value FOP, we inflated (or deflated) the surrogate values using the Philippine Wholesale Price Index as published in the *International Financial Statistics* of the International Monetary Fund.

Consistent with 19 CFR 351.408(c)(3), we valued labor using the PRC regression–based wage rate as reported on Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in December 2009, available at *http://ia.ita.doc.gov/wages/index.html*. Because this regression–based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by the respondent. If the NME wage rates are updated by the Department prior to issuance of the final results, we will use the updated wage rate in the final results. *See* Factor Valuation Memorandum.

We valued electricity using contemporaneous Philippine data from *The Cost of Doing Business in Camarines Sur*, which is available at the Philippine government's website for the province: http://www.camarinessur.gov.ph. This data pertained only to industrial consumption. *See* Factor Valuation Memorandum.

We calculated the value of domestic brokerage and handling using brokerage fees on the website of the Republic of the Philippines Tariff Commission, *http://www.tariffcommission.gov.ph/cao01–2001.html*.

We calculated the surrogate value for truck freight using Philippine data from two sources: 1) *The Cost of Doing Business in Camarines Sur*, available at the Philippine government's website for the province: http://www.camarinessur.gov.ph; and 2) a news article from the *Manila Times* entitled "Government Mulls Cut in Export Target."

We valued factory overhead, selling, general, and administrative expenses ("SG&A"), and profit, using the audited financial statements for the fiscal year ending December 31, 2008, from the following producers: Tequesta International Inc.; Insular Rattan and Native Products Corp.; Horizon International Manufacturing, Inc.; Arkane International Corporation; and Casa Cebuana Incorada, which are Philippine producers of merchandise identical to subject merchandise that received no countervailable subsidies and that earned a before–tax profit in 2008. From this information, we were able to determine factory overhead as a percentage of the total raw materials, labor and energy ("ML&E") costs; SG&A as a percentage of ML&E plus overhead (*i.e.*, cost of manufacture); and the profit rate as a percentage of the cost of manufacture plus SG&A. For further discussion, *see* Factor Valuation Memorandum.

**Currency Conversion**

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

**Preliminary Results of Review**

The Department preliminarily determines that the following weighted–average dumping margin exists for the period January 1, 2009, through June 30, 2009:

| Exporter | Weighted–average margin (percent) |
|---|---|
| Zhejiang Tianyi Scientific & Educational Equipment Co., Ltd. .. | 0 |

[36] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part*, 66 FR 1953 (January 10, 2001) ("*TRBs 1998-1999*"), and accompanying Issues and Decision Memorandum at Comment 1.

[37] *See TRBs 1998-1999* at Comment 1; *see also China Nat'l. Machinery Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334, 1338-39 (Ct. Int'l Trade 2003).

[38] *See* H.R. Rep. 100-576, at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24.

**Disclosure**

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

**Public Comment**

Interested parties may submit written comments no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c). Rebuttals to written comments must be limited to the issues raised in the written comments and may be filed no later than five days after the deadline for filing case briefs. *See* 19 CFR 351.309(d). Further, parties submitting written comments and rebuttal comments are requested to provide the Department with an additional copy of those comments on diskette. Any interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). If requested, a hearing normally will be held two days after the scheduled date for submission of rebuttal comments. *See* 19 CFR 351.310(d). Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

The Department will issue the final results of this new shipper review, which will include the results of its analysis of any issues raised in written comments, within 90 days of the date on which these preliminary results are issued, in accordance with 19 CFR 351.214(i)(1), unless the time limit is extended. *See* 19 CFR 351.214(i)(2).

**Assessment Rates**

Pursuant to 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For assessment purposes, the Department will calculate importer–specific (or customer) *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. The Department will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific assessment rate calculated in the final results of this review is above *de minimis*. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective upon publication of the final results of this new shipper review for shipments of subject merchandise from Zhejiang Tianyi entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For subject merchandise produced and exported by Zhejiang Tianyi, the cash deposit rate will be that established in the final results of this review; (2) for subject merchandise exported by Zhejiang Tianyi but not produced by Zhejiang Tianyi, the cash deposit rate will continue to be the PRC–wide rate of 216.01 percent; (3) for subject merchandise produced by Zhejiang Tianyi, and exported by any party but itself, the cash deposit rate will be the rate applicable to the exporter. If the cash deposit rate calculated in the final results is zero or *de minimis*, no cash deposit will be required for those entries of subject merchandise both produced and exported by Zhejiang Tianyi. These cash deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Interested Parties**

This notice serves as a 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 subsequent assessment of double antidumping duties.

The Department is 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: February 23, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–4422 Filed 3–2–10; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

**[Docket Number: 100217092–0110–01]**

### Solicitation of Participation In and Public Meeting to Discuss Public Safety 700 MHz Broadband Demonstration Network

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

**ACTION:** Notice of solicitation of participation.

**SUMMARY:** The National Institute of Standards and Technology (NIST) announces the building of a 700 MHz Public Safety Broadband Demonstration Network (Demonstration Network), which will provide manufacturers and first responders a location for early deployment of their systems in a multi-vendor, neutral host environment.[1] Emergency responders will see how these broadband systems will function and determine through hands-on experience how these systems meet their unique needs. This Notice of Solicitation of Participation both seeks Expressions of Interest from parties that may be interested in participating in the Demonstration Network and also announces a project kick-off meeting for all interested stakeholders.

**DATES:** Expressions of Interest in participating in the program are due on or before 5:00 pm Mountain Time, April 30, 2010. A kick-off informational meeting will be held March 15, 2010, via webinar over the Internet. The registration deadline for participation in the meeting is due by 5 p.m. Mountain Time, March 12, 2010. Please see registration instructions in the **SUPPLEMENTARY INFORMATION** section of this notice.

**ADDRESSES:** Expressions of Interest in participating in the Demonstration Network and registrations for the kick-off meeting should be sent to *700MHz@its.bldrdoc.gov.* The webinar details, meeting time and teleconference bridge information will be e-mailed to registrants prior to the event.

**FOR FURTHER INFORMATION CONTACT:** Emil Olbrich, (303) 497–4950, e-mail: *700MHz@its.bldrdoc.gov.* The mailing address is 325 Broadway, Mail Stop ITS.P, Boulder, CO, 80305.

**SUPPLEMENTARY INFORMATION:** Public safety agencies have long struggled with

[1] NIST Tech Beat (2009), Demonstration Network Planned for Public Safety 700 MHz Broadband. *http://www.nist.gov/public_affairs/techbeat/tb2009_1215.htm.*

effective cross-agency radio communications, due mainly to incompatible systems and non-contiguous spectrum assignments. But newly enacted Congressional legislation [2] and FCC Rulings [3] have created broadband spectrum cleared by the Digital Television (DTV) transition available to local, state and tribal public safety agencies (i.e. fire, police, emergency medical services), allowing for a unified system that would foster nationwide roaming and interoperability. Though this spectrum will provide ample opportunity for the build-out of next-generation communications systems that could achieve true interoperability for public safety, no government or independent laboratory facilities exist in the United States to test and demonstrate the behaviors of this yet-to-be-deployed 700 MHz network and the applications that could run on top of it.

To address this critical gap, the National Institute of Standards and Technology (NIST), through its Public Safety Communications Research (PSCR) program, will begin building a Public Safety Broadband Demonstration Network. This Demonstration Network will allow NIST, manufacturers and public safety users a site for the early deployment of their systems in order to evaluate the Third Generation Partnership Project (3GPP) Long Term Evolution (LTE) standard, in a multi-vendor environment and create integration opportunities for commercial service providers.

**Public Safety Broadband Demonstration Network**

The goal of this project is to demonstrate and evaluate the behaviors of 3GPP LTE technology deployed in the 700 MHz bands, specific to the needs of public safety agencies. NIST has developed an initial network design that must be evaluated by vendors, service providers, academia, and other stakeholders to ensure that it can support all test cases. In this project, emergency responders, vendors, carriers, academia and other stakeholders will have the opportunity to participate in the development, test planning and network design evaluation of the Demonstration Network system. Each participant may provide individual input to NIST; no consensus advice will be provided. Public Safety users will see how these broadband systems will function and determine through hands-on experience how the systems meet their unique needs. Features and system performance that commercial carriers may not be testing for commercial purposes, but that are of importance to public safety, will be a primary area of assessing public safety user requirements within the 3GPP LTE standard. This will include multicast/broadcast capabilities, priority access, pre-emption, SMS, and voice. Vendors who are developing LTE equipment (Band Class 14) are eligible to participate in this project.

On or before April 30, 2010, interested parties wishing to participate in the Demonstration Network should submit to the e-mail address in the **ADDRESSES** section, their name, address, phone number, and an e-mail address. After receiving all submissions, NIST may contact any party that submitted an expression of interest to follow-up on how its technology would meet the above evaluation criteria. As part of the Demonstration Network project, NIST will enter into Cooperative Research and Development Agreements (CRADAs) with participating equipment stakeholders.

The following information details the technical specifications of the Demonstration Network as it relates to radio frequency and the ability to transmit over the air.

*Demonstration Network Technology:* Equipment utilizing minimum 3GPP LTE Release 8, Evolved Packet Core (EPC) and IP Multimedia System (IMS). Other air interfaces may be considered.

*Demonstration Network Frequency Band:* 758–768 MHz & 788–798 MHz (3GPP Band Class 14) Authorization to transmit over-the-air for the Demonstration Network: Via a request for FCC Special Temporary Authority (STA) for Part 90 and/or Part 27.

*Phases for Stakeholder Participation:* The Demonstration Network will have the following three major phases for stakeholder participation:

Phase 1—Network and Test Planning: Stakeholders will be involved in creating a common test plan for all vendors and creating a common network deployment and coverage scheme.

Phase 2—Deployment: Equipment is scheduled for delivery to site locations. Coverage, network planning, site preparation completed. Installation and commissioning takes place.

Phase 3—Testing and Demonstrations: Test plan execution takes place. This may be staggered into sub-phases as equipment and features become available. Network is available to perform system level testing and demonstrations on.

*Equipment Disposition:* Stakeholder equipment used for the demonstration network will be returned to the stakeholders, at their expense, after the completion of the project or upon withdrawal from the project.

*Demonstration Network Timeline:* This demonstration network is currently in the preliminary planning stages and is expected to go live in mid 2010.

*Webinar* NIST intends to hold a webinar meeting on March 15, 2010 webinar to bring together interested stakeholders (vendors, carriers, public safety practitioners, academics) to specifically discuss how to move forward on the Demonstration Network and to establish the focus and goals of the project. There is no charge for participation in the meeting. The registration deadline is 5 p.m. Mountain Time on March 12, 2010. Please submit your name, email address and phone number to *700MHz@its.bldrdoc.gov* and you will be provided with the logistics for the webinar meeting.

Dated: February 26, 2010.

**Marc G. Stanley,**

*Acting Deputy Director.*

[FR Doc. 2010–4421 Filed 3–2–10; 8:45 am]

**BILLING CODE 3510–13–P**

[2] Public Law No: 111–4.

[3] Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, FCC WT Docket No. 06–150, PS Docket No. 06–229.

## COMMISSION OF FINE ARTS

### Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for 18 March 2010, at 10 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street, NW., Washington DC, 20001–2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our *Web site: http://www.cfa.gov.* Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by e-mailing *staff@cfa.gov;* or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated: February 24, 2010 in Washington DC.

**Thomas Luebke,**

*AIA Secretary.*

[FR Doc. 2010–4324 Filed 3–2–10; 8:45 am]

**BILLING CODE 6330–01–M**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Defense Intelligence Agency Advisory Board; Closed Meeting

**AGENCY:** Defense Intelligence Agency, DoD.

**ACTION:** Notice of closed meeting.

**SUMMARY:** Pursuant to the provisions of subsection (d) of section 10 of Public Law 92–463, as amended by section 5 of Public Law 94–409, notice is hereby given that the Defense Intelligence Agency Advisory Board, will meet on March 22 and 23, 2010. The meeting is closed to the public.

**DATES:** The meeting will be held on March 22, 2010 (from 1 p.m. to 5 p.m.) and on March 23, 2010 (from 8 a.m. to 5 p.m.).

**ADDRESSES:** The meeting will be held at the Pentagon on March 22, and on Bolling Air Force Base on March 23.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Caniano, Director, DIA Congressional and Public Affairs, Washington, DC 20340; *phone:* 703–614–4774.

**SUPPLEMENTARY INFORMATION:** The entire meeting is devoted to the discussion of classified information as defined in section 552b(c)(1), title 5 of the U.S. Code and therefore will be closed.

Dated: February 25, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2010–4402 Filed 3–2–10; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents

**AGENCY:** Office of the Assistant Secretary of Defense (Homeland Defense and America's Security Affairs), DoD.

**ACTION:** Notice of meeting.

**SUMMARY:** Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the Federal advisory committee meeting of the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities after Certain Incidents (hereinafter referred to as the Advisory Panel) will take place on March 17 and 18, 2010. Subject to the availability of space, the meeting is open to the public.

**DATES:** The meeting will be held on Wednesday, March 17, 2010, from 8:30 a.m. to 5 p.m. and on Thursday, March 18, 2010, from 8:30 a.m. to 5 p.m. Eastern Daylight Time.

**ADDRESSES:** The meeting will be held at the RAND Corporation, 1200 South Hayes Street, Arlington, Virginia 22202, 4th floor conference facilities.

**FOR FURTHER INFORMATION CONTACT:** *Advisory Panel's Designated Federal Officer:* Catherine Polmateer, telephone: 703–697–6370, OASD(HD&ASA), Resources Integration, 2600 Defense Pentagon, Washington, DC 20301–2600, *e-mail: Catherine.Polmateer@osd.mil.*

*Advisory Panel's Points of Contact at the Federally Funded Research and Development Center (FFRDC):* Andrew Morral, Principal Investigator, telephone 703–413–1100, x5119, *e-mail: morral@rand.org;* The RAND Corporation, 1200 South Hayes Street, Arlington, Virginia 22202.

**SUPPLEMENTARY INFORMATION:**

#### 15-Calendar Day Notification

Due to internal DoD difficulties, beyond the control of the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents or its Designated Federal Officer, the Government was unable to process the **Federal Register** notice for the March 17–18, 2010, meeting of the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents as required by 41 CFR 102–3.150(a). Accordingly, the Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

#### Purpose of the Meeting

The panel will discuss the key issues in its congressional mandate with senior members of the Department of Defense. It will receive briefings from one or more of the panel's subpanels. It will discuss preliminary findings, conclusions, and recommendations, based on its activities to date. It will decide on topics for research and other activities for future meetings, based on its congressionally-mandated tasks.

#### Agenda

- Opening Remarks by the Chairman
- Subpanel briefings
- Discussions with senior officials of the Department of Defense, including the Office of the Secretary of Defense, the Joint Staff, and the National Guard Bureau
- Discussion of preliminary findings, conclusions, and recommendations
- Discussion of future meetings
- Administration

#### Public's Accessibility to the Meeting

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis. (**Note:** Members of the public who choose to attend the meeting should allow approximately 15 minutes to clear building security on the ground floor (Hayes Street entrance) and RAND security (4th floor reception area)).

#### Written Statements

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972 (FACA), the public or interested organizations may submit written statements to the Advisory Panel about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the Advisory Panel.

All written statements shall be submitted to the Designated Federal Officer for the Advisory Panel, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Designated Federal Officer is provided in this notice or can be obtained from the GSA's FACA Database: *https://www.fido.gov/facadatabase/public.asp.*

Written statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer (see **FOR FURTHER INFORMATION CONTACT**) no later than 11 a.m., Eastern Standard Time (EST), Wednesday, March 10, 2010. Written statements received after this date may not be provided to or considered by the Advisory Panel until its next meeting.

The Designated Federal Officer will review all timely submissions with the Advisory Panel Chairperson and ensure they are provided to all members of the Advisory Panel before the meeting that is the subject of this notice.

All written statements received by the Designated Federal Officer will be retained as part of the committee's official records. In addition, statements timely submitted in response to a stated agenda of a planned meeting and provided to committee members in preparation for a meeting, will be made available to the public during the

meeting and posted to the GSA's FACA Database.

**Oral Statements**

In addition to written statements, and time permitting, the Chairperson of the Advisory Panel may allow Oral Statements by the public to the Members of the Advisory Panel. Any person seeking to address orally the Advisory Panel must submit a request to the Designated Federal Officer no later than 11 a.m., EST, Wednesday, March 10, 2010. Oral statements will be limited to five minutes (or less depending on time available). The Designated Federal Officer will provide timekeeping for oral statements and will notify the Chairperson when a presenter has reached allotted time.

Dated: February 25, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2010–4390 Filed 3–2–10; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before May 3, 2010.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues:

(1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 25, 2010.

**James Hyler,**

*Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Office of Planning, Evaluation, and Policy Development**

*Type of Review:* Revision.

*Title:* Annual Mandatory Collection of Elementary and Secondary Education Data through EDFacts.

*Frequency:* Annually.

*Affected Public:* State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 7,059.

*Burden Hours:* 1,113,034.

*Abstract:* EDFacts is in the implementation phase of a multiple year effort to consolidate the collection of education information about States, Districts, and Schools in a way that improves data quality and reduces paperwork burden for all of the national education partners. To minimize the burden on the data providers, EDEN seeks the transfer of the proposed data as soon as it has been processed for State, District, and School use. These data will then be stored in EDFacts and accessed by Federal education program managers and analysts as needed to make program management decisions. This process will eliminate redundant data collections while providing for the timeliness of data submission and use. Additional Information: The Department of Education (ED) is specifically requesting the data providers in each the State Education Agency (SEA) to review Attachment D which ask specific questions about the proposed data elements. These questions will help ED to determine which of these data can be provided for the upcoming school year and which data would be available in later years and which data, if any, is never expected to be available from the SEA. If information for a data group is not available, please provide information beyond the fact that it is not available. Are there specific impediments to providing this data that you can describe? Is the definition for the data group unclear or ambiguous? Do the requested permitted values align with the way your state collects the data? This is very important information because the collection of these data is mandatory. ED also seeks to know if the SEA data definitions are consistent and compatible with the EDEN definitions and accurately reflect the way data is stored and used for education by the States, Districts, and Schools. The answers to these questions by the data providers will influence the timing and content of the final EDEN proposal for the collection of this elementary and secondary data.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4232. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–4359 Filed 3–2–10; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

### Agency Information Collection Extension

**AGENCY:** U.S. Department of Energy.

**ACTION:** Submission for Office of Management and Budget (OMB) review; comment request.

**SUMMARY:** The Department of Energy (DOE) has submitted an information collection request to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three year extension of its End-Use Certificate (EUC), OMB Control Number 1910–5121. This information collection request covers information necessary to determine the acceptability of the individual(s) acquiring High Risk Personal Property.

**DATES:** Comments regarding this collection must be received on or before April 2, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202–395–4650.

**ADDRESSES:** Written comments should be sent to:

DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503;

and to:

Helene Mattiello, Industrial Property Management Specialist, MA–632/ L'Enfant Plaza Building, U. S. Department of Energy, Washington, DC 20585–1615, *helene.mattiello@hq.doe.gov.*

Alternatively, the information collection instrument and related instructions can be viewed at the Department of Energy homepage. DOE Directives, Regulations, and Standards Portal, *http://www.directives.doe.gov/forms/0000.html* (last visited Feb. 18, 2009) (follow the link for "DOE F 580.1").

**FOR FURTHER INFORMATION CONTACT:** Helene Mattiello, at the above address, or by telephone at (202) 287–1593, or by fax at (202) 287–1656.

**SUPPLEMENTARY INFORMATION:** *This information collection request contains:* (1) OMB No. 1910–5121; (2) *Information Collection Request Title:* End-Use Certificate. (3) *Type of Request:* Renewal. (4) *Purpose:* The EUC is intended to determine the acceptability of the individual(s) acquiring High Risk Personal Property; inform buyers of the laws and regulations governing the use, disposition, export and re-export of High Risk Personal Property; and ensure that the property is used as stipulated in the EUC. Respondents to this information collection request are typically the general public to include private citizens. (5) *Annual Estimated Number of Respondents:* 1000 (6) Annual *Estimated Number of Total Responses:* 1000 (7) *Annual Estimated Total Burden Hours:* 334 (approximately 20 minutes per respondent. (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* 0.

**Statutory Authority:** Department of Energy Personal Property Management Guide, DOE G 580.1–1.

Issued in Washington, DC, on *February 24, 2010.*

**Edward R. Simpson,**

*Director, Office of Procurement and Assistance Management, Department of Energy.*

[FR Doc. 2010–4371 Filed 3–2–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Idaho National Laboratory

**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), Idaho National Laboratory. 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:** Tuesday, March 16, 2010, 8 a.m.–5 p.m.

Opportunities for public participation will be from 1:30 p.m. to 1:45 p.m. and from 3:30 p.m. to 3:45 p.m.

These times are subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

**ADDRESSES:** Hilton Garden Inn, 700 Lindsay Boulevard, Idaho Falls, Idaho 83402.

**FOR FURTHER INFORMATION CONTACT:** Robert L. Pence, Federal Coordinator, Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS–1203, Idaho Falls, ID 83415. Phone (208) 526–6518; Fax (208) 526–8789 or e-mail: *pencerl@id.doe.gov* or visit the Board's Internet home page at: *http://www.inlemcab.org.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM in the areas of environmental restoration, waste management, and related activities.

*Tentative Topics (agenda topics may change up to the day of the meeting; please contact Robert L. Pence for the most current agenda):*

- Progress to Cleanup.
- InSitu Grouting—Work Plan Follow-up Discussion.
- Experimental Breeder Reactor-II Report—Engineering Evaluation/Cost Estimate Process.
- Budget Discussion—Fiscal Years 2011 and 2012.
- Update on Calcine Record of Decision.
- Update on Fast Flux Test Facility Fuel.

*Public Participation:* The EM SSAB, Idaho National Laboratory, 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 Robert L. Pence 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 presentations pertaining to agenda items should contact Robert L. Pence at the address or telephone number listed above. The request 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. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

*Minutes:* Minutes will be available by writing or calling Robert L. Pence, Federal Coordinator, at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.inlemcab.org/meetings.html.*

Issued at Washington, DC, on February 26, 2010.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. 2010–4319 Filed 3–2–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 2576–139]**

### FirstLight Hydro Generating Company; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

February 24, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Revised Shoreline Management Plan.

b. *Project No:* 2576–139.

c. *Date Filed:* June 30, 2009 and supplemented on December 4, 2009.

d. *Applicant:* FirstLight Power Hydro Generating Company.

e. *Name of Project:* Housatonic River Hydroelectric Project.

f. *Location:* The project is located on the Housatonic River, in Fairfield, Litchfield and New Haven Counties, Connecticut. The project does not occupy any federal land.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Robert Gates, Station Manager-Connecticut Hydro, 143 West St., Ext. Suite E, New Milford, CT 06776, (860) 350–3617.

i. *FERC Contact:* Any questions on this notice should be addressed to Isis Johnson at (202) 502–6346, or by *e-mail: Isis.Johnson@ferc.gov.*

j. *Deadline for filing comments and/or motions:* March 24, 2010.

This notice is intended to grant members of the public the opportunity to provide comments on the revised shoreline management plan (plan or SMP), and the additional information filed by the licensee on December 4, 2009. The SMP filed pursuant to this proceeding has been modified from the original plan, filed on July 27, 2006, and supplemented on January 18, and June 27, 2008. Any entity that previously intervened in the proceeding for the original plan (p-2576–083), is a party to this proceeding (p-2576–139) and is not required to submit additional motions. However, given that the revised plan has changed significantly from the original, to the extent that interveners need to modify or provide additional comments, such comments should be filed with the Commission per the instructions below. Further, all unsolicited comments that have been filed with the Commission in response to this proceeding are applicable and will be considered; as such, re-filing of said comments is not necessary.

Comments, Motions to Intervene, and Protests may be filed electronically via the Internet. 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. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings, please go to the Commission's Web site located at *http://www.ferc.gov.filing-comments.asp.*

Please include the project number (P–2576–139) on any comments, protests, 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 Proposal:* The proposed SMP is intended to provide for the maintenance of safe public access to lake shorelines and riverfront lands and waters, as well as for the stewardship and development of shoreline/riverfront areas. The SMP contains provisions for permitting non-project uses, establishing vegetated buffers, and conserving land owned by the licensee. The SMP also addresses, among other matters, management of derelict docks, moorings, shoreline stabilization methods, and enforcement.

l. 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 1–866–208–3676 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. Filing and Service of Responsive Documents: 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.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–4353 Filed 3–2–10; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL10–43–000]**

### Florida Power & Light Company; Notice of Filing

February 24, 2010.

Take notice that on February 17, 2010, Florida Power & Light Company (FPL) filed a petition for declaratory order pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.207 (2009), requesting that the Commission clarify the scope of its jurisdiction over

interconnection agreements between a public utility and a qualifying facility.

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. On or before the comment date, it is not necessary to 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 March 19, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–4354 Filed 3–2–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. AC10–50–000; RM08–5–000]**

### National Grid USA; Notice of Filing

February 24, 2010.

Take notice that on February 10, 2010, National Grid USA submitted a request for waiver of certain FERC Form No. 1 reporting requirements under Part 141 of regulations, 18 CFR 141, as established by the Federal Energy Regulatory Commission's Order No. 715.[1]

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 or 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. On or before the comment date, it is not necessary to 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:* March 10, 2010.

**Kimberly Bose,**

*Secretary.*

[FR Doc. 2010–4356 Filed 3–2–10; 8:45 am]

**BILLING CODE 6717–01–P**

[1] *Revisions to Forms, Statements and Reporting Requirements for Electric Utilities and Licensees, Order No. 715,* 124 FERC ¶ 61,273 (2008) (Order No. 715).

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 11834–057]**

### FPL Energy Maine Hydro, LLC; Notice of Intent To Prepare an Environmental Document and Soliciting Comments

February 24, 2010.

Take notice that the following material addressing required dam safety measures has been filed with the Commission and is available for public inspection:

a. *Filing:* Maine Waterway Development and Conservation Act Permit and Water Quality Certification Application for replacement of the spillway at the Upper Dam Development, which is being required under Part 12 of the Commission's regulations.

b. *Project No:* 11834–057.

c. *Date Filed:* January 28, 2010.

d. *Licensee:* FPL Energy Maine Hydro, LLC.

e. *Name of Project:* Upper and Middle Dam Storage Project.

f. *Location:* The Upper and Middle Dam Storage Project is located on the Rapid River in Oxford and Franklin Counties, Maine.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Licensee Contact:* Bill Scott, NextEra Energy Maine Operating Services, LLC, 160 Capitol Street, Suite 8, Augusta, Maine 04330, (207) 795–1342 ext. 246.

i. FERC Contact: Rebecca Martin, (202) 502–6012, and e-mail: *Rebecca.martin@ferc.gov.*

j. *Deadline for filing comments:* March 24, 2010.

Comments may be filed electronically via the Internet, 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. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: The Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. For more information on how to submit these types of filings, please go to the Commission's Web site located at *http://www.ferc.gov.filing-comments.asp.*

Please include the project number (P–11834–057) on any comments.

k. *Description of material:* FPL Energy Maine Hydro, LLC has filed a copy of its application for a Maine Waterway Development and Conservation Act Permit filed with the Maine Land Use Regulation Commission for its proposed replacement of the spillway at the Upper Dam Development, which is part of the Upper and Middle Dam Storage Project (FERC No. 11834). Replacement of the Upper Dam Development spillway is being required under Part 12 of the Commission's regulations for safety of water power projects and project works.

The proposal involves removal of the existing gated spillway structure and gatehouse, construction of a new

spillway designed for the capacity and elevation required for a probable maximum flood, and modification of the existing earthen embankments for improved slope stability and safety. The proposed remedial measures would not alter the basic footprint of the existing dam or involve substantial modification of the licensed operation of the project. Work is proposed to begin on July 1, 2010, and be completed by December 2011.

The Commission intends to prepare an environmental document, under the National Environmental Policy Act (NEPA), for the proposed Upper Dam spillway replacement. The NEPA document will analyze the environmental impacts that would be caused by the proposed replacement activities, and identify measures that would help mitigate adverse effects.

l. *Locations of the Filing:* A copy of the filing 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 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659.

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:* Anyone may submit comments on the material described in this notice. In completing its environmental review, the Commission will consider all comments filed. Any comments must be received on or before the deadline for filing comments specified above.

o. Any filing made with the Commission in response to this notice must bear in all capital letters the title "COMMENTS" and the Project Number: P–11834–057.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the material described in this notice. A copy of the filing may be obtained by agencies directly from the licensee. 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 licensee's representatives.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–4355 Filed 3–2–10; 8:45 am]

**BILLING CODE 6717–01–P**

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## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8812–7]**

## Agency Information Collection Activities; Proposed Renewal of Several Currently Approved Collections; Comment Request

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

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit requests to renew several currently approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). The ICRs are specifically identified in this document by their corresponding titles, EPA ICR numbers, OMB Control numbers, and related docket identification (ID) numbers. Before submitting these ICRs to OMB for review and approval, EPA is soliciting comments on specific aspects of the information collection activities.

**DATES:** Comments must be received on or before May 3, 2010.

**ADDRESSES:** Submit your comments, identified by the docket ID number for the corresponding ICR as identified in this document, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to the docket ID number for the corresponding ICR as identified in this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available in *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Lily Negash, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–8515; fax number:

(703) 305–5884; e-mail address: *negash.lily@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. What Information is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of PRA, EPA specifically solicits comments and information to enable it 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 estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
3. Enhance the quality, utility, and clarity of the information to be collected.
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

## II. What Should I Consider when I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the collection activity.
7. Make sure to submit your comments by the deadline identified under **DATES**.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

## III. What Do I Need to Know About PRA?

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information subject to PRA approval unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the preamble of the final rule, are further displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instruments or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in a list at 40 CFR 9.1.

Under PRA, *burden* means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

## IV. Which ICRs Are Being Renewed?

EPA is planning to submit a number of currently approved ICRs to OMB for review and approval under PRA. In addition to specifically identifying the ICRs by title and corresponding ICR, OMB and docket ID numbers, this unit provides a brief summary of the information collection activity and the Agency's estimated burden. The Supporting Statement for each ICR, a copy of which is available in the corresponding docket, provides a more detailed explanation.

### *A. Docket ID Number EPA–HQ–OPP–2009–0883*

*Title*: Application for Experimental Use Permit (EUP) to Ship and Use a Pesticide for Experimental Purposes Only.

*ICR numbers*: EPA ICR No. 0276.14, OMB Control No. 2070–0040.

*ICR status*: The approval for this ICR is scheduled to expire on November 30, 2010.

*Affected entities*: Entities potentially affected by this ICR include individuals or entities engaged in pesticide, fertilizer, and other agricultural chemical manufacturing (North American Industrial Classification System (NAICS) code 325300).

*Abstract*: This information collection provides EPA with the data necessary to determine whether to issue an EUP under section 5 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. FIFRA requires that before a pesticide product may be distributed or sold in the United States it must be registered by EPA. However, section 5 authorizes EPA to issue EUPs which allow pesticide companies to temporarily ship pesticide products for experimental use for the purpose of gathering data necessary to support the application for registration of a pesticide product. In general, EUPs are issued either for a pesticide not registered with the Agency or for a registered pesticide for a use not registered with the Agency.

*Burden statement*: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 10.1 hours per response. The ICR, a copy of which is available in the docket, provides a detailed explanation of this estimate, which is only briefly summarized here:

*Estimated total number of potential respondents*: 21.

*Frequency of response*: As needed.

*Estimated total average number of responses for each respondent*: 1.

*Estimated total annual burden hours*: 212.1 hours.

*Estimated total annual costs*: $12,917. This ICR does not involve any capital investment or maintenance and operational costs.

*Changes in the estimates from the last approval*: The renewal of this ICR will result in an overall decrease of 545.4 hours in the total estimated respondent burden identified in the currently approved ICR. This decrease reflects the fewer number of EUPs being submitted to the Agency. This change is an adjustment.

### *B. Docket ID Number EPA–HQ–OPP–2009–0884*

*Title*: Recordkeeping Requirements for Certified Applicators Using 1080 Collars for Livestock Protection.

*ICR numbers*: EPA ICR No. 1249.09, OMB Control No. 2070–0074.

*ICR status*: The approval for this ICR is scheduled to expire on November 30, 2010.

*Affected entities*: Entities potentially affected by this action are businesses and other institutions participating in pesticide, fertilizer, and other agricultural chemical manufacturing

(NAICS code 325300), e.g., pesticide registrants whose products include 1080 collars, government establishments primarily engaged in the regulation of agricultural marketing and commodities (NAICS code 926140), and states implementing a 1080 collar monitoring program (NAICS code 99920).

*Abstract*: This ICR affects four states (Montana, New Mexico, South Dakota, and Wyoming) that monitor the program plus one additional registrant. Applicators who are certified to apply livestock protection collars are required to keep records of: a) The number of collars attached on livestock; b) pasture(s) where collared livestock were placed; c) the dates of each attachment, inspection, and removal; d) the number and locations of livestock found with ruptured or punctured collars and the apparent cause of the damage; e) the number, dates, and approximate location of all collars lost; and f) the species, locations, and dates of all suspected poisonings of humans, domestic animals or non-target wild animals resulting from collar use.

Applicators maintain records, and the registrants/lead agencies do monitoring studies and submit the reports. These records are monitored by either the: a) State lead agencies, b) EPA regional offices, or c) the registrants. EPA receives annual monitoring reports from registrants or state lead agencies.

*Burden statement*: The annual public reporting and recordkeeping burden for this collection of information is estimated as follows: Average of 9 hours per response for registrant respondents, 40 hours per response for certified applicator respondents, and 77 hours per response for state agency respondents. The ICR, a copy of which is available in the docket, provides a detailed explanation of this estimate, which is only briefly summarized here:

*Estimated total number of potential respondents*: 48.

*Frequency of response*: Annual.

*Estimated total average number of responses for each respondent*: 1.

*Estimated total annual burden hours*: 1,944 hours.

*Estimated total annual costs*: $77,044.

*Changes in the estimates from the last approval*: The renewal of this ICR will result in an overall decrease of 9 hours in the total estimated respondent burden identified in the currently approved ICR. This change is due to a correction in the calculation of the total annual respondent burden hours.

*C. Docket ID Number EPA–HQ–OPP–2009–0887*

*Title*: Compliance Requirement for Child-Resistant Packaging.

*ICR numbers*: EPA ICR No. 0616.10, OMB Control No. 2070–0052.

*ICR status*: The approval for this ICR is scheduled to expire on November 30, 2010.

*Affected entities*: Entities potentially affected by this ICR include large and small entities engaged in manufacturing pesticide chemicals, wholesale merchandising of pesticide products, or pest management activities. The NAICS codes for respondents under this ICR include: Pesticide and other agricultural chemical manufacturing (NAICS code 325320), other chemical and allied products merchant wholesalers (NAICS code 424690), and exterminating and pest control services (NAICS code 561710).

*Abstract*: This information collection program is designed to provide EPA with assurances that the packaging of pesticide products sold and distributed to the general public in the United States meets standards set forth by the Agency pursuant to FIFRA. Registrants must certify to the Agency that the packaging or device meets these standards. Section 25(c)(3) of FIFRA authorizes EPA to establish standards for packaging of pesticide products and pesticidal devices to protect children and adults from serious illness or injury resulting from accidental ingestion or contact. The law requires that these standards are designed to be consistent with those under the Poison Prevention Packaging Act, administered by the Consumer Product Safety Commission (CPSC). Unless a pesticide product qualifies for an exemption, if the product meets certain criteria regarding toxicity and use, it must be sold and distributed in child-resistant packaging. Compliance regulations are contained in 40 CFR part 157. There are no forms associated with this information collection activity, and submission of confidential information is not required as a part of this information collection.

*Burden statement*: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 4.04 hours per response. The ICR, a copy of which is available in the docket, provides a detailed explanation of this estimate, which is only briefly summarized here:

*Estimated total number of potential respondents*: 1,733.

*Frequency of response*: On occasion.

*Estimated total average number of responses for each respondent*: One per certification of compliance.

*Estimated total annual burden hours*: 4,524 hours.

*Estimated total annual costs*: $240,660.

*Changes in the estimates from the last approval*: The renewal of this ICR will result in an overall increase of 1,051 hours in the total estimated respondent burden identified in the currently approved ICR. This increase reflects EPA's expectation of an increase in the number of responses driven by an influx of child-resistant packaging (CRP) submissions associated with the full implementation of the registration review program. In addition, the exclusive use period for certain pesticide chemicals is expiring. Registrants with products using these chemicals will now be required to provide their own CRP test data, which will have to be reviewed for human safety/health risk concerns. The total burden hours per response for compliance with the CRP requirements decreased from 4.94 hours to 4.04 hours. The average burden estimate for each response type has not changed. However, the distribution of responses has changed, resulting in a net shift from more burdensome to less burdensome type responses. This change is an adjustment.

*D. Docket ID Number EPA–HQ–OPP–2010–0049*

*Title*: Pesticide Product Registration Maintenance Fee.

*ICR numbers*: EPA ICR No. 1214.08, OMB Control No. 2070–0100.

*ICR status*: The approval for this ICR is scheduled to expire on November 30, 2010.

*Affected entities*: Entities potentially affected by this ICR include pesticide companies and state governments. The NAICS codes for respondents under this ICR include: Pesticide and other agricultural chemical manufacturing (NAICS code 325320) and regulation of agricultural marketing and commodities (NAICS code 9641).

*Abstract*: This information collection provides a practical means of communication between the registrants and EPA's Office of Pesticide Programs (OPP) to collect registration maintenance fees from pesticide registrants as required by law. Respondents complete and submit EPA Form 8570–30 indicating the respondent's liability for the registration maintenance fee.

The first registration maintenance fee filing form was sent to approximately 5,000 pesticide registrant firms in 1989. Since then, the number of respondents has slowly declined from approximately 2,800 firms in 1990 to 2,500 in 1991, 2,350 in 1992, 2,250 in 1993, and 2,200 in 1994. Since 1994, the number of registrants to which these forms are sent has declined steadily to a total of 1,720

in January 2009. Each affected firm is required to complete the filing for and submit their fee payment by January 15 of each year.

Annually, the Agency provides registrants a list of the registered products currently registered with the Agency. Registrants are provided the opportunity to review the list, determine its accuracy, and remit payment of the maintenance fee. The list of products has space identified for marking those products to be supported and those products that are to be canceled. The registrants are also instructed to identify any products on the list which they believe to be transferred to another company, and to add to the list any products which the company believes to be registered that are not on the Agency-provided list. The failure to pay the required fee for a product will result in cancellation of that product's registration.

*Burden statement*: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.96 hours per response. The ICR, a copy of which is available in the docket, provides a detailed explanation of this estimate, which is only briefly summarized here:

*Estimated total number of potential respondents*: 1,720.

*Frequency of response*: Annual.

*Estimated total average number of responses for each respondent*: 1.

*Estimated total annual burden hours*: 1,645 hours.

*Estimated total annual costs*: $129,088.

*Changes in the estimates from the last approval*: The renewal of this ICR will result in an overall increase of $3,288 in the total estimated respondent cost identified in the currently approved ICR. This change of increase in cost is merely because of the labor cost increase since the last renewal.

**V. What is the Next Step in the Process for these ICRs?**

EPA will consider the comments received and amend the individual ICRs as appropriate. The final ICR packages will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of these ICRs to OMB and the opportunity for the public to submit additional comments for OMB consideration. If you have any questions about any of these ICRs or the approval process in general, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**List of Subjects**

Environmental protection, Reporting and recordkeeping requirements.

Dated: February 23, 2010.

**Stephen A. Owens,**

*Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.*

[FR Doc. 2010–4321 Filed 3–2–10; 8:45 am]

**BILLING CODE 6560–50–S**

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## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–8988–5]**

## Environmental Impacts Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements Filed 02/23/2010 Through 02/23/2010 Pursuant to 40 CFR 1506.9;

*Notice*

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA has met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the Federal Register. Since February 2008, EPA has been including its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, after March 31, 2010, EPA will discontinue the publication of this notice of availability of EPA comments in the **Federal Register**.

*EIS No. 20100057, Final EIS, NHTSA, 00,* Corporate Average Fuel Economy (CAFE) Standards Passenger Car and Light Trucks Model Years 2012–2016, To Reduce National Energy Consumption by Increasing the Fuel Economy of Passenger Car and Light Trucks sold in the United States, Implementation, Wait Period Ends: 04/01/2010, Contact: Angel Jackson 202–366–0154.

Dated: February 26, 2010.

**Robert W. Hargrove,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2010–4389 Filed 3–2–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2010–0111; FRL–8811–2]**

## Notice of Filing of a Pesticide Petition for Residues of a Aspergillus flavus AF36 on Corn Food/Feed Commodities

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

**ACTION:** Notice.

**SUMMARY:** This notice announces the Agency's receipt of an initial filing of a pesticide petition proposing the modification of regulations for residues of a pesticide chemical in or on various commodities.

**DATES:** Comments must be received on or before April 2, 2010.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) as shown in the body of this document, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to the docket ID number EPA–HQ–OPP–2010–0111 and the pesticide petition number (PP) as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you

provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:**

Shanaz Bacchus, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8097; email address: *bacchus.shanaz@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary.

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date, and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

## II. What Action is the Agency Taking?

EPA is announcing its receipt of a pesticide petition filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the modification of regulations in 40 CFR part 180 for residues of a pesticide chemical in or on various food commodities. EPA has determined that the pesticide petition described in this notice contains the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petition. Additional data may be needed before EPA can make a final determination on this pesticide petition.

In accordance with 40 CFR 180.7(f), a summary of the petition that is the subject of this notice, prepared by the petitioner, is included in the docket EPA has created for this rulemaking. The docket for the petition is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the modification of regulations for residues of a pesticide in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

## III. Amended Tolerance Exemption

*PP 9E7662*. (EPA–HQ–OPP–2010–0101). Arizona Cotton Research and Protection Council, 3721 East Wier Avenue, Phoenix, AZ 85040–2933, proposes to amend an exemption from the requirement of a tolerance in 40 CFR 180.1206 for residues of the antifungal

agent, *Aspergillus flavus* AF36, in or on corn food and feed commodities. The petitioner believes no analytical method is needed because the pesticide occurs naturally and would be present irrespective of treatment, and there are no residues of toxicological concern.

**List of Subjects**

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 18, 2010.

**Keith A. Matthews,**

*Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.*

[FR Doc. 2010–4323 Filed 3–2–10; 8:45 am]

**Billing Code 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2010–0001; FRL–8813–1]**

## Tribal Pesticide Program Council; Notice of Public Meeting

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

**ACTION:** Notice.

**SUMMARY:** The Tribal Pesticide Program Council (TPPC) will hold a 2–day meeting on Wednesday, March 17, 2010 and Thursday, March 18, 2010. This notice announces the location and times for the meeting and sets forth tentative agenda topics.

**DATES:** The meeting will be held on Wednesday, March 17, 2010, from 9 a.m. to 5 p.m., and on Thursday, March 18, 2010, from 9 a.m. to 1 p.m.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

**ADDRESS:** The meeting will be held at the Office of Pesticide Programs (OPP) First Floor Conference Center South S1204–06, 2777 S. Crystal Drive, Arlington, VA 22202.

**FOR FURTHER INFORMATION CONTACT:** Mary Powell, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7384; fax number: (703) 308–1850; e-mail address: *powell.mary@epa.gov*. For information about the TPPC, please see *http://www.epa.gov/oppfead1/tribes/tppc.htm*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be interested in this meeting if you are interested in the TPPC's information-exchange relationship with EPA regarding important issues in Indian country related to human and environmental exposure to pesticides and insight into EPA's decision-making process. All parties are invited and encouraged to participate as appropriate. Potentially affected entities may include, but are not limited to, those who use, or conduct testing of, chemical substances under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or the Federal Food, Drug and Cosmetic Act (FFDCA).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Copies of this Document and Other Related Information?*

EPA has established a docket for this action under docket ID number EPA–HQ–OPP–2010–0001. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

### II. Tentative Agenda Topics

1. Worker Protection Standard.
2. Container/Containment rule.
3. Tribal presentations.
4. EPA regional report.
5. Update on Tribal Integrated Pest Management.
6. Bed bugs.
7. Tribal caucus (TPPC only).

### III. How Can I Request to Participate in this Meeting?

You may submit a request to participate in this meeting to the person listed under **FOR FURTHER INFORMATION CONTACT**. Do not submit any information in your request that is considered CBI. Requests to participate in the meeting, identified by docket ID number EPA–HQ–OPP–2010–0001, must be received on or before [*insert date 10 days after date of publication in the* **Federal Register**].

**List of Subjects**

Environmental protection, Pesticides, Tribes.

Dated: February 22, 2010.

**William R. Diamond,**

*Director, Field and External Affairs Division, Office of Pesticide Programs.*

[FR Doc. 2010–4303 Filed 3–2–10; 8:45 a.m.]

**BILLING CODE 6560–50–S**

## EXPORT-IMPORT BANK OF THE U.S.

**[Public Notice 145]**

## Agency Information Collection Activities: Final Collection; Comment Request

*Correction*

In notice document 2010–3647 appearing on page 8353 in the issue of February 24, 2010, make the following correction:

In the first column, the paragraph that begins with "**DATES:**" should read: "**DATES:** Comments should be received on or before April 26, 2010 to be assured of consideration."

[FR Doc. C1–2010–3647 Filed 3–2–10; 8:45 am]

**BILLING CODE 1505–01–D**

## EXPORT-IMPORT BANK OF THE U.S.

**[Public Notice 139]**

## Agency Information Collection Activities: Final Collection; Comment Request

*Correction*

In notice document 2010–3646 appearing on page 8352 in the issue of February 24, 2010, make the following correction:

In the third column, the paragraph that begins with "**DATES:**" should read: "**DATES:** Comments should be received on or before April 26, 2010 to be assured of consideration."

[FR Doc. C1–2010–3646 Filed 3–2–10; 8:45 am]

**BILLING CODE 1505–01–D**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested

02/24/2010.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology and (e) ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number.

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**DATES:** Persons wishing to comment on this information collection should submit comments by May 3, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax on (202) 395–5167, or via e–mail to Nicholas_A._Fraser@omb.eop.gov and to Cathy Williams, Federal Communications Commission (FCC), via e–mail to Cathy.Williams@fcc.gov and PRA@fcc.gov.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection send an e–mail to PRA@fcc.gov or contact Cathy Williams on (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

OMB Control Number: 3060–1103.

Title: Section 76.41, Franchise Application Process.

Type of Review: Extension of a currently approved collection.

Form Number: N/A.

Respondents: Business or other for profit entities; State, local or tribal government.

Number of Respondents and Responses: 6,006 respondents; 24,000 responses.

Estimated Hours per Response: 0.5 to 4 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 54,000 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 USC 151, 152, 154(i), 157nt, 201, 531, 541 and 542.

Confidentiality: No need for confidentiality required with this collection of information.

Needs and Uses: The Commission adopted on December 20, 2006 a Report and Order In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("R&O"), FCC 06–180, MB Docket 05–311. This R&O provides rules and guidance to implement Section 621 of the Communications Act of 1934, as amended. Section 621 of the Communications Act prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. The Commission has found that the current franchising process constitutes an unreasonable barrier to entry for competitive entrants that impede enhanced cable competition and accelerated broadband deployment. The information collection requirements adopted as a result of FCC 06–180 are as follows:

47 CFR 76.41(b) requires a competitive franchise applicant to include the following information in writing in its franchise application, in addition to any information required by applicable state and local laws: (1) the applicant's name; (2) the names of the applicant's officers and directors; (3) the business address of the applicant; (4) the name and contact information of a designated contact for the applicant; (5) a description of the geographic area that the applicant proposes to serve; (6) the PEG channel capacity and capital support proposed by the applicant; (7) the term of the agreement proposed by the applicant; (8) whether the applicant holds an existing authorization to access the public rights–of–way in the subject franchise service area; (9) the amount of the franchise fee the applicant offers to pay; and (10) any additional information required by applicable state or local laws.

47 CFR 76.41 (d) states when a competitive franchise applicant files a franchise application with a franchising authority and the applicant has existing authority to access public rights–of–way in the geographic area that the applicant proposes to serve, the franchising authority grant or deny the application within 90 days of the date the application is received by the franchising authority. If a competitive franchise applicant does not have existing authority to access public rights–of–way in the geographic area that the applicant proposes to serve, the franchising authority must perform grant or deny the application within 180 days of the date the application is received by the franchising authority. A franchising authority and a competitive franchise applicant may agree in writing to extend the 90–day or 180–day deadline, whichever is applicable.

Federal Communications Commission.

**Alethea Lewis,**

*Federal Register Liaison,*

*Office of the Secretary,*

*Office of Managing Director.*

[FR Doc. 2010–4369 Filed 3–2–10 8:45 am]

BILLING CODE 6712–01–S

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection Being Reviewed by the Federal Communicatons Commission, Comments Requested

February 25, 2010.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction

Act of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

**DATES:** Persons wishing to comments on this information collection should submit comments on or before May 3, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to Judith B. Herman, Federal Communications Commission (FCC). To submit your PRA comments by e–mail send them to: PRA@fcc.gov.

**FOR FURTHER INFORMATION CONTACT:** Judith B. Herman, OMD, 202–418–0214. For additional information about the information collection(s) send an e–mail to PRA@fcc.gov or contact Judith B. Herman, 202–418–0214.

**SUPPLEMENTARY INFORMATION:**

OMB Control No: 3060–1030.

Title: Service Rules for Advanced Wireless Services (AWS) in the 1.7 GHz and 2.1 GHz Bands.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit, not–for–profit institutions, and state, local or tribal government.

Number of Respondents: 979 respondents; 1,630 responses.

Estimated Time Per Response: .25 – 5 hours.

Frequency of Response: Semi–annual and on occasion reporting requirements, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. sections 151, 154(i), 301, 302, 303(f), 303(g), 303(r), 307, 308, 309, 310, 316 and the Commercial Spectrum Enhancement Act (CSEA) of 2004, Pub. L. No. 108–494.

Total Annual Burden: 33,480 hours.

Total Annual Cost Burden: $581,800.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality except as follows: The clearinghouses have committed, pursuant to the FCC's directive, to implement safeguards to maintain the confidentiality of information where necessary to protect respondents' legitimate commercial interests. Additionally, the Ninth Report and Order, 71 FR 29818 (May 24, 2006) protects the specific location of the Broadband Radio Service (BRS) licensees' end–user/subscriber equipment, customer names, addresses and contact for purpose of relocation, which could raise competitive concerns. The Commission's rules permit filing information with the Commission to request confidential treatment of their information under 47 CFR 0.459 of the Commission's rules.

Need and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission has not changed the reporting, recordkeeping and/or third party disclosure requirements. The Commission is reporting a 4,333 hour increase in burden hours and a $2,139,400 decrease in annual costs. The change in burden hours and costs are due to a review of the Commission's initial burden estimates.

The public burden requirements will be used by incumbent licensees and new entrants to negotiate relocation agreements and to coordinate operations to avoid interference. The information will also be used by the clearinghouses to maintain a national database, determine reimbursement obligations of entrants pursuant to the Commission's rules and notify such entrants of their reimbursement obligations. Also, the information will be used to facilitate dispute resolution and for FCC oversight of the clearinghouses and the cost–sharing plan. Additionally, the requirements regarding foreign ownership, substantial service compliance, and interference coordination has been used in the past and will continue to be used to minimize interference, verify that the applicants are legally and technically qualified to hold licenses, and to determine compliance with Commission rules.

Federal Communications Commission.

**Alethea Lewis,**

*Federal Register Liaison,*

*Office of the Secretary,*

*Office of Managing Director.*

[FR Doc. 2010–4370 Filed 3–02–10 8:45 am]

**BILLING CODE 6712–01–S**

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## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

02/24/2010.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology and (e) ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the

Paperwork Reduction Act (PRA) that does not display a valid control number.

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**DATES:** Persons wishing to comment on this information collection should submit comments by May 3, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via e–mail to Nicholas_A._Fraser@omb.eop.gov and to Cathy Williams, Federal Communications Commission (FCC), via e–mail to Cathy.Williams@fcc.gov and PRA@fcc.gov.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection send an e–mail to PRA@fcc.gov or contact Cathy Williams on (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

OMB Control Number: 3060–0560.

Title: Section 76.911, Petition for Reconsideration of Certification.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit entities, State, local or Tribal Government.

Number of Respondents and Responses: 25 respondents; 30 responses.

Estimated Hours per Response: 2 – 10 hours

Total Annual Burden: 220 hours.

Total Annual Costs: None.

Privacy Impact Assessment: No impact(s).

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 4(i) and 623 of the Communications Act of 1934, as amended.

Confidentiality: No need for confidentiality required with this collection of information.

Needs and Uses: 47 CFR 76.911(a) states a cable operator, or other interested party, may challenge a franchising authority's certification by filing a petition for reconsideration. The petition may allege either of the following: (1) The cable operator is not subject to rate regulation because effective competition exists as defined in 47 CFR 76.905; (2) The franchising authority does not meet the certification standards set forth in 47 U.S.C. 543(a)(3).

47 CFR 76.911(b)(2) states a petitioner filing pursuant to 47 CFR 76.911(a)(2) may request a stay of rate regulation. A filing pursuant to 47 CFR 76.911(a)(1) will automatically stay rate regulation.

Federal Communications Commission.

**Alethea Lewis,**

*Federal Register Liaison,*

*Office of the Secretary,*

*Office of Managing Director.*

[FR Doc. 2010–4368 Filed 3–2–10; 8:45 am]

**BILLING CODE 6712–01–S**

## FEDERAL ELECTION COMMISSION

### Sunshine Act Notices

**AGENCY:** Federal Election Commission.

**DATE & TIME:** Thursday, March 4, 2010, at 11 a.m.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth Floor).

**STATUS:** This hearing will be open to the public.

**AUDIT HEARING:** AFL–CIO Cope Political Contributions Committee.

**DATE & TIME:** Thursday, March 4, 2010, at 2 p.m.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth Floor).

**STATUS:** This hearing will be open to the public.

**AUDIT HEARING:** The Jefferson Committee.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Darlene Harris, Acting 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,**

*Acting Secretary of the Commission.*

[FR Doc. 2010–4394 Filed 3–2–10; 8:45 am]

**BILLING CODE 6715–01–M**

## FEDERAL HOUSING FINANCE AGENCY

**[No. 2010–N–01]**

### Notice of Annual Adjustment of the Cap on Average Total Assets That Defines Community Financial Institutions

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Notice.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) has adjusted the cap on average total assets that defines a "Community Financial Institution" based on the annual percentage increase in the Consumer Price Index for all urban consumers (CPI–U) as published by the Department of Labor (DOL). These changes took effect on January 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Patricia L. Sweeney, Division of Federal Home Loan Bank Regulation, 202–408–2872, *Pat.Sweeney@fhfa.gov,* Federal Housing Finance Agency, 1625 Eye Street, NW., Washington, DC 20006–4001.

**SUPPLEMENTARY INFORMATION:**

### I. Statutory and Regulatory Background

Section 2(10)(A) of the Federal Home Loan Bank Act (Bank Act) defines a "Community Financial Institution" (CFI) as any Federal Home Loan Bank member the deposits of which are insured by the Federal Deposit Insurance Corporation and that has average total assets below a statutory cap. *See* 12 U.S.C. 1422(10)(A); 12 CFR 1263.1 (defining the term *Community financial institution or CFI).* In 2008, section 1211(a) of the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654 (2008), amended the definition of CFI to increase the average total assets cap for CFIs to $1 billion. Section 2(10)(B) requires the FHFA Director annually to adjust the statutory cap to reflect inflation over the prior year. *See* 12 U.S.C. 1422(10)(B); 12 CFR 1263.1 (definition the term *CFI asset cap*). In 2009, FHFA adjusted the statutory cap for inflation by applying the CPI–U adjustment resulting in a 1.1 percent increase to the CFI asset cap. Accordingly, as of January 1, 2009, the adjusted CFI asset cap was $1,011,000,000. *See* 74 FR 7438 (Feb. 17, 2009). This Notice announces the annual CPI–U adjustment for the CFI asset cap, effective January 1, 2010.

### II. Calculating the Annual Adjustment

Consistent with the practice of other federal agencies and past agency practice, FHFA bases the annual adjustment to the CFI asset cap on the percentage increase in the CPI–U from November 2008 to November 2009. Specifically, the annual adjustment to the CFI asset cap reflects the percentage by which the CPI–U published for November of the preceding calendar year exceeds the CPI–U published for November of the year before the preceding calendar year.

The DOL encourages use of CPI–U data that have not been seasonally adjusted in "escalation agreements" because seasonal factors are updated

annually and seasonally adjusted data are subject to revision for up to five years following the original release. Unadjusted data are not routinely subject to revision, and previously published unadjusted data are only corrected when significant calculation errors are discovered. Accordingly, FHFA uses data that have not been seasonally adjusted.

For 2010, applying the unadjusted CPI–U, the current CFI asset cap has been increased by 1.8 percent to reflect inflation over the prior year. Thus, as of January 1, 2010, the CFI asset cap is $1,029,000,000, which amount was obtained by rounding to the nearest million, which has been the practice for all prior adjustments.

Dated: February 18, 2010.

**Edward J. DeMarco,**

*Acting Director, Federal Housing Finance Agency.*

[FR Doc. 2010–4337 Filed 3–2–10; 8:45 am]

BILLING CODE P

## 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 March 18, 2010.

**A. Federal Reserve Bank of Cleveland** (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

*1. Jeffrey J. Woda* , Powell, Ohio, and David Cooper, Jr., New Albany, Ohio; acting in concert, to acquire voting shares of Benchmark Bancorp, and thereby indirectly acquire voting shares of Benchmark Bank, both of Gahanna, Ohio.

**B. Federal Reserve Bank of St. Louis** (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

*1. Dana A. Bode*, Mound City, Illinois, individually, and as a member of the Bode Family Control Group, which consists of Dana A. Bode, Carl E. Bode, the Dana A Bode Trust U/A 01/26/07 with Dana A. Bode and Carl E. Bode as trustees; the Allison L. Bode Trust U/A 10/29/02 with Dana A. Bode as trustee; the William M. Bode Trust U/A 10/29/02 with Dana A. Bode as trustee; the Carl E. Bode Trust U/A 1/26/07 with Carl E. Bode and Dana A. Bode, as trustees; and the Bode Retirement Trust U/A 1/01/85 with Carl E. Bode as trustee; acting in concert, to retain control of FSBO Holdings, Inc., and thereby indirectly retian control of First State Bank of Olmstead, both of Olmsted, Illinois.

Board of Governors of the Federal Reserve System, February 26, 2010.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 2010–4361 Filed 3–2–10; 8:45 am]

BILLING CODE 6210–01–S

## 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 part 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

Intlmove LLC, 16980 NE. 19th Avenue, North Miami Beach, FL 33162. Officers: Eric J. Polacek, President/Member, David Etzion, Member, (Qualifying Individuals), Gloria Comins, Member.

Lars Courier, Inc. dba Lars International Freight Forwarders, 16900 North Bay Road, Apt. 1906, Sunny Isles, FL 33160. Officers: Rudy O. Vargas-Milian, Secretary, (Qualifying Individual), Andres Panesso, President/Treasurer/Director.

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Intertrans Express (NY), Inc., 10 East Merrick Road, #203, Valley Stream, NY 11580. Officer: Chun aka Peter T. Tao, President/Secretary, (Qualifying Individual).

International Trade Brokers and Forwarders Co, 2261 NW. 66th Avenue, #221, Miami, FL 33122. Officer: Alvaro Munoz, President, (Qualifying Individual).

T & B Master Logistics, Inc., 4919 Indian Wood Road, Suite 399, Culver City, CA 90230. Officers: Sunnie Kim, Secretary, (Qualifying Individual), Hyeon S. Shin, President/CEO/Treasurer/CFO.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

Dandino, Inc. dba Relo Moving, 626 E. 62nd Street, Los Angeles, CA 90001. Officers: Carlos Gonzales, Vice President, (Qualifying Individual), Daniel Yaniv, President.

Dated: February 26, 2010.

**Rachel E. Dickon,**

*Assistant Secretary.*

[FR Doc. 2010–4419 Filed 3–2–10; 8:45 am]

BILLING CODE 6730–01–P

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

| License No. | Name/address | Date reissued |
|---|---|---|
| 017678N | Four Link International, Inc., 146–27 167th Street, #100, Jamaica, NY 11434 | January 2, 2010. |
| 018613N | Caribbean Cargo & Package Services, Inc., 147–46 176th Street, Jamaica, NY 11434 | December 18, 2009. |
| 021418F | Asbun International Freight, Inc., 8140 NW. 74th Avenue, Suite 13 & 14, Medley, FL 33166 | January 4, 2010. |

| License No. | Name/address | Date reissued |
|---|---|---|
| 021476F ..... | Norma's Cargo Solutions LLC, 5665 SW. 8th Street, Miami, FL 33134 ..... | January 21, 2010. |

**Sandra L. Kusumoto,**

*Director, Bureau of Certification and Licensing.*

[FR Doc. 2010–4418 Filed 3–2–10; 8:45 am]

BILLING CODE 6730–01–P

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License Revocation

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary license has 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:* 021172NF.

*Name:* Panorama Services and Travel Corp.

*Address:* 10510 W. Flagler Street, Miami, FL 33174.

*Date Revoked:* January 6, 2010.

*Reason:* Failed to maintain a valid bond.

**Sandra L. Kusumoto,**

*Director, Bureau of Certification and Licensing.*

[FR Doc. 2010–4417 Filed 3–2–10; 8:45 am]

BILLING CODE 6730–01–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0115]**

### Federal Acquisition Regulation; Information Collection; Notification of Ownership Changes

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning notification of ownership changes.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before May 3, 2010.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden to the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael O. Jackson, Procurement Analyst, Contract Policy Branch, GSA, (202) 208–4949 or e-mail *michaelo.jackson@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Purpose

Allowable costs of assets are limited in the event of change in ownership of a contractor. Contractors are required to provide the Government adequate and timely notice of this event per the FAR clause at 52.215–19, Notification of Ownership Changes.

### B. Annual Reporting Burden

*Respondents:* 100.

*Responses per Respondent:* 1.

*Total Responses:* 100.

*Hours per Response:* 1.25.

*Total Burden Hours:* 125.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0115, Notification of Ownership Changes, in all correspondence.

Dated: February 25, 2010.

**Al Matera,**

*Director, Acquisition Policy Division.*

[FR Doc. 2010–4393 Filed 3–2–10; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0007]**

### Federal Acquisition Regulation; Submission for OMB Review; Summary Subcontract Report

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for comments regarding an extension to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning summary subcontract report. A request for public comments published in the **Federal Register** at 73 FR 21779, on April 22, 2008. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before April 2, 2010.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to GSA Desk Officer, OMB, Room 10236, NEOB, Washington, DC 20503, and a copy to the Regulatory Secretariat (MVCB), General Services Administration, 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control Number 9000–0007, Summary Subcontract Report, in all correspondence.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rhonda Cundiff, Procurement Analyst, Contract Policy Branch, GSA, (202) 501–0044 or via e-mail at *Rhonda.cundiff@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

In accordance with the Small Business Act (15 U.S.C. 631, *et seq.*), contractors receiving a contract for more than $10,000 agree to have small and small disadvantaged business concerns participate in the performance of the contract as far as practicable. Contractors receiving a contract or a modification to a contract expected to exceed $500,000 ($1 million for construction) must submit a subcontracting plan that provides maximum practicable opportunities for small and small disadvantaged business concerns. Specific elements required to be included in the plan are specified in section 8(d) of the Small Business Act and are implemented in FAR Subpart 19.7.

**B. Annual Reporting Burden**

*Number of Respondents:* 103,908.

*Responses per Respondent:* 1.

*Total Responses:* 103,908.

*Average Burden Hours per Response:* 12.4.

*Total Burden Hours:* 1,288,459.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 9000–0007, Summary Subcontract Report, in all correspondence.

Dated: February 25, 2010.

**Al Matera,**

*Director, Acquisition Policy Division.*

[FR Doc. 2010–4396 Filed 3–2–10; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0006]**

## Federal Acquisition Regulation; Submission for OMB Review; Subcontracting Plans/Individual Subcontract Report

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning subcontracting plans/individual subcontract report. A request for public comments published in the **Federal Register** at 73 FR 21779 on April 22, 2008. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to GSA Desk Officer, OMB, Room 10236, NEOB, Washington, DC 20503, and a copy to the Regulatory Secretariat (MVCB), General Services Administration, 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0006, Subcontracting Plans/Individual Subcontract Report in all correspondence.

**DATES:** Submit comments on or before April 2, 2010.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rhonda Cundiff, Procurement Analyst, Contract Policy Branch, GSA (202) 501–0044 or e-mail *Rhonda.cundiff@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

In accordance with Federal Acquisition Regulation 19.702, contractors receiving a contract for more than the simplified acquisition threshold agree to have small business, small disadvantaged business, and women-owned small business, HUBZone small business, veteran-owned small business and service-disabled veteran-owned small business concerns participate in the performance of the contract as far as practicable. Contractors receiving a contract or a modification to a contract expected to exceed $500,000 ($1,000,000 for construction) must submit a subcontracting plan that provides maximum practicable opportunities for the above named concerns. Specific elements required to be included in the plan are specified in section 8(d) of the Small Business Act and implemented in FAR subpart 19.7.

In conjunction with these plans, contractors must submit semiannual reports of their progress on Subcontract Report.

**B. Annual Reporting Burden**

*Respondents:* 103,908.

*Responses per Respondent:* 3.

*Total Responses:* 311,724.

*Hours per Response:* 11.90.

*Total Burden Hours:* 3,709,516.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0006, Subcontracting Plans/Individual Subcontract Report, in all correspondence.

Dated: February 25, 2010.

**Al Matera,**

*Director, Acquisition Policy Division.*

[FR Doc. 2010–4398 Filed 3–2–10; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2009–N–0554]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Manufactured Food Regulatory Program Standards

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by April 2, 2010.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0601. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

### Manufactured Food Regulatory Program Standards—(OMB Control Number 0910–0601)—Extension

#### I. Background

In the **Federal Register** of July 20, 2006 (71 FR 41221), FDA announced the availability of a draft document entitled "Manufactured Food Regulatory Program Standards." These draft program standards are the framework that States should use to design and manage its manufactured food program. The implementation of the program standards will be negotiated as an option for payment under the State food contract. States that are awarded this option will receive up to $25,000 over a period of 5 years to fully implement the program standards. In the first year of implementing the program standards, the State program conducts a baseline self-assessment to determine if they meet the elements of each standard. The State program should use the worksheets and forms contained herein; however it can use alternate forms that are equivalent. The State program maintains the documents and verifying records required for each standard. The information contained in the documents must be current and fit-for-use. If the State program fails to meet all program elements and documentation requirements of a standard, it develops a strategic plan to fully implement the program standards in 5 years. The strategic plan includes the following: (1) The individual element or documentation requirement of the standard that was not met, (2) improvements needed to meet the program element or documentation requirement of the standard, and (3) projected completion dates for each task.

#### II. Electronic Access

Persons with access to the Internet may obtain the draft program standards at *http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM125448.pdf.*

In the **Federal Register** of December 2, 2009 (74 FR 63154), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

| No. of Respondents | Annual Frequency per Response | Total Annual Responses | Hours per Response | Total Hours |
|---|---|---|---|---|
| 44 | 1 | 44 | 40 | 1,760 |

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

TABLE 2.—ESTIMATED FIRST-YEAR BASELINE SELF-ASSESSMENT BURDEN[1]

| No. of Respondents | Five-Year Frequency per Response | Total First-Year Responses | Hours per Response | Total Hours |
|---|---|---|---|---|
| 17 | 1 | 17 | 200 | 3,400 |

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

Dated: February 25, 2010.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2010–4340 Filed 3–2–10; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Notice of Meeting; National Commission on Children and Disasters

**AGENCY:** Administration for Children and Families, Department of Health and Human Services.

**ACTION:** Notice of meeting.

**DATE:** The meeting will be held on Tuesday, March 23, 2010, from 9:30 a.m. to 3:30 p.m.

**ADDRESSES:** The meeting will be held at the Administration for Children and Families, 901 D Street SW., Washington, DC 20024. To attend either in person or via teleconference, please register by 5 p.m. Eastern Time, March 18, 2010. To register, please e-mail *jacqueline.haye@acf.hhs.gov* with "Meeting Registration" in the subject line, or call (202) 205–9560. Registration

must include your name, affiliation, and phone number. If you require a sign language interpreter or other special assistance, please call Jacqueline Haye at (202) 205–9560 or e-mail *jacqueline.haye@acf.hhs.gov* as soon as possible and no later than 5 p.m. Eastern Time, March 9, 2010.

*Agenda:* The Commission will discuss: (1) Reports of Subcommittees; (2) Progress on the implementation of Interim Report recommendations; and (3) strategic planning for the development of the October 2010 Report.

Written comments may be submitted electronically to *roberta.lavin@acf.hhs.gov* with "Public Comment" in the subject line. The Commission recommends that you include your name, mailing address and an e-mail address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment, and it allows the Commission to contact you if further information on the substance of the comment is needed or if your comment cannot be read due to technical difficulties. The Commission's policy is that the Commission will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment placed in the official record. The Commission will provide an opportunity for public comments during the public meeting on March 23, 2010. Those wishing to speak will be limited to three minutes each; speakers are encouraged to submit their remarks in writing in advance to ensure their comment is received in case there is inadequate time for all comments to be heard on March 23, 2010.

*Additional Information:* Contact Roberta Lavin, Office of Human Services Emergency Preparedness and Response, e-mail *roberta.lavin@acf.hhs.gov* or (202) 401–9306.

**SUPPLEMENTARY INFORMATION:** The National Commission on Children and Disasters is an independent Commission that shall conduct a comprehensive study to examine and assess the needs of children as they relate to preparation for, response to, and recovery from all hazards, building upon the evaluations of other entities and avoiding unnecessary duplication by reviewing the findings, conclusions, and recommendations of these entities. The Commission shall then submit a report to the President and the Congress on the Commission's independent and specific findings, conclusions, and recommendations to address the needs of children as they relate to preparation for, response to, and recovery from all hazards, including major disasters and emergencies.

Dated: February 22, 2010.

**Carmen R. Nazario,**

*Assistant Secretary for Children and Families.*

[FR Doc. 2010–4326 Filed 3–2–10; 8:45 am]

**BILLING CODE 4184–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; 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 individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Web-Enabled Cognitive/Neuropsychological Evaluation System (4411)

*Date:* March 30, 2010.

*Time:* 1:30 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call)

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401 (301) 435–1439, *lf33c.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: February 19, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–4039 Filed 3–2–10; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Public Health Research on Craniofacial Malformation, Funding Opportunity Announcement (FOA) DP 10–001, Initial Review

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

*Time and Date:* 11 a.m.–5 p.m., April 22, 2010 (Closed).

*Place:* Teleconference.

*Status:* The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

*Matters to be Discussed:* The meeting will include the initial review, discussion, and evaluation of applications received in response to "Public Health Research on Craniofacial Malformation, FOA DP 10–001."

*Contact Person for More Information:* Michael Dalmat, DrPH, Scientific Review Officer, National Center for Chronic Disease and Health Promotion, Office of the Director, Extramural Research Program Office, 4770 Buford Highway, NE., Mailstop K–92, Atlanta, GA 30341, Telephone: (770) 488–6423, E-mail: *MED1@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: February 24, 2010.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 2010–4433 Filed 3–2–10; 8:45 am]

**BILLING CODE 4163–18–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; 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 Drug Abuse Special Emphasis Panel NIDA–K Conflicts.

*Date:* March 8, 2010.

*Time:* 5 p.m. to 7 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Kristen V. Huntley, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401. 301–435–1433. *huntleyk@mail.nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel NIDA CEBRA R21 Review.

*Date:* March 17, 2010.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852. (Virtual Meeting.)

*Contact Person:* Gerald L. McLaughlin, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Blvd., Bethesda, MD 20892–8401. 301–402–6626. *gm145a@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: February 19, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–4040 Filed 3–2–10; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2010–0010]**

## National Protection and Programs Directorate; Guidance Document Request and Evaluation

**AGENCY:** National Protection and Programs Directorate, DHS.

**ACTION:** 60-Day notice and request for comments; new information collection request: 1670–NEW.

**SUMMARY:** The Office of Emergency Communications (OEC) has submitted the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35).

**DATES:** Comments are encouraged and will be accepted until May 3, 2010. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** Written comments and questions about this Information Collection Request should be forwarded to NPPD/CS&C/OEC, *Attn.*: Jonathan Clinton, *Jonathan.Clinton@dhs.gov* Written comments should reach the contact person listed no later than May 3, 2010. Comments must be identified by "DHS–2010–0010" and may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.*
- *E-mail: Jonathan.Clinton@dhs.gov.* Include the docket number in the subject line of the message.

*Instructions:* All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

**SUPPLEMENTARY INFORMATION:** OEC was formed under Title XVIII of the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*, as amended, and requires OEC to foster the development of interoperable emergency communications capabilities and to facilitate the sharing of information on best practices for achieving, maintaining, and enhancing interoperable emergency communications capabilities. OEC meets these requirements, in part, by developing and disseminating guidance documents on interoperable emergency communications issues. The guidance document request form and the guidance document evaluation form will help OEC stakeholders to, first, request the guidance documents and, second, to assess the effectiveness of the guidance documents. OEC will use the request form to track the request for and dissemination of the guidance documents to stakeholders. OEC will use the evaluation information for continuous improvement to its documents. Guidance document request forms and evaluation forms will primarily be submitted electronically. They may also be submitted in paper form at conferences, meetings, and other events. OMB is particularly interested in comments which:

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, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

### Analysis

*Agency:* Department of Homeland Security, National Protection and Programs Directorate.

*Title:* Guidance Document Request and Evaluation.

*Form:* Not Applicable.

*OMB Number:* 1670–NEW.

*Frequency:* On occasion.

*Affected Public:* State, local, or tribal government.

*Number of Respondents:* 5,000.

*Estimated Time per Respondent:* 20 minutes.

*Total Burden Hours:* 1,667 annual burden hours.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintaining):* $40,708.14.

Signed: February 19, 2010.

**Thomas Chase Garwood, III,**

*Chief Information Officer, National Protection and Programs Directorate, Department of Homeland Security.*

[FR Doc. 2010–4346 Filed 3–2–10; 8:45 am]

**BILLING CODE 9110–9P–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2010–0012]**

## National Protection and Programs Directorate; Critical Infrastructure Partnership Advisory Council (CIPAC)

**AGENCY:** National Protection and Programs Directorate, DHS.

**ACTION:** Update of CIPAC council membership.

**SUMMARY:** The Department of Homeland Security (DHS) announced the

establishment of the Critical Infrastructure Partnership Advisory Council (CIPAC) by notice published in the **Federal Register** (71 FR 14930–14933) dated March 24, 2006. That notice identified the purpose of CIPAC as well as its membership. This notice provides (i) the quarterly CIPAC membership update, (ii) instructions on how the public can obtain the CIPAC membership roster and other information on the Council, and (iii) information on recently completed CIPAC meetings.

**FOR FURTHER INFORMATION CONTACT:** Nancy Wong, Director Partnership Programs and Information Sharing Office, Partnership and Outreach Division, Office of Infrastructure Protection, National Protection and Programs Directorate, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–3999 or e-mail at *CIPAC@dhs.gov.*

*Responsible DHS Official:* Nancy J. Wong, Director Partnership Programs and Information Sharing Office, Partnership and Outreach Division, Office of Infrastructure Protection, National Protection and Programs Directorate, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–3999 or e-mail at *CIPAC@dhs.gov.*

**SUPPLEMENTARY INFORMATION:** *Purpose and Activity:* CIPAC facilitates interaction between government officials and representatives of the community of owners and/or operators for each of the critical infrastructure and key resources (CIKR) sectors defined by Homeland Security Presidential Directive 7 (HSPD–7) and identified in the National Infrastructure Protection Plan (NIPP). The scope of activities covered by CIPAC includes planning; coordinating among government and CIKR owner/operator security partners; implementing security program initiatives; conducting operational activities related to critical infrastructure protection security measures, incident response, recovery, infrastructure resilience, reconstituting CIKR assets and systems for both man-made as well as naturally occurring events; and sharing threat, vulnerability, risk mitigation, and infrastructure continuity information and best practices.

*Organizational Structure:* CIPAC members are organized into 18 CIKR sectors. Within all of the sectors containing private sector CIKR owners/operators, there generally exists a Sector Coordinating Council (SCC) that includes CIKR owners and/or operators or their representative trade associations. Each of the sectors also has a Government Coordinating Council (GCC) whose membership includes a lead Federal agency that is defined as the Sector Specific Agency (SSA), and all relevant Federal, State, local, tribal, and/or territorial government agencies (or their representative bodies) whose mission interests also involve the scope of the CIPAC activities for that particular sector.

*CIPAC Membership:* CIPAC Membership includes (i) CIKR owner and/or operator members of an SCC; CIKR owners and operators own and invest in infrastructure assets or in the systems and processes to secure them. CIKR owners and/or operators are held responsible by the public for CIKR operations and the response and recovery when their CIKR assets and systems are disrupted; (ii) trade association members who are members of a SCC representing the interests of CIKR owners and/or operators; (iii) each sector's Government Coordinating Council (GCC) members; and, (iv) State, local, tribal, and territorial governmental officials comprising the DHS State, Local, Tribal, Territorial GCC.

*CIPAC Membership Roster and Council Information:* The current roster of CIPAC membership is published on the CIPAC Web site (*http://www.dhs.gov/cipac*) and is updated as the CIPAC membership changes. Members of the public may visit the CIPAC Web site at any time to obtain current CIPAC membership as well as the current and historic list of CIPAC meetings and agendas.

Signed: February 22, 2010.

**Nancy Wong,**

*Designated Federal Officer for the CIPAC.*

[FR Doc. 2010–4344 Filed 3–2–10; 8:45 am]

**BILLING CODE 9110–9P–P**

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## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2010–0006]**

## National Protection and Programs Directorate; Technical Assistance Request and Evaluation

**AGENCY:** National Protection and Programs Directorate, DHS.

**ACTION:** 60-Day notice and request for comments; new information collection request: 1670–NEW.

**SUMMARY:** The Department of Homeland Security, National Protection and Programs Directorate/Cybersecurity and Communications/Office of Emergency Communications, has submitted the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (P.L. 104–13, 44 U.S.C. Chapter 35).

**DATES:** Comments are encouraged and will be accepted until May 3, 2010. This process is conducted in accordance with 5 CFR 1320.1

**ADDRESS:** Written comments and questions about this Information Collection Request should be forwarded to NPPD/CS&C/OEC, Attn.: Jonathan Clinton, *Jonathan.Clinton@dhs.gov.*

Written comments should reach the contact person listed no later than May 3, 2010. Comments must be identified by DHS–2010–0006 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.*
- *E-mail: Jonathan.Clinton@dhs.gov.* Include the docket number in the subject line of the message.

*Instructions:* All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

**SUPPLEMENTARY INFORMATION:** The Office of Emergency Communications (OEC), formed under Title XVIII of the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.,* as amended, is authorized to provide technical assistance at no charge to State, regional, local, and tribal government officials. OEC will use the Technical Assistance Request Form to identify the number and type of technical assistance requests from each State and territory. OEC will use the Technical Assistance Evaluation Form to support quality improvement of its technical assistance services. Registration forms will be submitted electronically. Evaluation forms may be submitted electronically or in paper form.

The Office of Management and Budget is particularly interested in comments which:

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, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

**Analysis**

*Agency:* Department of Homeland Security, National Protection and Program Directorate.

*Title:* Technical Assistance Request and Evaluation.

*Form:* Not Applicable.

*OMB Number:* 1670–NEW.

*Frequency:* Annual.

*Affected Public:* State, local, or tribal government.

*Number of Respondents:* 350.

*Estimated Time Per Respondent:* 15 minutes.

*Total Burden Hours:* 175 annual burden hours.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintaining):* $4,273.50.

Signed: February 12, 2010.

**Thomas Chase Garwood, III,**

*Chief Information Officer, National Protection and Programs Directorate, Department of Homeland Security.*

[FR Doc. 2010–4345 Filed 3–2–10; 8:45 am]

BILLING CODE 9110–9P–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5298–N–02]**

## Low-Income Housing Tax Credit (LIHTC) Tenant Data Collection: Responses To Advance Solicitation of Comment on Data Collection Methodology

**AGENCY:** Office of the Assistant Secretary for Policy Development and Research, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice follows the publication, on March 30, 2009, of an advance notice soliciting public comment on methodology for the collection of data on low-income housing tax credit housing, as required by statute. HUD received public comments on that advance notice, and, after considering the public comment, is now issuing the specific information collection requirements. This notice references the publication in the **Federal Register** (75 FR 8392, February 24, 2010), of a notice of proposed information collection. Copies of the actual revised forms may be viewed by contacting the **FOR FURTHER INFORMATION CONTACT** listed in this notice. The proposed information collection is published pursuant to HUD's procedures for obtaining Office of Management and Budget (OMB) approval for information collections, and, as such, there is a provision for public comment. However, please be advised that if you commented on the March 30, 2009 notice, your comments have already been considered and there is no need to resubmit them.

**DATES:** *Effective Date:* April 2, 2010.

**FOR FURTHER INFORMATION CONTACT:** For questions on LIHTC tenant data collection, contact Michael K. Hollar, Senior Economist, Economic Development and Public Finance Division, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8234, Washington, DC 20410–6000, telephone number 202–402–5878, or send an e-mail to *Michael.K.Hollar@hud.gov.* For specific legal questions pertaining to Section 42 of the Internal Revenue Code, contact Branch 5, Office of the Associate Chief Counsel, Passthroughs and Special Industries, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, telephone number 202–622–3040, fax number 202–622–4451. Additional copies of this notice are available through HUD User at 800–245–2691 for a small fee to cover duplication and mailing costs.

*Copies Available Electronically:* This notice and additional information about the LIHTC program are available electronically on the Internet at *http://www.huduser.org/datasets/lihtc.html.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

Section 2835(d) of the Housing and Economic Reform Act of 2008 (Pub. L. 110–289, approved July 30, 2008) (HERA) amends Title I of the U.S. Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act) to add a new section 36 (to be codified as 42 U.S.C. 1437z–8) that requires each State agency administering tax credits under section 42 of the Internal Revenue Code of 1986 (low-income housing tax credits or LIHTC) to furnish HUD, not less than annually, information concerning the race, ethnicity, family composition, age, income, use of rental assistance under section 8(o) of the 1937 Act or other similar assistance, disability status, and monthly rental payments of households residing in each property receiving such credits through such agency. New section 36 of the 1937 Act further provides that to the extent feasible, collect such information through existing reporting processes and in a manner that minimizes burden on property owners.

New section 36 requires HUD to establish standards and definitions for the information to be collected by State agencies and to provide States with technical assistance in establishing systems to compile and submit such information and, in coordination with other Federal agencies administering housing programs, establish procedures to minimize duplicative reporting requirements for properties assisted under multiple housing programs.

On March 30, 2009, HUD published a notice at 74 FR 14149 seeking early input from State agencies and other interested stakeholders on a methodology or approach to meet the statutory requirement to furnish HUD the required information. HUD received approximately 25 comments on this notice by the comment due date of May 29, 2009, from entities including State housing finance and tax credit agencies; tax credit property managers; housing trade associations; research institutes; and nonprofit organizations. The following summary of public comments addresses the significant issues raised and the approach HUD is taking in response. Additionally, interested members of the public may view and respond to the notice of information collection published in the **Federal Register** (75 FR 8392); however, there is no need to resubmit comments HUD already received in connection with the March 30, 2009 notice.

### II. Public Comments

*1. Tenant Data Collection*

*Comment:* A number of commenters supported the general idea of using the National Council of State Housing Agencies (NCSHA) Tenant Income Certification (TIC) for tenant data collection, but also suggested that States retain flexibility to make modifications. It was suggested that a separate page be added to collect racial, ethnic, and disability status data, along with a statement that responding is voluntary. Other commenters opposed the use of these forms on various grounds. Other commenters stated that Housing Finance Agencies (HFAs) should be given the flexibility to design their own forms, but use the NCSHA TIC to obtain uniform definitions of the required data, which can be adapted. Some

commenters stated that data should be collected on the head of household only or only in an aggregated form. Some commenters stated that the disability status questions were overly detailed and intrusive. Some commenters objected to the collection of social security numbers (SSNs), citing privacy concerns and lack of a secure way to store the information. Other commenters stated that data collected should be limited to items specifically identified by Congress. Some commenters, on the other hand, asked for additional data, such as zip codes.

*Response:* Generally, HUD will collect the data required by the statute, along with a minimal amount of additional information needed to assist in collection of the data while minimizing the public burden. Accordingly, HUD declines to add questions about zip codes and additional breakdowns by type of assistance. The statutory direction to seek information about "disability status" seems in its plain meaning to simply be seeking information on whether a family has a member with a disability, and HUD accordingly is modifying that particular request for information. However, collecting data for only the head of household or in the aggregate would not enable HUD to report on family composition, as required by statute.

As to forms, while HUD is submitting forms for approval and use if desired, HUD is not requiring the use of specific forms. The forms are provided as a way to convey the standards and definitions of the required data. Thus, States may incorporate the required data elements into their existing forms, provided that the definitions are consistent with those put forth by HUD.

As to SSNs, HUD is balancing legitimate privacy concerns against the statutory direction to "establish procedures to minimize duplicative reporting requirements for properties assisted under multiple housing programs" and to minimize paperwork burdens on funding recipients. HUD has decided to request partial SSNs. In so doing, HUD is protecting privacy but also obtaining partial SSNs that will be used for data matching with existing HUD databases. Thus, HUD can obtain information, for example about assistance types, without adding to the burden on funding recipients. HUD plans to require reporting on project-based assistance, HOME, HOPE VI, Community Development Block Grant, and Rural Housing Service assistance, and use the partial SSNs to match data from other assistance programs, to obtain the needed data while minimizing the burdens of data collection.

*Comment:* Commenters asked that the collection of information be limited in frequency, such as at initial move-in and annual updates. Racial, ethnic, and disability status data should only be collected at move-in. Some commenters stated that all personal data should only be collected once, as HFAs will learn of updates at recertification or if a tenant's assistance is modified; conversely, insofar as the Internal Revenue Service no longer requires income recertification, there is no need to continue collecting this data after move-in and it would not be third-party verified.

*Response:* The tenant data will be collected annually as required by statute. HUD is taking steps to minimize the compliance burden to the extent possible given statutory requirements. After the initial data collection, in which data on all tenants is required, only data on re-certifications and new tenants will be required. Consistent with statutory changes in HERA, tenants residing in 100 percent low-income unit properties are not subject to re-certification. The racial and ethnic data will only need to be collected once, but since disability status can change, this will need to be collected with re-certification.

*Comment:* Some commenters asked that information collected be limited in scope. Some commenters asked that HUD specify that data will not be collected on tenants not residing in LIHTC units. Some commenters asked that the age information be limited to the number of residents above and below the age of 18.

*Response:* Pursuant to the statute, which covers "State agencies administering tax credits," HUD will not require the collection of data on tenants in non-LIHTC units. The statutory requirement to collect race and ethnicity is not limited to head of household and thus the best reading of the statute is that the information must be collected for all tenants. The statutory requirement to collect household composition and age does not indicate a restriction to "the number of persons over/under 18 years old," but rather, the plain language of the statute refers only to "age."

*Comment:* Some commenters addressed data elements on the forms proposed by HUD. A commenter stated that data elements should include whether a project is "family," "elderly," or "other" in order to "assist in assessing the role of exclusionary land use requirements on LIHTC development." One commenter generally had the following suggestions: (1) Full tenant-level data on rental assistance are provided except where a project has 100 percent project-based tenants; (2) the project-level data are updated periodically to show changes in subsidy status; and (3) information on the specific type of rental assistance is available either on the form or through data matching with other subsidy programs.

*Response:* HUD's proposed project data collection form asks whether a project is targeted to a particular group, including families and elderly. The data collection will be consistent with re-certification changes in HERA, which no longer requires re-certification for properties consisting of 100 percent low-income properties. While property-level data will not need to be updated annually, HUD will ask States to update any changes. HUD will match tenant data to other HUD administrative databases to identify assistance from other subsidy programs.

*Comment:* Commenters suggested alternate data transfer formats. Two commenters stated that HUD should adopt the State Housing Finance Agency-LIHTC Data Transfer Standard as the methodology for collecting data because it is was created by affordable housing owners and trade associations, is open, accessible, and available to any user, and less costly than using a non-standard format.

*Response:* HUD agrees that the LIHTC Data Transfer Standard is widely adopted and accessible. HUD's current Tenant Rental Assistance Certification System (TRACS) system, which is used to collect data on Section 8 tenants, uses this data transfer standard. HUD will be using a system similar to, and based on, TRACS.

*Comment:* A number of commenters stated that data uploads in Extensible Markup Language (XML) format should be allowed, because XML files are easily produced by common software and most HFAs are familiar with XML. Commenters stated specifically that the National Affordable Housing Management Association (NAHMA) XML standard or a reasonable variation should be adopted or used as a starting point, as the industry has already invested effort in this standard and it has broad acceptance. One commenter stated that data transmission should flexibly allow Excel files or XML format files, as some HFAs may have issues and/or budget constraints in converting data to XML. Some commenters favored expanding the existing TRACS system, or cross-referencing TRACS, to include tax credit projects, but one commenter stated that TRACS is not a workable

system as it is not used by many States, unless it could be modified to allow XML upload and aggregate-only data.

*Response:* XML is beneficial since it is a commonly used method of electronically encoding documents, usable over the Internet, and compatible with many programming interfaces that can be used to extract data. HUD will be using a system similar to TRACS to accept data files from the State housing finance agencies. This system accepts a variety of file formats, including XML. HUD plans to modify the system for this data collection effort to ensure that it accepts the requested file formats.

*Comment:* HUD should make clear that responses to race, ethnicity, and disability status data are voluntary; whether the requirement to collect data exists for the 15-year tax credit compliance period or the extended period as well, arguing that the data collection should not apply after the initial 15 year period; and that, since there is no built-in enforcement mechanism, a good-faith effort to collect the data should suffice for compliance. One commenter stated that HUD should address how the data collection methodology will be coordinated with the authority HERA grants for State tax credit agencies to waive annual recertification requirements.

*Response:* Data collection will include all low-income units monitored for compliance as long as they remain in the program, including those in the extended-use period. Tying the collection of information to the actual technical use of the credit makes little sense as most tax-credit owners actually sell or syndicate their credits at the outset. The key, rather, is that the units have received the benefit of tax credits and continue to remain in the program as low-income units, and it is those complying units that Congress seeks information about.

Data collection will be consistent with new HERA re-certification rules for 100 percent low-income unit properties. As to the race, ethnicity, and disability questions, a household cannot be forced to provide this information. If the household does not provide the information, the State agency shall make its best efforts to report the information based on observation or derived from other sources.

*Comment:* Commenters stated that HUD should make available a guidebook, procedures manual, or other informational guidance.

*Response:* HUD is specifying the data it is collecting in this notice and in the paperwork approval request published in the **Federal Register**. In addition, the information contact listed in this rule can provide copies of the actual revised notices. HUD may publish additional guidance in the near future.

*Comment:* HUD should make development-level data available as soon as possible after it is collected so that it can be analyzed, for example, to determine Fair Housing Act compliance or whether families with incomes below the poverty line are being served.

*Response:* The statute requires HUD to compile and make the information collected available "not less than annually." HUD plans to fulfill that statutory requirement.

*Comment:* One commenter stated that data elements should be precisely defined so there is no variability from State to State. For example, all States should follow the same rounding rules.

*Response:* HUD believes that most of the data being collected, such as age, ethnicity, family composition, disability status and age, is expressible in whole integers and will not require rounding. If it appears that rounding rules could affect the data in a statistically significant way, HUD may provide further guidance as needed.

*Comment:* One commenter sought additional data collections for civil-rights related purposes. This commenter stated that HUD should collect racial and ethnic data on applicants for LIHTC housing to better assess affirmative marketing compliance. This commenter also stated that when initial data is released, HUD should contract with "reputable and independent research organizations to analyze the civil rights performance of LIHTC State agencies and project managers/developers" to identify possible patterns of civil rights violations for further action by HUD's Office of Fair Housing and Equal Opportunity. This commenter states that there has been a "longstanding failure" to collect racial and ethnic data in the LIHTC program.

*Response:* HUD does not have statutory authority to collect data on applicants. While generally HUD supports improved civil rights performance in assisted housing, this particular statute is limited to collecting specified information. This information includes race, ethnicity, and disability status on households residing in properties receiving credits under the low-income housing tax credit program. Congress has not currently provided HUD with the authorization or funding to conduct the study suggested.

*Comment:* Some commenters state that there should be transition periods of various times to give State agencies time to launch their new systems. Commenters also stated that compliance costs would be significant and that HUD should provide or petition Congress to provide additional funding to cover the extra costs.

*Response:* HUD understands that States may encounter difficulty in completing the data collection requests. HUD will address on a State-by-State basis the need for additional time and is procuring services to assist States in their transition. However, while Congress has authorized funds for this data collection, funds were not appropriated for this specific purpose in Fiscal Year (FY) 2009. The authorized funding amounts are limited to $2,500,000 for FY 2009 and $900,000 for each of FYs 2010 through 2013. States should be aware of this limited funding.

## III. Information Collection

Parties interested in viewing and commenting on the information collection requirements may do so by responding to the separate notice of information collection published in the **Federal Register** (75 FR 8392).

Dated: February 22, 2010.

**Jean Lin Pao,**

*General Deputy Assistant Secretary for Policy Development and Research.*

[FR Doc. 2010–4386 Filed 3–2–10; 8:45 am]

BILLING CODE 4210–67–P

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLMT926000–10–L19100000–BJ0000–LRCM08RS4045]**

### Notice of Filing of Plats of Survey: Montana

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of filing of plats of survey.

**SUMMARY:** The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM Montana State Office, Billings, Montana, thirty (30) days from the date of publication in the **Federal Register.**

**FOR FURTHER INFORMATION CONTACT:** Steve Toth, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669, telephone (406) 896–5121 or (406) 896–5009.

**SUPPLEMENTARY INFORMATION:** This survey was executed at the request of the Superintendent, Fort Peck Agency, through the Rocky Mountain Regional Director, Bureau of Indian Affairs, and was necessary to determine boundaries of Trust or Tribal Interest lands.

The lands we surveyed are:

**Principal Meridian, Montana**

T. 26 N., R. 43 E.

The plat, in 2 sheets, representing the dependent resurvey of a portion of the subdivisional lines, a portion of the subdivision of sections 11, 12, 13, and 14, the adjusted original meanders of the former left bank of the Missouri River, downstream, through sections 11, 14, 15, and a portion of section 13, and a certain division of accretion line in section 13, and the subdivision of sections 11, 12, and 14, and the survey of the meanders of the present left bank of the Missouri River, downstream, through sections 11, 12, 14, and a portion of section 13, and certain division of accretion lines in sections 13 and 14, Township 26 North, Range 43 East, Principal Meridian, Montana, was accepted February 3, 2010.

We will place a copy of the plat, in 2 sheets, and related field notes we described in the open files. They will be available to the public as a matter of information. If the BLM receives a protest against this survey, as shown on this plat, in 2 sheets, prior to the date of the official filing, we will stay the filing pending our consideration of the protest. We will not officially file this plat, in 2 sheets, until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals.

**Authority:** 43 U.S.C. Chap. 3.

Dated: February 25, 2010.

**Michael T. Birtles,**

*Chief Cadastral Surveyor, Division of Resources.*

[FR Doc. 2010–4438 Filed 3–2–10; 8:45 am]

**BILLING CODE 4310–DN–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Minor Boundary Revision of Pinnacles National Monument

**AGENCY:** National Park Service, Interior.

**ACTION:** Announcement of boundary revision.

**SUMMARY:** This notice announces the revision to the boundary of Pinnacles National Monument, pursuant to the authority specified below, to include three adjacent and contiguous tracts of land in San Benito County, California, totaling 114.79 acres. Tract 02–105 contains 31.58 acres and is further identified by Assessor's Parcel Number (APN) 028–130–012. Tract 02–106 contains 81.71 acres and is further identified by APNs 028–130–032 and 028–130–033. Tract 02–107 contains 1.5 acres and is further identified by APN 028–130–018.

The tracts are depicted on Drawing No. 114/80,014, Sheet 2 of 3, Segment Map 01 (Consolidated 01–02), revised March 11, 2009. This map is on file and available for inspection at the following locations: National Park Service, Land Resources Program Center, Pacific West Region, 1111 Jackson St., Suite 700, Oakland, CA 94607, and National Park Service, Department of the Interior, Washington, DC 20240.

**SUPPLEMENTARY INFORMATION:** 16 U.S.C. 460*l*–9(c)(1) provides that after notifying the House Committee on Natural Resources and the Senate Committee on Energy and Resources, the Secretary of the Interior is authorized to make this boundary revision. This action will add three tracts containing a total of 114.79 acres to the Pinnacles National Monument. The National Park Service proposes to acquire these parcels from the individual tract owners, who have consented to the acquisition.

The National Park Service has determined that it will be feasible to administer these lands. The views of and impacts on local communities have been considered. Other alternatives for the management and protection of resources on these lands are not adequate.

**DATES:** The effective date of this boundary revision is March 3, 2010.

**FOR FURTHER INFORMATION CONTACT:** National Park Service, Chief, Pacific Land Resources Program Center, Pacific West Region, 1111 Jackson St., Suite 700, Oakland, CA 94607, (510) 817–1414. 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 request in your comment that your personal identifying information be withheld from public review, we cannot guarantee that we will be able to do so.

Dated: February 25, 2010.

**Rory D. Westberg,**

*Acting Regional Director, Pacific West Region.*

[FR Doc. 2010–4413 Filed 3–2–10; 8:45 am]

**BILLING CODE 4312–EP–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Consistent with Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. 9622(d), and 28 CFR 50.7, notice is hereby given that on February 24, 2010, the United States lodged a Partial Consent Decree with South Tahoe Refuse Company, Inc. ("STR") in *United States of America* v. *El Dorado County, California, et al,* Civil No. S–01–1520 MCE GGH (E.D. Cal.), with respect to the Meyers Landfill Site, located in Meyers, El Dorado County, California (the "Site").

On August 3, 2001, Plaintiff United States of America ("United States"), on behalf of the United States Department of Agriculture, Forest Service ("Forest Service"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9607, against Defendants, El Dorado County, California (the "County") and the City of South Lake Tahoe, California ("the City"). The complaint filed by the United States seeks recovery of environmental response costs incurred by the Forest Service related to the release or threatened release and/or disposal of hazardous substances at or from the Meyers Landfill Site, a former municipal waste disposal facility located on National Forest Service System lands administered by the Lake Tahoe Basin Management Unit of the Forest Service, with accrued interest, and a declaration of the County's and the City's liability for future response costs incurred by the United States related to the Site. The County filed a Third Party Complaint for contribution against a number of third party defendants, including STR.

Under the proposed Partial Consent Decree STR will pay $1.0 million, which will be deposited into a Forest Service Special account to fund future response actions at the Site. The amount of the proposed settlement is based upon financial information provided by STR indicating a limited ability to pay. In exchange for STR's payment, STR will receive from the United States a covenant not to sue or to take administrative action pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. 9606 and 9607, as amended, for the performance of response actions at Operable Unit One ("OU–1") at the Site and the United States' past response costs, interim response costs, and future OU1 response costs at the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Partial Consent Decree. Comments should be addressed to the Acting Assistant Attorney General, Environment and Natural Resources

Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *El Dorado County, California, et al,* Civil No. S–01–1520 MCE GGH (E.D. Cal.) (DOJ Ref. No. 90–11–3–06554) (Partial Consent Decree with STR).

The Partial Consent Decree with STR may be examined at U.S. Department of Agriculture, Office of General Counsel, 33 New Montgomery Street, 17th Floor, San Francisco, CA 94150 (contact Rose Miksovsky, (415) 744–3158). During the public comment period, the Partial Consent Decree with STR may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Partial Consent Decree with STR may also be obtained by mail from the Consent Decree Library, U.S. Department of Justice, P.O. Box 7611, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please refer to *United States of America* v. *El Dorado County, California, et al,* Civil No. S–01–1520 MCE GGH (E.D. Cal.) (DOJ Ref. No. 90–11–3–06554) (Partial Consent Decree with STR), and enclose a check in the amount of $6.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

**Maureen Katz,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2010–4310 Filed 3–2–10; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

### Office of Justice Programs

**[OJP (NIJ) Docket No. 1512]**

### Draft NIJ Restraints Standard for Criminal Justice

**AGENCY:** National Institute of Justice, Office of Justice Programs, DOJ.

**ACTION:** Notice of Draft NIJ Restraints Standard for Criminal Justice and Certification Program Requirements.

**SUMMARY:** In an effort to obtain comments from interested parties, the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice will make available to the general public two draft documents: (1) A draft standard entitled, "NIJ Restraints Standard for Criminal Justice" and (2) a draft companion document entitled, "NIJ Restraints Certification Program Requirements". The opportunity to provide comments on these two documents is open to industry technical representatives, criminal justice agencies and organizations, research, development and scientific communities, and all other stakeholders and interested parties. Those individuals wishing to obtain and provide comments on the draft documents under consideration are directed to the following Web site: *http://www.justnet.org.*

**DATES:** Comments must be received on or before April 19, 2010.

**FOR FURTHER INFORMATION CONTACT:** Casandra Robinson, by telephone at 202–305–2596 [**Note:** this is not a tollfree telephone number], or by e-mail at *casandra.robinson@usdoj.gov.*

**Kristina Rose,**

*Acting Director, National Institute of Justice.*

[FR Doc. 2010–4434 Filed 3–2–10; 8:45 am]

**BILLING CODE 4410–18–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Registration

By Notice dated November 23, 2009, and published in the **Federal Register** on December 2, 2009 (74 FR 63156), ISP Freetown Fine Chemicals, 238 South Main Street, Assonet, Massachusetts 02702, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Phenylacetone (8501), a basic class of controlled substance listed in schedule II.

The company plans to import the controlled substance to manufacture amphetamine.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a), and determined that the registration of ISP Freetown Fine Chemicals to import the basic class of controlled substance is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated ISP Freetown Fine Chemicals to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: February 25, 2009.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–4399 Filed 3–2–10; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Registration

By Notice dated November 20, 2009, and published in the **Federal Register** on November 30, 2009 (74 FR 62598), Aptuit, 10245 Hickman Mills Drive, Kansas City, Missouri 64137, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of Poppy Straw Concentrate (9670), a basic class of controlled substance listed in schedule II.

The company plans to import an ointment for the treatment of wounds which contain trace amounts of the controlled substance normally found in poppy straw concentrate for packaging and labeling for clinical trials.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a), and determined that the registration of Aptuit to import the basic class of controlled substance is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Aptuit to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: February 24, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–4440 Filed 3–2–10; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Registration

By Notice dated October 16, 2009, and published in the **Federal Register** on October 28, 2009 (74 FR 55584), Clinical Supplies Management, 342 42nd Street South, Fargo, North Dakota 58103, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of Poppy Straw Concentrate (9670), a basic class of controlled substance listed in schedule II.

The company plans to import an ointment for the treatment of wounds which contains trace amounts of controlled substances normally found in poppy straw concentrate which will be packaged and labeled for clinical trials.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and § 952(a), and determined that the registration of Clinical Supplies Management to import the basic class of controlled substance is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Clinical Supplies Management to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and § 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: February 24, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–4439 Filed 3–2–10; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated October 30, 2009, and published in the **Federal Register** on November 6, 2009, (74 FR 57522), ISP Freetown Fine Chemicals, 238 South Main Street, Assonet, Massachusetts 02702, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| 2,5–Dimethoxyamphetamine (7396) | I |
| Amphetamine (1100) | II |
| Methylphenidate (1724) | II |
| Phenylacetone (8501) | II |
| Dextropropoxyphene, bulk (non-dosage forms) (9273) | II |

The company plans to manufacture bulk API, for distribution to its customers. The bulk 2,5–Dimethoxyamphetamine will be used for conversion into non-controlled substances.

No comments or objections have been received. DEA has considered the factors in 21 USC 823(a) and determined that the registration of ISP Freetown Fine Chemicals to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated ISP Freetown Fine Chemicals to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 USC 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: February 25, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–4400 Filed 3–2–10; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated October 16, 2009, and published in the **Federal Register** on October 28, 2009, (74 FR 55587), Cayman Chemical Company, 1180 East Ellsworth Road, Ann Arbor, Michigan 48108, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule I:

| Drug | Schedule |
|---|---|
| Marihuana (7360) | I |
| Tetrahydrocannabinols (7370) | I |

The company plans to manufacture small quantities of marihuana derivatives for research purposes.

In reference to drug code 7360 (Marihuana), the company plans to bulk manufacture cannabidiol. In reference to drug code 7370 (Tetrahydrocannabinols), the company will manufacture a synthetic THC. No other activity for this drug code is authorized for this registration.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Cayman Chemical Company to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Cayman Chemical Company to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: February 24, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–4401 Filed 3–2–10; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated October 16, 2009, and published in the **Federal Register** on October 28, 2009, (74 FR 55587), American Radiolabeled Chemical, Inc., 101 Arc Drive, St. Louis, Missouri 63146, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| Gamma Hydroxybutyric Acid (2010) | I |
| Ibogaine (7260) | I |
| Lysergic acid diethylamide (7315) | I |
| Tetrahydrocannabinols (7370) | I |
| Dimethyltryptamine (7435) | I |
| 1-[1-(2–Thienyl)cyclohexyl]piperidine (7470) | I |
| Dihydromorphine (9145) | I |
| Normorphine (9313) | I |
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Amobarbital (2125) | II |
| Phencyclidine (7471) | II |
| Phenylacetone (8501) | II |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Ecgonine (9180) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Metazocine (9240) | II |
| Dextropropoxyphene, bulk (non-dosage forms) (9273) | II |
| Morphine (9300) | II |
| Oripavine (9330) | II |
| Thebaine (9333) | II |
| Oxymorphone (9652) | II |
| Phenazocine (9715) | II |
| Fentanyl (9801) | II |

The company plans to manufacture small quantities of the listed controlled substances as radiolabeled compounds for biochemical research.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of American Radiolabeled Chemical, Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated American Radiolabeled Chemical Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: February 24, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–4403 Filed 3–2–10; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances Notice of Registration

By Notice dated October 21, 2009, and published in the **Federal Register** on October 28, 2009, (74 FR 55588), Johnson Matthey Inc., Custom Pharmaceuticals Department, 2003 Nolte Drive, West Deptford, New Jersey 08066–1742, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| Gamma Hydroxybutyric Acid (2010) | I |
| Tetrahydrocannabinols (7370) | I |
| Dihydromorphine (9145) | I |
| Difenoxin (9168) | I |
| Propiram (9649) | I |
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Lisdexamfetamine (1205) | II |
| Methylphenidate (1724) | II |
| Nabilone (7379) | II |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Ecgonine (9180) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Methadone (9250) | II |
| Methadone intermediate (9254) | II |
| Morphine (9300) | II |
| Thebaine (9333) | II |
| Oxymorphone (9652) | II |
| Noroxymorphone (9668) | II |
| Alfentanil (9737) | II |
| Remifentanil (9739) | II |
| Sufentanil (9740) | II |
| Fentanyl (9801) | II |

The company plans to manufacture the listed controlled substances in bulk for sale to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Johnson Matthey Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Johnson Matthey Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: February 24, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–4404 Filed 3–2–10; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF LABOR

### Office of the Secretary

### Bureau of International Labor Affairs: Labor Advisory Committee for Trade Negotiations and Trade Policy

**ACTION:** Meeting Notice.

**SUMMARY:** Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given of a meeting of the Labor Advisory Committee for Trade Negotiation and Trade Policy.

Date, Time, Place: March 16, 2010; 10:30 a.m.–11:30 a.m.; U.S. Department of Labor, Secretary's Conference Room, 200 Constitution Ave., NW., Washington, DC.

*Purpose:* The meeting will include a review and discussion of current issues which influence U.S. trade policy. Potential U.S. negotiating objectives and bargaining positions in current and anticipated trade negotiations will be discussed. Pursuant to 19 U.S.C. 2155(f) it has been determined that the meeting will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining

positions. Accordingly, the meeting will be closed to the public.

**FOR FURTHER INFORMATION CONTACT:** Gregory Schoepfle, Director, Office of Trade and Labor Affairs; *Phone:* (202) 693–4887.

Signed at Washington, DC, the 25th day of February 2010.

**Sandra Polaski,**

*Deputy Undersecretary, International Affairs.*

[FR Doc. 2010–4352 Filed 3–2–10; 8:45 am]

**BILLING CODE 4510–28–P**

## NATIONAL SCIENCE FOUNDATION

### Committee Management Renewals

The NSF management officials having responsibility for three advisory committees listed below have determined that renewing these groups for another two years is necessary and in the public interest in connection with the performance of duties imposed upon the Director, National Science Foundation (NSF), by 42 U.S.C. 1861 *et seq.* This determination follows consultation with the Committee Management Secretariat, General Services Administration.

*Committees:*

Advisory Committee for Environmental Research and Education, #9487.

Proposal Review Panel for Industrial Innovations and Partnerships, #28164.

Proposal Review Panel for Emerging Frontiers in Research and Innovation, #34558.

Effective date for renewal is March 1, 2010. For more information, please contact Susanne Bolton, NSF, at (703) 292–7488.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 2010–4233 Filed 3–2–10; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–266 and 50–301; NRC–2010–0078]**

### FPL Energy Point Beach, LLC; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Renewed Facility Operating License Nos. DPR–24 and DPR–27 issued to FPL Energy Point Beach, LLC (the licensee) for operation of the Point Beach Nuclear Plant, Units 1 and 2 located in the Town of Two Creeks, Manitowoc County, Wisconsin.

On July 14, 2009, the Nuclear Regulatory Commission published a Notice of Consideration of Issuance, Proposed No Significant Hazards Consideration Determination, and Opportunity for Hearing in the **Federal Register** (74 FR 34048) for a proposed amendment that would change the legal name of the licensee and owner from "FPL Energy Point Beach, LLC" to "NextEra Energy Point Beach, LLC."

On January 19, 2010, the licensee submitted a supplement which expanded the original scope of work. The proposed revisions would correct an administrative error within a License Condition contained in Appendix C of the Renewed Facility Operating Licenses. The correction changes "FPLE Group Capital" to the appropriately titled "FPL Group Capital."

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

This request is for administrative changes only. No actual facility equipment or accident analyses will be affected by the proposed changes. Therefore, this request will have no impact on the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

This request is for administrative changes only. No actual facility equipment or accident analyses will be affected by the proposed changes and no failure modes not bounded by previously evaluated accidents will be created. Therefore, this request will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Margin of safety is associated with confidence in the ability of the fission product barriers (*i.e.,* fuel cladding, reactor coolant system pressure boundary, and containment structure) to limit the level of radiation dose to the public. This request is for administrative changes only. No actual plant equipment or accident analyses will be affected by the proposed changes. Additionally, the proposed changes will not relax any criteria used to establish safety limits, will not relax any safety system settings, and will not relax the bases for any limiting conditions of operation. Therefore, these proposed changes will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking and Directives Branch (RDB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RDB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the 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 for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The requestor/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 to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (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 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).

For further details with respect to this license amendment application, see the application for amendment dated [date], which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Attorney for licensee: M.S. Ross, Vice President & Associate General Council, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420.

Dated at Rockville, Maryland, this 24th day of February 2010.

For the Nuclear Regulatory Commission.

**Justin C. Poole,**

*Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–4378 Filed 3–2–10; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–280 and 50–281; NRC–2010–0079]**

## Virginia Electric and Power Company Surry Power Station, Unit Nos. 1 and 2 Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption, pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR), Section 73.5, "Specific exemptions," from 10 CFR part 73, "Physical protection of plants and materials," from the implementation date for certain requirements of 10 CFR part 73 for Facility Operating License Nos. DPR–32 and DPR–37, issued to Virginia Electric and Power Company (the licensee), for operation of the Surry Power Station, Unit Nos. 1 and 2 (Surry). In accordance with 10 CFR 51.21, "Criteria for and identification of licensing and regulatory actions requiring environmental assessments," the NRC prepared an environmental assessment documenting its finding. The NRC concluded that the proposed actions will have no significant environmental impact.

### Environmental Assessment

*Identification of the Proposed Action*

The proposed action would exempt Surry from the required implementation date of March 31, 2010, for several new requirements of 10 CFR part 73. Specifically, Surry would be granted an exemption from being in full compliance with certain new requirements contained in Section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," of 10 CFR part 73 by the March 31, 2010, deadline. Instead, the licensee has proposed an

alternate full compliance implementation date of August 31, 2010, approximately 5 months beyond the date required by 10 CFR part 73. The proposed action, an extension of the schedule for completion of certain actions required by the revised 10 CFR part 73, does not involve any physical changes to the reactor, fuel, plant structures, support structures, water, or land at the Surry site.

The proposed action is in accordance with the licensee's application dated December 7, 2009.

*The Need for the Proposed Action*

The proposed action is needed to provide the licensee with additional time due to the large scope of work required to meet the requirements of the new 10 CFR 73.55.

*Environmental Impacts of the Proposed Action*

The NRC has completed its environmental assessment of the proposed exemption. The staff has concluded that the proposed action to extend the implementation deadline would not significantly affect plant safety and would not have a significant adverse effect on the probability of an accident occurring.

The proposed action would not result in an increased radiological hazard beyond those previously analyzed in the environmental assessment and finding of no significant impact made by the Commission in promulgating its revisions to 10 CFR part 73 as discussed in a **Federal Register** notice dated March 29, 2009 (74 FR 13967). There will be no change to radioactive effluents that effect radiation exposures to plant workers and members of the public. Therefore, no changes or different types of radiological impacts are expected as a result of the proposed exemption.

The proposed action does not result in changes to land use or water use, or result in changes to the quality or quantity of non-radiological effluents. No changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Steven's Act are expected. There are no impacts to the air or ambient air quality.

There are no impacts to historical and cultural resources. There would be no impact to socioeconomic resources. Therefore, no changes to or different types of non-radiological environmental impacts are expected as a result of the proposed exemption.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action. In addition, in promulgating its revisions to 10 CFR part 73, the Commission proposed an environmental assessment and published a finding of no significant impact (Part 73, Power Reactor Security Requirements (74 FR 13926), March 27, 2009).

If this exemption is granted, the NRC staff's safety evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption to the regulation.

*Environmental Impacts of the Alternatives to the Proposed Action*

As an alternative to the proposed actions, the NRC staff considered denial of the proposed actions (*i.e.,* the "no-action" alternative). Denial of the exemption request would result in no change in current environmental impacts. If the proposed action was denied, the licensee would have to comply with the March 31, 2010, implementation deadline. The environmental impacts of the proposed exemption and the "no action" alternative are similar.

*Alternative Use of Resources*

The action does not involve the use of any different resources than those considered in the "Final Environmental Statement Related to the Continuation of Construction and the Operation of Units 1 and 2, Surry Power Station," dated May 1972 and June 1972, respectively, as supplemented through the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 6 Regarding Surry Power Station, Units 1 and 2—Final Report (NUREG–1437, Supplement 6)," dated November 2002.

*Agencies and Persons Consulted*

In accordance with its stated policy, on February 3, 2010, the NRC staff consulted with the Virginia State official, Mr. Leslie Foldesi, Division of Radiological Health of the Virginia Department of Health, regarding the environmental impact of the proposed action. The State official had no comments.

**Finding of No Significant Impact**

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated December 7, 2009. The attachments to the licensee's December 7, 2009, letter requesting this exemption, contain safeguards information and, accordingly, are not available to the public. Publicly available parts of these documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O–1F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available records will be accessible electronically from the Agencywide Document Access and Management System (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 800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 24th day of February 2010.

For the Nuclear Regulatory Commission.

**Karen Cotton,**

*Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–4437 Filed 3–2–10; 8:45 am]

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## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–395; NRC–2010–0077]**

## South Carolina Electric & Gas Company; Virgil C. Summer Nuclear Station; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of an exemption from Title 10 of the *Code of Federal Regulations,* (10 CFR), Section 50.46, "Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors," and 10 CFR 50, Appendix K, AECCS Evaluation Models, for the Renewed Facility Operating License No. NPF–12, issued to South Carolina Electric & Gas Company (SCE&G, the licensee), for operation of the Virgil C. Summer Nuclear Station (VCSNS), located in Fairfield County, South Carolina. In accordance with the requirements of 10 CFR part 51, the NRC has prepared an Environmental

Assessment (EA) in support of this exemption. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate.

**Environmental Assessment**

*Identification of the Proposed Action*

The proposed action would allow SCE&G to use Optimized ZIRLO™, an advanced alloy fuel cladding material for pressurized-water reactors. The proposed action is in accordance with the licensee's application dated June 9, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML091620072).

*The Need for the Proposed Action*

The proposed action is needed so that SCE&G can use Optimized ZIRLO™, an advanced alloy for fuel rod cladding and other assembly structural components at the VCSNS.

Section 50.46 of 10 CFR and 10 CFR part 50, appendix K, make no provisions for use of fuel rods clad in a material other than zircaloy or ZIRLO™. Since the chemical composition of the Optimized ZIRLO™ alloy differs from the specifications for zircaloy or ZIRLO, a plant-specific exemption is required to allow the use of the Optimized ZIRLO™ alloy as a cladding material or in other assembly structural components at the VCSNS.

*Environmental Impacts of the Proposed Action*

The NRC has completed its environmental assessment of the proposed exemption. The staff has concluded that the proposed action to approve the use of an additional fuel rod cladding material would not significantly affect plant safety and would not have a significant adverse effect on the probability of an accident occurring.

The proposed action would not result in an increased radiological hazard beyond those previously analyzed in the Final Environmental Statement for the Virgil C. Summer Nuclear Station, Unit No. 1, NUREG–0719, dated May 1981 (ADAMS Accession No. ML072750234) and the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG–1437, Supplement 15, dated February 2004 (ADAMS Accession No. ML040540718). There will be no change to radioactive effluents that affect radiation exposures to plant workers and members of the public. Therefore, no changes or different types of radiological impacts are expected as a result of the proposed exemption.

The proposed action does not result in changes to land use or water use, or result in changes to the quality or quantity of non-radiological effluents. No changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Steven's Act are expected. There are no impacts to the air or ambient air quality.

There are no impacts to historical and cultural resources. There would be no impact to socioeconomic resources. Therefore, no changes to or different types of non-radiological environmental impacts are expected as a result of the proposed exemption.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action. The NRC staff's safety evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption to the regulation, if granted.

*Environmental Impacts of the Alternatives to the Proposed Action*

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.,* the "no-action" alternative). Denial of the application request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

*Alternative Use of Resources*

The action does not involve the use of any different resources than those considered in the Final Environmental Statement for the Virgil C. Summer Nuclear Station, Unit No. 1, NUREG–0719, dated May 1981 (ADAMS Accession No. ML072750234) and the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG–1437, Supplement 15, dated February 2004 (ADAMS Accession No. ML040540718).

*Agencies and Persons Consulted*

In accordance with its stated policy, on January 11, 2010, the staff consulted with the South Carolina State official, Susan Jenkins of the South Carolina Department of Health and Environmental Control, regarding the environmental impact of the proposed action. The State official had no comments.

*Finding of No Significant Impact*

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

**Further Information**

Documents related to this action, including the application for an exemption and license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession number for the document related to this notice, "License Amendment Request for Use of Optimized Zirlo™ Fuel Rod Cladding," dated June 9, 2009, is ML091620072. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

The document may also be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 24th day of February 2010.

For the Nuclear Regulatory Commission.

**Robert E. Martin,**

*Senior Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–4383 Filed 3–2–10; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–321 and 50–366; NRC–2010–0024]**

## Southern Nuclear Operating Company, Inc.; Edwin I. Hatch Nuclear Plant, Units 1 and 2; Exemption

### 1.0 Background

Southern Nuclear Operating Company, Inc. (SNC, the licensee), is the holder of Renewed Facility Operating License Nos. DPR–57 and

NPF–5, which authorizes operation of the Edwin I. Hatch Nuclear Plant, Units 1 and 2 (HNP). The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now, or hereafter, in effect.

The facility consists of two boiling-water reactors located in Appling County, Georgia.

**2.0 Request/Action**

Title 10 of the *Code of Federal Regulations* (10 CFR), Part 73, "Physical protection of plants and materials," Section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," published March 27, 2009, effective May 26, 2009, with a full implementation date of March 31, 2010, requires licensees to protect, with high assurance, against radiological sabotage by designing and implementing comprehensive site security programs. The amendments to 10 CFR 73.55 published on March 27, 2009, establish and update generically applicable security requirements similar to those previously imposed by Commission orders issued after the terrorist attacks of September 11, 2001, and implemented by licensees. In addition, the amendments to 10 CFR 73.55 include additional requirements to further enhance site security based upon insights gained from implementation of the post September 11, 2001, security orders. It is from one requirement of these new requirements that HNP now seeks an exemption from the March 31, 2010, implementation date. All other physical security requirements established by this recent rulemaking have already been or will be implemented by the licensee by March 31, 2010.

By letter dated November 6, 2009, as supplemented by letter dated November 20, 2009, the licensee requested an exemption in accordance with 10 CFR 73.5, "Specific exemptions." The licensee's letters contain proprietary information and, accordingly, those portions are not available to the public. The licensee has requested an exemption from the March 31, 2010, compliance date stating that a number of issues will present a significant challenge to timely completion of the project related to a specific requirement in 10 CFR Part 73. Specifically, the request is to extend the compliance date for one specific requirement from the current March 31, 2010, deadline to December 6, 2010. Being granted this exemption for the one item will allow the licensee to complete the modifications designed to update equipment and incorporate state-of-the-art technology to meet the noted regulatory requirement.

**3.0 Discussion of Part 73 Schedule Exemptions From the March 31, 2010, Full Implementation Date**

Pursuant to 10 CFR 73.55(a)(1), "By March 31, 2010, each nuclear power reactor licensee, licensed under 10 CFR Part 50, shall implement the requirements of this section through its Commission-approved Physical Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, and Cyber Security Plan referred to collectively hereafter as 'security plans.'" Pursuant to 10 CFR 73.5, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 73 when the exemptions are authorized by law, and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

NRC approval of this exemption would; as noted above, allow an extension from March 31, 2010, to December 6, 2010, for the implementation date for one specific requirement of the new rule. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

In the draft final rule provided to the Commission (SECY–08–0099 dated July 9, 2008), the NRC staff proposed that the requirements of the new regulation be met within 180 days. The Commission directed a change from 180 days to approximately 1 year for licensees to fully implement the new requirements. This change was incorporated into the final rule. From this, it is clear that the Commission wanted to provide a reasonable timeframe for licensees to achieve full compliance.

As noted in the final rule, the Commission also anticipated that licensees would have to conduct site specific analyses to determine what changes were necessary to implement the rule's requirements, and that changes could be accomplished through a variety of licensing mechanisms, including exemptions. Since issuance of the final rule, the Commission has rejected a generic industry request to extend the rule's compliance date for all operating nuclear power plants, but noted that the Commission's regulations provide mechanisms for individual licensees, with good cause, to apply for relief from the compliance date (Reference: June 4, 2009, letter from R.W. Borchardt, NRC, to M.S. Fertel, Nuclear Energy Institute). The licensee's request for an exemption is therefore consistent with the approach set forth by the Commission as discussed in the June 4, 2009, letter.

*HNP Schedule Exemption Request*

The licensee provided detailed information in its letter dated November 6, 2009, as supplemented November 20, 2009, requesting an exemption. It describes a comprehensive plan to install equipment related to a certain requirement in the new Part 73 rule and provides a timeline for achieving full compliance with the new regulation. The submittals contain proprietary information regarding the site security plan, details of the specific requirement of the regulation for which the site cannot be in compliance by the March 31, 2010, deadline and why, the required changes to the site's security configuration, and a timeline with critical path activities that will bring the licensee into full compliance by December 6, 2010. The timeline provides dates indicating (1) when various phases of the project begin and end (*i.e.,* design, field construction), (2) outages scheduled for each unit, and (3) when critical equipment will be ordered, installed, tested and become operational.

Notwithstanding the schedular exemption for this limited requirement, the licensee will continue to be in compliance with all other applicable physical security requirements as described in 10 CFR 73.55 and reflected in its current NRC approved physical security program. By December 6, 2010, HNP will be in full compliance with all the regulatory requirements of 10 CFR 73.55, as issued on March 27, 2009.

**4.0 Conclusion for Part 73 Schedule Exemption Request**

The NRC staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an extension of the compliance date to December 6, 2010, with regard to a specific requirement of 10 CFR 73.55.

Accordingly, the Commission has determined that pursuant to 10 CFR 73.5, "Specific exemptions," an exemption from the March 31, 2010, compliance date is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants the requested exemption.

The NRC staff has determined that the long-term benefits that will be realized

when the HNP equipment installation is complete justifies extending the full compliance date with regard to the specific requirement of 10 CFR 73.55. The security measure, that HNP needs additional time to implement, is a new requirement imposed by the March 27, 2009, amendments to 10 CFR 73.55, and is in addition to those required by the security orders issued in response to the events of September 11, 2001. Therefore, it is concluded that the licensee's actions are in the best interest of protecting the public health and safety through the security changes that will result from granting this exemption.

As per the licensee's request and the NRC's regulatory authority to grant an exemption from the March 31, 2010, implementation deadline for the requirement specified in the SNC letter dated November 6, 2009, as supplemented November 20, 2009, the licensee is required to be in full compliance by December 6, 2010. In achieving compliance, the licensee is reminded that it is responsible for determining the appropriate licensing mechanism (*i.e.,* 10 CFR 50.54(p) or 10 CFR 50.90) for incorporation of all necessary changes to its security plans.

Pursuant to 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 3761; dated January 22, 2010).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 24th day of February 2010.

For the Nuclear Regulatory Commission.

**Allen G. Howe,**

*Acting Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–4380 Filed 3–2–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–424 and 50–425; NRC–2010–0023]**

## Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 1 and 2; Exemption

### 1.0 Background

Southern Nuclear Operating Company, Inc. (SNC, the licensee), is the holder of Renewed Facility Operating License Nos. NPF–68 and NPF–81, which authorizes operation of the Vogtle Electric Generating Plant, Units 1 and 2 (VEGP). The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The facility consists of two pressurized-water reactors located in Burke County, Georgia.

### 2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR), Part 73, "Physical protection of plants and materials," Section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," published March 27, 2009, effective May 26, 2009, with a full implementation date of March 31, 2010, requires licensees to protect, with high assurance, against radiological sabotage by designing and implementing comprehensive site security programs. The amendments to 10 CFR 73.55 published on March 27, 2009 establish and update generically applicable security requirements similar to those previously imposed by Commission orders issued after the terrorist attacks of September 11, 2001, and implemented by licensees. In addition, the amendments to 10 CFR 73.55 include additional requirements to further enhance site security based upon insights gained from implementation of the post September 11, 2001, security orders. It is from one requirement of these new requirements that VEGP now seeks an exemption from the March 31, 2010, implementation date. All other physical security requirements established by this recent rulemaking have already been or will be implemented by the licensee by March 31, 2010.

By letter dated November 6, 2009, as supplemented by letter dated November 20, 2009, the licensee requested an exemption in accordance with 10 CFR 73.5, "Specific exemptions." The licensee's letters contain proprietary information and, accordingly, those portions are not available to the public. The licensee has requested an exemption from the March 31, 2010, compliance date stating that a number of issues will present a significant challenge to timely completion of the project related to a specific requirement in 10 CFR Part 73. Specifically, the request is to extend the compliance date for one specific requirement from the current March 31, 2010, deadline to September 27, 2010. Being granted this exemption for the one item will allow the licensee to complete the modifications designed to update equipment and incorporate state-of-the-art technology to meet the noted regulatory requirement.

### 3.0 Discussion of Part 73 Schedule Exemptions From the March 31, 2010, Full Implementation Date

Pursuant to 10 CFR 73.55(a)(1), "By March 31, 2010, each nuclear power reactor licensee, licensed under 10 CFR Part 50, shall implement the requirements of this section through its Commission-approved Physical Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, and Cyber Security Plan referred to collectively hereafter as 'security plans.' " Pursuant to 10 CFR 73.5, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 73 when the exemptions are authorized by law, and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

NRC approval of this exemption would; as noted above, allow an extension from March 31, 2010, to September 27, 2010, for the implementation date for one specific requirement of the new rule. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

In the draft final rule provided to the Commission (SECY–08–0099 dated July 9, 2008), the NRC staff proposed that the requirements of the new regulation be met within 180 days. The Commission directed a change from 180 days to approximately 1 year for licensees to fully implement the new requirements. This change was incorporated into the final rule. From this, it is clear that the Commission wanted to provide a reasonable timeframe for licensees to achieve full compliance.

As noted in the final rule, the Commission also anticipated that licensees would have to conduct site specific analyses to determine what changes were necessary to implement the rule's requirements, and that changes could be accomplished through a variety of licensing mechanisms, including exemptions. Since issuance of the final rule, the Commission has rejected a generic industry request to extend the rule's compliance date for all operating nuclear power plants, but noted that the Commission's regulations provide mechanisms for individual licensees, with good cause, to apply for relief from the compliance date (Reference: June 4, 2009, letter from R.W. Borchardt, NRC, to M.S. Fertel,

Nuclear Energy Institute). The licensee's request for an exemption is therefore consistent with the approach set forth by the Commission as discussed in the June 4, 2009, letter.

*VEGP Schedule Exemption Request*

The licensee provided detailed information in its letter dated November 6, 2009, as supplemented November 20, 2009, requesting an exemption. It describes a comprehensive plan to install equipment related to a certain requirement in the new Part 73 rule and provides a timeline for achieving full compliance with the new regulation. The submittals contain proprietary information regarding the site security plan, details of the specific requirement of the regulation for which the site cannot be in compliance by the March 31, 2010, deadline and why, the required changes to the site's security configuration, and a timeline with critical path activities that will bring the licensee into full compliance by September 27, 2010. The timeline provides dates indicating (1) when various phases of the project begin and end (*i.e.,* design, field construction), (2) outages scheduled for each unit, and (3) when critical equipment will be ordered, installed, tested and become operational.

Notwithstanding the schedular exemption for this limited requirement, the licensee will continue to be in compliance with all other applicable physical security requirements as described in 10 CFR 73.55 and reflected in its current NRC approved physical security program. By September 27, 2010, VEGP will be in full compliance with all the regulatory requirements of 10 CFR 73.55, as issued on March 27, 2009.

## 4.0 Conclusion for Part 73 Schedule Exemption Request

The NRC staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an extension of the compliance date to September 27, 2010, with regard to a specific requirement of 10 CFR 73.55.

Accordingly, the Commission has determined that pursuant to10 CFR 73.5, "Specific exemptions," an exemption from the March 31, 2010, compliance date is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants the requested exemption.

The NRC staff has determined that the long-term benefits that will be realized when the VEGP equipment installation is complete justifies extending the full compliance date with regard to the specific requirement of 10 CFR 73.55. The security measure, that VEGP needs additional time to implement, is a new requirement imposed by the March 27, 2009, amendments to 10 CFR 73.55, and is in addition to those required by the security orders issued in response to the events of September 11, 2001. Therefore, it is concluded that the licensee's actions are in the best interest of protecting the public health and safety through the security changes that will result from granting this exemption.

As per the licensee's request and the NRC's regulatory authority to grant an exemption from the March 31, 2010, implementation deadline for the requirement specified in the SNC letter dated November 6, 2009, as supplemented November 20, 2009, the licensee is required to be in full compliance by September 27, 2010. In achieving compliance, the licensee is reminded that it is responsible for determining the appropriate licensing mechanism (*i.e.,* 10 CFR 50.54(p) or 10 CFR 50.90) for incorporation of all necessary changes to its security plans.

Pursuant to 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment 75 FR 3943; dated January 25, 2010.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 24 day of February 2010.

For the Nuclear Regulatory Commission.

**Allen G. Howe,**

*Acting Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–4381 Filed 3–2–10; 8:45 am]

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## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. STN 50–528, STN 50–529, and STN 50–530; NRC–2010–0058]**

## Arizona Public Service Company, et al.; Palo Verde Nuclear Generating Station, Units 1, 2, and 3; Exemption

## 1.0 Background

The Arizona Public Service Company (APS, the facility licensee) is the holder of Facility Operating License Nos. NPF–41, NPF–51, and NPF–74, which authorize operation of the Palo Verde Nuclear Generating Station (PVNGS, the facility), Units 1, 2, and 3, respectively. The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (NRC, or the Commission) now or hereafter in effect.

The facility consists of three pressurized-water reactors located in Maricopa County, Arizona.

## 2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, Appendix G, "Fracture Toughness Requirements," which is invoked by 10 CFR 50.60, requires that pressure-temperature (P–T) limits be established for the reactor coolant pressure boundary during normal operating and hydrostatic or leak rate testing conditions. Specifically, 10 CFR Part 50, Appendix G states that "[t]he appropriate requirements on both the pressure-temperature limits and the minimum permissible temperature must be met for all conditions," and "[t]he pressure-temperature limits identified as 'ASME [American Society for Mechanical Engineers] Appendix G limits' in Table 3 require that the limits must be at least as conservative as limits obtained by following the methods of analysis and the margins of safety of Appendix G of Section XI of the ASME Code [Boiler and Pressure Vessel Code]." The regulations in 10 CFR Part 50, Appendix G, also specify the applicable editions and addenda of the ASME Code, Section XI, which are incorporated by reference in 10 CFR 50.55a. In the most recent version of 10 CFR (2009 Edition), the 1977 Edition through the 2004 Edition of the ASME Code, Section XI are incorporated by reference in 10 CFR 50.55a. Finally, 10 CFR 50.60(b) states that, "[p]roposed alternatives to the described requirements in Append[ix] G * * * of this part or portions thereof may be used when an exemption is granted by the Commission under [10 CFR] 50.12."

By letter dated February 19, 2009, as supplemented by letter dated December 22, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession Nos. ML090641014 and ML100040069, respectively), the licensee submitted a request for exemption from 10 CFR Part 50, Appendix G regarding the pressure-temperature (P–T) limits calculation, and a license amendment request to revise Technical Specification (TS) 3.4, "Reactor Coolant System (RCS)," to relocate the P–T limits and the low temperature overpressure protection (LTOP) system enable temperatures from the TS to a licensee-controlled document; the Pressure and Temperature Limits Report (PTLR). In the license amendment request, the

licensee identified Combustion Engineering (CE) Owners Group Topical Report CE NPSD–683–A, Revision 6, "Development of a RCS Pressure and Temperature Limits Report (PTLR) for the Removal of P–T Limits and LTOP Requirements from the Technical Specifications" (ADAMS Accession No. ML011350387), as the PTLR methodology that would be cited in the administrative controls section of the PVNGS, Units 1, 2, and 3 Technical Specifications governing PTLR content. The NRC staff evaluated the specific PTLR methodology in CE NPSD–683, Revision 6. This evaluation was documented in the NRC safety evaluation (SE) of March 16, 2001 (ADAMS Accession No. ML010780017), which specified additional licensee actions that are necessary to support a licensee's adoption of CE NPSD–683, Revision 6. The final approved version of this report was reissued as CE NPSD–683–A, Revision 6, which included the NRC SE and the required additional action items as an attachment to the report. One of the additional specified actions stated that if a licensee proposed to use the methodology in CE NPSD–683–A, Revision 6, for the calculation of flaw stress intensity factors due to membrane stress from pressure loading ($K_{IM}$), an exemption was required, since the methodology for the calculation of $K_{IM}$ values in CE NPSD–683–A, Revision 6, could not be shown to be conservative with respect to the methodology for the determination of $K_{IM}$ provided in editions and addenda of the ASME Code, Section XI, Appendix G through the 2004 Edition. Therefore, in addition to the license amendment request, the licensee's February 19, 2009, submittal also contains an exemption request, consistent with the requirements of 10 CFR 50.12 and 50.60, to apply the $K_{IM}$ calculational methodology of CE NPSD–683–A, Revision 6, as part of the PVNGS, Units 1, 2, and 3 PTLR methodology.

During the NRC staff's review of CE NPSD–683, Revision 6, the NRC staff evaluated the $K_{IM}$ calculational methodology of that report versus the methodologies for the calculation of $K_{IM}$ given in the ASME Code, Section XI, Appendix G. In the NRC's March 16, 2001, SE, the staff noted, "[t]he CE NSSS [nuclear steam supply system] methodology does not invoke the methods in the 1995 edition of Appendix G to the Code for calculating $K_{IM}$ factors, and instead applies FEM [finite element modeling] methods for estimating the $K_{IM}$ factors for the RPV [reactor pressure vessel] shell * * * the staff has determined that the $K_{IM}$ calculation methods apply FEM modeling that is similar to that used for the determination of the $K_{IT}$ factors [as codified in the ASME Code, Section XI, Appendix G]. The staff has also determined that there is only a slight non-conservative difference between the P–T limits generated from the 1989 edition of Appendix G to the Code and those generated from CE NSSS methodology as documented in CE/ABB Evaluation 063–PENG–ER–096, Revision 00, "Technical Methodology Paper Comparing ABB/CE PT Curve to ASME Section III, Appendix G," dated January 22, 1998 (ADAMS Accession No. ML100500514, non-proprietary version). The staff considers that this difference is reasonable and that it will be consistent with the expected improvements in P–T generation methods that have been incorporated into the 1995 edition of Appendix G to the Code." This conclusion regarding the comparison between the CE NSSS methodology and the 1995 Edition of the ASME Code, Section XI, Appendix G methodology also applies to the 2004 Edition of the ASME Code, Section XI, Appendix G methodology because the evolution of the ASME Code Section XI, Appendix G methodology does not affect the $K_{IM}$ calculation significantly.

In summary, the staff concluded in its March 16, 2001, SE that the calculation of $K_{IM}$ using the CE NPSD–683, Revision 6 methodology would lead to the development of P–T limit curves which may be slightly non-conservative with respect to those which would be calculated using the ASME Code, Section XI, Appendix G methods, and that such a difference was to be expected with the development of more refined calculational techniques. Furthermore, the staff concluded in its March 16, 2001, SE that P–T limit curves that would be developed using the methodology of CE NPSD–683, Revision 6 would be adequate for protecting the RPV from brittle fracture under all normal operating and hydrostatic/leak test conditions.

### 3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present.

This exemption results in changes to the plant by allowing the use of an alternative methodology for calculating flaw stress intensity factors in the RPV due to membrane stress from pressure loadings in lieu of meeting the requirements in 10 CFR 50.60 and 10 CFR Part 50, Appendix G. As stated above, 10 CFR 50.12 allows NRC to grant exemptions from the requirements of 10 CFR Part 50. In addition, the granting of the exemption will not result in violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

The underlying purpose of 10 CFR 50.60 and 10 CFR part 50, appendix G is to ensure that appropriate P–T limits and the minimum permissible temperature are established for the RPV under normal operating and hydrostatic or leak rate test conditions. The licensee's alternative methodology for establishing the P–T limits and the LTOP setpoints is described in CE NPSD–683–A, Revision 6, which has been approved by the NRC staff. Based on the above, no new accident precursors are created by using the alternative methodology. Thus, the probability of postulated accidents is not increased. Also, based on the above, the consequences of postulated accidents are not increased. In addition, the licensee used an NRC-approved methodology for establishing P–T limits and minimum permissible temperatures for the reactor vessel. Therefore, there is no undue risk to the public health and safety.

The exemption results in changes to the plant by allowing an alternative methodology for calculating flaw stress intensity factors in the reactor vessel. This change to the calculation of stress intensity factors in the reactor vessel material has no negative implications for security issues. Therefore, the common defense and security is not impacted by this exemption.

Special circumstances, pursuant to 10 CFR 50.12(a)(2)(ii), are present in that continued operation of PVNGS, Units 1, 2, and 3 with P–T limit curves developed in accordance with the ASME Code, Section XI, Appendix G is not necessary to achieve the underlying purpose of 10 CFR part 50, appendix G. Application of the $K_{IM}$ calculational methodology of CE NPSD–683–A, Revision 6 in lieu of the calculational methodology specified in the ASME Code, Section XI, Appendix G provides an acceptable alternative evaluation procedure, which will continue to meet the underlying purpose of 10 CFR part 50, appendix G. The underlying purpose of the regulations in 10 CFR part 50, appendix G is to provide an acceptable margin of safety against brittle failure of

the reactor coolant system during any condition of normal operation to which the pressure boundary may be subjected over its service lifetime.

Based on the staff's March 16, 2001, SE regarding CE NPSD–683, Revision 6 and the licensee's rationale to support the exemption request, the staff agrees with the licensee's determination that an exemption is required to approve the use of the $K_{IM}$ calculational methodology of CE NPSD–683–A, Revision 6. The staff concludes that the application of the $K_{IM}$ calculational methodology of CE NPSD–683–A, Revision 6, for PVNGS, Units 1, 2, and 3 provides sufficient margin in the development of RPV P–T limit curves such that the underlying purpose of the regulations (10 CFR part 50, appendix G) continues to be met. Therefore, the NRC staff concludes that the exemption requested by the licensee is justified based on the special circumstances of 10 CFR 50.12(a)(2)(ii), "[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule."

Based upon a consideration of the conservatism that is incorporated into the methodologies of 10 CFR part 50, appendix G and ASME Code, Section XI, Appendix G, the staff concludes that application of the $K_{IM}$ calculational methodology of CE NPSD–683–A, Revision 6, as described, would provide an adequate margin of safety against brittle failure of the RPV. Therefore, the staff concludes that the exemption is appropriate under the special circumstances of 10 CFR 50.12(a)(2)(ii), and that the application of the $K_{IM}$ calculational methodology of CE NPSD–683–A, Revision 6, is acceptable for use in the PVNGS, Units 1, 2, and 3 PTLR methodology.

### 4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants APS an exemption from the requirements of 10 CFR part 50, appendix G to allow application of the $K_{IM}$ calculational methodology of CE NPSD–683–A, Revision 6 in establishing the PTLR methodology for PVNGS, Units 1, 2, and 3.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 8149; dated February 23, 2010).

*This exemption is effective upon issuance.*

Dated at Rockville, Maryland, this 24th day of February 2010.

For the Nuclear Regulatory Commission.

**Allen G. Howe,**

*Acting Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–4388 Filed 3–2–10; 8:45 am]

BILLING CODE 7590–01–P

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## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–282 and 50–306; NRC–2010–0046]**

## Northern States Power Company—Minnesota Prairie Island Nuclear Generating Plant, Units 1 and 2; Exemption

### 1.0 Background

Northern States Power Company, a Minnesota corporation (NSPM, the licensee) is the holder of Facility Operating License Nos. DPR–42 and DPR–60, which authorize operation of the Prairie Island Nuclear Generating Plant, Units 1 and 2 (PINGP). The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of two pressurized-water reactors located in Goodhue County, Minnesota.

### 2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, "Physical protection of plants and materials," Section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," published March 27, 2009, effective May 26, 2009, with a full implementation date of March 31, 2010, requires licensees to protect, with high assurance, against radiological sabotage by designing and implementing comprehensive site security programs. The amendments to 10 CFR 73.55 published on March 27, 2009, establish and update generically applicable security requirements similar to those previously imposed by Commission orders issued after the terrorist attacks of September 11, 2001 and implemented by licensees. In addition, the amendments to 10 CFR 73.55 include additional requirements to further enhance site security based upon insights gained from implementation of the post September 11, 2001 security orders. It is from five of these new requirements that PINGP now seeks an exemption from the March 31, 2010 implementation date. All other physical security requirements established by this recent rulemaking have already been or will be implemented by the licensee by March 31, 2010.

By letter dated November 5, 2009, as supplemented by letters dated November 30 and December 17, 2009, the licensee requested an exemption in accordance with 10 CFR 73.5, "Specific exemptions." The licensee's November 5 and December 17, 2009, letters, and certain portions of its November 30, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML100050096), letter, contain security-related information and, accordingly, are not available to the public. The licensee has requested an exemption from the March 31, 2010, compliance date identified in 10 CFR 73.55(a)(1), stating that specific parts of the new requirements will require more time to implement before all requirements can be met. Specifically, the request is to extend the compliance date for five specific requirements from the current March 31, 2010, deadline to June 30, 2011. Being granted this exemption for the five requirements would allow the licensee to complete the modifications designed to provide significant upgrades to the security system to meet the noted regulatory requirements.

### 3.0 Discussion of Part 73 Schedule Exemptions From the March 31, 2010, Full Implementation Date

Pursuant to 10 CFR 73.55(a)(1), "By March 31, 2010, each nuclear power reactor licensee, licensed under 10 CFR part 50, shall implement the requirements of this section through its Commission-approved Physical Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, and Cyber Security Plan, referred to collectively hereafter as 'security plans.'" Pursuant to 10 CFR 73.5, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 73 when the exemptions are authorized by law, and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

NRC approval of this exemption would, as noted above, extend the required compliance date for the requirements specified in the licensee's

request from March 31, 2010, to June 30, 2011, for five specific requirements of the new rule. As stated above, 10 CFR 73.5 allows the NRC to grant exemptions from the requirements of 10 CFR part 73. The NRC staff has determined that granting of the licensee's proposed exemption would not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

In the draft final rule provided to the Commission on July 9, 2008, the NRC staff proposed that the requirements of the new regulation be met within 180 days. The Commission directed a change from 180 days to approximately 1 year for licensees to fully implement the new requirements. This change was incorporated into the final rule. From this, it is clear that the Commission wanted to provide a reasonable timeframe for licensees to achieve full compliance.

As noted in the final Power Reactor Security Requirements rule (74 FR 13925, March 27, 2009), the Commission also anticipated that licensees would have to conduct site specific analyses to determine what changes were necessary to implement the rule's requirements, and that these changes could be accomplished through a variety of licensing mechanisms, including exemptions. Since issuance of the final rule, the Commission has rejected a generic industry request to extend the rule's compliance date for all operating nuclear power plants, but noted that the Commission's regulations provide mechanisms for individual licensees, with good cause, to apply for relief from the compliance date (*Reference:* June 4, 2009 letter from R. W. Borchardt, NRC, to M.S. Fertel, Nuclear Energy Institute). The licensee's request for an exemption is therefore consistent with the approach set forth by the Commission and discussed in the June 4, 2009, letter.

*PINGP Schedule Exemption Request*

The licensee provided detailed information in Enclosures 1 and 2 of its November 5, 2009, submittal letter requesting an exemption, as well as in its supplemental letter dated December 17, 2009. It describes a comprehensive plan to upgrade the security capabilities of the PINGP site and provides a timeline for achieving full compliance with the new regulation. Enclosures 1 and 2 contain security-related information regarding the site security plan, details of specific portions of the regulation for which the site cannot be in compliance by the March 31, 2010, deadline and why, the required changes to the site's security configuration, and a timeline with critical path activities that will bring the licensee into full compliance by June 30, 2011. The licensee stated that the schedule for the physical modifications associated with this request were developed based on current information and anticipated impediments to construction such as planned refueling outages at both Units 1 and 2 and winter weather conditions that may impair construction due to frozen ground or extreme cold that creates personnel safety issues.

Enclosure 2 to the November 5, 2009, submittal includes a timeline that provides dates indicating when (1) construction will begin on various phases of the project, (2) outages are scheduled for each unit, and (3) critical equipment will be ordered, installed, and become operational.

Notwithstanding the schedular exemptions for these limited requirements, the licensee will continue to be in compliance with all other applicable physical security requirements as described in 10 CFR 73.55 and reflected in its current NRC approved physical security program. By June 30, 2011, PINGP will be in full compliance with all the regulatory requirements of 10 CFR 73.55, as issued on March 27, 2009.

**4.0 Conclusion for Part 73 Schedule Exemption Request**

The staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an exemption from the March 31, 2010, compliance date to June 30, 2011, with regard to the specified requirements of 10 CFR 73.55.

Accordingly, the Commission has determined that pursuant to 10 CFR 73.5, "Specific exemptions," exemption from the March 31, 2010, compliance date is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants the requested exemption.

The NRC staff has determined that the long-term benefits that will be realized when these projects are complete justify extending the March 31, 2010, full compliance date with regard to the specified requirements of 10 CFR 73.55 for this particular licensee. The security measures, that PINGP needs additional time to implement, are new requirements imposed by March 27, 2009 amendments to 10 CFR 73.55, and are in addition to those required by the security orders issued in response to the events of September 11, 2001. Therefore, it is concluded that the licensee's actions are in the best interest of protecting the public health and safety through the security changes that will result from granting this exemption.

As per the licensee's request and the NRC's regulatory authority to grant an exemption from the March 31, 2010, compliance date for the five requirements specified in Enclosure 1 of the NSPM letter dated November 5, 2009, the licensee is required to be in full compliance by June 30, 2011. In achieving compliance, the licensee is reminded that it is responsible for determining the appropriate licensing mechanism (*i.e.,* 10 CFR 50.54(p) or 10 CFR 50.90) for incorporation of all necessary changes to its security plans.

Pursuant to 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment [75 FR 6225; dated February 8, 2010].

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 23rd day of February 2010.

For The Nuclear Regulatory Commission.

**Allen G. Howe,**

*Acting Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–4382 Filed 3–2–10; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

**[NRC–2008–0577]**

## Notice of Issuance of Regulatory Guide

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of issuance and availability of Regulatory Guide 1.47, Revision 1, "Bypassed and Inoperable Status Indication for Nuclear Power Plant Safety Systems."

**FOR FURTHER INFORMATION CONTACT:** Khoi Nguyen, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 251–7453 or e-mail *Khoi.Nguyen@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to an existing guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the

NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 1 of Regulatory Guide 1.47 was issued with a temporary identification as Draft Regulatory Guide, DG–1205. This guide describes a method that the staff of the NRC considers acceptable for use in complying with the NRC's regulations with respect to bypassed and inoperable status indication for nuclear power plant safety systems.

The regulatory framework that the NRC has established for nuclear power plants consists of a number of regulations and supporting guidelines applicable to bypassed and inoperable status indication, including, but not limited to, General Design Criterion (GDC) 1, "Quality Standards and Records," GDC 13, "Instrumentation and Control," GDC 19, "Control Room," GDC 21, "Protection System Reliability and Testability," GDC 22, "Protection System Independence," and GDC 24, "Separation of Protection and Control Systems," as set forth in Appendix A, "General Design Criteria for Nuclear Power Plants," to Title 10, Part 50, "Domestic Licensing of Production and Utilization Facilities," of the *Code of Federal Regulations* (10 CFR part 50). GDC 1 requires that structures, systems, and components important to safety be designed and installed to quality standards commensurate with the importance-to-safety of the functions to be performed. GDC 13 requires that appropriate controls be provided to maintain variables and systems that can affect the fission process, the integrity of the reactor core, the reactor coolant pressure boundary, and the containment and its associated systems within prescribed operating ranges. GDC 19 requires that a control room be provided from which actions can be taken to operate the nuclear power unit safely under normal operating conditions. GDC 21 requires that the protection system be designed for high functional reliability and inservice testability. GDC 22 requires that the protection system be designed to ensure that the effects of normal operating, maintenance, and testing on redundant channels do not result in the loss of the protection function or be demonstrated to be acceptable on some other defined basis. GDC 24 requires that interconnection of the protection and control systems be limited to ensure that safety is not significantly impaired.

## II. Further Information

In October 2008, DG–1205 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on December 22, 2008. The staff's responses to the comments received are located in the NRC's Agencywide Documents Access and Management System (ADAMS) under Accession No. ML092330085.

Electronic copies of Regulatory Guide 1.47, Revision 1 are available through the NRC's public Web site under "Regulatory Guides" at *http://www.nrc.gov/reading-rm/doc-collections/.*

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4209, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 24th day of February 2010.

For the Nuclear Regulatory Commission.

**Andrea D. Valentin,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2010–4435 Filed 3–2–10; 8:45 am]

BILLING CODE 7590–01–P

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## NUCLEAR REGULATORY COMMISSION

**[NRC–2009–0384]**

## Notice of Issuance of Regulatory Guide

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of issuance and availability of Regulatory Guide 1.40.

**FOR FURTHER INFORMATION CONTACT:** Thomas Koshy, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 251–7663, e-mail: *Thomas.Koshy@nrc.gov,* or R.A. Jervey, telephone: (301) 251–7404, e-mail: *Richard.Jervey@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to an existing guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 1 of Regulatory Guide 1.40, "Qualification of Continuous Duty Safety-Related Motors for Nuclear Power Plants," was issued with a temporary identification as Draft Regulatory Guide DG–1150.

This RG describes a method that the staff of the NRC deems acceptable for complying with the Commission's regulations for qualification of continuous duty safety-related motors for nuclear power plants.

The Commission's regulations in Title 10, Part 50, "Domestic Licensing of Production and Utilization Facilities," of the *Code of Federal Regulations* (10 CFR part 50), require that structures, systems, and components in a nuclear power plant that are important to safety be designed to accommodate the effects of environmental conditions (*i.e.,* they must remain functional under postulated design-basis events). Toward that end, General Design Criteria 1, 2, 4, and 23 of Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 CFR Part 50 contain the general requirements. The specific requirements pertaining to qualification of certain electrical equipment important to safety appear in 10 CFR 50.49, "Environmental Qualification of Electric Equipment Important to Safety for Nuclear Power Plants." In addition, Criterion III, "Design Control," of Appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," to 10 CFR part 50, requires that test programs, when used to verify the adequacy of a specific design feature, should include suitable qualification testing of a prototype unit under the most adverse design conditions.

## II. Further Information

In August 2009, DG–1150 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on October 30, 2009. The staff's responses to the comments received are located in the NRC's Agencywide Documents Access and Management System under accession number ML093080126. Electronic copies of RG 1.40, Revision 1 are available through the NRC's public Web site under "Regulatory Guides" at *http://*

*www.nrc.gov/reading-rm/doc-collections/.*

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4209, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov.*

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Dated at Rockville, Maryland, this 22nd day of February 2010.

For the Nuclear Regulatory Commission.

**Andrea D. Valentin,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2010–4406 Filed 3–2–10; 8:45 am]

**BILLING CODE 7590–01–P**

## SMALL BUSINESS ADMINISTRATION

### Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration under the Small Business Investment Act of 1958, under Section 309 of the Act and Section 107.1900 of the Small Business Administration Rules and Regulations (13 CFR 107.1900) to function as a small business investment company under the Small business Investment Company License No. 09/79–0412 issued to Telesoft Partners, L.P., and said license is hereby declared null and void.

United States Small Business Administration.

Dated: January 5, 2010.

**Sean J. Green,**

*AA/Investment.*

[FR Doc. 2010–4292 Filed 3–2–10; 8:45 am]

**BILLING CODE M**

## SECURITIES AND EXCHANGE COMMISSION

**[Rule 248.30; SEC File No. 270–549; OMB Control No. 3235–0610]**

### Proposed Collection; Comment Request

*Upon Written Request, Copies Available From:* 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 (the "Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 248.30 (17 CFR 248.30), under Regulation S–P is titled "Procedures to Safeguard Customer Records and Information; Disposal of Consumer Report Information." Rule 248.30 (the "safeguard rule") requires brokers, dealers, investment companies, and investment advisers registered with the Commission ("registered investment advisers") (collectively "covered institutions") to adopt written policies and procedures for administrative, technical, and physical safeguards to protect customer records and information. The safeguards must be reasonably designed to "insure the security and confidentiality of customer records and information," "protect against any anticipated threats or hazards to the security and integrity" of those records, and protect against unauthorized access to or use of those records or information, which "could result in substantial harm or inconvenience to any customer." The safeguard rule's requirement that covered institutions' policies and procedures be documented in writing constitutes a collection of information and must be maintained on an ongoing basis. This requirement eliminates uncertainty as to required employee actions to protect customer records and information and promotes more systematic and organized reviews of safeguard policies and procedures by institutions. The information collection also assists the Commission's examination staff in assessing the existence and adequacy of covered institutions' safeguard policies and procedures.

We estimate that as of the end of 2009, there are 5253 broker-dealers, 4522 investment companies, and 11,450 investment advisers currently registered with the Commission, for a total of 21,225 covered institutions. We expect that all of these covered institutions have already documented their safeguard policies and procedures in writing and therefore will incur no hourly burdens related to the initial documentation of policies and procedures.

However, we expect that approximately 10 percent of the 21,225 covered institutions currently registered with the Commission will review and update their policies and procedures each year, for a total of 2123 covered institutions that will spend time to update their policies and procedures. The amount of time spent reviewing and updating safeguard policies and procedures is likely to vary widely, based on the size of the entity, the complexity of its operations, and any significant changes in the security environment. We estimate that it will take a typical covered institution that reviews and updates its safeguard policies and procedures approximately 20 hours to complete such a review and document the results, for a total hourly burden for all institutions of 42,460 hours.

Although existing covered institutions would not incur any initial hourly burden in complying with the safeguards rule, we expect that newly registered institutions would incur some hourly burdens associated with documenting their safeguard policies and procedures. We estimate that approximately 1500 broker-dealers, investment companies, or investment advisers register with the Commission annually. However, we also expect that approximately 70% of these newly registered covered institutions (1050) are affiliated with an existing covered institution, and will rely on an organization-wide set of previously documented safeguard policies and procedures created by their affiliates. We estimate that these affiliated newly registered covered institutions will incur a significantly reduced hourly burden in complying with the safeguards rule, as they will need only to review their affiliate's existing policies and procedures, and identify and adopt the relevant policies for their business. Therefore, we expect that newly registered covered institutions with existing affiliates will incur an hourly burden of approximately 15 hours in identifying and adopting safeguard policies and procedures for their business, for a total hourly burden for all affiliated new institutions of 15,750 hours.

Finally, we expect that the 450 newly registered entities that are not affiliated with an existing institution will incur a significantly higher hourly burden in reviewing and documenting their safeguard policies and procedures. We expect that virtually all of the newly registered covered entities that do not have an affiliate are likely to be small entities and are likely to have smaller and less complex operations, with a correspondingly smaller set of safeguard policies and procedures to document, compared to other larger existing

institutions with multiple affiliates. We estimate that it will take a typical newly registered unaffiliated institution approximately 65 hours to review, identify, and document their safeguard policies and procedures, for a total of 29,250 hours for all newly registered unaffiliated entities.

Therefore, we estimate that the total annual hourly burden associated with the safeguards rule is 87,460 hours. We also estimate that all covered institutions will be respondents each year, for a total of 21,225 respondents.

These estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number. The safeguard rule does not require the reporting of any information or the filing of any documents with the Commission. The collection of information required by the safeguard rule is mandatory.

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.

Please direct your written comments to Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: February 23, 2010.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–4335 Filed 3–2–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 29160; 812–13595]**

## Millington Securities, Inc. and Millington Unit Investment Trusts; Notice of Application

February 25, 2010.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application under (a) section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from sections 2(a)(32), 2(a)(35), 14(a), 19(b), 22(d) and 26(a)(2)(C) of the Act and rules 19b–1 and rule 22c–1 thereunder and (b) sections 11(a) and 11(c) of the Act for approval of certain exchange and rollover privileges.

**APPLICANTS:** Millington Securities, Inc. ("Millington") and Millington Unit Investment Trusts (the "Millington Trusts").[1]

**SUMMARY OF APPLICATION:** Applicants request an order to permit certain unit investment trusts to: (a) Impose sales charges on a deferred basis and waive the deferred sales charge in certain cases; (b) offer unitholders certain exchange and rollover options; (c) publicly offer units without requiring the Depositor to take for its own account $100,000 worth of units; and (d) distribute capital gains resulting from the sale of portfolio securities within a reasonable time after receipt.

**FILING DATES:** The application was filed on October 27, 2008 and amended on March 19, 2009, December 4, 2009, February 24, 2010 and February 25, 2010.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 19, 2010, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, 222 S. Mill Street, Naperville, Illinois 60540.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Sr., Senior Counsel, at (202) 551–6868, or Julia Kim Gilmer, Branch Chief, at (202) 551–6821 (Office of Investment Company Regulation, Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

*Applicants' Representations:*

1. The Millington Trust is a unit investment trust ("UIT") that is registered under the Act. Any future Trust will be a registered UIT. Millington, an Illinois corporation, is registered under the Securities Exchange Act of 1934 as a broker-dealer and is the Depositor of the Millington Trusts. Each Series will be created by a trust indenture between the Depositor and a banking institution or trust company as trustee ("Trustee").

2. The Depositor acquires a portfolio of securities, which it deposits with the Trustee in exchange for certificates representing units of fractional undivided interest in the Series' portfolio ("Units"). The Units are offered to the public through the Depositor and dealers at a price which, during the initial offering period, is based upon the aggregate market value of the underlying securities, or, the aggregate offering side evaluation of the underlying securities if the underlying securities are not listed on a securities exchange, plus a front-end sales charge. The maximum sales charge may be reduced in compliance with rule 22d-1 under the Act in certain circumstances, which are disclosed in the Series' prospectus.

3. The Depositor is not legally obligated, and does not currently intend, to maintain a secondary market for Units of outstanding equity Series, but may seek to do so in the future. Other broker-dealers may or may not maintain a secondary market for Units of a Series. If a secondary market is maintained, investors will be able to

[1] Applicants also request relief for future unit investment trusts (collectively, with the Millington Trusts, the "Trusts") and series of the Trusts ("Series") that are sponsored by Millington or any entity controlling, controlled by or under common control with Millington (together with Millington, the "Depositors"). Any future Trust and Series that relies on the requested order will comply with the terms and conditions of the application. All existing entities that currently intend to rely on the requested order are named as applicants.

purchase Units on the secondary market at the current public offering price plus a front-end sales charge. If such a market is not maintained at any time for any Series, holders of the Units ("Unitholders") of that Series may redeem their Units through the Trustee.

**A. Deferred Sales Charge and Waiver of Deferred Sales Charge Under Certain Circumstances**

1. Applicants request an order to the extent necessary to permit one or more Series to impose a sales charge on a deferred basis ("DSC"). For each Series, the Depositor would set a maximum sales charge per Unit, a portion of which may be collected "up front" (*i.e.,* at the time an investor purchases the Units). The DSC would be collected subsequently in installments ("Installment Payments") as described in the application. The Depositor would not add any amount for interest or any similar or related charge to adjust for such deferral.

2. When a Unitholder redeems or sells Units, the Depositor intends to deduct any unpaid DSC from the redemption or sale proceeds. When calculating the amount due, the Depositor will assume that Units on which the DSC has been paid in full are redeemed or sold first. With respect to Units on which the DSC has not been paid in full, the Depositor will assume that the Units held for the longest time are redeemed or sold first. Applicants represent that the DSC collected at the time of redemption or sale, together with the Installment Payments and any amount collected up front, will not exceed the maximum sales charge per Unit. Under certain circumstances, the Depositor may waive the collection of any unpaid DSC in connection with redemptions or sales of Units. These circumstances will be disclosed in the prospectus for the relevant Series and implemented in accordance with rule 22d–1 under the Act.

3. Each Series offering Units subject to a DSC will state the maximum charge per Unit in its prospectus. In addition, the prospectus for such Series will include the table required by Form N–1A (modified as appropriate to reflect the difference between UITs and open-end management investment companies) and a schedule setting forth the number and date of each Installment Payment, along with the duration of the collection period. The prospectus also will disclose that portfolio securities may be sold to pay the DSC if distribution income is insufficient and that securities will be sold pro rata, if practicable, otherwise a specific security will be designated for sale.

**B. Exchange Option and Rollover Option**

1. Applicants request an order to the extent necessary to permit Unitholders of a Series to exchange their Units for Units of another Series ("Exchange Option") and Unitholders of a Series that is terminating to exchange their Units for Units of a new Series of the same type ("Rollover Option"). The Exchange Option and Rollover Option would apply to all exchanges of Units sold with a front-end sales charge or DSC.

2. A Unitholder who purchases Units under the Exchange Option or Rollover Option would pay a lower sales charge than that which would be paid for the Units by a new investor. The reduced sales charge will be reasonably related to the expenses incurred in connection with the administration of the DSC program, which may include an amount that will fairly and adequately compensate the Depositor and participating underwriters and brokers for their services in providing the DSC program.

*Applicants' Legal Analysis:*

**A. DSC and Waiver of DSC**

1. Section 4(2) of the Act defines a "unit investment trust" as an investment company that issues only redeemable securities. Section 2(a)(32) of the Act defines a "redeemable security" as a security that, upon its presentation to the issuer, entitles the holder to receive approximately his or her proportionate share of the issuer's current net assets or the cash equivalent of those assets. Rule 22c–1 under the Act requires that the price of a redeemable security issued by a registered investment company for purposes of sale, redemption or repurchase be based on the security's current net asset value ("NAV"). Because the collection of any unpaid DSC may cause a redeeming Unitholder to receive an amount less than the NAV of the redeemed Units, applicants request relief from section 2(a)(32) and rule 22c–1.

2. Section 22(d) of the Act and rule 22d–1 under the Act require a registered investment company and its principal underwriter and dealers to sell securities only at the current public offering price described in the investment company's prospectus, with the exception of sales of redeemable securities at prices that reflect scheduled variations in the sales load. Section 2(a)(35) of the Act defines the term "sales load" as the difference between the sales price and the portion of the proceeds invested by the depositor or trustee. Applicants request relief from section 2(a)(35) and section 22(d) to permit waivers, deferrals or other scheduled variations of the sales load.

3. Under section 6(c) of the Act, the Commission may exempt classes of transactions, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that their proposal meets the standards of section 6(c). Applicants state that the provisions of section 22(d) are intended to prevent (a) riskless trading in investment company securities due to backward pricing, (b) disruption of orderly distribution by dealers selling shares at a discount, and (c) discrimination among investors resulting from different prices charged to different investors. Applicants assert that the proposed DSC program will present none of these abuses. Applicants further state that all scheduled variations in the sales load will be disclosed in the prospectus of each Series and applied uniformly to all investors, and that applicants will comply with all the conditions set forth in rule 22d–1.

4. Section 26(a)(2)(C) of the Act, in relevant part, prohibits a trustee or custodian of a UIT from collecting from the trust as an expense any payment to the trust's depositor or principal underwriter. Because the Trustee's payment of the DSC to the Depositor may be deemed to be an expense under section 26(a)(2)(C), applicants request relief under section 6(c) from section 26(a)(2)(C) to the extent necessary to permit the Trustee to collect Installment Payments and disburse them to the Depositor. Applicants submit that the relief is appropriate because the DSC is more properly characterized as a sales load.

**B. Exchange Option and Rollover Option**

1. Sections 11(a) and 11(c) of the Act prohibit any offer of exchange by a UIT for the securities of another investment company unless the terms of the offer have been approved in advance by the Commission. Applicants request an order under sections 11(a) and 11(c) for Commission approval of the Exchange Option and the Rollover Option.

**C. Net Worth Requirement**

1. Section 14(a) of the Act requires that a registered investment company have $100,000 of net worth prior to making a public offering. Applicants state that each Series will comply with this requirement because the Depositor

will deposit more than $100,000 of securities. Applicants assert, however, that the Commission has interpreted section 14(a) as requiring that the initial capital investment in an investment company be made without any intention to dispose of the investment. Applicants state that, under this interpretation, a Series would not satisfy section 14(a) because of the Depositor's intention to sell all the Units of the Series.

2. Rule 14a–3 under the Act exempts UITs from section 14(a) if certain conditions are met, one of which is that the UIT invest only in "eligible trust securities," as defined in the rule. Applicants state that they may not rely on rule 14a–3 because certain Series (collectively, "Equity Series") will invest all or a portion of their assets in equity securities or shares of registered investment companies which do not satisfy the definition of eligible trust securities.

3. Applicants request an exemption under section 6(c) of the Act to the extent necessary to exempt the Equity Series from the net worth requirement in section 14(a). Applicants state that the Series and the Depositor will comply in all respects with the requirements of rule 14a–3, except that the Equity Series will not restrict their portfolio investments to "eligible trust securities."

**D. Capital Gains Distribution**

1. Section 19(b) of the Act and rule 19b–1 under the Act provide that, except under limited circumstances, no registered investment company may distribute long-term gains more than once every twelve months. Rule 19b–1(c), under certain circumstances, exempts a UIT investing in eligible trust securities (as defined in rule 14a–3) from the requirements of rule 19b–1. Because the Equity Series do not limit their investments to eligible trust securities, however, the Equity Series will not qualify for the exemption in paragraph (c) of rule 19b–1. Applicants therefore request an exemption under section 6(c) from section 19(b) and rule 19b–1 to the extent necessary to permit capital gains earned in connection with the sale of portfolio securities to be distributed to Unitholders along with the Equity Series' regular distributions. In all other respects, applicants will comply with section 19(b) and rule 19b–1.

2. Applicants state that their proposal meets the standards of section 6(c). Applicants assert that any sale of portfolio securities would be triggered by the need to meet Trust expenses, Installment Payments, or by redemption requests, events over which the Depositor and the Equity Series do not have control. Applicants further state that, because principal distributions must be clearly indicated in accompanying reports to Unitholders as a return of principal and will be relatively small in comparison to normal dividend distributions, there is little danger of confusion from failure to differentiate among distributions.

*Applicants' Conditions:*

Applicants agree that any order granting the requested relief will be subject to the following conditions:

**A. DSC Relief and Exchange and Rollover Options**

1. Whenever the Exchange Option or the Rollover Option is to be terminated or its terms are to be amended materially, any holder of a security subject to that privilege will be given prominent notice of the impending termination or amendment at least 60 days prior to the date of termination or the effective date of the amendment, provided that: (a) No such notice need be given if the only material effect of an amendment is to reduce or eliminate the sales charge payable at the time of an exchange, to add one or more new Series eligible for the Exchange Option or the Rollover Option, or to delete a Series which has terminated; and (b) no notice need be given if, under extraordinary circumstances, either (i) there is a suspension of the redemption of Units of the Series under section 22(e) of the Act and the rules and regulations promulgated thereunder, or (ii) a Series temporarily delays or ceases the sale of its Units because it is unable to invest amounts effectively in accordance with applicable investment objectives, policies and restrictions.

2. An investor who purchases Units under the Exchange Option or the Rollover Option will pay a lower sales charge than that which would be paid for the Units by a new investor.

3. The prospectus of each Series offering exchanges or rollovers and any sales literature or advertising that mentions the existence of the Exchange Option or Rollover Option will disclose that the Exchange Option and the Rollover Option are subject to modification, termination or suspension without notice, except in certain limited cases.

4. Any DSC imposed on a Series' Units will comply with the requirements of subparagraphs (1), (2) and (3) of rule 6c–10(a) under the Act.

5. Each Series offering Units subject to a DSC will include in its prospectus the disclosure required by Form N–1A relating to deferred sales charges (modified as appropriate to reflect the differences between UITs and open-end management investment companies) and a schedule setting forth the number and date of each Installment Payment.

**B. Net Worth Requirement**

1. Applicants will comply in all respects with the requirements of rule 14a–3 under the Act, except that the Equity Series will not restrict their portfolio investments to "eligible trust securities."

For the Commission, by the Division of Investment Management, under delegated authority.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–4366 Filed 3–2–10; 8:45 am]

BILLING CODE 8011–01–P

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## SECURITIES AND EXCHANGE COMMISSION

**[File No. 500–1]**

## In the Matter of Primegen Energy Corp.; Order of Suspension of Trading

March 1, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of PrimeGen Energy Corporation ("PrimeGen") because of questions regarding the accuracy of publicly disseminated information concerning, among other things, the company's current financial condition, management, and business operations. PrimeGen is quoted on the Pink Sheets under the symbol "PGNE."

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on March 1, 2010, through 11:59 p.m. EST, on March 12, 2010.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2010–4502 Filed 3–1–10; 11:15 am]

BILLING CODE 8011–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61580; File No. SR–NASDAQ–2010–016]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Pricing for the NASDAQ Options Market ("NOM")

February 24, 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 27, 2010, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. Pursuant to Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] NASDAQ has designated this proposal as establishing or changing a due, fee, or other charge, which renders the proposed rule change effective upon filing. 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 proposes to modify pricing for Nasdaq members using the NASDAQ Options Market ("NOM"). NASDAQ will make the proposed rule change effective on February 1, 2010. The text of the proposed rule change is available at *http://nasdaqomx.cchwallstreet.com/,* 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 those 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 parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Nasdaq is modifying NASDQ Rule 7050, the fee schedule for NOM, to establish pricing for two newly-listed products, the NASDAQ 100 Index Option (NDX) and the Mini NASDAQ 100 Index Option (MNX). Specifically, Nasdaq is establishing a fee of $0.50 per executed contract for Customers, Firms, and Non-NOM Market Makers to remove liquidity in NDX and MNX options and $0.40 per executed contract for NOM Market Makers to remove liquidity.[5] Nasdaq is also proposing to offer a rebate of $0.10 per executed contract for Customers, Firms, and Non-NOM Market Makers and $0.20 per executed contract for NOM Market Makers.

The proposed fee schedule distinguishes between firms that register to and actually make markets on NOM and firms that make markets on other options markets. This pricing convention, which is currently employed by the International Securities Exchange and other exchanges, recognizes the substantial value that registered market makers add to a given marketplace by guaranteeing to provide regular two-sided quotes and to maintain minimum liquidity.[6] Nasdaq seeks to encourage continued market making on NOM and to attract additional market making by establishing this new fee schedule. To receive NOM Market Maker pricing, the firm must be registered as a NOM Market Maker in the specified security.

Nasdaq believes that the proposed fees are competitive, fair and reasonable, and non-discriminatory in that they apply equally to all similarly situated members and customers. As with all fees, Nasdaq may adjust these proposed fees in response to competitive conditions by filing a new proposed rule change. If the proposed fee schedule is successful in establishing vibrant markets in NDX and MNX options on NOM, Nasdaq may expand this pricing model to other options in the future.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(4) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls. Consistent with past practice, the proposed change identifies a class of person subject to transaction execution fees based on the role of that class in bringing order flow to NASDAQ.

*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, as amended.

*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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [9] and subparagraph (f)(2) of Rule 19b–4 thereunder.[10] 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

[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] NOM Market Makers must be registered as such pursuant to Chapter VII, Section 2 of the Nasdaq Options Rules, and must also remain in good standing pursuant to Chapter VII, Section 4. Non-NOM Market Makers are registered market makers on another options market that append the market maker designation to orders routed to NOM.

[6] *See* ISE Fee Schedule. *http://www.ise.com/assets//documents//OptionsExchange//legal/fee/fee_schedule.pdf.*

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(a)(ii).

[10] 17 CFR 240.19b–4(f)(2).

Number SR–NASDAQ–2010–016 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–NASDAQ–2010–016. 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 Web site viewing and printing 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–NASDAQ–2010–016 and should be submitted on or before March 24, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–4367 Filed 3–2–10; 8:45 am]

**BILLING CODE 8011–01–P**

[11] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### Reports, Forms and Record Keeping Requirements; Agency Information Collection Activity Under OMB Review

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on November 24, 2009 [74 FR 61404]. The docket number is NHTSA 2009–0180.

**DATES:** Comments must be submitted on or before April 2, 2010.

**FOR FURTHER INFORMATION CONTACT:** Lori Summers, National Highway Traffic Safety Administration, Office of Rulemaking, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590. Ms. Summers' telephone number is (202) 366–1740.

**SUPPLEMENTARY INFORMATION:**

### National Highway Traffic Safety Administration

*Title:* Part 585—Advanced Air Bag Phase-In Reporting Requirements.

*OMB Number:* 2127–0599.

*Type of Request:* Extension of a currently approved collection.

*Abstract:* 49 U.S.C. 30111 authorizes the issuance of Federal motor vehicle safety standards (FMVSS) and regulations. The agency, in prescribing a FMVSS or regulation, considers available relevant motor vehicle safety data, and consults with other agencies, as it deems appropriate. Further, the statute mandates that in issuing any FMVSS or regulation, the agency considers whether the standard or regulation is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed," and whether such a standard will contribute to carrying out the purpose of the Act. The Secretary is authorized to invoke such rules and regulations as deemed necessary to carry out these requirements.

Using this authority, the agency issued FMVSS No. 208, "Occupant crash protection," to aid the agency in achieving many of its safety goals. This notice requests comments on the extension of the phase-in reporting requirements of this FMVSS related to the implementation of advanced air bags. Phase 1 of the advanced air bag phase-in began September 1, 2003 with 100 percent compliance by September 1, 2005. Phase 2 of the advanced air bag phase-in begins September 1, 2007 with 100 percent compliance by September 1, 2009. Phase 3 of the advanced air bag phase-in began September 1, 2009 with 100 percent compliance by September 1, 2011.

NHTSA needs this information to ensure that vehicle manufacturers are certifying their applicable vehicles as meeting the new advanced air bag requirements of FMVSS No. 208. NHTSA will use this information to determine whether a manufacturer has complied with the amended requirements during the phase-in period.

*Affected Public:* Individuals, households, business, other for-profit, not-for-profit, farms, Federal Government and State, Local or Tribal Government.

*Estimated Total Annual Burden:* 1,342 hours (22 affected manufacturers × 61 hours).

**ADDRESSES:** Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A Comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued in Washington, DC, on February 25, 2010.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

[FR Doc. 2010–4336 Filed 3–2–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

### Office of Hazardous Materials Safety; Notice of Application for Special Permits

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** List of applications for special permits.

**SUMMARY:** In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4 —Cargo aircraft only, 5—Passenger-carrying aircraft.

**DATES:** Comments must be received on or before April 2, 2010.

*Address Comments To:* Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590 in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

**FOR FURTHER INFORMATION CONTACT:** Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, Southeast, Washington, DC or at *http://regulations.gov*.

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on February 18, 2010.

**Delmer F. Billings,**

*Director, Office of Hazardous Materials, Special Permits and Approvals.*

| Application No. | Docket No. | Applicant | Regulation(s) affected | Nature of special permits thereof |
|---|---|---|---|---|
| | | **NEW SPECIAL PERMITS** | | |
| 14951–N | | Lincoln Composites, Lincoln, NE. | 49 CFR 173.302a | To authorize the manufacture, marking, sale and use of non-DOT specification fully wrapped fiber reinforced composite gas cylinders for the transportation of certain compressed gases. (mode 1) |
| 14965–N | | JiangXi Oxygen Plant Co., Ltd., Jiangxi Province. | 49 CFR 178.276 | To authorize the manufacture, marking, sale and use of non-DOT specification portable tanks mounted within an ISO frame that have been designed, constructed and stamped in accordance with Section VIII, Division 2 of the ASME Code. (modes 1, 2, 3) |
| 14966–N | | Vulcore Industrial LLC, Fort Wayne, IN. | 49 CFR 173.302 and 180.205. | To authorize the manufacture, marking, sale and use of non-DOT specification cylinders for the transportation of compressed air for use in self-contained breathing apparatus. (modes 1, 2, 3, 4, 5) |
| 14967–N | | GFS Chemicals, Inc., Columbus, OH. | 49 CFR 171–180 | To authorize the one-time transportation in commerce of certain hazardous materials to a new site to be transported as essentially unregulated. (mode 1) |
| 14969–N | | Pace Air Freight, Inc., Plainfield, IN. | 49 CFR 173.196 and 178.609. | To authorize the one-way transportation in commerce of certain Category A infectious substances in alternative packaging (freezers) by motor vehicle. (mode 1) |
| 14971–N | | Northrop Grumman Corporation, Baltimore, MD. | 49 CFR 173.24 | To allow the controlled release of nitrogen and air from a cylinder during transportation to maintain an inert atmosphere in a shipping container to protect the electronic sensors for a satellite. (mode 1) |
| 14973–N | | NEC Corporation, Fuchu, Tokyo 183–8501. | 49 CFR 173.304a, 173.301, 172.101 Table Column (9B). | To authorize the transportation in commerce of anhydrous ammonia in non-DOT specification packaging (heat pipes). (modes 1, 4) |

[FR Doc. 2010–4034 Filed 3–2–10; 8:45 am]

**BILLING CODE 4909–60–M**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

### Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** List of applications for modification of special permits.

**SUMMARY:** In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to

expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modification of special permits (e.g. to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix "M" denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

**DATES:** Comments must be received on or before March 18, 2010.

**ADDRESS COMMENTS TO:** Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

**FOR FURTHER INFORMATION CONTACT:** Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington DC or at *http://regulations.gov.*

This notice of receipt of applications for modification of special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5 117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on February 23, 2010.

**Delmer F. Billings,**

*Director, Office of Hazardous Materials Special Permits and Approvals.*

| Application number | Docket number | Applicant | Regulation(s) affected | Nature of special permit |
|---|---|---|---|---|
| **MODIFICATION SPECIAL PERMITS** | | | | |
| 8826–M | | Phoenix Air Group, Inc. Cartersville, GA. | 49 CFR 172.101; 172.204(c)(3); 173.27; 175.30(a)(1); 175.320(b). | To modify the special permit to authorize additional Division 1.5 and 1.6 hazardous materials and make corrections to reflect the current statutes and regulations changes. |
| 11447–M | | SAES Pure Gas, Inc. San Luis Obispo, CA. | 49 CFR 173.187 | To modify the special permit to increase the number of pressure vessels from six to eight. |
| 13057–M | | MINTEQ International Inc. Canaan, CT. | 49 CFR 172 Subparts D, E and F; 173.24(c) Subparts E and F of Part 173. | To modify the special permit by the deleting of three hazardous materials from paragraph 6; change the length of continuous rollor coil from 10,000 meters to 12,500 meters; and authorize steel pallets in addition to wooden pallets in paragraph 7.a.(5). |
| 14282–M | | T.F. Boyle Transportation, Inc. (Boyle Transportation) Billerica, MA. | 49 CFR 173.835(g) | To modify the special permit to authorize an additional four Class hazardous materials. |
| 14650–M | | Air Transport International, L.L.C. Little Rock, AR. | 49 CFR 172.101; 171.11; 172.204(c)(3); 173.27; 175.30(a)(1); 175.320(b). | To modify the special permit to authorize additional Division 1.4D explosives and to authorize additional dedicated air charter flights. |

[FR Doc. 2010–4035 Filed 3–2–10; 8:45 am]

BILLING CODE 4910–60–M

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Cancellation of Environmental Impact Statement; Harris and Brazoria Counties, TX

**AGENCY:** Federal Highway Administration (FHWA), TxDOT.

**ACTION:** Cancellation of SH 35 EIS.

**SUMMARY:** In Vol. 68, No. 210/Thursday, October 30, 2003/Notices, FHWA issued a Notice of Intent to advise the public that an Environmental Impact Statement would be prepared for the proposed SH 35 roadway between Bellfort Road and FM 1462 in Harris and Brazoria Counties, Texas. The use of Federal funding for this project is no longer proposed and a State Environmental Impact Statement will be prepared.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gregory S. Punske, Federal Highway Administration, Texas Division, 300 East 8th Street, Room 826, Austin, Texas 78701, Telephone (512) 536–5960.

Issued on: February 19, 2010.

**Gregory S. Punske,**

*District Engineer, FHWA Texas Division.*

[FR Doc. 2010–4036 Filed 3–2–10; 8:45 am]

BILLING CODE 4910–22–M

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Notice of Informational Filing

In accordance with Section 236.913 of Title 49 of the Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received an informational filing from the Marquette Rail, LLC to permit field testing of the TrackAccess System in the autonomous mode without a dispatcher. The informational filing is described below, including the requisite docket number where the informational filing and any related information may be found. The document is also available for public inspection; however, FRA is not accepting public comments.

**Marquette Rail, LLC**

[Docket Number FRA–2008–0081]

The Marquette Rail, LLC has submitted an informational filing to permit field testing of the software-based dispatch system for low density lines identified as TrackAccess System. The informational filing addresses the requirements under 49 CFR 236.913(j)(1). Specifically, the informational filing contains a description of the TrackAccess product and an operational concepts document, pursuant to 49 CFR 236.913(j)(1).

TrackAccess is an electronic track occupancy system similar to the conventional block register. It is designed to protect the area of exclusive track occupancy given to roadway

workers or train crew members by excluding the possibility of electronic issuance of conflicting track occupancy authorities. TrackAccess aims to reduce the potential for human errors associated with issuance of track occupancy authorities to roadway workers and train crews by the dispatcher. In its autonomous mode of operation, the TrackAccess System assumes electronic delivery of track occupancy authorities to roadway workers and train crews.

The Marquette Rail, LLC desires to commence field testing of the product on or about March 1, 2010, or as soon thereafter as practicable, contingent upon FRA acceptance and approval of their informational filing.

Interested parties are invited to review the informational filing and associated documents at DOT's Docket Management Facility during regular business hours (9 a.m.–5 p.m.) at 1200 New Jersey Avenue. SE., Room W12–140, Washington DC 20590. All documents in the public docket are available for inspection and copying on the Internet at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications received into any of our dockets by name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, number 70; Pages 19477–78).

Issued in Washington, DC on February 25, 2010.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety, Standards and Program Development.*

[FR Doc. 2010–4334 Filed 3–2–10; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2010–03]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before March 23, 2010.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2010–0010 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Anna Bruse, 202–267–9655, or Laverne Brunache, 202–267–3133, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on February 25, 2010.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2010–0010.

*Petitioner:* Federal Aviation Administration, Air Traffic Organization's Administration & Talent Management Directorate.

*Section of SFAR Affected:* SFAR 103(5)(b)(vii).

### Description of Relief Sought

Federal Aviation Administration, Air Traffic Organization's Administration & Talent Management Directorate seeks an exemption from SFAR 103(5)(b)(vii) to forgo inclusion of a statement identifying any operational error, operational deviation or runway incursion in the last 5 years while working a control position for Air Traffic Controllers reaching the age of 56 through December 31, 2011.

[FR Doc. 2010–4357 Filed 3–2–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

### S&S Shortline Railroad, LLC

[Waiver Petition Docket Number FRA–2010–0002]

The S&S Shortline Railroad, LLC (SSR) of Farmington, Utah, has petitioned for a permanent waiver of compliance for one locomotive (SSR 4501) and one caboose (SSR 1469) from the requirements of the Railroad Safety Glazing Standards, 49 CFR part 223, which require certified glazing in all windows. SSR is a small railroad in Northern Nevada. The railroad is located in a very remote and isolated portion of the state and has been free of vandalism and other incidents. Because of the remoteness and isolation, SSR does not anticipate any vandalism problems.

The subject locomotive, SSR 4501, is a 1940's era GE 45-ton 300-hp switching

locomotive. The front, rear and side glazing does not conform to 49 CFR 223.11 glazing requirements; however, these windows are glazed with ¼″ laminated safety glass that is in good condition with no discoloration. The locomotive is primarily used as a backup locomotive. The subject caboose, SSR 1469, is an ex D&RGW steel caboose with cupola that is used primarily as a "shoving platform." This caboose was acquired with the original glazing in good condition with no discoloration, but does not meet the 49 CFR 223.13 glazing requirements.

SSR states that they operate primarily in the Bureau of Land Management open range and agricultural environment. They do not experience any rock throwing or shooting at their equipment, and operate at a maximum speed of 10 mph. SSR states that the expenses of retrofitting the subject locomotive and caboose to comply with FRA glazing safety standards will impose an undue financial burden on their small railroad to protect from situations they do not encounter.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2010–0002) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on February 25, 2010.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. 2010–4332 Filed 3–2–10; 8:45 am]

**BILLING CODE 4910–06–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

### Burlington Junction Railway

[Waiver Petition Docket Number FRA–2010–0017]

The Burlington Junction Railway (BJRY) of Burlington, Iowa, has petitioned for a permanent waiver of compliance for one Baldwin RS–4–TC locomotive built in 1953, and rebuilt in 1988, numbered BJRY 3238, from the requirements of the Railroad Safety Glazing Standards, Title 49 CFR Part 223, which require certified glazing in all windows. The railroad indicates that the locomotive is used to switch an industrial park next to the City of Rochelle, Illinois, over an approximately 3.0-mile long track surrounded by warehouses and undeveloped rural agriculture fields. The locomotive is used as a stand-by for the primary unit, and is used two to three times a month. The top speed of operations is 10 mph. BJRY has provided an estimate of $5,914.26 for material and assembly that does not include installation costs.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2010–0017) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.—5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on February 26, 2010.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. 2010–4376 Filed 3–2–10; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2010–0046; Notice No. 10–1]**

### Safety Advisory Notice: Use of Composite Cargo Tanks Manufactured Under DOT Special Permits

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA).

**ACTION:** Safety advisory notice.

**SUMMARY:** This safety advisory is issued to remind all persons who manufacture or use composite cargo tank motor vehicles authorized under DOT special permits of the requirement to conduct testing to ensure that the material to be transported in the cargo tank is compatible with the materials used in the construction of the cargo tank.

**FOR FURTHER INFORMATION CONTACT:** Charles Hochman, Senior Advisor (Technology), Pipeline and Hazardous Materials Safety Administration, (202) 366–4545 or Donald Burger, Chief, Special Permits and General Approvals, Pipeline and Hazardous Materials Safety Administration, (202) 366–4535.

**SUPPLEMENTARY INFORMATION:** The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) contain specifications for the design and construction of cargo tank motor vehicles in Part 178, Subpart J (*see* §§ 178.320–178). Currently, the HMR do not contain include a specification for composite cargo tanks, such as fiber reinforced plastic (FRP) or glass fiber reinforced plastic (GFRP) cargo tanks.

Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) authorizes the Department of Transportation to issue variances—termed special permits—from the HMR in a way that achieves a safety level at least equal to the safety level required under Federal hazmat law or consistent with the public interest and Federal hazmat law, if a required safety level does not exist. That authority is delegated to the Pipeline and Hazardous Materials Safety Administration (PHMSA).

PHMSA has issued the following special permits (SPs) for the manufacture, marking, sale, and use of FRP or GFRP cargo tank motor vehicles:

| SP number | Holder | Status | Expiration date |
|---|---|---|---|
| 9166 | Comptank Corp. | Expired | 12/31/2009 |
| 10878 | Tankcon FRP | Active | 9/30/2010 |
| 11565 | C.P.F. Dualam | Active | 3/31/2010 |
| 11903 | Comptank Corp. | Active | 10/31/2010 |
| 12516 | Poly-Coat Systems | Active | 11/30/2010 |
| 14275 | Hawk Corp. | Active | 12/31/2011 |
| 14277 | Ascus Technology | Active | 11/30/2012 |
| 14779 | Corrosion Companies | Active | 11/30/2011 |

On December 30, 2009, a glass fiber reinforced plastic composite cargo tank manufactured in accordance with a special permit (DOT–SP 11903) failed catastrophically and released its entire contents onto the highway. PHMSA's investigation of the accident concluded that the failure resulted from the carriage of a material in the cargo tank that was incompatible with the materials used in the manufacture of the cargo tank. The material in question reacted with and degraded the corrosion barrier and the structural glass matrix of the tank leading to catastrophic failure.

As demonstrated by the by the December 30, 2009 incident, the shipment of a material that is not compatible with the corrosion barrier and structural glass matrix of a composite cargo tank can lead to a catastrophic failure and potentially cause serious injuries, fatalities, and property and environmental damage. All of the special permits identified above contain the following requirement:

> The compatibility of the commodities and the (FRP or GFRP) cargo tank must be based on ASTM C 581 "Standard Test Method for Chemical Resistance of Thermosetting Resins Used in Glass Fiber Reinforced Structures". Test reports must be maintained by the owner or manufacturer for as long as the cargo tank remains in active service.

PHMSA is concerned that owners and manufacturers of composite cargo tanks are not performing the required compatibility testing or maintaining test reports. To prevent another incident similar to the one that occurred on December 20, 2009, this advisory reminds all persons involved in the manufacture and use of composite cargo tank motor vehicles authorized under DOT special permits of the requirement to perform compatibility testing. Failure to perform the required compatibility testing and to maintain the test reports may result in the suspension or termination of the special permit as well as civil or criminal penalties.

Persons who offer for transportation or transport hazardous materials in violation of applicable HMR requirements may be subject to significant civil penalties and criminal fines and imprisonment. The maximum penalties depend on several factors, including the nature and circumstances, extent and gravity, and severity of the consequences of the violation, but can range up to $100,000 for a civil penalty and $500,000 and ten years in jail for a criminal penalty.

**Magdy El-Sibaie,**

*Acting Associate Administrator for Hazardous Materials Safety.*

[FR Doc. 2010–4318 Filed 3–2–10; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

**[FHWA Docket No. FHWA–2009–0119]**

### Surface Transportation Project Delivery Pilot Program; Caltrans Audit Report

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Final report.

**SUMMARY:** Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) established the Surface Transportation Project Delivery Pilot Program, codified at 23 U.S.C. 327. To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates semiannual audits during each of the first 2 years of State participation. This final report presents the findings from the fourth FHWA audit of the California

Department of Transportation (Caltrans) under the pilot program.

**FOR FURTHER INFORMATION CONTACT:** Ms. Ruth Rentch, Office of Project Development and Environmental Review, (202) 366–2034, *Ruth.Rentch@dot.gov,* or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366–4928, *Michael.Harkins@dot.gov,* Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

## Electronic Access

An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at *http://www.archives.gov* and the Government Printing Office's Web site at *http://www.access.gpo.gov.*

## Background

Section 6005 of SAFETEA–LU (codified at 23 U.S.C. 327) established a pilot program to allow up to five States to assume the Secretary of Transportation's responsibilities for environmental review, consultation, or other actions under any Federal environmental law pertaining to the review or approval of highway projects. In order to be selected for the pilot program, a State must submit an application to the Secretary.

On June 29, 2007, Caltrans and FHWA entered into a Memorandum of Understanding (MOU) that established the assignments to and assumptions of responsibility to Caltrans. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under the National Environmental Policy Act, as well as the FHWA's responsibilities under other Federal environmental laws for most highway projects in California.

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) requires the Secretary to conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The results of each audit must be presented in the form of an audit report and be made available for public comment. The FHWA solicited comments on the fourth audit report in a **Federal Register** Notice published on December 23, 2009, at 74 FR 68308. The FHWA received no comments. This notice provides the final draft of the fourth FHWA audit report for Caltrans under the pilot program.

**Authority:** Section 6005 of Pub. L. 109–59; 23 U.S.C. 315 and 327; 49 CFR 1.48.

Issued on: February 23, 2010.

**Victor M. Mendez,**

*Administrator.*

## Surface Transportation Project Delivery Pilot Program Federal Highway Administration Audit of California Department of Transportation July 27–31, 2009

## Introduction

### *Overall Audit Opinion*

Based on the information reviewed, it is the Federal Highway Administration (FHWA) audit team's opinion that as of July 31, the California Department of Transportation (Caltrans) has continued to make progress toward meeting all responsibilities assumed under the Surface Transportation Project Delivery Pilot Program (Pilot Program), as specified in the Memorandum of Understanding (MOU) [1] with FHWA and in the Caltrans Application for Assumption (Application).

With the completion of FHWA's fourth audit, Caltrans has been operating under the Pilot Program for 2 years. In compliance with the time specifications for the required audits, FHWA has completed the four semiannual audits in the first 2 years of State participation. As required under the Pilot Program, FHWA audits of Caltrans will now be on an annual basis. During the four audits conducted, the audit team has completed on-site audits at 9 of the 12 Caltrans Districts and the remaining Districts were within the scope of the Caltrans Regional Offices that were audited. The audit team continues to identify significant differences across the Districts in terms of the Pilot Program. Example of such differences include: resource availability and allocation; methods of implementation; processes and their improvement; and progress toward meeting all commitments. It is the audit team's opinion that the highly decentralized nature of Caltrans' operations is a major contributing factor to the variation observed. The decentralized nature of the organization necessitates clear, consistent, and ongoing oversight by Caltrans Headquarters over Districts' implementation and operation of the Pilot Program. A robust oversight program will help foster the exchange of information and the sharing of best practices and resources between Districts and will put the entire organization in a better position to more fully implement all assumed responsibilities and meet all Pilot Program commitments.

The FHWA commends Caltrans for its implementation of corrective actions in response to previous audit findings. However, these corrective actions and "fixes" have been put into practice on a case-by-case basis. The FHWA recommends that Caltrans develop a departmentwide, holistic corrective action management approach and system that will develop and implement an internal process review to determine needed improvements to existing processes and procedures.

Due to the multiyear timeframes associated with more complex and controversial projects, the full lifecycle of the environmental review aspect of project development (proceeding from initiation of environmental studies and concluding with the issuance of a record of decision or equivalent decision document) has yet to be fully realized within the period of the Pilot Program. Over the past 2 years, the FHWA California Division has continued to execute the FHWA role for 22 project reviews and decisions excluded from the Pilot Program. Caltrans continues to gain experience in understanding the resource requirements and processes necessary to administer its Pilot Program. It is the audit team's opinion that Caltrans needs to continue to refine its approaches and resources to meet all Pilot Program commitments, especially given the likelihood of increasing resource demands associated with exclusively managing ever-more complex and controversial projects under the Pilot Program.

During the on-site audit, Caltrans staff and management continued to express ongoing interest in receiving feedback from the FHWA audit team related to program successes and areas in need of improvement. By addressing all findings in this report, Caltrans will continue to move its program toward full compliance with all assumed responsibilities and meeting all Pilot Program commitments.

## Limitations of the Audit

The conclusions presented in this report are opinions based upon interviews of selected persons knowledgeable about past and current activities related to the execution of the Pilot Program at Caltrans, and a review of selected documents over a limited time period. The FHWA audit team's ability to conduct the audit and make determinations of Caltrans successful participation in having met its commitments under the Pilot Program

[1] Caltrans MOU between FHWA and Caltrans available at: *http://environment.fhwa.dot.gov/strmlng/safe_cdot_pilot.asp.*

during the four audits conducted have been further limited by the following:

• Not every District was audited. Each audit (including this audit) consisted of visits to selected Caltrans Districts.

• Incomplete project files. Project files and associated project documentation have, when reviewed, not always been complete (*i.e.,* a full administrative record was not always available for review by the auditor team). This is especially true for projects where the project or related studies were initiated prior to commencement of the Pilot Program.

• The limited scope of Pilot Program activity to date conducted by Caltrans. Since Caltrans has not been operating under the Pilot Program for the period of time that is generally agreed to be required to complete the full lifecycle of most Environmental Impact Statements (EIS) and other complex projects, FHWA is not yet able to fully determine how Caltrans complies with all the responsibilities assumed in those project situations.

• Insufficient data to determine time savings. Similarly, it is too early in Caltrans' participation in the Pilot Program, and there is not enough data available, for FHWA to be able to report conclusively on time savings being achieved as a result of Caltrans participation in the Pilot Program.

• Lack of ability to view legal comments provided by Caltrans staff attorneys. As in prior audits, Caltrans did not permit access to its attorneys' written comments on assigned environmental documents. The inability to document the existence (not the substance) of such comments has made it difficult for the audit team to determine if the legal sufficiency process is being implemented in an effective—as opposed to a timely—manner. While recognizing Caltrans' expressed concerns about the attorney-client privilege and acknowledging the dialogue that has taken place regarding these concerns and the appropriate documentation of this process, the audit team, mindful of the provisions of 23 CFR 1.5 as well as sections 8.1.6, 8.2.2, and 8.2.4 of the MOU, is considering whether documentation beyond the timeline provided by Caltrans Legal Division's Legal Information Computer System database and individual findings of legal sufficiency is necessary for FHWA to evaluate fully Caltrans' compliance with these requirements.

• Distinction between the two Categorical Exclusion (CE) assumption processes. Since the assumption by Caltrans of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59) Section 6004 CE process is not a part of these audits, it is not possible to validate the correctness of determinations placing individual CEs under the aegis of each assumed responsibility.

• Continued errors in the quarterly reports. Since the quarterly reports continue to contain errors, it is difficult to have confidence that all National Environmental Policy Act (NEPA) documents have been reported and thus can be part of the FHWA audit plans.

*Background*

The SAFETEA–LU Section 6005(a) established the Pilot Program, codified at title 23, United States Code, section 327. The Pilot Program allows the Secretary of Transportation (Secretary) to assign, and the State to assume, the Secretary's responsibilities under NEPA for one or more highway projects. Upon assigning NEPA responsibilities, the Secretary may further assign to the State all or part of the Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review of a specific highway project. When a State assumes the Secretary's responsibilities under this program, the State becomes solely responsible and is liable for carrying out the responsibilities it has assumed, in lieu of the FHWA.

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates that FHWA, on behalf of the Secretary, conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The focus of the FHWA audit process is four fold: (1) To assess a Pilot State's compliance with the required MOU and applicable Federal laws and policies, (2) to collect information needed to evaluate the success of the Pilot Program, (3) to evaluate Pilot State progress in meeting its performance measures, and (4) to collect information for use in the Secretary's annual report to Congress on the administration of the Pilot Program. Additionally, 23 U.S.C. 327(g) requires FHWA to present the results of each audit in the form of an audit report that is published in the **Federal Register**. This audit report must be made available for public comment, and FHWA must respond to public comments received no later than 60 days after the date on which the period for public comment closes. The FHWA solicited comments on the fourth audit report in a **Federal Register** Notice published December 22, 2009, at 74 FR 68308. The FHWA received no comments during the comment period. This notice provides the final draft of the fourth FHWA audit report for Caltrans under the pilot program.

Caltrans published its Application under the Pilot Program on March 14, 2007, and made it available for public comment for 30 days. After considering public comments, Caltrans submitted its Application to FHWA on May 21, 2007, and FHWA, after soliciting the views of Federal agencies, reviewed and approved the Application. Then on June 29, 2007, Caltrans and FHWA entered into an MOU that established the assignments to and assumptions of responsibility to Caltrans, which became effective July 1, 2007. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under NEPA, as well as FHWA's responsibilities under other Federal environmental laws for most highway projects in California. Caltrans' participation in the Pilot Program is effective through August 2011 (23 U.S.C 327(i)(1)).

*Scope of the Audit*

This is the fourth FHWA audit of the Caltrans Pilot Program. The on-site portion of the audit was conducted in California from July 27 through July 31, 2009. As required in SAFETEA–LU, each FHWA audit must assess compliance with the roles and responsibilities assumed by the Pilot State in the MOU. The audit also includes recommendations to assist Caltrans in administering a successful Pilot Program.

The audit primarily focused on the continued review of compliance with assumed responsibilities.

Prior to the on-site audit, FHWA conducted telephone interviews with Federal resource agency staff at the U.S. Army Corps of Engineers (USACE), the U.S. Fish and Wildlife Service (USFWS), the National Park Service, the National Oceanic and Atmospheric Administration and the Environmental Protection Agency regional office in California. The on-site audit included visits to the Caltrans Offices in District 5 (San Luis Obispo), District 7 (Los Angeles), District 11 (San Diego), and District 12 (Irvine). Additionally, Caltrans legal staff was interviewed in Sacramento and USACE office in Irvine was visited.

This report documents findings within the scope of the audit as of the completion date of the on-site audit on July 31, 2009.

*Audit Process and Implementation*

The intent of each FHWA audit completed under the Pilot Program is to ensure that each Pilot State complies with the commitments in its MOU with FHWA. The FHWA does not evaluate specific project-related decisions made by the State because these decisions are the sole responsibility of the Pilot State. However, the FHWA audit scope does include the review of the processes and procedures (including documentation) used by the Pilot State to reach project decisions in compliance with MOU section 3.2.

In addition, Caltrans committed in its Application (incorporated by reference in MOU section 1.1.2) to implement specific processes to strengthen its environmental procedures in order to assume the responsibilities assigned by FHWA under the Pilot Program. The FHWA audits review how Caltrans is meeting each commitment and assesses Pilot Program performance in the core areas specified in the *Scope of the Audit* section of this report.

The Caltrans' Pilot Program commitments address:

- Organization and Procedures under the Pilot Program
- Expanded Quality Control Procedures
- Independent Environmental Decisionmaking
- Determining the NEPA Class of Action
- Consultation and Coordination with Resource Agencies
- Issue Identification and Conflict Resolution Procedures
- Record Keeping and Retention
- Expanded Internal Monitoring and Process Reviews
- Performance Measures to Assess the Pilot Program
- Training to Implement the Pilot Program
- Legal Sufficiency Review.

The FHWA team for the fourth audit included representatives from the following offices or agencies:

- FHWA Office of Project Development and Environmental Review
- FHWA Office of the Chief Counsel
- FHWA Alaska Division Office
- FHWA Resource Center Environmental Team
- Volpe National Transportation Systems Center
- USFWS.

During the onsite audit, FHWA interviewed 80 staff from the Caltrans four District offices, Caltrans legal staff, and the USACE. The audit team interviewed a cross-section of staff including top senior managers, senior environmental planners, generalists, associate planners, and technical experts. The audit team also reviewed project files and records for over 45 projects managed under the Pilot Program.

The FHWA acknowledges that Caltrans identified specific issues during its fourth self-assessment performed under the Pilot Program (required by MOU section 8.2.6), and has established processes to address most issues. Some issues described in the Caltrans self assessment may overlap with FHWA findings identified in this audit report.

In accordance with MOU section 11.4.1, FHWA provided Caltrans with a 30-day comment period to review this draft audit report. The FHWA reviewed comments received from Caltrans and revised sections of the draft report, where appropriate, prior to publishing it in the **Federal Register** for public comment.

*Status of Findings Since Last Audit*

As part of the fourth audit, FHWA evaluated the corrective actions implemented by Caltrans in response to the audit findings in the third audit report.

Most of the compliant findings in the third audit report involved specific processes and procedures of the North and Central Region offices. As these offices were not visited during this fourth audit, we cannot report on the continuance of their compliance.

The FHWA reviewed the current status of "Deficient" and "Needs Improvement" audit findings identified during the third FHWA audit in January 2009.

"Deficient" audit findings status:

1. *Quarterly Reports*—The quarterly reports Caltrans provides to FHWA under section 8.2.7 of the MOU continue to include an inaccurate listing of all approvals and decisions under the Pilot Program. This continued area of deficiency was also reported by Caltrans in their fourth self assessment.

2. *Performance Measure*—"*Monitor relationships with Federal and State resource agencies*"—Caltrans reported in its fourth self-assessment that a survey was conducted in early 2009 with those Federal and State resource agencies that it works with on Pilot Program projects.

3. *Delegation of Signature Authority*—This issue has been rectified through issuance of clarifying direction to staff.

4. *Assignment of Section 6002 Responsibility under the Pilot Program*—Caltrans has revised its *Standard Environmental Reference* (SER) to correct and clarify the template letters for inviting cooperating and participating agencies to participate in an EIS project, as per section 6002 of SAFETEA–LU.

"Needs Improvement" audit findings:

1. *Quality Assurance/Quality Control (QA/QC) Certification Process*—Ongoing improvement was observed in the completion of the QC certification forms. Nevertheless incorrect and incomplete QC certification forms were still identified.

2. *Self Assessment and Process Reviews*—As per the suggestion of this finding, the Caltrans fourth self assessment included review of ongoing projects as well as completed projects.

3. *Air Quality Conformity Determinations*—The project files reviewed during the fourth audit contained the necessary FHWA air quality conformity determination documentation, where applicable.

4. *Project Files/Uniform File System (UFS)*—Some project files reviewed during this audit met the requirements of Section 8.2.4 of the MOU and SER Chapter 38 while other files reviewed did not meet these requirements.

5. *Commitment of Resources*—Inconsistencies continued to be observed with regard to charging time spent on pilot program activities to the official Pilot Program code (6DELE).

6. *Training on Air Quality Conformity*—Caltrans reported in its fourth self assessment that Air Quality training has been offered and is to be provided in the upcoming training plan.

7. *Assignments under the Pilot Program*—Caltrans staff interviewed indicated a better understanding of the SAFETEA–LU Section 6002 (23 U.S.C. 139) environmental review process requirements than indicated in the third audit.

8. *Performance Measure*—"*Monitor relationships with the general public*"—The fourth Caltrans self assessment reported a new process for monitoring this performance measure had been implemented. Monitoring of how the relationships are evolving is now being conducted.

9. *Documentation of Class of Action Determination*—For projects initiated under the Pilot Program, project files for class of action determination reviewed during the fourth audit, contained this documentation.

10. *Local Assistance Training Plan*—This finding was not revisited as to its status during the fourth audit.

*Effective Practices*

The FHWA audit team observed the following effective practices during the fourth audit:

1. One Caltrans District training coordinator implemented a system to

capture and track which employees in that district completed online training courses by creating and assigning a unique billing code for time spent taking such courses. This training coordinator then manually input this information into an employee's training plans.

2. In some Districts, electronic files are set up and organized to mirror the UFS headings.

3. In one Caltrans District, new environmental staff are required to attend an internal 23-day "boot camp" that introduces them to the processes, procedures, and related information needed for their position.

4. The use of a memorandum to the file with a complete explanation of the circumstances and details regarding the "down-scoping" of a project from an EIS to an environmental assessment (EA), or from an EA to a CE.

5. Explanatory notes in a project file under one UFS tab stating where the information for that tab is found filed under another tab within the project file.

*Findings Definitions*

The FHWA audit team carefully examined Pilot Program areas to assess compliance in accordance with established criteria in the MOU and Application. The time period covered by this fourth audit report is from the start of the Caltrans Pilot Program (July 1, 2007) through completion of the third onsite audit (July 31, 2009) with the focus of the audit on the most recent 6 month period. This report presents audit findings in three areas:

- *Compliant*—Audit verified that a process, procedure or other component of the Pilot Program meets a stated commitment in the Application and/or MOU.
- *Needs Improvement*—Audit determined that a process, procedure or other component of the Pilot Program as specified in the Application and/or MOU is not fully implemented to achieve the stated commitment or the process or procedure implemented is not functioning at a level necessary to ensure the stated commitment is satisfied. *Action is recommended to ensure success.*
- *Deficient*—Audit was unable to verify if a process, procedure or other component of the Pilot Program met the stated commitment in the Application and/or MOU. *Action is required to improve the process, procedure or other component prior to the next audit; or*

Audit determined that a process, procedure or other component of the Pilot Program did not meet the stated commitment in the Application and/or MOU. *Corrective action is required prior to the next audit. or*

*Audit determined that for a past Needs Improvement finding,* the rate of corrective action has not proceeded in a timely manner; is not on the path to timely resolution of the finding.

**Summary of Findings—July 2009**

**Compliant**

C1) *Legal Sufficiency Timeline*—Caltrans' Legal Division has developed a consistent process to conduct required legal sufficiency reviews by attorneys (per 23 CFR 771.125(b) and 774.7(d)). Based on interviews with staff and information provided during the audit, legal reviews of NEPA and Section 4(f) of the U.S. DOT Act of 1966 (Section 4(f)) documents appear to be conducted within the times allotted by Caltrans internal performance goals.

**Needs Improvement**

N1) *Inadequate Guidance in the SER*—Section 8.2.5 of the MOU requires "At a minimum, Caltrans' quality control and quality assurance activities will include the review and monitoring of its processes relating to project decisions, environmental analysis, project file documentation, checking for errors and omissions, legal sufficiency reviews, and taking appropriate corrective action as needed." Several instances were identified where the guidance provided in the SER was unclear, misleading, or incomplete. This resulted in documents incorrectly completed and/or processes not implemented correctly. Examples of such instances were:

a.) SER Chapter 38 requires that the SEP sign the Environmental Document Review Checklist once it is completed. Review of project files revealed Environmental Document Review Checklists that were either not signed by a Senior Environmental Planner (SEP) or not signed at all. Additionally, different versions of the checklist were found in various project files, none of which designated which signature line was to be completed by the SEP. These various instances of noncompliance with the SER requirement were observed within individual Districts and also from District to District.

b.) SER Chapter 38 guidance does not distinguish between the "pilot program" citation required to appear in individual Section 4(f) Evaluations prepared for Section 6005 CE projects and those prepared for Section 6004 CE projects. The statement in the SER regarding the project being carried out by Caltrans under its assumption of responsibility pursuant to 23 U.S.C. 327 is only applicable to Section 4(f) evaluations for Section 6005 CEs under the Pilot Program. The CEs completed by Caltrans under the Section 6004 CE assumption should refer to 23 U.S.C. 326. Through interviews and project file reviews, confusion about this was identified and, at least in some cases, the apparent misunderstanding that the same language is to be used for both Section 6004 and Section 6005 CEs with individual Section 4(f) evaluations.

c.) SER Chapter 33 discusses the process and documentation for conducting NEPA re-evaluations (to comply with 23 CFR 771.129). The chapter, last updated November 10, 2008, does not provide clear direction on how to process a re-evaluation under the Pilot Program. The chapter includes a reference to a joint FHWA/Caltrans guidance on NEPA consultation and re-evaluation, dated June 21, 2007, that states, "When the NEPA Pilot Program (NEPA assumption) begins, the joint guidance and the NEPA/CEQA Revalidation form will be revised as necessary." The FHWA/Caltrans joint guidance has not been revised to take the Pilot Program into consideration. There is a link to a review form that matches the form contained in the joint FHWA/Caltrans guidance and has FHWA removed as having approval authority; however, there is no guidance on the appropriate use of the form.

d.) SER Chapter 25 references FHWA Order 6640.2 *FHWA Actions to address Environmental Justice in minority and Low-Income Populations;* however, the flowchart and guidance provided in that chapter do not fully reflect the definition of Disproportionately High and Adverse Effect on Minority and Low-Income Populations provided in that Order, nor does it clearly state the need to identify population served and/or affected by race, or national origin, and income level when determining such effects. The SER chapter provides discussion points and some sources for reference material, but does not provide specific guidance to NEPA practitioners for how to integrate a project level review into a NEPA process, to document proposed steps to guard against disproportionately high and adverse effects, or to document meaningful public involvement opportunities and consider the results.

N2) *Procedural and Substantive Requirements*—MOU Section 5.1.4 states that Caltrans will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering. Areas in need of improvement in working with Federal agencies included:

a.) Through interviews with USACE and USFWS staff located in California, instances were identified where there was confusion as to the implementation of the Endangered Species Act (ESA) Section 7 process and how it is related to the USACE permitting process. Verbal comments were made by resource agency staff that when working on local agency projects, the local project sponsors lacked clarity on the information regarding the ESA Section 7 compliance needed for the USACE permitting process. It was also learned that on more than one occasion, local agencies inappropriately acted as lead agency for ESA Section 7 consultation and Section 404 of the Clean Water Act coordination.

b.) The SER Chapter 38, *Consultation and Coordination with Federal Agencies,* requires Caltrans to include the following specific language in consultation documents being transmitted directly to Federal resource agencies:

> Caltrans is [transmitting/initiating * * * (describe product or action)] as the NEPA lead agency under the provisions of the *Memorandum of Understanding (MOU) between the Federal Highway Administration and the California Department of Transportation Concerning the State of California's Participation in the Surface Transportation Project Delivery Pilot Program,* which became effective on July 1, 2007. The MOU was signed pursuant to Section 6005 of the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) which allows the Secretary of Transportation to assign, and the State of California to assume, responsibility for FHWA's responsibilities under other Federal environmental laws. As this project is covered by the Pilot Program MOU, FHWA has assigned and Caltrans has assumed FHWA responsibility for environmental review, consultation, and coordination on this project. Please direct all future correspondence on this project to Caltrans.

A letter in a project file from Caltrans to USFWS requesting initiation of formal ESA Section 7 consultation did not include the required language regarding the responsibilities assumed by Caltrans.

N3) *Section 4(f) Documentation*—MOU Section 5.1.1 affirms that Caltrans is subject to the same procedural and substantive requirements that apply to the DOT in carrying out the responsibilities assumed under the Pilot Program. Through project file reviews and interviews with Caltrans staff, inconsistencies were identified with the *documentation* required in carrying out the Section 4(f) provisions. These included:

a.) For one project, no documentation was provided in the EA or in the project file to support the assertion that "[t]emporary uses do not normally constitute 'use' under Section 4(f) policy." The FHWA regulation regarding "temporary occupancies of land," 23 CFR 774.13(d), states in pertinent part that there must be documented agreement with the official with jurisdiction over the Section 4(f) resource that the requisite conditions have been met. 23 CFR 774.13(d)(5).

b.) Two project files that together contained inadequate documentation of three potential Section 4(f) resources were identified. Documentation did not fully support statements that these resources were not, in fact, Section 4(f) resources. In one case, the official with jurisdiction even disputed the statement in the environmental document that the subject property was not a Section 4(f) resource and provided information to support a Section 4(f) resource identification. In another document, there was an implied *de minimis* effect by the use of the term; however, no supporting documentation was provided, nor was there any evidence of public involvement or coordination with the officials with jurisdiction over the Section 4(f) resource, as required by 49 U.S.C. 303(d) and 23 CFR 774.7(b).

c.) In four project files reviewed during the audit, documentation did not reflect that the current Section 4(f) regulations are being adhered to in all NEPA processes. In these four projects, references were made to the prior FHWA regulations at 23 CFR 771.135 rather than to the updated regulations at 23 CFR Part 774.

N4) *Circulation of a Draft Section 4(f) Evaluation*—Project file reviews and interviews with Caltrans staff identified confusion as to the requirements for the circulation of the Section 4(f) Evaluation to the Department of the Interior (DOI) for review. In one instance, Caltrans staff contacted the FHWA Division Office to determine circulation requirements and documentation indicates that the Section 4(f) Evaluation was sent to FHWA for forwarding to DOI.

N5) *Section 4(f) Implementation*—MOU Section 5.1.1 requires Caltrans to be subject to the same procedural and substantive requirements that apply to the DOT when carrying out the responsibilities it has assumed. Through project file reviews and interviews of Caltrans staff, several inconsistencies with the *implementation and general understanding* required in carrying out the Section 4(f) provisions were identified. These include:

a.) Text in an EA that cited the Section 4(f) "policy" should have referred to the Section 4(f) "regulations." The correct citation for this Section 4(f) Evaluation should have been the FHWA regulations, 23 CFR Part 774.

b.) Review of a final Environmental Assessment/Finding of No Significant Impact (EA/FONSI) and project files revealed a lack of understanding regarding the applicability of FHWA's Nationwide Programmatic Section 4(f) evaluation for the rehabilitation or replacement of historic bridges. Under the Programmatic, all five criteria of applicability set forth in this programmatic must be met and the explanation for meeting the criteria must be included in the document and the project file *(http://www.environment.fhwa.dot.gov/projdev/4fbridge.asp)*. In addition, the draft EA for this project reached a Section 4(f) conclusion prior to executing the Section 106 MOU with the State Historic Preservation Office.

N6) *Legal Division Staff*—Caltrans' Legal Division consists of four largely autonomous offices[2] serving different regions of the State. The MOU section 4.2.2 requires Caltrans "to obtain adequate* * * staff capability" including "without limitation* * * [d]emonstrating, in a consistent manner, the capacity to perform Caltrans' assumed responsibilities under this MOU and applicable Federal laws." As noted in a previous audit report, Caltrans maintains a staff of attorneys in each of the four offices trained to support the Pilot Program, and tracks the training each of these attorneys receives related to environmental law. The audit team notes that many of the attorneys assigned to the Pilot Program have a great deal of general legal experience; however, over the life of the Pilot it has become apparent that the four legal offices vary widely when it comes to attorneys with significant experience in Federal environmental law. During this audit, it became clear that this inconsistency increased following the retirement of a highly experienced attorney near the end of 2008. This retirement has resulted in two of Caltrans' legal offices—each of which serves some of Caltrans' largest and busiest Districts—having on staff no attorneys with substantial experience in Federal environmental law. It is the audit team's understanding that legal sufficiency reviews are conducted independently within these autonomous offices, increasing the potential that legal sufficiency reviews may be applied in an inconsistent manner across the State.

[2] The four offices are located in Sacramento, San Francisco, Los Angeles, and San Diego.

N7) *Training*—Section 4.2.2 of the MOU requires Caltrans to maintain adequate organizational and staff capacity to effectively carry out the responsibilities it has assumed under Section 3 of the MOU. The following inconsistencies were noted during interviews:

a.) Interviews and personnel training record reviews identified two tools used by Caltrans to determine the capacity of Caltrans staff to carry out Pilot Program responsibilities including a Learning Management System (LMS) and Individual Development Plans (IDPs). The audit team observed that these tools, and possibly others, are used in varying ways and with varying success across Districts to (1) identify training needs or gaps in areas of expertise and (2) plan and track the training each employee receives. Given this variation and use of these tools and approaches, it is unclear how District leadership ensures that all Caltrans employees have the capacity to carry out assigned responsibilities assumed under the Pilot Program and how this information can be collected.

b.) Interviews reflected a lack of knowledge in two areas. As is detailed in other portions of this audit report, several instances of inadequate staff capacity for determining compliance process requirements related to the Section 4(f) and ESA Section 7 processes were observed during this audit. This is an example of a needed competency that does not appear to be being met and/or being tracked. As was also noted earlier in this report, there is varying understanding of the re-evaluation process and requires additional training for staff to be competent in the understanding of this process.

c.) As the demand for and use of online training courses increases, there is currently no consistent method for Caltrans to track which employees have completed online training courses and to incorporate this information into the LMS and into the employee IDPs. In order to ensure that Caltrans employees implementing NEPA duties have the knowledge and skills to assume the responsibilities under Section 3 of the MOU, Caltrans should begin to track this information and also determine which online training courses should be prerequisites for performing certain NEPA assumption activities.

N8) *Maintenance of Project and General Administrative Files*—Section 8.2.4 of the MOU requires Caltrans to maintain project and general administrative files pertaining to its discharge of the responsibilities assumed under the Pilot Program. Caltrans has instituted specific procedures for maintaining project files and has provided training on these procedures. Inconsistencies in the application of these procedures, reported in previous audit findings, were also identified in this audit. Inconsistencies in 12 of the 47 project files reviewed during the audit, including:

a.) Required project documentation was missing from several project files. Examples of missing documentation included: a Biological Opinion; ESA Section 7 concurrence documentation; internal and external communications related to the project; letters from the District Local Agency Engineer to the local agency transmitting the Preliminary Environmental Study form with the list of the required technical studies for the project; and noise abatement decision report.

b.) Some required file documentation missing from project files was eventually located elsewhere in the District Office. Examples of items missing from the project file, but brought to auditors upon request, included cooperating agencies' letters, FHWA project level air quality conformity determinations, Caltrans' noise abatement decision reports, a project's Section 106 MOA, and evidence of the circulation of Section 4(f) documents to the DOI. Required documentation could not be located during the audit.

c.) The required documentation according to 23 CFR 771.111(h)(2)(vi), which states that the State must provide "transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered" could not be located during the audit. In two instances, the public hearing transcript was not found nor was any certification (or other documentation) that a hearing had been held.

d.) In several instances, project files were missing required UFS tabs (though they contained pertinent documentation) and some sections contained no information or explanation as to why the tabs were missing or tab sections were empty.

N9) *Varying Oversight/Analysis of Commitment of Resources* — Section 4.2.2 of the MOU requires that "Caltrans will maintain adequate organizational and staff capability, including competent and qualified consultants where necessary or desirable, to effectively carry out the responsibilities it has assumed under part 3 of this MOU. This includes, without limitation:

○ Using appropriate environmental technical and managerial expertise;

○ Devoting adequate staff resources; and

○ Demonstrating, in a consistent manner, the capacity to perform Caltrans' assumed responsibilities under this MOU and applicable Federal laws."

Previous audits have tried to determine how Caltrans monitors its resources to implement the Pilot Program, but based on audit interviews, were unable to identify a uniform process. Through interviews and material reviewed during this audit, it was determined that the existing system used by Caltrans to track resources showed inconsistent use of billing codes and in one case identified an error not previously found by Caltrans. During the interviews with Caltrans environmental personnel, inconsistencies continued to be identified in the reporting and use of these Pilot Program codes. These inconsistencies include:

(a) Lack of familiarity with the activities eligible to be billed to the Pilot Program,

(b) Lack of supervisory direction as to what activities should be billed to the Pilot Program;

(c) Failure to report all times eligible for billing under the appropriate codes for both Capital and Local Assistance programs (codes 6DELE and 6LADELE, respectively);

(d) Varying degrees of oversight, or no oversight of the billing codes for the Pilot Program performed in the Districts.

**Deficient**

D1) *Quality Control Quality (QA/QC) Assurance*—Under the Pilot Program, and as reflected in the language cited on each environmental document assigned to Caltrans per MOU Section 3.2.5, NEPA documentation should reflect that FHWA has no role in the environmental review and decisionmaking process for assigned projects. Through project file and document reviews, three instances were observed where in a document or in the project file, there were references to FHWA being involved in the decisionmaking process.

D2) *QA/QC Certification Process*—Section 8.2.5 of the MOU and SER Chapter 38 require Caltrans staff to review each environmental document in accordance with the policy memorandum titled "Environmental Document Quality Control Program under the NEPA Pilot Program" (July 2, 2007). Incomplete and incorrectly completed QC certification forms continue to be identified. Five of the seven identified instances occurred in 2008. Examples of these are:

a) Four instances in which review signatures on QA/QC forms were not

obtained the proper sequence in accordance with the Caltrans established QA/QC processes;

b) Three project files where QA/QC forms were either incomplete or missing.

D3) *Quarterly Reporting*—MOU Section 8.2.7 requires Caltrans to submit a report to FHWA each quarter for the first 2 years of Pilot program listing all approvals and decisions Caltrans makes with respect to responsibilities assumed under the MOU. Quarterly reports submitted by Caltrans for the first eight quarters of Pilot program participation were reviewed for this audit. Each of the first seven quarterly reports has been revised; some reports have been revised multiple times. In summary, for the first seven quarterly reports, a total of 63 new projects were added in report revisions and 29 projects initially reported were subsequently deleted. The reporting issues spanned across the majority of districts reporting projects, and seven districts submitted revisions to four or more quarterly reports. Inaccurate project reporting has been a consistent issue affecting the quarterly report process and has been identified in previous FHWA audit reports. Among the errors discovered were reporting errors related to incorrectly characterizing projects (e.g., CEs under Section 6004 and Section 6005), and omissions associated with untimely reporting of project approvals and decisions by district staff (i.e., a subsequent quarterly report included a project that was approved in the previous quarter). The approach used by each district to collect project information for the quarterly reports is highly variable and is one key contributor to continued reporting inaccuracies.

The current Caltrans approach to developing the quarterly reports continues to be deficient. The accuracy of the reports on project approvals and decisions affects FHWA oversight of the Pilot Program. For example, if Caltrans does not report to FHWA a project being administered under the Pilot Program, the project may not be included in the audit process. Additionally, now that the FHWA onsite audit process will move to an annual basis (semi-annual audits were required during the first 2 years of the Pilot Program), the project approval and decision reporting takes on increased significance as less in-field auditing will occur.

## Response to Comments and Finalization of Report

The FHWA received no comments during the 30-day comment period for the draft audit report. Therefore, the FHWA feels that there is no need to revise the draft audit report findings and finalizes the audit report with this notice.

[FR Doc. 2010–4432 Filed 3–2–10; 8:45 am]

BILLING CODE 4910–22–P

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## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Additional Designations of Individuals and Entities Pursuant to Section 804(b) of the Foreign Narcotics Kingpin Designation Act ("Kingpin Act"), 21 U.S.C. 1903(b)

**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 seven individuals and one entity whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act ("Kingpin Act") (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

**DATES:** The designation by the Director of OFAC of seven individuals and one entity identified in this notice, pursuant to section 805(b) of the Foreign Narcotics Kingpin Designation Act ("Kingpin Act"), 21 U.S.C. 1904(b), is effective on February 25, 2010.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW. (Treasury Annex), Washington, DC 20220, Tel.: 202/622–2490.

**SUPPLEMENTARY INFORMATION:**

## Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on 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

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On February 25, 2010 the Director of OFAC designated seven individuals and one entity whose property and interests in property are blocked pursuant to section 805(b) of the Foreign Narcotics Kingpin Designation Act.

The list of additional designees is as follows:

## Individuals

1. MENDEZ VARGAS, Jose de Jesus (a.k.a. CHAMULA; a.k.a. CHANGO; a.k.a. CHANGO MENDEZ; a.k.a. CHUY; a.k.a. CHUY MENDEZ; a.k.a. EL CHANGO; a.k.a. MENDEZ VARGAS, Jesus; a.k.a. MENDEZ, Jesus), Tazumbos, Jalisco, Mexico; Calle Dr. Lose Luis Mora Col Morelos, Apatzingan, Michoacan, Mexico; Calle Carlos Salazar Col Buenos Aires, Apatzingan, Michoacan, Mexico; Toluca, Mexico, Mexico; Calle Acatitla 122, Col. Ferrocarril, Apatzingan, Mexico; Potrero Grande de C de Paracuaro, Apatzingan, Mexico; c/o Club Abaro, Ave Vicente Villada, Mexico City, Municipio de Mexico City, D.F., Mexico; DOB 28 Feb 1974; alt. DOB 18 Sep 1989; alt. DOB 6 Aug 1973; POB El Coloma, Michoacan; alt. POB Eduardo Neri, Guerrero; alt. POB Acapulco de Juarez, Guerrero; nationality Mexico; C.U.R.P. MEVJ890918HGRNRS09 (Mexico) (individual) [SDNTK]

2. MORENO GONZALEZ, Nazario (a.k.a. CASTREJÓN PEÑA, Víctor

Nazario; a.k.a. CHAYO; a.k.a. EL CHAYO; a.k.a. EL DULCE; a.k.a. EL MAS LOCO; a.k.a. LA COMADRE; a.k.a. LOCO; a.k.a. MORENO, Chayo; a.k.a. MORENO MADRIGAL, Nazario; a.k.a. MORENO, Jose; a.k.a. TINO), Calle Isidro Murivera, Matamoros 51370, Mexico; Apatzingan, Michoacan, Mexico; 625 Virgilio Garza Chepevera, Monterrey, Nuevo Leon 64030, Mexico; 7 Calle Fray Servando Teresa de Mier, Aptazingan, Michoacan, Mexico; 336 Calle Priv Carlos S de Gortari, Monterrey, Nuevo Laredo, Mexico; 36 Calle Nayarit, Caborca, Sonora 83610, Mexico; DOB 8 Mar 1970; alt. DOB 6 Mar 1970; alt. DOB 12 Jun 1967; alt. DOB 12 Jun 1979; alt. DOB 2 Feb 1982; POB Ario de Rosales, Michoacan, Mexico; alt. POB Guanajuatillo, Michoacan, Mexico; citizen Mexico; C.U.R.P. MOGN700308HMNRNZ07 (Mexico); Identification Number 092520304 (Mexico); R.F.C. MOGN670612TN0 (Mexico); alt. R.F.C. MOGN700308TN2 (Mexico); alt. R.F.C. MOGN790612TN8 (Mexico); SSN 601–62–3570 (United States) (individual) [SDNTK]

3. LOYA PLANCARTE, Dionicio (a.k.a. EL TIO; a.k.a. LOYA PLANCARTE, Dionisio), La Calle Prolongacion Finlandia, Fracc Arboledas, Morelia, Michoacan, Mexico; Calle Sin Nombre 100, Cenobio Moreno, Apatzingan, Michoacan 60710, Mexico; Joan Sebastian Bach 87, 2–B, Col Bosque de la Loma, Morelia, Michoacan, Mexico; DOB 21 Oct 1955; POB Michoacan, Mexico; R.F.C. LOPD5510214S1 (Mexico) (individual) [SDNTK]

4. GÓMEZ MARTINEZ, Servando (a.k.a. EL PROFE; a.k.a. EL PROFESOR; a.k.a. LA TUTA), 236 Ave. Lazaro Cardenas, Centro 60920, Mexico; 25 Calle Libertad, Vigencia, Mexico; DOB 6 Feb 1966; POB Arteaga, Michoacan, Mexico; C.U.R.P. GOMS660206HMNMRR08 (Mexico); R.F.C. GOMS660206NS4 (Mexico); alt. R.F.C. GOMS790516 (Mexico) (individual) [SDNTK]

5. PLANCARTE SOLÍS, Enrique (a.k.a. KIKE; a.k.a. LA CHIVA), Michoacan, Mexico; c/o Colonia Centro, Ave Lazaro Cardenas Sur 134, Nueva Italia, Michoacan, Mexico; DOB 14 Sep 1970; POB Michoacan, Mexico; nationality Mexico; C.U.R.P. PASE700914HMNLLN09 (Mexico) (individual) [SDNTK]

6. RUEDA MEDINA, Jose Arnoldo (a.k.a. EL FLACO; a.k.a. FLACO; a.k.a. LA MINSA; a.k.a. LOPEZ HUERTA, Arnoldo; a.k.a. LOPEZ RUEDA, Jose Arnoldo; a.k.a. MODELO); DOB 15 Dec 1969; alt. DOB 27 Dec 1969; POB Michoacan, Mexico; alt. POB Paracuaro, Mexico; nationality Mexico; C.U.R.P. RUMA691215HMNDDR08 (Mexico) (individual) [SDNTK]

7. BARRERA MEDRANO, Nicandro (a.k.a. BARRERA MENDOZA, Nicandro; a.k.a. BARRERA, Nicandro; a.k.a. BARRERA, Robert; a.k.a. CHAPARRO; a.k.a. CHATO; a.k.a. EL NICA; a.k.a. EL NICE; a.k.a. EL NICO; a.k.a. NICA; a.k.a. NICANDRO, Barrera Mendoza; a.k.a. NICO), c/o Purepecha Trucking Co., Uruapan, Michoacan, Mexico; DOB 2 Nov 1964; POB Michoacan, Mexico; citizen Mexico; C.U.R.P. BAMN641102HMNRDC02 (Mexico) (individual) [SDNTK]

**Entity**

1. TRANSPORTADORA PUREPECHA S.A. DE C.V. (a.k.a. PUREPECHA TRUCKING CO.), Avenida de la Revolution 7, Zumpimito, Carr. Apatzingan y Articulo 27, Uruapan, Michoacan 60190, Mexico; Zaragoza 1050, Reynosa, Tabasco, Mexico; Km. 7 Carretera Antigua, Nuevo Laredo, Tamaulipas, Mexico; Zaragoza 1050, Reynosa, Tabasco, Mexico; R.F.C. TPU991105FB4 (Mexico) [SDNTK]

Dated: February 25, 2010.

**Adam J. Szubin,**

*Director, Office of Foreign Assets Control.*

[FR Doc. 2010–4373 Filed 3–2–10; 8:45 am]

**BILLING CODE 4811–42–P**

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### La Jolla Bank, FSB, La Jolla, CA; Notice of Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision (OTS) has duly appointed the Federal Deposit Insurance Corporation as sole Receiver for La Jolla Bank, FSB, La Jolla, California (OTS No. 08247), on February 19, 2010.

Dated: February 22, 2010.

By the Office of Thrift Supervision.

**Sandra E. Evans,**

*Federal Register Liaison.*

[FR Doc. 2010–4038 Filed 3–2–10; 8:45 am]

**BILLING CODE 6720–01–M**

Federal Register

Wednesday,
March 3, 2010

# Part II

# Environmental Protection Agency

## 40 CFR Part 63

## National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 63**

**[EPA–HQ–OAR–2008–0708, FRL–9115–7]**

**RIN 2060–AP36**

## National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines

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

**ACTION:** Final rule.

**SUMMARY:** EPA is promulgating national emission standards for hazardous air pollutants for existing stationary compression ignition reciprocating internal combustion engines that either are located at area sources of hazardous air pollutant emissions or that have a site rating of less than or equal to 500 brake horsepower and are located at major sources of hazardous air pollutant emissions. In addition, EPA is promulgating national emission standards for hazardous air pollutants for existing non-emergency stationary compression ignition engines greater than 500 brake horsepower that are located at major sources of hazardous air pollutant emissions. Finally, EPA is revising the provisions related to startup, shutdown, and malfunction for the engines that were regulated previously by these national emission standards for hazardous air pollutants.

**DATES:** This final rule is effective on May 3, 2010.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2008–0708. EPA also relies on materials in Docket ID Nos. EPA–HQ–OAR–2002–0059, EPA–HQ–OAR–2005–0029, and EPA–HQ–OAR–2005–0030 and incorporates those dockets into the record for the final rule. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Headquarters Library, Room Number 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation will be 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Ms. Melanie King, Energy Strategies Group, Sector Policies and Programs Division (D243–01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–2469; facsimile number (919) 541–5450; e-mail address *king.melanie@epa.gov.*

**SUPPLEMENTARY INFORMATION:** *Background Information Document.* On March 5, 2009 (71 FR 9698), EPA proposed national emission standards for hazardous air pollutants (NESHAP) for existing stationary reciprocating internal combustion engines (RICE) that either are located at area sources of hazardous air pollutants (HAP) emissions or that have a site rating of less than or equal to 500 brake horsepower (HP) and are located at major sources of HAP emissions. In addition, EPA proposed national emission standards for HAP for existing stationary compression ignition (CI) engines greater than 500 brake HP that are located at major sources. A summary of the public comments on the proposal and EPA's responses to the comments, as well as the Regulatory Impact Analysis Report, are available in Docket ID No. EPA–HQ–OAR–2008–0708.

*Organization of This Document.* The following outline is provided to aid in locating information in the preamble.

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G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

## I. General Information

### *A. Does this action apply to me?*

*Regulated Entities.* Categories and entities potentially regulated by this action include:

| Category | NAICS [1] | Examples of regulated entities |
|---|---|---|
| Any industry using a stationary internal combustion engine as defined in this final rule. | 2211 | Electric power generation, transmission, or distribution. |
| | 622110 | Medical and surgical hospitals. |
| | 48621 | Natural gas transmission. |
| | 211111 | Crude petroleum and natural gas production. |
| | 211112 | Natural gas liquids producers. |

| Category | NAICS [1] | Examples of regulated entities |
|---|---|---|
| | 92811 | National security. |

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your engine is regulated by this action, you should examine the applicability criteria of this final rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. Where can I get a copy of this document?*

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

*C. Judicial Review*

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by May 3, 2010. Under section 307(d)(7)(B) of the CAA, only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Section 307(d)(7)(B) of the CAA further provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for us to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

*D. Why is EPA not promulgating a final decision for spark ignition engines?*

In the notice of proposed rulemaking for this rule, published on March 5, 2009, EPA proposed the NESHAP for all existing stationary RICE located at area sources of HAP emissions and existing stationary RICE that had a site rating of less than or equal to 500 brake HP and located at major sources of HAP emissions. Also, EPA proposed NESHAP for existing stationary CI engines greater than 500 brake HP located at major sources.

During the comment period following the proposal, EPA received a number of comments stating that EPA had insufficient emissions data for existing spark ignition (SI) engines. Because commenters believed that EPA had inadequate emissions data for SI engines, they suggested that EPA should consider seeking an extension of its February 10, 2010 consent decree deadline to allow additional time for the collection of emissions data for SI engines. Several commenters indicated that they would work with EPA to gather the necessary test data to obtain adequate and sufficient emissions tests for SI engines. Among other things, the commenters noted that developing the final requirements for SI engines later in 2010 would provide sufficient time for industry to develop test programs, conduct testing of engines, assemble test results, and submit the complete results to EPA for review. Other commenters requested that EPA seek a one year extension of its consent decree deadline for SI engines, which would mean a final rule for these engines by February 10, 2011.

In consideration of the comments, EPA sought and obtained a six month extension of its February 10, 2010 deadline for SI engines. EPA maintains that this period is sufficient for the commenters to provide additional test data for the SI engines. Thus, pursuant to the revised consent decree between EPA and Sierra Club, EPA will finalize requirements for existing stationary SI engines that are less than or equal to 500 HP and located at major sources of HAP emissions and existing stationary SI engines that are located at area sources of HAP emissions by August 10, 2010. For these reasons, this final rule does not contain standards for existing stationary SI engines that are less than or equal to 500 HP and located at major sources of HAP emissions and existing stationary SI engines that are located at area sources of HAP emissions.

Consistent with the original consent decree, EPA is finalizing regulations for existing stationary CI engines that are less than or equal to 500 HP and located at major sources and existing stationary CI engines that are located at area sources in this final rule. EPA is also promulgating requirements for existing stationary non-emergency CI engines that are greater than 500 HP and located at major sources.

EPA plans to continue to work with affected stakeholders over the next several months in order to obtain more complete emissions data for existing stationary SI engines. The emissions data collected will be analyzed and if EPA's review indicates that the submitted data meets acceptance criteria, EPA will include the data in developing final standards. EPA will promulgate regulations for existing stationary SI engines by August 10, 2010.

## II. Background

This action promulgates NESHAP for existing stationary CI RICE with a site rating of less than or equal to 500 HP located at major sources, existing non-emergency CI engines with a site rating greater than 500 HP at major sources, and existing stationary CI RICE of any power rating located at area sources. EPA is finalizing these standards to meet its statutory obligation to address HAP emissions from these sources under sections 112(d), 112(c)(3) and 112(k) of the CAA. The final NESHAP for stationary RICE will be promulgated

under 40 CFR part 63, subpart ZZZZ, which already contains standards applicable to new stationary RICE and some existing stationary RICE.

EPA promulgated NESHAP for existing, new, and reconstructed stationary RICE greater than 500 HP located at major sources on June 15, 2004 (69 FR 33474). EPA promulgated NESHAP for new and reconstructed stationary RICE that are located at area sources of HAP emissions and for new and reconstructed stationary RICE that have a site rating of less than or equal to 500 HP that are located at major sources of HAP emissions on January 18, 2008 (73 FR 3568). At that time, EPA did not promulgate final requirements for existing stationary RICE that are located at area sources of HAP emissions or for existing stationary RICE that have a site rating of less than or equal to 500 HP that are located at major sources of HAP emissions. Although EPA proposed standards for these sources, EPA did not finalize these standards due to comments received indicating that the proposed Maximum Achievable Control Technology (MACT) determinations for existing sources were inappropriate because of a decision by the U.S. Court of Appeals for the District of Columbia Circuit on March 13, 2007, which vacated EPA's MACT standards for the Brick and Structural Clay Products Manufacturing source category (40 CFR part 63, subpart JJJJJ). *Sierra Club* v. *EPA,* 479 F.3d 875 (DC Cir. 2007). Among other things, the DC Circuit found that EPA's no emission reduction MACT determination in the challenged rule was unlawful. Because EPA had used a MACT floor methodology in the proposed stationary RICE rule similar to the methodology used in the Brick MACT, EPA decided to re-evaluate the MACT floors for existing major sources that have a site rating of less than or equal to 500 brake HP consistent with the Court's decision in the Brick MACT case. Also, EPA has re-evaluated the standards for existing area sources in light of the comments received on the proposed rule.

In addition, stakeholders have encouraged the Agency to review whether there are further ways to reduce emissions of pollutants from existing stationary diesel engines. In its comments on EPA's 2005 proposed rule for new stationary diesel engines (70 FR 39870), the Environmental Defense Fund (EDF) suggested several possible avenues for the regulation of existing stationary diesel engines, including use of diesel oxidation catalysts or catalyzed diesel particulate filters (CDPF), as well as the use of ultra low sulfur diesel (ULSD) fuel. EDF suggested that such controls can provide significant pollution reductions at reasonable cost. EPA issued an advance notice of proposed rulemaking (ANPRM) in January 2008, where it solicited comment on several issues concerning options to regulate emissions of pollutants from existing stationary diesel engines, generally, and specifically from larger, older stationary diesel engines. EPA solicited comment and collected information to aid decision-making related to the reduction of HAP emissions from existing stationary diesel engines and specifically from larger, older engines under CAA section 112 authorities. The Agency sought comment on the larger, older non-emergency CI engines because available data indicate that those engines emit the majority of particulate matter (PM) and toxic emissions from non-emergency stationary CI engines as a whole. A summary of comments and responses that were received on the ANPRM is included in docket EPA–HQ–OAR–2007–0995. EPA proposed and is finalizing emissions reductions from existing non-emergency stationary diesel engines at major sources that have a site rating greater than 500 HP.

This action also revises the provisions of the existing NESHAP as it applies to periods of startup, shutdown, and malfunction. This revision affects all stationary engines regulated in this NESHAP, including stationary engines that were regulated by the 2004 and 2008 NESHAP. The revision of these provisions is a result of a Court decision that invalidated regulations related to startup, shutdown and malfunction in the General Provisions of Part 63 (*Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008)).

## III. Summary of the Final Rule

### *A. What is the source category regulated by the final rule?*

This final rule addresses emissions from existing stationary CI engines less than or equal to 500 HP located at major sources and all existing stationary CI engines located at area sources. This final rule also addresses emissions from existing stationary non-emergency CI engines greater than 500 HP at major sources. A major source of HAP emissions is generally a stationary source that emits or has the potential to emit any single HAP at a rate of 10 tons (9.07 megagrams) or more per year or any combination of HAP at a rate of 25 tons (22.68 megagrams) or more per year. An area source of HAP emissions is a source that is not a major source.

This action revises the regulations at 40 CFR part 63, subpart ZZZZ, currently applicable to new and reconstructed stationary RICE and to existing stationary RICE greater than 500 HP located at major sources. Through this action, we are adding to subpart ZZZZ requirements for: Existing CI stationary RICE less than or equal to 500 HP located at major sources and existing CI stationary RICE located at area sources.

1. Stationary CI RICE ≤500 HP at Major Sources

This action revises 40 CFR part 63, subpart ZZZZ, to address HAP emissions from existing stationary CI RICE less than or equal to 500 HP located at major sources. For stationary engines less than or equal to 500 HP at major sources, EPA must determine what is the appropriate MACT for those engines under sections 112(d)(2) and (d)(3) of the CAA.

EPA has divided stationary CI RICE into emergency and non-emergency engines in order to capture the unique differences between these types of engines.

2. Stationary CI RICE at Area Sources

This action revises 40 CFR part 63, subpart ZZZZ, in order to address HAP emissions from existing stationary RICE located at area sources. Section 112(d) of the CAA requires EPA to establish NESHAP for both major and area sources of HAP that are listed for regulation under CAA section 112(c). As noted above, an area source is a stationary source that is not a major source.

Section 112(k)(3)(B) of the CAA calls for EPA to identify at least 30 HAP that, as a result of emissions of area sources, pose the greatest threat to public health in the largest number of urban areas. EPA implemented this provision in 1999 in the Integrated Urban Air Toxics Strategy (64 FR 38715, July 19, 1999). Specifically, in the Strategy, EPA identified 30 HAP that pose the greatest potential health threat in urban areas, and these HAP are referred to as the "30 urban HAP." Section 112(c)(3) of the CAA requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. EPA implemented these requirements through the Integrated Urban Air Toxics Strategy (64 FR 38715, July 19, 1999). The area source stationary engine source category was one of the listed categories. A primary goal of the Strategy is to achieve a 75 percent reduction in cancer incidence attributable to HAP emitted from stationary sources.

Under CAA section 112(d)(5), EPA may elect to promulgate standards or requirements for area sources "which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants." Additional information on generally available control technologies (GACT) and management practices is found in the Senate report on the legislation (Senate report Number 101–228, December 20, 1989), which describes GACT as:

> * * * methods, practices and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems.

Consistent with the legislative history, EPA can consider costs and economic impacts in determining GACT, which is particularly important when developing regulations for source categories, like this one, that have many small businesses.

Determining what constitutes GACT involves considering the control technologies and management practices that are generally available to the area sources in the source category. EPA also considers the standards applicable to major sources in the same industrial sector to determine if the control technologies and management practices are transferable and generally available to area sources. In appropriate circumstances, EPA may also consider technologies and practices at area and major sources in similar categories to determine whether such technologies and practices could be considered generally available for the area source category at issue. Finally, as EPA has already noted, in determining GACT for a particular area source category, EPA considers the costs and economic impacts of available control technologies and management practices on that category.

The urban HAP that must be regulated at stationary RICE to achieve the CAA section 112(c)(3) requirement to regulate categories accounting for 90 percent of the urban HAP are: 7 polycyclic aromatic hydrocarbons (PAH), formaldehyde, acetaldehyde, arsenic, benzene, beryllium compounds, and cadmium compounds. As explained below, EPA chose to select formaldehyde to serve as a surrogate for HAP emissions. Formaldehyde is the hazardous air pollutant present in the highest concentration from stationary engines. In addition, emissions data show that formaldehyde emission levels are related to other HAP emission levels. EPA has previously demonstrated that carbon monoxide (CO) is an appropriate surrogate for formaldehyde and is consequently finalizing emission standards in terms of CO for existing stationary CI RICE at area sources.

Consistent with existing stationary CI RICE at major sources, EPA has also divided the existing stationary CI RICE at area sources into emergency and non-emergency engines in order to properly take into account the differences between these engines.

3. Stationary CI RICE > 500 HP at Major Sources

In addition, EPA is finalizing emission standards for non-emergency stationary CI engines greater than 500 HP at major sources.

*B. What are the pollutants regulated by the final rule?*

The final rule regulates emissions of HAP. Available emissions data show that several HAP, which are formed during the combustion process or which are contained within the fuel burned, are emitted from stationary engines. The HAP which have been measured in emission tests conducted on diesel fired stationary RICE include: 1, 3-butadiene, acetaldehyde, acrolein, benzene, ethylbenzene, formaldehyde, n-hexane, naphthalene, PAH, polycyclic organic matter, styrene, toluene, and xylene. Metallic HAP from diesel fired stationary RICE that have been measured include: Cadmium, chromium, lead, manganese, mercury, nickel, and selenium.

EPA described the health effects of these HAP and other HAP emitted from the operation of stationary RICE in the preamble to 40 CFR part 63, subpart ZZZZ, published on June 15, 2004 (69 FR 33474). More detail on the health effects of these HAP and other HAP emitted from the operation of stationary RICE can be found in the Regulatory Impact Analysis (RIA) for the final rule. These HAP emissions are known to cause, or contribute significantly to air pollution, which may reasonably be anticipated to endanger public health or welfare.

The final rule will limit emissions of HAP through emissions standards for CO for existing stationary CI RICE. Carbon monoxide has been shown to be an appropriate surrogate for HAP emissions from CI engines. For the NESHAP promulgated in 2004, EPA found that there is a relationship between CO emissions reductions and HAP emissions reductions from CI stationary engines. Therefore, because testing for CO emissions has many advantages over testing for HAP emissions, CO emissions were chosen as a surrogate for HAP emissions reductions for CI stationary engines.

For the standards being finalized in this action, EPA believes that previous decisions regarding the appropriateness of using CO in concentration (parts per million (ppm)) levels as has been done for stationary sources before as surrogates for HAP are still valid.[1] Consequently, EPA is finalizing emission standards for CO for stationary CI engines in order to regulate HAP emissions. In addition, EPA is promulgating separate provisions relevant to emissions of metallic HAP from existing diesel engines, as discussed in section III.C. of this preamble.

In addition to reducing HAP and CO, the final rule will result in the reduction of PM emissions from existing stationary diesel engines. The aftertreatment technologies expected to be used to reduce HAP and CO emissions also reduce emissions of PM from diesel engines. Also, the final rule requires the use of ULSD for diesel-fueled stationary non-emergency CI engines greater than 300 HP with a displacement of less than 30 liters per cylinder. This will result in lower emissions of sulfur oxides ($SO_X$) and sulfate particulate from these engines by reducing the sulfur content in the fuel.

*C. What are the final requirements?*

1. Existing Stationary RICE at Major Sources.

The numerical emission standards that are being finalized in this action for stationary non-emergency CI RICE located at major sources are shown in Table 1 of this preamble. The numerical emission standards are in units of ppm by volume, dry basis (ppmvd) or percent reduction.

[1] In contrast, mobile source emission standards for diesel engines (both nonroad and on-highway) are promulgated on a mass/bhp-hr basis rather than concentration.

TABLE 1—NUMERICAL EMISSION STANDARDS FOR EXISTING STATIONARY CI RICE LOCATED AT MAJOR SOURCES

| Subcategory | Except during periods of startup |
|---|---|
| Non-Emergency CI 100≤HP≤300 | 230 ppmvd CO at 15% $O_2$. |
| Non-Emergency CI 300<HP≤500 | 49 ppmvd CO at 15% $O_2$ or 70% CO reduction. |
| Non-Emergency CI >500 HP | 23 ppmvd CO at 15% $O_2$ or 70% CO reduction. |

In addition, certain existing stationary RICE located at major sources are subject to fuel requirements. Owners and operators of existing stationary non-emergency CI engines greater than 300 HP with a displacement of less than 30 liters per cylinder located at major sources that use diesel fuel must use only diesel fuel meeting the requirements of 40 CFR 80.510(b). This section requires that diesel fuel have a maximum sulfur content of 15 ppm and either a minimum cetane index of 40 or a maximum aromatic content of 35 volume percent. These fuel requirements are being finalized in order to reduce the potential formation of sulfate compounds that are emitted when high sulfur diesel fuel is used in combination with oxidation catalysts and to assist in the efficient operation of the oxidation catalysts.

EPA is finalizing work practice standards for existing stationary emergency CI RICE less than or equal to 500 HP located at major sources and existing stationary non-emergency CI RICE less than 100 HP located at major sources. Existing stationary emergency CI RICE less than or equal to 500 HP located at major sources are subject to the following work practices:

- Change oil and filter every 500 hours of operation or annually, whichever comes first, except that sources can extend the period for changing the oil if the oil is part of an oil analysis program as discussed below and none of the condemning limits are exceeded;
- Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first; and
- Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.

Existing stationary non-emergency CI RICE less than 100 HP located at major sources are subject to the following work practices:

- Change oil and filter every 1,000 hours of operation or annually, whichever comes first, except that sources can extend the period for changing the oil if the oil is part of an oil analysis program as discussed below and none of the condemning limits are exceeded;
- Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first; and
- Inspect all hoses and belts every 500 hours or annually, whichever comes first, and replace as necessary.

Sources also have the option to use an oil change analysis program to extend the oil change frequencies specified above. The analysis program must at a minimum analyze the following three parameters: Total Base Number, viscosity, and percent water content. The analysis must be conducted at the same frequencies specified for changing the engine oil. If the condemning limits provided below are not exceeded, the engine owner or operator is not required to change the oil. If any of the condemning limits are exceeded, the engine owner or operator must change the oil before continuing to use the engine. The condemning limits are as follows:

- Total Base Number is less than 30 percent of the Total Base Number of the oil when new; or
- Viscosity of the oil has changed by more than 20 percent from the viscosity of the oil when new; or
- Percent water content (by volume) is greater than 0.5.

Pursuant to the provisions of 40 CFR 63.6(g), sources can also request that the Administrator approve alternative work practices.

EPA is also including in the final rule additional capture and collection requirements to reduce metallic HAP emissions. Owners and operators of existing stationary non-emergency CI engines greater than 300 HP located at major sources must do one of the following if the engine is not already equipped with a closed crankcase ventilation system: (1) Install a closed crankcase ventilation system that prevents crankcase emissions from being emitted to the atmosphere, or (2) install an open crankcase filtration emission control system that reduces emissions from the crankcase by filtering the exhaust stream to remove oil mist, particulates, and metals.

2. Existing Stationary RICE at Area Sources

The numerical emission standards that are being finalized in this action for stationary CI RICE located at area sources are shown in Table 2 of this preamble. Existing stationary emergency engines at area sources located at residential, commercial, or institutional facilities are not part of the source category and therefore are not subject to any requirements under this final rule.

Although existing stationary non-emergency CI RICE greater than 300 HP that are located at area sources in Alaska that are not accessible by the Federal Aid Highway System (FAHS) do not have to meet the CO emission standards specified in Table 2 of this preamble, they must meet the management practices discussed in this section for non-emergency CI RICE less than or equal to 300 HP.

TABLE 2—NUMERICAL EMISSION STANDARDS FOR EXISTING STATIONARY RICE LOCATED AT AREA SOURCES

| Subcategory | Except during periods of startup |
|---|---|
| Non-Emergency CI 300<HP≤500 | 49 ppmvd CO at 15% $O_2$ or 70% CO reduction. |
| Non-Emergency CI>500 HP | 23 ppmvd CO at 15% $O_2$ or 70% CO reduction. |

Also, owners and operators of existing stationary non-emergency CI engines greater than 300 HP with a displacement of less than 30 liters per cylinder located at area sources that use diesel fuel must use only diesel fuel meeting the requirements of 40 CFR 80.510(b). This section requires that diesel fuel have a maximum sulfur content of 15 ppm and either a minimum cetane index of 40 or a maximum aromatic content of 35 volume percent.

EPA is finalizing management practices for existing stationary emergency CI RICE located at area sources and existing stationary non-emergency CI RICE less than or equal to 300 HP located at area sources. Existing stationary emergency CI RICE located at area sources are subject to the following management practices:

- Change oil and filter every 500 hours of operation or annually, whichever comes first, except that sources can extend the period for changing the oil if the oil is part of an oil analysis program as discussed below and the condemning limits are not exceeded;
- Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first; and
- Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.

Existing stationary non-emergency CI RICE less than or equal to 300 HP located at area sources are subject to the following management practices:

- Change oil and filter every 1,000 hours of operation or annually, whichever comes first, except that sources can extend the period for changing the oil if the oil is part of an oil analysis program as discussed below and the condemning limits are not exceeded;
- Inspect air cleaner every 1000 hours of operation or annually, whichever comes first; and
- Inspect all hoses and belts every 500 hours or annually, whichever comes first, and replace as necessary.

As discussed above for major sources, these sources may utilize an oil analysis program in order to extend the specified oil change requirement specified above. Also, sources have the option to work with State permitting authorities pursuant to EPA's regulations at 40 CFR subpart E ("Approval of State Programs and Delegation of Federal Authorities") for approval of alternative management practices. Subpart E implements section 112(l) of the CAA, which authorizes EPA to approve alternative State/local/Tribal HAP standards or programs when such requirements are demonstrated to be no less stringent than EPA promulgated standards.

Finally, in order to reduce metallic HAP emissions, existing stationary non-emergency CI engines greater than 300 HP located at area sources must do one of the following if the engine is not already equipped with a closed crankcase ventilation system: (1) Install a closed crankcase ventilation system that prevents crankcase emissions from being emitted to the atmosphere, or (2) install an open crankcase filtration emission control system that reduces emissions from the crankcase by filtering the exhaust stream to remove oil mist, particulates, and metals.

3. Startup Requirements

The following stationary engines are subject to specific operational standards during engine startup:

- Existing CI RICE less than or equal to 500 HP located at major sources,
- Existing non-emergency CI RICE greater than 500 HP located at major sources,
- Existing CI RICE located at area sources,
- New or reconstructed non-emergency two-stroke lean burn (2SLB) >500 HP located at a major source of HAP emissions,
- New or reconstructed non-emergency four-stroke lean burn (4SLB) >=250 HP located at a major source of HAP emissions,
- Existing non-emergency four-stroke rich burn (4SRB) >500 HP located at a major source of HAP emissions,
- New or reconstructed non-emergency 4SRB >500 HP located at a major source of HAP emissions, and
- New or reconstructed non-emergency CI >500 HP located at a major source of HAP emissions.

Engine startup is defined as the time from initial start until applied load and engine and associated equipment reaches steady state or normal operation. For stationary engines with catalytic controls, engine startup means the time from initial start until applied load and engine and associated equipment reaches steady state, or normal operation, including the catalyst. Owners and operators must minimize the engine's time spent at idle and minimize the engine's startup to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the engine must meet the otherwise applicable emission standards. These requirements will limit the HAP emissions during periods of engine startup. Pursuant to the provisions of 40 CFR 63.6(g), engines at major sources may petition the Administrator for an alternative work practice. An owner or operator of an engine at an area source can work with its State permitting authority pursuant to EPA's regulations at 40 CFR subpart E for approval of an alternative management practice. *See* 40 CFR Subpart E (setting forth requirements for, among other things, equivalency by permit, rule substitution).

*D. What are the operating limitations?*

In addition to the standards discussed above, EPA is finalizing operating limitations for stationary non-emergency CI RICE that are greater than 500 HP. Owners and operators of engines that are equipped with oxidation catalyst must maintain the catalyst so that the pressure drop across the catalyst does not change by more than 2 inches of water from the pressure drop across the catalyst that was measured during the initial performance test. Owners and operators of these engines must also maintain the temperature of the stationary RICE exhaust so that the catalyst inlet temperature is between 450 and 1350 degrees Fahrenheit (°F). Owners and operators may petition for a different temperature range; the petition must demonstrate why it is operationally necessary and appropriate to operate below the temperature range specified in the rule (*see* 40 CFR 63.8(f)). Owners and operators of engines that are not using oxidation catalyst must comply with any operating limitations approved by the Administrator.

Owners and operators of existing stationary non-emergency CI engines greater than 300 HP meeting the requirement to use open or closed crankcases must follow the manufacturer's specified maintenance requirements for operating and maintaining the open or closed crankcase ventilation systems and replacing the crankcase filters, or can request the Administrator to approve different maintenance requirements that are as protective as manufacturer requirements.

*E. What are the requirements for demonstrating compliance?*

The following sections describe the requirements for demonstrating compliance under the final rule.

1. Existing Stationary CI RICE at Major Sources

Owners and operators of existing stationary non-emergency CI RICE located at major sources that are less than 100 HP and stationary emergency CI RICE located at major sources must operate and maintain their stationary RICE and aftertreatment control device (if any) according to the manufacturer's emission-related written instructions or develop their own maintenance plan. Owners and operators of existing stationary non-emergency CI RICE located at major sources that are less than 100 HP and existing stationary emergency CI RICE located at major sources do not have to conduct any

performance testing because they are not subject to numerical emission standards.

Owners and operators of existing stationary non-emergency CI RICE located at major sources that are greater than or equal to 100 HP and less than or equal to 500 HP must conduct an initial performance test to demonstrate that they are achieving the required emission standards.

Owners and operators of existing stationary non-emergency CI RICE greater than 500 HP located at major sources must conduct an initial performance test and must test every 8,760 hours of operation or 3 years, whichever comes first, to demonstrate that they are achieving the required emission standards.

Owners and operators of stationary non-emergency CI RICE that are greater than 500 HP and are located at a major source must continuously monitor and record the catalyst inlet temperature if an oxidation catalyst is being used on the engine. The pressure drop across the catalyst must also be measured monthly. If an oxidation catalyst is not being used on the engine, the owner or operator must continuously monitor and record the operating parameters (if any) approved by the Administrator.

On October 9, 2008 (73 FR 59956), EPA proposed performance specification requirements for continuous parametric monitoring systems (CPMS). Currently there are no performance specifications for the CPMS that are required for continuously monitoring the catalyst inlet temperature. The timetable for finalizing the proposed performance specification requirements is uncertain; therefore, EPA plans to finalize performance specification requirements in 40 CFR part 63, subpart ZZZZ for the CPMS systems used for continuous catalyst inlet temperature monitoring when the final requirements are promulgated for existing SI engines in August 2010.

2. Existing Stationary RICE at Area Sources

Owners and operators of existing stationary RICE located at area sources that are subject to management practices, as shown in Table 2 of this preamble, must develop a maintenance plan that specifies how the management practices will be met. Owners and operators of existing stationary RICE that are subject to management practices do not have to conduct any performance testing.

Owners and operators of existing stationary non-emergency CI RICE greater than 300 HP that are located at area sources must conduct an initial performance test to demonstrate that they are achieving the required emission standards.

Owners and operators of existing stationary non-emergency CI RICE that are greater than 500 HP and located at area sources and are not limited use stationary RICE must conduct an initial performance test and must test every 8,760 hours of operation or 3 years, whichever comes first, to demonstrate that they are achieving the required emission standards. Owners and operators of existing stationary non-emergency CI RICE that are greater than 500 HP and located at area sources and are limited use stationary RICE must conduct an initial performance test and must test every 8,760 hours of operation or 5 years, whichever comes first, to demonstrate that they are achieving the required emission standards.

Owners and operators of existing stationary non-emergency CI RICE that are greater than 500 HP and are located at an area source must continuously monitor and record the catalyst inlet temperature if an oxidation catalyst is being used on the engine. The pressure drop across the catalyst must also be measured monthly. If an oxidation catalyst is not being used on the engine, the owner or operator must continuously monitor and record the operating parameters (if any) approved by the Administrator.

*F. What are the reporting and recordkeeping requirements?*

The following sections describe the reporting and recordkeeping requirements that are required under the final rule.

Owners and operators of existing stationary emergency RICE that do not meet the requirements for non-emergency engines are required to keep records of their hours of operation. Owners and operators of existing stationary emergency RICE must install a non-resettable hour meter on their engines to record the hours of operation of the engine. Emergency stationary RICE may be operated for the purpose of maintenance checks and readiness testing, provided that the tests are recommended by the Federal, State or local government, the manufacturer, the vendor, or the insurance company associated with the engine. Maintenance checks and readiness testing of such units are limited to 100 hours per year. There is no time limit on the use of emergency stationary engines in emergency situations; however, the owner or operator is required to record the length of operation and the reason the engine was in operation during that time. Records must be maintained documenting why the engine was operating to ensure the 100 hours per year limit for maintenance and testing operation is not exceeded. In addition, owners and operators are allowed to operate their stationary emergency RICE for non-emergency purposes for 50 hours per year, but those 50 hours are counted towards the total 100 hours provided for operation other than for true emergencies. The 50 hours per year for non-emergency purposes cannot be used to generate income for a facility, for example, to supply power to an electric grid or otherwise supply power as part of a financial arrangement with another entity. However, owners and operators may operate the emergency engine for a maximum of 15 hours per year as part of a demand response program if the regional transmission organization or equivalent balancing authority and transmission operator has determined there are emergency conditions that could lead to a potential electrical blackout, for example unusually low frequency, equipment overload, capacity or energy deficiency, or unacceptable voltage level. The engine may not be operated for more than 30 minutes prior to the time when the emergency condition is expected to occur, and the engine operation must be terminated immediately after the facility is notified that the emergency condition is no longer imminent. The 15 hours per year of demand response operation are counted as part of the 50 hours of operation per year provided for non-emergency situations. Owners and operators must keep records showing how they were notified of the emergency condition and by whom, and the time that the engine was operated as part of demand response.

Owners and operators of existing stationary CI RICE located at area sources that are subject to management practices as shown in Table 2 of this preamble are required to keep records that show that management practices that are required are being met. These records must include, at a minimum: Oil and filter change dates and corresponding hour on the hour meter; inspection and replacement dates for air cleaners, hoses, and belts; and records of other emission-related repairs and maintenance performed.

Owners and operators of existing non-emergency stationary CI RICE greater than 300 HP must keep records of the manufacturer's recommended maintenance procedures for the closed crankcase ventilation system or open crankcase filtration system and records of the maintenance performed on the system.

In terms of reporting requirements, owners and operators of existing stationary RICE, except stationary RICE that are less than 100 HP, existing emergency stationary RICE, and existing stationary RICE that are not subject to numerical emission standards, must submit all of the applicable notifications as listed in the NESHAP General Provisions (40 CFR part 63, subpart A), including an initial notification, notification of performance test, and a notification of compliance for each stationary RICE which must comply with the specified emission limitations.

## IV. Summary of Significant Changes Since Proposal

Most of the rationale used to develop the proposed rule remains the same for the final rule. Therefore, the rationale previously provided in the preamble to the proposed rule is not repeated in the final rule, and the rationale sections of the rule, as proposed, should be referred to. Major changes that have been made to the rule since proposal are discussed in this section with rationale following in the Summary of Responses to Major Comments section.

### *A. Applicability*

EPA proposed to regulate HAP emissions from existing stationary engines less than or equal to 500 HP located at major sources and all existing stationary engines located at area sources. EPA also proposed NESHAP for existing stationary non-emergency CI engines greater than 500 HP that are located at major sources.

In the final rule, EPA is only regulating HAP emissions from existing stationary CI engines. EPA will address HAP emissions from existing stationary SI engines in a separate rulemaking later this year.

Another change from the proposal is that the final rule is not applicable to existing stationary emergency engines at area sources that are located at residential, commercial, or institutional facilities. These engines are not subject to any requirements under the final rule because they are not part of the regulated source category. EPA has found that existing stationary emergency engines located at residential, commercial, and institutional facilities that are area sources were not included in the original Urban Air Toxics Strategy inventory and were not included in the listing of urban area sources. More information on this issue can be found in the memorandum entitled, "Analysis of the Types of Engines Used to Estimate the CAA Section 112(k) Area Source Inventory for Stationary Reciprocating Internal Combustion Engines," available from the rulemaking docket.

### *B. Final Emission Standards*

#### 1. Existing Stationary CI Engines <100 HP Located at Major Sources

For the proposed rule, EPA required existing stationary engines less than 50 HP that are located at major sources to meet a formaldehyde emission standard. EPA is not finalizing a formaldehyde emission standard for stationary CI engines less than 50 HP, but is instead requiring compliance with a work practice. In addition, in light of several comments asserting that the level at which we subcategorized small engines at major sources was inappropriate, EPA is finalizing a work practice standard for engines less than 100 HP.

In the proposed rule, existing stationary CI engines less than 100 HP located at major sources were required to meet a 40 ppmvd CO at 15 percent oxygen ($O_2$) standard. In the final rule, all existing stationary CI engines less than 100 HP located at major sources must meet work practices. These work practices are described in section III.C. of this preamble. EPA believes that work practices are appropriate and justified for this group of stationary engines because the application of measurement methodology is not practicable due to technological and economic limitations. Further information on EPA's decision can be found in section V.B. below and in the memorandum entitled, "MACT Floor Determination for Existing Stationary Non-Emergency CI RICE Less Than 100 HP and Existing Stationary Emergency CI RICE Located at Major Sources and GACT for Existing Stationary CI RICE Located at Area Sources," which is available from the rulemaking docket.

#### 2. Existing Stationary Non-Emergency CI Engines 100≤HP≤300

EPA is finalizing a CO emission standard for existing stationary non-emergency CI engines greater than or equal to 100 HP and less than or equal to 300 HP located at major sources of 230 ppmvd CO at 15 percent $O_2$ standard. EPA revised the proposed CO standard for this group of engines based on additional information and data received after the proposal, which led to a reevaluation of the MACT floor for these stationary engines. A discussion of the final MACT floor determination can be found in the memo entitled "MACT Floor and MACT Determination for Existing Stationary Non-Emergency CI RICE Greater Than or Equal to 100 HP Located at Major Sources," which is available from the rulemaking docket. All existing stationary CI engines less than or equal to 300 HP located at area sources, both emergency and non-emergency, are subject to management practice standards under the final rule, as was proposed.

#### 3. Existing Stationary Non-Emergency CI Engines >300 HP

EPA proposed that existing stationary non-emergency CI engines greater than 300 HP meet a 4 ppmvd CO at 15 percent $O_2$ standard or a 90 percent CO reduction standard. Numerous commenters indicated that EPA's dataset was insufficient and urged EPA to gather more data to obtain a more complete representation of emissions from existing stationary CI engines. Commenters also questioned the emission standard setting approach that EPA used at proposal and claimed that the proposed standards did not take into account emissions variability and may not be achievable. For the final rule EPA has obtained additional test data for existing stationary CI engines and has included this additional data in the MACT floor analysis. EPA is also using an approach that better considers emissions variability, as discussed in V.B. below.

In the final rule, EPA is providing owners and operators the option of meeting either a CO concentration or a CO percent reduction standard. Owners and operators of existing stationary non-emergency CI engines greater than 300 HP and less than or equal to 500 HP located at major and area sources must either reduce CO emissions by at least 70 percent or limit the concentration of CO in the engine exhaust to 49 ppmvd, at 15 percent $O_2$. Owners and operators of existing stationary non-emergency CI engines greater than 500 HP located at major and area sources must either reduce CO emissions by at least 70 percent or limit the concentration of CO in the engine exhaust to 23 ppmvd, at 15 percent $O_2$. EPA's review of the data indicate that it is appropriate to base the MACT standard on a reduction level of 70 percent, which takes into account the variability of the emission reduction efficiency of aftertreatment under various operational conditions.

#### 4. Existing Stationary Emergency CI Engines 100≤HP≤500 Located at Major Sources

For existing stationary emergency engines located at major sources, we proposed that these engines be subject to a 40 ppmvd CO at 15 percent $O_2$ standard. In the final rule, existing stationary emergency CI engines greater than or equal to 100 HP and less than

or equal to 500 HP and located at major sources must meet work practices. These work practices are described in section III.C. of this preamble. EPA believes that work practices are appropriate and justified for this group of stationary engines because the application of measurement methodology is not practicable due to technological and economic limitations. Further information on EPA's decision can be found in the memorandum entitled "MACT Floor Determination for Existing Stationary Non-Emergency CI RICE Less Than 100 HP and Existing Stationary Emergency CI RICE Located at Major Sources and GACT for Existing Stationary CI RICE Located at Area Sources," which is available from the rulemaking docket.

5. Existing Stationary Emergency CI Engines >500 HP Located at Area Sources

For existing stationary emergency engines located at area sources, EPA reevaluated the information available for emergency engines and considered extensive input received from industry and other groups who asserted that the proposed standards were not GACT for emergency engines at area sources. In the final rule, as discussed below in section V.B., all existing stationary emergency CI engines located at area sources must meet management practice standards.

*C. Management Practices*

EPA proposed management practices for several subcategories of engines located at area sources. EPA explained that the proposed management practices would be expected to ensure that emission control systems are working properly and would help minimize HAP emissions from the engines. EPA proposed specific maintenance practices and asked for comments on the need and appropriateness for those procedures. Based on feedback received during the public comment period, which included information submitted in comment letters and additional information EPA received following the close of the comment period from different industry groups, EPA is finalizing management practices for existing stationary non-emergency CI engines less than or equal to 300 HP located at area sources and all existing emergency stationary CI engines located at area sources.

Existing stationary non-emergency CI engines less than or equal to 300 HP located at area sources are required to change the oil and filter every 1,000 hours of operation or annually, whichever comes first, inspect air cleaner every 1,000 hours of operation or annually, whichever comes first, and inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary. Existing emergency stationary CI engines located at area sources are required under the final rule to change the oil and filter every 500 hours of operation or annually, whichever comes first, inspect air cleaner every 1000 hours of operation or annually, whichever comes first, and inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary. EPA is adding an option for sources to use an oil change analysis program to extend the oil change frequencies specified above. The analysis program must at a minimum analyze the following three parameters: Total Base Number, viscosity, and percent water content. If the condemning limits provided below are not exceeded, the engine owner or operator is not required to change the oil. If any of the limits are exceeded, the engine owner or operator must change the oil before continuing to use the engine. The condemning limits are as follows:

- Total Base Number is less than 30 percent of the Total Base Number of the oil when new; or
- Viscosity of the oil has changed by more than 20 percent from the viscosity of the oil when new; or
- Percent water content (by volume) is greater than 0.5.

Owners and operators of all engines subject to management practices also have the option to work with State permitting authorities pursuant to EPA's regulations at 40 CFR subpart E for alternative maintenance practices to be used instead of the specific maintenance practices promulgated in this rule. The maintenance practices must be at least as stringent as those specified in the final rule.

The final rule specifies that in situations where an emergency engine is operating during an emergency and it is not possible to shut down the engine in order to perform the work or management practice requirements on the schedule required in the final rule, or if performing the work or management practice on the required schedule would otherwise pose an unacceptable risk under Federal, State, or local law, the maintenance activity can be delayed until the emergency is over or the unacceptable risk under Federal, State, or local law has abated. The maintenance should be performed as soon as practicable after the emergency has ended or the unacceptable risk under Federal, State, or local law has abated. Sources must report any failure to perform the work practice on the schedule required and the Federal, State or local law under which the risk was deemed unacceptable.

*D. Startup, Shutdown and Malfunction*

EPA proposed formaldehyde and CO emission standards for existing stationary engines at major sources to apply during periods of startup and malfunction. EPA also proposed certain standards for existing stationary engines at area sources that would apply during startup and malfunction. Based on various comments and concerns with the proposed emission standards for periods of startup, EPA has determined that it is not feasible to finalize numerical emission standards that would apply during startup because the application of measurement methodology to this operation is not practicable due to technological and economic limitations, as discussed in detail in section V.D.

As a result, EPA is promulgating operational standards during startup that specify that owners and operators must limit the engine startup time to no more than 30 minutes and must minimize the engine's time spent at idle during startup. Based on information reviewed by EPA, engine startup typically requires no more than 30 minutes. We received comments indicating that there are conditions where it may take more than 30 minutes to startup the engine, for example for cold starts or where the ambient conditions are very cold. However, commenters did not provide enough specificity in their comments, nor did commenters provide data, to determine whether any scenarios were appropriate to allow a longer startup period. Owners and operators of engines at major sources have the option to petition the Administrator pursuant to 40 CFR 63.6(g) for alternative work practices. Any petition must be based on specific factual information indicating the reason the alternative work practice is necessary for that engine and is no less stringent than startup requirements in the rule. An owner or operator of an engine at an area source can work with its State permitting authority pursuant to EPA's regulations at 40 CFR subpart E for approval of an alternative management practice, based on specific factual information indicating the reason that an alternative management practice is necessary for that engine. Such alternative management practice must be demonstrated to be no less

stringent than EPA promulgated standards.

As discussed further below, in section V.D., EPA is not setting separate standards for malfunctions in this rule. Therefore, the standards that apply during normal operation also apply during malfunction. EPA believes that any emissions occurring during a malfunction would be of such a short duration compared to the emissions averaged during overall testing time (three one-hour runs) that the engine would still be able to comply with the emission standard. In addition, EPA does not view malfunction as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be taken into account in setting CAA section 112(d) standards. Further, as is explained in more detail in Section V.D. below, even if malfunctions were considered a distinct operating mode, we believe it would be impracticable to take into account malfunctions in setting CAA section 112(d) standards.

*E. Other*

EPA is including an additional requirement in the final rule that will reduce metallic HAP emissions. Owners and operators of existing stationary non-emergency CI engines greater than 300 HP must do one of the following if the engine is not already equipped with a closed crankcase ventilation system: (1) Install a closed crankcase ventilation system that prevents crankcase emissions from being emitted to the atmosphere, or (2) install an open crankcase filtration emission control system that reduces the crankcase emissions by filtering the exhaust stream to remove oil mist, particulates, and metals. Owners and operators must follow the manufacturer's specified maintenance requirements for operating and maintaining the open or closed crankcase ventilation systems and replacing the crankcase filters, or can request the Administrator to approve different maintenance requirements that are as protective as manufacturer requirements.

EPA is including special provisions in the final rule for existing stationary non-emergency CI RICE greater than 300 HP located at area sources in Alaska not accessible by the FAHS. Owners and operators of these engines do not have to meet the CO emission standards specified in Table 2 of this preamble, but must instead meet the management practices that are described for stationary non-emergency CI RICE less than or equal to 300 HP in section III.C. of this preamble.

The final rule specifies that stationary CI engines that are used to startup combustion turbines should meet the same requirements as stationary emergency CI engines.

## V. Summary of Responses to Major Comments

A more detailed summary of comments and EPA's responses can be found in the document entitled "Response to Public Comments on Proposed National Emission Standards for Hazardous Air Pollutants for Existing Stationary Reciprocating Internal Combustion Engines Located at Area Sources of Hazardous Air Pollutant Emissions or Have a Site Rating Less Than or Equal to 500 Brake HP Located at Major Sources of Hazardous Air Pollutant Emissions," which is available from the rulemaking docket (*see* **ADDRESSES** section).

*A. Applicability*

*Comment:* Numerous commenters expressed concern over EPA's decision to not distinguish between rural and urban engines at area sources in the proposed rule. Several commenters requested that EPA reevaluate its congressional authority to regulate area HAP sources in rural areas. The commenters believed that the proposal is inconsistent with 42 U.S.C. 7412(n)(4)(B) [CAA section 112(n)(4)(B)]. Commenters requested clarification of EPA's rationale to regulate low levels of emissions from engines at oil and gas production facilities outside metropolitan areas, contending that EPA has applied this rule more broadly than the Congressional intent of the CAA, and requested that EPA reevaluate this issue of whether EPA can regulate rural area sources in light of the 42 U.S.C. 7412(n)(4)(B) language.

Commenters stated that EPA has based this rulemaking for area sources on sections of the CAA and its Urban Air Toxics Strategy that are intended to remove threats to public health in urban areas. The commenters do not believe that the remote RICE at area sources in the oil and gas industry threaten public health in urban areas. Several commenters noted that the NESHAP for glycol gas dehydrators (40 CFR part 63, subpart HH) takes into account the location of area sources and does not apply the specific requirements of the rule to rural area sources. The commenters believe that the same approach should be used for the RICE rule, *i.e.,* engines that are not located in or near populated areas should be exempt or subject to an alternative set of requirements so as not to force expensive requirements on remote engines that have no impact on public health.

One commenter on behalf of the agricultural industry expressed that the operational area of these engines has not been studied to evaluate the environmental benefit obtained in congested areas as compared to open agricultural locations. This commenter opined that there should be some measure of variable compliance provided in relation to the area of operation of these engines.

*Response:* EPA is finalizing its proposal to regulate existing stationary CI engines located at area sources on a nationwide basis. EPA has not made a final determination with regard to existing SI engines at area sources, and will do so in the later rule finalizing regulations for SI engines. EPA believes that the CAA provides the Agency with the authority to regulate area sources nationwide. Section 112(k)(1) of the CAA states that "It is the purpose of this subsection to achieve a substantial reduction in emissions of hazardous air pollutants from area sources and an equivalent reduction in the public health risks associated with such sources including a reduction of not less than 75 per centum in the incidence of cancer attributable to emissions from such sources." Consistent with this expressed purpose of section 112(k) of the CAA to reduce both emissions and risks, CAA section 112(k)(3)(i) requires that EPA list not less than 30 HAP that, as a result of emissions from area sources, present the greatest threat to public health in the largest number of urban areas. Sections 112(c)(3) and (k)(3)(ii) of the CAA require that EPA list area source categories that represent not less than 90 percent of the area source emissions of each of the listed HAP. Section 112(c) of the CAA requires that EPA issue standards for listed categories under CAA section 112(d). These relevant statutory provisions authorize EPA to regulate listed area source engines and not just engines located in urban areas. EPA believes that sections 112(c) and 112(k) of the CAA do not prohibit issuing area source rules of national applicability. EPA also disagrees with the statement that the proposal was inconsistent with section 112(n)(4)(B) of the CAA. The term "associated equipment" was defined for the purposes of subpart ZZZZ in the first RICE MACT rule not to include stationary RICE. EPA has not revisited that issue in this rule and the commenters have not provided sufficient reason to revisit that issue.

EPA does not believe that existing stationary CI engines are more prevalent

in rural areas than in urban areas. Indeed, EPA estimates that only 17 percent of stationary CI area source engines subject to the rule are located in rural areas, using the definitions used in the Urban Air Toxics Strategy. Given the requirement to regulate all engines in the source category in urban areas, we do not believe requiring regulation on a national basis is inappropriate.

The majority of stationary CI engines are used for emergency purposes. EPA has estimated that 80 percent of stationary CI engines are emergency engines and EPA has taken steps in the final rule to reduce the burden on owners and operators of these engines. All emergency CI engines located at area sources of HAP emissions are subject only to management practices under the final rule. EPA has also determined that existing emergency engines located at residential, institutional, and commercial facilities that are area sources of HAP emissions were not included in the original Urban Air Toxics Strategy inventory and therefore are not included in the source category listing. In the final rule, EPA has specified that those engines are not subject to subpart ZZZZ. In addition, existing non-emergency CI engines less than or equal to 300 HP that are located at area sources of HAP emissions are also only subject to management practices. EPA believes that requiring management practices instead of specific emission limitations and/or control efficiency requirements on the majority of existing stationary CI engines at area sources alleviates concerns regarding costly and burdensome requirements for rural sources.

For existing stationary non-emergency CI engines greater than 300 HP, EPA determined that GACT was the use of oxidation catalyst control. The commenters did not provide a reason that GACT would be different for non-emergency stationary CI engines located in rural areas. In determining GACT, EPA can consider factors such as availability and feasibility of control technologies and management practices, as well as costs and economic impacts. These factors are not different for existing stationary non-emergency CI engines in urban versus rural areas. For example, the availability of oxidation catalysts would be the same for urban and rural engines, and if an engine was in a rural location, that would not preclude an owner from being able to install aftertreatment controls. For the final rule, EPA estimated the capital cost of retrofitting an existing stationary non-emergency CI engine to around $7,000 for a 300 HP engine. Annual costs of operating and maintaining the control device are estimated to be approximately $2,000 per year for the same engine. These costs would not be prohibitive for any engines and either rural or urban areas and are expected to be the same no matter the location. Furthermore, the controls that are expected to be used on non-emergency engines above 300 HP will have the co-benefit of PM reductions. PM emissions can travel tens or hundreds of miles from their source, so emissions from diesel engines in rural areas can impact urban populations. There is also no reason to distinguish between the rural and urban area source engines that are subject to management practices. There is nothing limiting owners and operators of existing stationary CI engines located in rural areas from following the management practices specified in the final rule.

In response to requests that agricultural stationary engines should be treated differently from other engines and should be allowed special provisions, EPA is of the understanding that the majority of stationary engines used for agricultural purposes are below 300 HP. Several commenters representing agricultural interests have made the statement to EPA that most of their engines are below 300 HP. As previously discussed in this response, EPA is finalizing management practices for area source engines less than or equal to 300 HP. Therefore, it is not expected that many stationary agricultural engines will be required to put on controls. Agricultural engines less than or equal to 300 HP at rural and urban area sources would be required to follow the management practices specified in the final rule. Management practices will ensure that emissions are reduced and engines are properly operated.

Consistent with the proposal and for the reasons discussed, EPA is finalizing national requirements for existing stationary CI engines without a distinction between urban and non-urban areas.

*Comment:* Five commenters expressed that EPA's proposal would have a significant impact to the State of Alaska, especially with respect to power generation in their rural communities. They explained that Alaska has unique regional circumstances whereby regulating diesel engine emissions in rural Alaska in the same manner as other engines nationwide could have unintended negative consequences. The commenters were concerned about the extension of section 112(k) of the CAA requirements to rural sources, expressing that the purpose of CAA section 112(k) is to address urban issues. The commenters opined that the scale of HAP emissions in rural areas of Alaska is different and should be addressed in a way that is appropriate to the rural conditions that exist there. The commenters expressed that, historically, EPA has recognized the unique aspects of rural Alaska's diesel distribution system and diesel engine use and has allowed Alaska some flexibility (*e.g.,* under the CI NSPS). The commenters requested that EPA assess and consider rural Alaska's situation and allow for flexibility to address the challenges associated with the proposed rule.

*Response:* EPA agrees with the commenters that stationary CI area source engines located in remote areas of Alaska have special challenges that should be taken into consideration. As the commenters noted, over 180 rural communities in Alaska that are not accessible by the Federal Aid Highway System rely on stationary diesel engines and fuel for electricity. They are scattered over long distances in remote areas and are not connected to population centers by road or power grid. They are located in the most severe arctic environments in the United States. Transportation of diesel fuel to these areas is dependent on weather and communities typically pay some of the highest prices for fuel in the United States. Stationary engines located in rural areas of Alaska have different fuel storage and use logistics and higher operating and compliance costs. Many of these communities are accessible only by plane. In light of the comments, we believe it is appropriate to treat engines located at area sources in areas of Alaska that are not accessible by the Federal Aid Highway System as a separate subcategory. We re-evaluated GACT for the subcategory of stationary engines located at area sources of HAP that are in an area of Alaska that is not accessible by the Federal Aid Highway System. For these engines, we determined that GACT is the same management practices as those required for non-emergency CI RICE less than or equal to 300 HP located at area sources. For more discussion of this issue, refer to the memo entitled "MACT Floor Determination for Existing Stationary Non-Emergency CI RICE Less Than 100 HP and Existing Stationary Emergency CI RICE Located at Major Sources and GACT for Existing Stationary CI RICE Located at Area Sources."

*B. Final Emission Requirements*

*Comment:* Several commenters expressed opposition to EPA's proposal to have emission standards apply to

small engines at major sources. Three commenters said that EPA should not finalize emission limits for engines less than 100 HP. One commenter argued that stationary engines that are less than 100 HP should be exempted from numerical HAP emission standards. In the commenter's opinion, it is not cost effective to install add-on controls on small engines or to purchase a new engine. According to the commenter, the majority of engines in this size range are operated for intermittent household or other infrequent use and emissions are naturally limited, the commenter said, and low emissions do not justify the costs associated with requiring a numerical HAP limit. One commenter does not believe that measurement is economically practicable for a small unit as the cost of testing will likely exceed the value of the engine itself. The commenter urged EPA to exclude small sources from the category.

*Response:* EPA has reanalyzed its proposed standards based on the information and data presented and EPA concludes that it is not feasible within the context of this rulemaking to prescribe emission limitations for existing stationary CI engines smaller than 100 HP located at major sources, because the measurement of emissions from these engines is not practicable due to technological and economic limitations. In order to measure the emissions from these engines on a ppmvd at 15 percent $O_2$ basis, the following test methods are required: EPA Method 1 or 1A for selection of sampling ports; EPA Method 3, 3A, or 3B for determining the $O_2$ concentration; EPA Method 4 for measuring the moisture content, and EPA Method 10 or ASTM D6522–00 (2005) for measuring the CO concentration. These test methods require the sample point to be a certain distance between the engine and the exhaust. Because engines below 100 HP often have exhaust pipes with very small diameters and lengths, stack testing using these methods could require a modification or extension of the exhaust pipe to accomplish the test. The cost to do the testing ranges from approximately $1,000–$5,000 depending on the method used. Generally, 100 HP engines cost around $5,000–$7,000 dollars and 50 HP engines cost approximately $4,000–$5,000, so the cost of performance testing could approach the cost of the engine itself. Given the cost of the testing itself, the physical adjustments necessary to accomplish the test, and the particular circumstances pertaining to stationary engines below 100 HP, we believe that the application of measurement methodology to this class of engines is not practicable due to technological and economic limitations. Therefore, EPA is promulgating work practice standards for these engines. Additional detail regarding this analysis can be found in the memorandum entitled "MACT Floor Determination for Existing Stationary Non-Emergency CI RICE Less Than 100 HP and Existing Stationary Emergency CI RICE Located at Major Sources and GACT for Existing Stationary CI RICE Located at Area Sources."

*Comment:* One commenter stated that the use of CO as a surrogate for HAP emissions from stationary diesel engines is flawed and does not meet the DC Courts three part test for reasonableness. According to the commenter, the DC Court surrogate three part test requires EPA to demonstrate each of the following: (1) HAP from the source must be "invariantly present" in the surrogate; (2) control technology that reduces the surrogate must "indiscriminately capture" HAP from the source; and (3) control of the surrogate is the only means to control HAP from the source. The commenter pointed out that EPA admitted that CO may not be an adequate surrogate for metallic HAP emissions in the current proposal. The commenter argued that oxidation catalyst is only capable of 30 percent reduction of PM, thus allowing 70 percent of the PM, including metallic and semi-volatile HAP to be emitted to the atmosphere. In addition, the commenter pointed out that technologies that control CO are not the only means by which a source can achieve reductions in HAP emitted from stationary diesel engines. The commenter believes that based on the DC Court's three tests, final standards are not appropriate, and recommended that EPA adopt standards based on PM rather than CO reductions.

*Response:* EPA believes that CO emissions are an appropriate surrogate for HAP emissions for stationary CI engines. EPA has demonstrated the relationship between CO emissions and HAP emissions in previous rulemakings for stationary engines. EPA does not have any data to support a relationship between PM emissions and HAP emissions for stationary CI engines, nor did the commenter provide any data to support such a relationship for this source category. It is clear that there are methods for reducing PM emissions, like reducing sulfur from fuel, that may not lead to a reduction in HAP. In addition, it is not clear that reductions in PM would reduce emissions of all HAP emitted from stationary engines, particularly emissions of formaldehyde, acetaldehyde, *etc.,* that represent the vast majority of the HAP emissions from this source category. Therefore, for this particular source category, use of PM as a surrogate for HAP is not appropriate. The commenter also did not provide any data from testing of stationary CI engines to show that CO is not a good surrogate for metallic HAP. CO is also a better surrogate for HAP emitted from stationary CI engines than PM because PM is more difficult and expensive to measure than CO for this source category. For semi-volatile HAP, the testing conducted by EPA at Colorado State University showed that an oxidation catalyst reduced PAH emissions by greater than 90 percent for most of the PAH that were tested, and that CO level reductions correlated with level reductions in such HAP.

In addition, as discussed above, EPA is taking an additional action pursuant to its authority under section 112(d)(2)(B) and (C) for further control of metallic HAP. EPA determined that the most effective and achievable method for of controlling metallic HAP emissions from existing stationary CI engines is through the use of crankcase emission control systems. Combustion gases and oil mist that are vented from the engine crankcase are a substantial source of any metallic HAP emissions from stationary CI engines. EPA is promulgating a further standard under section 112(d)(2)(B) and (C) that requires stationary non-emergency diesel engines greater than 300 HP to install either an open or closed crankcase filtration emission control system if the engine is not already equipped with one. The open crankcase filtration emission control system reduces emissions from the crankcase by filtering the exhaust stream to remove oil mist, particulates, and metals. In the case of the closed system, crankcase emissions are collected and filtered and those that remain in a gaseous state are routed to the intake manifold for burning. We believe this requirement will reduce metallic HAP from the stationary engine emissions.

*Comment:* Multiple commenters were concerned with how EPA set the MACT floor for the proposed rule. Several commenters said that EPA has not considered variability in setting the MACT floor for the proposed rule. A commenter cited the recent Brick MACT ruling which indicated that "floors may legitimately account for variability [in the best performing sources that are the MACT floor basis] because "each [source] must meet the [specified] standard every day and under all operating conditions." The commenters

stated EPA's data set is not sufficient in covering variability. One commenter noted that the Courts have been critical of EPA's process for setting minimum allowable emission limits. The commenter stated that EPA set the emission limits by averaging the best 12 percent of all performance tests for each subcategory, but did not consider operational variations of the units. The commenter recommended that EPA set emission limits at the emissions level that is actually achieved under the worst reasonably foreseeable circumstances for the best performing 12 percent as allowed by the Courts in the Cement Kiln MACT and Brick Kiln MACT decisions.

Multiple commenters suggested that EPA should consider a scenario under which lower temperatures and reduced catalyst efficiencies may occur due to reduced engine speed or load, resulting in lower temperatures and consider an alternative work practice under section 112(h) of the CAA for the situation. Two commenters noted that the emission standards in the proposed rule apply at all times, but that there is no data or information in the rulemaking docket that supports the proposed limits at low loads or at operating conditions other than high load. The commenters expressed that EPA should provide data and analysis that supports requiring emission limits to be met at all times. Also, for compliance at all times, the commenter asked what averaging times apply.

*Response:* EPA agrees that emissions variability should be better analyzed and has included a revised approach to variability in the MACT floor analysis. The final emission standards are based on test data collected from stationary engines produced by different engine manufacturers, operating at various loads and other conditions, and located in various types of service and locations. The engines range in size from 160 HP to 3,570 HP. The data includes engines operating at loads from 25–100 percent. To the extent commenters believed further data would have beneficial to EPA, EPA must make its determinations based on the information available to it. EPA asked for further data, and EPA did receive further data following the proposal, which led to changes in the final regulations. For engines operating at reduced speed or loads resulting in a reduced exhaust temperature, EPA believes that numerical emission requirements are still appropriate and there is no justification to only require work practice standards during these situations. We do not believe that the provisions of section 112(h) of the CAA are met (except as discussed elsewhere with regard to periods of start-up, emergency engines, and engines below 100 HP) because testing is not economically and technologically impractical and the emissions can be readily routed through a conveyance for purposes of emission testing. EPA believes that the final emission standards will be achievable at all times covered by the standards and will reflect the numerous engine models and operating scenarios that can be expected from stationary engines.

Regarding the comment asking about the averaging times that apply, EPA has clarified in the final rule that the emission standards are based on the average of three one-hour runs.

*Comment:* Several commenters expressed concern with the proposed limits for emergency engines at both area and major sources. Numerous commenters stated that EPA should adopt management practices for emergency engines at area sources and not require emission limits from these engines. Commenters stated that emergency engines need special consideration, due to minimal operation, and the commenters said that EPA should apply section 112(h) of the CAA for emergency engines at major sources because of this limited operation. Several commenters recommended that emergency engines be subject to only work practice standards that limit the number of hours allowed for operation during non-emergency events.

Several commenters recommended that EPA require management practices rather than a numerical emission limit for emergency diesel generators greater than 500 HP at area sources. The commenters suggested that such management practices could replace the existing proposed emission standard requirements for emergency CI engines greater than 500 HP. The commenters stated that the proposed rule and related docket indicates that CI emergency diesel engines can achieve a 40 ppmvd CO emission standard for both normal operations and startup or malfunction periods without add-on technology, which the commenters did not believe was correct. The commenters said the proposed rulemaking does not provide any basis for the proposed standards for emergency engines of this size range, and the GACT determination has not been properly established for these engines. In particular, according to the commenters, subsection 1 of section IV.B. of the proposed rule, which is cited in subsection 2 as the basis for the area source standards for large CI engines, does not appear to include any discussion of emission controls for emergency CI engines greater than 500 HP. In the absence of such justification, the commenters state that the MACT floor for these large engines is no controls. The commenter acknowledged that such a no control argument may not be acceptable under the MACT because of the Brick MACT court case, but the commenters stated that there is no such limitation in making GACT determinations. The commenter was concerned that establishing an emission standard for large emergency CI engines would establish requirements for the installation of add-on controls for some, if not most of the sources in that category. EPA needs to conduct a regulatory analysis and assessment of the costs of these controls. The commenter gave an example of the impact of an emission limit and the impact of installing controls on one of his units. The commenter concluded that because of the unit's limited operation, an oxidation catalyst control will have limited, if any, control effectiveness in actual use.

The commenters said that despite EPA's claims that the agency is not requiring performance tests of emergency engines, major sources with existing emergency engines appear to have an implicit testing requirement to demonstrate that they comply with concentration limits. Such testing could significantly increase the time the typical emergency engine would be used in year and impose additional environmental impact and costs. The commenters said EPA needs to resolve the conflict between the preamble and the regulatory language and replace the emission limits for emergency engines with work practices. The commenters raised similar concerns about the apparent requirement for performance testing of emergency RICE due to ambiguous rule language and said it should be clarified to explicitly state that such testing is not required. The commenter said the rule would require not only initial performance testing, but testing every 3 years. Because engine operation for performance testing would likely exceed typical operation for operational testing and maintenance, these testing requirements would result in increased operation of the engine with a corresponding significant increase in operating costs and emissions of other pollutants such as $NO_X$. The commenters said emergency engines are used only during emergencies, other than short (less than one-half hour) weekly tests to assure the engines will perform. According to the commenter, performance tests (initial or

every 3 years) consisting of three 1-hour runs typically cost about $10,000 each and are not justified for limited use engines, the tests alone would add substantially to the fuel use of these engines are result in additional and unnecessary emissions and work practice standards under section 112(h) are more appropriate due to "technological and economic limitations."

*Response:* EPA reviewed the information submitted by the commenters and determined that it would be appropriate to require management practices for all emergency stationary CI engines at area sources. Because these engines are typically used only a few number of hours per year, the costs of emission control and the costs of emission testing are not warranted when compared to the emission reductions that would be achieved. The proposed numeric emission levels are not GACT for emergency engines at area sources. Such engines rarely if ever use the type of emission controls that might have been necessary for many engines to meet the numeric standard, and such engines are rarely if ever subjected to emissions testing. Therefore, EPA determined that GACT for all stationary emergency engines at area sources is the use of management practices.

EPA also analyzed the types of engines that were included in the area source category listing for stationary RICE. As a result of this analysis, EPA determined that emissions from existing stationary emergency engines located at residential, commercial, and institutional facilities that are area sources of HAP were not included in the 1990 baseline emissions inventory that was used as the basis for the listing of source categories needed to ensure that 90 percent of area source emissions are regulated. Existing stationary emergency engines located at residential, commercial, and institutional facilities that are area sources are therefore not subject to this regulation.

For stationary emergency engines at major sources, EPA determined that it is not feasible to prescribe or enforce an emission standard because the application of measurement methodology to this class of engines is impracticable due to technological and economic limitations. A more detailed discussion of this determination can be found in the memorandum entitled "MACT Floor Determination for Existing Stationary Non-Emergency CI RICE Less Than 100 HP and Existing Stationary Emergency CI RICE Located at Major Sources and GACT for Existing Stationary CI RICE Located at Area Sources." EPA determined that it is impracticable to test stationary CI emergency engines using the test procedures specified in subpart ZZZZ because using these procedures would increase the required number of hours of operation of the engine beyond the routinely scheduled reliability testing and maintenance operation, thereby increasing emissions. While emergency engines have periods of operation for scheduled maintenance and reliability testing, those periods are usually several hours shorter than the number of hours that would be required to run the necessary emissions tests under subpart ZZZZ. CARB conducted a survey of stationary emergency diesel engines in 2002 [2] to determine the average number of hours that stationary emergency diesel engines operate. The average hours of operation for maintenance and testing were 22 hours per year, which is less than two hours per month. For the engines that CARB surveyed, 86 percent operated less than 30 hours/year for testing and maintenance. Thirty percent operated less than 10 hours/year. National Fire Protection Association (NFPA) codes require that stationary diesel engines that are used for emergency purposes are run 30 minutes per week (27 hours per year) for maintenance and testing purposes. It is impracticable to test emergency stationary engines as a result of emergency operation because emergencies are unplanned events and implementation of the test procedures specified in subpart ZZZZ require advance planning before tests are conducted. In an emergency, the owner/operator does not have the advance planning time necessary to implement subpart ZZZZ. It is also impracticable to test stationary CI emergency engines at major sources because of the large population of these engines. EPA estimates that there are over 200,000 existing stationary CI engines from 100–500 HP at major sources that are subject to this rulemaking. There are only approximately 300–400 testing firms and these stationary engines are not the only sources that are required to be tested, so if testing were required for these engines, it would take many years to test all of these engines. The cost for testing all of these engines would also be approximately $200 million, which would be unreasonable.

EPA expects that these changes from the proposed rule address the concerns expressed by the commenters about the requirements for stationary emergency CI engines. Regarding the comments pertaining to performance testing for emergency engines, EPA did not intend for the rule to require performance testing for emergency engines. The final rule does not contain any performance testing requirements for emergency engines.

*Comment:* One commenter recommended that the standard require CDPF or a combination of oxidation catalysts and CDPF for new or existing non-emergency diesel RICE. The commenter stated that EPA's proposal calls for oxidation catalysts on non-emergency CI engines, which EPA reports will result in a 90 percent reduction in CO and 30 percent reduction in PM, whereas CDPF would result in greater reductions in PM (90 percent reductions or greater).

Another commenter reported that it had conducted risk assessment evaluations for diesel particulate emissions from non-emergency diesel engines and found that the diesel particulate emissions from non-emergency diesel engines and found that the diesel particulate emissions often create a significant cancer risk even when there is a 30 percent PM reduction. The commenter recommended that EPA base standards on CDPF or a combination of oxidation catalyst and CDPF, for existing and new non-emergency diesel engines.

*Response:* The standards that EPA proposed and that EPA is finalizing do not require a particular control technology. For the proposed rule, EPA's beyond-the-floor analysis resulted in standards that were based on the use of oxidation catalyst control for stationary non-emergency diesel engines above 300 HP; EPA has made the same determination for the beyond-the-floor standards in the final rule. EPA determined that the MACT standards should be based on oxidation catalyst rather than CDPF because we do not have any data that shows that CDPFs get greater reductions of HAP than oxidation catalysts on stationary engines, and CDPFs are approximately four times as costly as oxidation catalysts.[3] EPA also has concerns regarding the technical feasibility of CDPFs for existing stationary diesel engines. Many existing diesel engines are not electronically controlled, and PM emissions from older engines are often too high for efficient operation of

[2] *California Air Resources Board Staff Report:* Initial Statement of Reasons for Proposed Rulemaking. Airborne Toxic Control Measure for Stationary Compression Ignition Engines. Stationary Source Division, Emissions Assessment Branch. September 2003.

[3] *California Air Resources Board Staff Report:* Initial Statement of Reasons for Proposed Rulemaking. Airborne Toxic Control Measure for Stationary Compression Ignition Engines. Stationary Source Division, Emissions Assessment Branch. September 2003.

a CDPF. Further, engine exhaust temperatures are often not high enough for regeneration of the CDPF filter substrate. EPA notes that owners and operators are free to choose whichever control technology, which could be oxidation catalyst or CDPF, as long as they meet the final standards. EPA is not addressing new diesel engines in this rulemaking.

*Comment:* A few commenters were concerned about requirements that might apply to engines that startup turbines. Four commenters suggested that RICE used to startup combustion turbines be exempt from the proposed rule, or deemed to fall under the "emergency" definition in 40 CFR § 63.6675. One commenter explained that turbine RICE only run for a few minutes to get the unit started and the total fuel consumption is not significant. One commenter was concerned that the short run-time during each operation may not be long enough to get the filter up to its design temperature for achievement of its removal efficiency (and note that EPA discusses it in the preamble) or that a filter may require additional run time for regeneration. The commenter further noted that the additional run-time required by the 3 year testing requirement could outstrip the run-time needed to support these combustion turbine peaking unit starting devices just for compliance with the RICE rule. The commenter noted that increased consumption of fuel for rule compliance would be wasting the natural resource and adding emissions for no measurable reduction being gained by the rule. Two commenters noted that every major power plant in the United States is required to have black start capability, which typically involves a small combustion turbine equipped with a diesel engine used for startup of the turbine. According to the commenter, the diesel starting engine, rated less than 500 HP, generally operates less than 10 minutes per combustion turbine start. The commenter indicated that the majority of black start units only operate during emergencies or unusually high demand days, and that a review of the commenter's company's operating data determined that seven black start units in the system averaged 32 starts per year (which equates to less than 6 hours of operation per year, although some limited additional operation may occur as a result of routine maintenance and readiness testing).

*Response:* In the final rule EPA has required that stationary engines used to startup combustion turbines meet work practice standards. EPA finds that the short time of operation for these engines (10–15 minutes per start) makes application of measurement methodology for these engines using the required procedures, which require continuous hours of operation, impracticable. Requiring numerical emission standards for these engines would actually require substantially longer operation than would occur normally in use, leading to greater emissions and greater costs. EPA also agrees with the commenters that it would not be appropriate to set emission limits that are based on the use of aftertreatment control for the subcategory of stationary CI engines that are used to startup combustion turbines. Oxidation catalyst control would not be effective for these engines due to their short time of operation (10–15 minutes per start).

*C. Management Practices*

*Comment:* Several commenters did not agree with the specific management practices that EPA has proposed in the rule for area sources or recommended different maintenance practices. According to the commenters, the maintenance frequency in the proposed rule exceeds current practices or is not supported in the proposed rule. Several commenters agreed that management practices are appropriate for the proper operation of the engines and is a reasonable means to reduce HAP emissions, however, did not agree with the specific maintenance practices proposed by EPA. Numerous commenters recommended that EPA allow owners/operators to follow engine manufacturers' recommended practices or the owners/operators own site-specific maintenance plan.

One commenter pointed out that operators have a direct interest in maintaining engine oil, hoses, and belts, so the engine runs reliably, but the appropriate frequency for these maintenance practices are specific to engine design and are not "one size fits all." Ten commenters recommended that EPA revise fixed maintenance (one-size-fits-all) requirements to maintenance plans. The commenters stated that, while fixed maintenance intervals work well for new mass produced engines similar to those in automobiles, they are inappropriate for the wide variety of existing engines used in the oil and gas, agriculture, and power generation industries across the nation. The commenters pointed out that EPA allows the use of operator-defined maintenance plans that are "consistent with good air pollution control practice for minimizing emissions" to be used in other portions of this same rule, and asserted that EPA should allow the use of operator-defined maintenance plans to greatly reduce cost and allow operators to optimize maintenance for each type of engine.

One of these commenters added that current industry engine maintenance programs are driven by tried-and-true practices and since these practices effectively keep the engines running, they allow the products of the members of the commenter's organization to go to market. The commenter stated that additional, burdensome, frequent, and time-consuming maintenance requirements will cause the members of the commenter's organization to more-frequently shut down engines and thus shut down production.

Two commenters said that if EPA keeps the management practices as proposed, the frequencies associated with conducting engine maintenance should be revised to be commensurate with today's practices. The commenter believes the maintenance practices, as proposed, are significantly burdensome and lack basis. According to the commenters, EPA should replace the maintenance hour intervals with company recommended performance-based maintenance practices to be documented in an operator-defined maintenance plan consistent with requirements in 40 CFR part 60, subpart JJJJ.

One commenter stated that most of the engine manufacturers for the engines in the oil and gas industry recommend oil changes on a monthly schedule. The commenter also indicated that it is common practice to periodically sample and test the engine oil to see if the oil properties are sufficient to extend this time period between oil changes. According to the commenter, this testing has shown in many cases that the oil change interval can be extended without any detrimental effects on the engine, which allows industry to maximize efficiencies, minimize oil usage, reduce waste, and streamline operations with no negative impacts to the engine or emissions.

One commenter expressed that inspection of hoses and belts has no impact on HAP emissions. The commenter expressed that, generally, it agreed that performing maintenance on engines will help to reduce HAP emissions, but that while inspecting belts and hoses is an important part of general engine maintenance (and most sources likely conduct regular inspections of their engines), such inspections have no effect on emissions and should be removed from the proposed rule.

*Response:* EPA proposed to require specific management practices for certain engines, primarily for smaller existing stationary engines at area sources where EPA thought that add-on controls were not GACT. EPA indicated at proposal that the management practices specified in the proposal reflected GACT and that such practices would provide a reasonable level of control, while at the same time ensuring that the burden on particularly small businesses and individual owners and operators would be minimized. EPA asked for comment on the proposed management practices and received comments on the proposal from industry.

EPA agrees with the commenters that it is difficult to adopt a set of management practices that are appropriate for all types of stationary engines. Regardless, EPA must promulgate emission standards pursuant to section 112(d)(5) for all engines at area sources covered by the final rule. EPA still believes that a management practice approach reflects GACT for emergency engines and smaller engines at area sources. These management practices represent what is generally available among such engines to reduce HAP, and the practices will ensure that emissions are minimized and engines are properly operated. EPA does not agree with the commenters that it would be appropriate to simply specify that owners and operators follow the manufacturer's recommended maintenance practices for the engine. EPA cannot delegate to manufacturers the final decision regarding the proper management practices required by section 112(d). To address the comments that there may be special and unique operating situations where the management practices in the rule may not be appropriate, for example engines using a synthetic lubricant, EPA notes that owners/operators may work with State permitting authorities pursuant to 40 CFR subpart E ("Approval of State Programs and Delegation of Federal Authorities") for approval of alternative management practices for their engines. Subpart E implements section 112(l) of the CAA, which authorizes EPA to approve alternative State/local/Tribal HAP standards or programs when such requirements are demonstrated to be no less stringent than EPA promulgated standards.

The management practices EPA proposed for stationary engines greater than 50 HP included changing the oil and filter every 500 hours, replacing the spark plugs every 1,000 hours, and inspecting all hoses and belts every 500 hours and replacing as necessary. For engines less than 50 HP, EPA proposed to require that these engines change the oil and filter every 200 hours, replace spark plugs every 500 hours, and inspect all hoses and belts every 500 hours and replace as necessary.

EPA agrees that there is a wide range of recommended maintenance procedures, but EPA must promulgate specific requirements pursuant to section 112(d) for this source category. Based on the different suggested maintenance recommendations EPA has reviewed, maintenance requirements appear to vary depending on whether the engine is used for standby, intermittent, or continuous operation. Maintenance is also dependent on the engine application, design, and model. Taking into consideration the information received from commenters on the proposed maintenance practices for oil and filter changes and carefully reviewing engine manufacturer recommended maintenance procedures, EPA has determined that for stationary non-emergency engines below 300 HP, GACT will require the oil and filter to be changed every 1,000 hours of operation or annually, whichever comes first, which reflects the management practices that are generally available. For stationary emergency engines, the final rule requires the oil and filter to be changed every 500 hours of operation or annually, whichever comes first. EPA notes that in the final rule it has clarified that spark plug changes are not required for stationary diesel engines since diesel engines do not use spark plugs. EPA also determined that it would be appropriate to include the option to use an oil analysis program in the final rule.

EPA does not agree with the comments that inspecting belts and hoses has no impact on emissions. Ensuring that the engine is properly operated and maintained will help minimize the HAP emissions from the engine. Properly maintained belts and hoses allow the engine to operate at maximum efficiency. Hoses are generally used to move coolant through the engine to prevent the engine from overheating. Overheating of the engine can cause a malfunction in the combustion process, and may also burn the engine oil in the combustion chamber. Both of these conditions may increase pollutant emissions from the engine. Belts are commonly used for electrical generation and engine timing, and if worn or broken can cause damage to the engine and increase emissions. Therefore, EPA has required management practices that reflect GACT and that, in EPA's view, will ensure the proper operation and maintenance of the engine.

*D. Startup, Shutdown and Malfunction*

*Comment:* Several commenters expressed serious concern over the proposed emission standards for periods of startup, shutdown, and malfunction (SSM). The commenters state that the U.S. Court of Appeals for the District Columbia Circuit vacated the SSM exemption in 40 CFR part 63, subpart A on December 19, 2008, and the decision requires the Agency to implement standards that apply at all times, including during SSM periods. Numerous commenters thought the quick response to the December 2008 Court decision on the SSM issue is premature and recommended that EPA wait for a final decision before incorporate elements from this case. Numerous commenters are of the opinion that EPA has not provided a technical basis for its establishment of SSM limits and that any SSM limits should be replaced with work practice standards and disagreed with the decision to include limits for SSM periods. In addition, several commenters said that emissions during SSM events cannot be measured and therefore cannot be confirmed and limits are not enforceable. One commenter recommended that EPA require a SSM plan similar to the SSM plan currently required under 40 CFR part 63, subpart ZZZZ. The commenter also pointed out that 40 CFR 63.6650(b) in the existing rule requires operators to operate and maintain their equipment in a manner consistent with good air pollution control practices at all times, including periods of SSM. The commenter believed that this requirement in conjunction with a SSM plan will achieve the same goals as the proposed rules in a much more cost effective and logical manner.

Many commenters recommended that EPA consider other alternatives to implement during SSM periods, such as possibly requiring work practice standards, which the commenters believe is the most reasonable approach and is justified under the CAA. Commenters believed that work practice standards that minimize the emissions during SSM periods is the most practical method of keeping HAP emissions from engines as low as possible.

Several commenters said that there is no method to determine compliance during SSM periods. The commenters said that it will be difficult or impossible to design a test program to describe emissions during SSM events, *e.g.,* the commenter is not sure how a

malfunction would be defined considering the unexpected and anomalous nature of the event. Therefore, emissions during these periods cannot be confirmed, the commenters said. Similarly, commenters believed that it is not reasonable to set numerical limits during startup because there are no available or repeatable test methods or procedures for measuring emissions during startup or malfunction, plus there is no prescribed definition of what constitutes startup of an engine, which can vary significantly for a number of reasons such as engine and catalyst type, fuel, climatic conditions, application and load.

One commenter said that there are no viable measurement methods available to measure CO, formaldehyde or VOC during transient operation and a review conducted by the commenter of Table 4 in the proposed rule shows the inconsistencies related to transient measurement acceptability with respect to stack gas moisture and flow rate, delays in the actual response of analyzers, issues in obtaining an accurate measurement during a transient test due to an axial diffusion function in long gaseous emissions sample lines, and field gaseous emission measurements require stack traverse as well for the emissions under measurement, per EPA Methods 7, 10, 25, *etc.,* which eliminates the possibility of getting an accurate measurement during transient events such as a startup.

One commenter claimed that issuance of numerical limits for SSM based on the emissions of the "best controlled sources prior to full warm up of the catalytic control" fails to consider emissions during malfunction of the engines themselves. The commenter asserts that while EPA appropriately determined that during a control device malfunction, the floor and standard cannot be set assuming operation of the control device, EPA errs in limiting its analysis solely to operation of the controls since emissions can increase as a result of engine malfunctions as well. The commenter noted that its experience is consistent with EPA's statements that emissions during an engine malfunction may increase due to the effects on exhaust temperatures and composition. The commenter concluded that emission limits would need to be based on the emissions level from the best performing sources without control while the engine is malfunctioning. One commenter added that it does not make sense to set any numerical standards during a malfunction of an engine because inherent in the concept of a malfunction is that emissions will be malfunctioning as well. It is also not logical to apply the concept of "best performing" malfunctioning engine, the commenter said. For these reasons, it is unreasonable for EPA to promulgate numerical emission limits for periods of malfunction, in the commenter's opinion. Emission testing for malfunctions would be near impossible to conduct given the sporadic and unpredictable nature of the events, the commenter said. The commenter said that the nature of malfunctions means it is not feasible to predict or simulate emissions that occur during periods of malfunctions. The commenter asserted that with respect to engines, it is not technologically or economically feasible to apply measurement methodology for the emissions during SSM periods and further, that it is unreasonable for the Agency in the face of the lack of accurate emission measurements to simply set the standard at the level for normal operations (*e.g.,* for sources not using a control device). The commenter stated that this situation is precisely the circumstance in which Congress envisioned that a work practice standard would be established, and urged EPA to adopt a work practice standard applicable to malfunction and startup periods for engines consistent with section 112(h) of the CAA and not to apply the numerical limits for normal operations.

One commenter stated that EPA solicited comment on the level of specificity needed to define the periods of startup and malfunction. The commenter believes the responses differ based on whether the event is a startup or malfunction. The commenter noted that startup of an engine begins with the start of fuel flow to the engine and ends when the engine has achieved normal operating temperature and air to fuel flows as indicated by the manufacturers' specifications, and while the initiation of a startup is predictable, its conclusion is not time-determined, but operationally-determined. The commenter noted where a catalyst is used to control emissions; startup does not end until the required catalyst bed temperature has been achieved, however, this may happen before the engine air and fuel flows are normal and thus catalyst bed temperature is not the exclusive criterion that defines the end of the startup period. The commenter noted that the start of the malfunction should be defined as when the normal operation emission limit is exceeded and the end of the malfunction should be set as when the normal operation emission limit is restored or the engine is shutdown. The commenter noted that malfunctions often require shutdown to address, but such shutdowns can be delayed because immediate engine shutdown would cause other upsets. Therefore, the commenter believes it would not be reasonable to set any specific time limits on either startup or malfunction periods, because their duration can be a function of operational need. Similarly, one commenter disagreed that it would be appropriate to set a specific limit on the time allowed for startup because not all engines experience the same type of startup and malfunction. The length of startup will depend on many factors including engine type, size, fuel type and duty cycle, plus the frequency of required startups will also vary greatly among engines because some engines are only used for intermittent operation.

Some commenters thought that limiting the engine startup time is a reasonable method to limit emissions. The commenter added that the most effective way to control emissions during startup for engines with catalysts is to limit the amount of time it takes to warm up the exhaust to initialize the catalyzation process and startup time can be easily monitored. The commenter added that the time to be monitored at startup be defined as from the initial engine in-cylinder combustion, corresponding with continuous operation, up to the point that a defined catalyst inlet temperature is reached. The commenter also recommended that owners/operators be able to request additional startup time if necessary in special circumstances, *e.g.,* in extremely cold climates or where sufficient load cannot be reached within 30 minutes. The commenters recommended a limit of one hour for startup and 30 minutes for shutdown. The rule should not include a time limit for malfunctions, as the length of time during which an engine will be out of compliance would depend on the type of malfunction, the commenters said. The commenters suggested that each affected source would be required to prepare a SSM plan, which would have to address appropriate actions and time limits for malfunctions. The commenter suggested that for engine startups, the work practice should require loading the engine to normal operating load as soon as practicable so that the catalytic controls are within operating range as soon as practicable

The commenters also objected to EPA's proposed second option. The commenter said the data are apparently derived from the best controlled engines not using catalytic controls. The commenter said that emissions data

from steady-state operation of uncontrolled engines does not account for the cooler engine and fuel temperature conditions during startup. Nor does the second option properly account for malfunctions.

One commenter proposed that EPA treat SSM emissions as de minimis, using the DC Circuit rationale in Alabama Power Co. v. Costle. The commenter noted that catalyst systems do not perform at low temperatures, and the SSM periods vary in duration and intensity, which can significantly impact actual emissions profiles. The commenter provided examples of why an assumption that SSM emissions are identical to normal stable operations emissions is erroneous and a gross over-simplification of unit operations.

*Response:* EPA received extensive comments on the proposed requirements applicable to existing stationary engines during SSM. Consistent with the recent Court decision that vacated the exemption in 40 CFR 63.6(f)(1) and (h)(1) for SSM (*Sierra Club* v. *EPA,* 551 F.3d 1019), EPA has established standards in this rule that apply at all times. EPA disagrees with those comments suggesting that EPA was premature in proposing standards during periods of startup, shutdown and malfunction. The United States Court of Appeals for the District of Columbia Circuit issued its opinion vacating the SSM exemption in December 2008, and we appropriately accounted for that decision in proposing the rule in February 2009. EPA does not believe it is appropriate to promulgate final rules that are inconsistent with the decision of the DC Circuit.

EPA has determined that the emissions from stationary CI engines during startup are significantly different than the emissions during normal operation. During startup, incomplete combustion of the diesel fuel causes variations in the pollutant concentrations and fluctuations in the flow rate of the exhaust gas. Incomplete combustion is due to cold areas of the cylinder walls that cause the temperature to be too low for efficient combustion. As the engine continues to operate, these cold regions begin to heat up and allow for more complete combustion of the diesel fuel and stabilization of the exhaust flow rate and pollutant concentrations. In addition, the engine experiences extreme transient conditions during startup, including variations in speed and load, poor atomization of the fuel injection, which leads to variable engine and engine exhaust temperatures, variable exhaust gas flow rates, and variable diluent pollutant concentration. Note for example the brief time spent at different load conditions as shown in Figure 1 of the attachment to EMA's letter dated February 17, 2009 (EPA–HQ–OAR–2008–0708–0019), which illustrates the transient nature of the engine startup phase. Other factors that cause emissions to be higher during startup, including for engines that are not equipped with oxidation catalyst, are a higher propensity for engine misfire and poorer atomization of the fuel spray during startup. After-treatment technologies like oxidation catalysts and CDPFs must also reach a threshold temperature in order to reduce emissions effectively. In the February 17, 2009, EMA letter, EMA provided various graphs illustrating sample engine startup profiles and graphs demonstrating the effect of engine exhaust temperature on catalyst efficiency. Figure 6 of the attachment to EMA's letter (EPA–HQ–OAR–2008–0708–0019.1) shows how the CO efficiency is a function of the catalyst inlet temperature.

EPA has evaluated the criteria in section 112(h) and carefully considered and reviewed the comments on this issue. EPA has determined that it is not feasible to prescribe a numerical emission standard for stationary CI engines during periods of startup because the application of measurement methodology to these engines is not practicable due to the technological and economic limitations described below.

EPA test methods (*e.g.,* 40 CFR part 60, appendix A, Methods 2, 3A, 4, and 10) do not respond adequately to the relatively short term and highly variable exhaust gas characteristics occurring during these periods. The innate and substantial changes in the engine operations during startup operations create rapid variations in exhaust gas flow rate as well as changes in both pollutant and diluent gas concentrations. Correlating the exhaust gas flow rates and the gas components concentration data for each fraction of time over the entire period of a startup operation is necessary to apportion the values appropriately and to determine representative average emissions concentrations or total mass emissions rate.

Measuring flow and concentration data in the types of rapidly changing exhaust gas conditions characteristic of stationary CI engines is unachievable with current technologies applicable to stack emissions testing. For example, application of Method 2 to measure stack flow rate requires collecting data for velocity pressure and stack temperature at each of 12 traverse points and a corresponding stack moisture and oxygen concentration (for molecular weight determination). This traverse operation requires about 30 minutes to complete to produce a single value for the test period, which is approximately the same amount of time as the engine startup period. Clearly a single flow rate value would not sufficiently represent the variable flow conditions nor allow appropriate apportioning of the pollutant concentration measurements over that same period for calculating a representative average emissions value. Even if the start-up period is longer than 30 minutes, the stack flow rate test period could not be short enough to represent the short term (*e.g.,* minute-by-minute) result necessary for representative emissions calculations. These findings lead us to conclude that correlating the flow and concentration data as necessary to determine appropriate proportional contributions to the emissions rates or concentrations in calculating representative emissions over these short highly variable conditions with currently available field testing procedures is problematic for stationary CI engines. In addition, even were it technically feasible to measure emissions during startups for stationary CI engines, the cost of doing so for every startup at every covered engine would impose a substantial economic burden. There are approximately 936,000 existing stationary CI engines that are subject to this rule; the cost for testing every one of these engines during engine startup could be more than $1 billion.

EPA is therefore finalizing an operational standard in lieu of a numerical emission limit during periods of startup in accordance with section 112(h) of the CAA. EPA is limited to the information before it, which, of course, includes any information provided by the commenters. *See* 112(d)(3)(A). In this case, EPA carefully analyzed all of the information before it, including that provided by commenters, and determined that this standard complies with the requirements of sections 112(d) and 112(h). The final rule requires that owners and operators of stationary engines limit the startup time to 30 minutes or less. Engine startup is defined as the time from initial start until applied load and engine and associated equipment reaches steady state or normal operation. For stationary engine with catalytic controls, engine startup means the time from initial start until applied load and engine and associated equipment reaches steady state or normal operation, including the catalyst. EPA is also including a requirement in the final rule to

minimize the engine's time spent at idle and minimize the engine's startup time at startup to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the otherwise applicable emission standards apply. As with any work practice, CAA section 112(h)(3) and EPA's implementing regulations at 40 CFR 63.6(g) provide that major sources can petition the Administrator for approval of an alternative work practice, which must be at least as stringent as what is required in the regulation.

Regarding shutdown, EPA determined that it was not necessary to establish different standards that would be applicable during shutdown for stationary CI engines. The commenters did not provide any information that shows emissions would be higher during shutdown than during normal operation. In addition, commenters are incorrect that compliance with the standards must be instantaneous. Compliance with these emission standards has always been based on the results of testing that is conducted over a three-hour period; EPA has made this more explicit in this rule. Since the shutdown period for stationary CI engines is typically only a matter of minutes, it is believed that even if a shutdown occurred during the performance test, the engine would still be able to comply with the emission limitation. In a letter dated February 17, 2009 (EPA–HQ–OAR–2008–0708–0019), EMA indicates that HAP emissions will be sufficiently controlled during periods of shutdown. EMA stated in its letter that according to manufacturers, emissions control equipment would most likely continue to reduce emissions as designed throughout the shutdown period. According to EMA, this is because engine emissions control systems and equipment are, during the start of an engine shutdown, at high enough temperatures to control HAP emissions and will continue to be sufficiently high until the engine shuts down. This trend is illustrated in the attachment to EMA's February 17, 2009, letter to EPA, where EMA provided two graphs with sample engine shutdown profiles. Figure 2 of the attachment to EMA's letter (EPA–HQ–OAR–2008–0708–0019.1) shows catalyst temperatures versus minutes during engine shutdown and illustrates stable catalyst temperatures.

In establishing the standards in this rule, EPA has taken into account startup periods and, for the reasons explained above, has established different standards for those periods. With respect to malfunctions, EPA proposed two options for subcategories where the proposed emission standard was based on the use of catalytic controls. The first proposed option was to have the same standards apply during normal operation and malfunctions. The second proposed option was that standards during malfunctions be based on emissions expected from the best controlled sources prior to the full warm-up of the catalytic control. For subcategories where the proposed emission standard was not based on the use of catalytic controls, we proposed the same emission limitations apply during malfunctions and periods of normal operations. EPA is finalizing the first option described above, which is that the same standards apply during normal operation and malfunctions. In the proposed rule, EPA expressed the view that there are different modes of operation for any stationary source, and that these modes generally include startup, normal operations, shutdown, and malfunctions. However, after considering the issue of malfunctions more carefully, EPA believes that malfunctions are distinguishable from startup, shutdown and normal operations.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, malfunction is defined as a "sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner * * *" (40 CFR 63.2). EPA has determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of CAA section 112(d) standards, which, once promulgated, apply at all times. For example, we note that Section 112 uses the concept of "best performing" sources in defining MACT, the level of stringency that major source standards must meet. One commenter expressed the view that it is not logical to apply the concept of "best performing" to a source that is malfunctioning. Indeed, the goal of best performing sources is to operate in such a way as to avoid malfunctions of their units. Similarly, although standards for area sources are not required to be set based on "best performers," we believe that what is "generally available" should not be based on periods in which there is a "failure to operate."

Moreover, even if malfunctions were considered a distinct operating mode, we believe it would be impracticable to take malfunctions into account in setting CAA section 112(d) standards for stationary CI engines. As noted above, by definition, malfunctions are sudden and unexpected events and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources. Moreover, malfunctions can vary in frequency, degree, and duration, further complicating standard setting.

Finally, EPA believes that malfunctions will not cause stationary CI engines to violate the standard that applies during normal operations. Stationary CI engines would in most cases shut down immediately or with very little delay in the event of a malfunction. Because the standard is expressed as the average of three one-hour runs, or a work or management practice, any emissions that occur prior to engine shutdown should not affect a source's ability to comply with the standard. Commenters' concerns regarding compliance certifications should not be a concern for this same reason. This approach will also encourage shutdowns as soon as practicable when a malfunction that affects emissions occurs. In the unlikely event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, "sudden, infrequent, not reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation." 40 CFR 63.2 (definition of malfunction).

EPA does not agree with the commenter who said that EPA should treat SSM emissions as de minimis. It is doubtful whether a de minimis exemption is even possible under section 112(d) of the Act in these circumstances, *see National Lime Ass'n* v. *EPA*, 233 F. 3d 625, 640 (DC Cir, 2000), but in any case the commenter provides no specific information to justify EPA making such a de minimis finding in this instance. Given the very narrow and specific circumstances delineated by the court in *Alabama Power* v. *Costle*, 636 F.2d 323 (DC Cir. 1979) for making such a finding, and the lack of specific information from the commenter that these circumstances exist in this instance, we do not make a *de minimis* finding.

*E. Emergency Engines*

*Comment:* Several commenters stated that EPA's proposed definition of emergency is not clear as to whether it includes emergency engines that operate in emergency demand response (DR) programs. The commenter believed that the record on 40 CFR part 60, subpart IIII, from which the proposed rule definition was drawn, clearly indicates that the 40 CFR part 60, subpart IIII definition was meant to address peak shaving, not emergency engines participating in emergency DR programs. Several commenters requested that EPA modify the proposed definition of emergency engines to enable engines to maintain their status as emergency engines, even though the engines that are used in DR programs are part of a financial agreement and based on the current definition would not be considered emergency engines. Two commenters stated that emergency DR programs should not be confused with economic DR programs (*e.g.*, peak shaving). Emergency DR programs are initiated by the transmission system operators when the threat of power outages is imminent and are critical to maintaining available power during periods of extreme load on the electric power infrastructure, according to the commenters. The events are rare and unplanned, out of the control of emergency engine owners/operators, and no power is supplied to the grid, but used at the individual facility, the commenter said. The commenter said that emergency DR events during the year are typically limited to no longer than 2 to 6 hours per event, with the number of events per year capped by the regional power pool. The commenter believed that, by establishing a subcategory for generators that serve facilities participating in a DR program and that only operate 200 hrs/yr, including any hours operated for maintenance purposes, EPA could require maintenance practices, and remove any disincentive that may be created over the increased administrative burden and potential post-combustion control retrofit costs if their emergency stationary RICE would be required to be re-characterized as "non-emergency" in order to participate in DR programs. The commenter suggested that a 100 hour operating limit could also be considered as an alternative. Three commenters (stated that they receive many benefits from their participation in the local DR program, and that they use emergency DR events and tests events to replace some of the Joint Commission on Accreditation of Healthcare Organizations' mandated hospital generator tests. According to the commenters the costs that they would have to absorb to meet the proposed emission limits would be prohibitive and that to require facilities to meet rigid emission limits with very little reduction in emissions is not encouraged. Emergency engines are used throughout the U.S. and provide vital safety requirements at hospitals and healthcare institutions, the commenters said. Commenters stated that emergency engines participating in emergency DR programs provide a critical service in stabilizing the electric grid on the rare occasions when the grid is about to fail. Many States endorse the use of emergency engines participating in emergency DR programs, according to commenter 82. Two commenters cited various DR programs in the New England area that existing engines participate in. A commenter provided detailed discussion of several emergency DR programs across the country, including States in New England, the Mid Atlantic and Midwest, and the South, that are supportive of using emergency engines as part of their emergency DR programs, and that accommodate operation of these engines through various definitions of emergency, or through permitting. The commenter concluded that it is very important that EPA not adopt rules that conflict with how much of the U.S. handles emergency DR.

*Response:* EPA agrees that it would be appropriate to allow emergency engines to operate as part of emergency demand response programs for a limited number of hours of operation per year in situations where grid failure and a blackout are imminent. In the final rule, EPA has revised the requirements for emergency engines to reflect this.

*F. Emissions Data*

*Comment:* Multiple commenters believe that the emissions data for engines is not adequate to conduct an appropriate MACT floor analysis. EPA should collect additional data and redo the MACT floor analysis, according to numerous commenters. The commenters also stated that EPA did not consider emissions variability in setting the MACT floor.

Commenters stated that the MACT floors should not be based on data using single measurements, when three measurements are a standard requirement for demonstrating compliance. In the absence of multiple measurements, outliers and erroneous errors cannot be caught, according to the commenters.

The commenters said that EPA should use data from units of similar size to set standards for sources of the same size, *e.g.,* emissions from a large engine should not be used to set standards for a 100 HP engine unless EPA can demonstrate that such an assumption is justified. The commenters are concerned that the data EPA has used for the MACT floor analysis is not representative of the current population of engines.

Commenters criticized the applicability and use of the RICE emissions database as representative of the engines being regulated. One commenter noted that the 40 ppmvd numerical emissions limit for CO appears to be based on 10 tests of only one make and model of engine (Caterpillar, Model No. 3508) over a 3-day period in the Research and Development Laboratory of CSU in 1999 (Docket No. EPA–HQ–OAR–2008–0708–0006). The commenter states that according to the engine population data presented in the impacts document in the docket (Docket No. EPA–HQ–OAR–2008–0798–0028) the promulgated rule would impose limits on more than 50,000 CI engines. The commenter believed that basing the limit on such a small and unrepresentative sample jeopardizes the accuracy of any assumptions made about the operational conditions or performance of the regulated population as well as the accuracy of any cost of compliance estimates, and leads to an underestimation of the impact of the rule.

*Response:* Section 112(d)(3) of the CAA requires EPA to set MACT standards based on the test data that is available to the Agency and this is what EPA did at proposal. EPA recognizes that it had limited emissions test data at the time it developed the proposed rule. However, EPA notes that it used the data that was available at the time of proposal. EPA requested additional test data to supplement the emissions database during the development of previous rules for stationary engines and also in an advance notice of proposed rulemaking for this rule and did not receive any data. EPA again requested additional test data during the comment period for the current engine rulemaking and made an additional effort post-proposal to reach out to industry and other sources in order to supplement the existing emission data set. EPA did receive additional emissions data for stationary CI engines during the post-proposal period for this rulemaking. The additional data include tests for 11 stationary engines, ranging in size from 160 HP to 3,570 HP. The

inclusion of this additional data in the MACT floor analysis for the final rule addresses the commenters' concerns about using data for one large engine to set the MACT floor for smaller engines.

EPA understands the concerns of commenters with regard to whether the MACT floor analysis for the proposed rule took emissions variability appropriately into account. EPA took emissions variability into account to a greater degree when conducting the MACT floor analysis for the final rule. For engines where EPA had data for multiple tests on the same engine, EPA used the highest test run concentration as the representative emissions for that engine. EPA also used the lowest percent reduction observed in determining the percent reduction expected from applicable aftertreatment controls in determining beyond-the-floor MACT standards. Therefore, the variability in emissions from the engine was factored into the MACT floor analysis and the beyond-the-floor MACT analysis.

EPA does not agree that it would be inappropriate to use data from one run in setting MACT floors; using the highest run from the testing takes into account the variability of emissions.

*G. Final Rule Impacts*

*Comment:* Several commenters indicated that the costs are not representative of actual costs of implementing the rule and numerous commenters said that the proposed rule will have a significant financial impact on their sources. According to the commenters, EPA has underestimated the cost impacts of the rule by an order of magnitude or more. Numerous commenters indicated that EPA has used old, faulty, and inappropriate data on the cost of controls, testing, recordkeeping and reporting to estimate the economic impacts of the rule. Commenters said that EPA should gather current information on the cost of controls and redo the cost calculations. The commenters provided specific examples of where they believe EPA has used inappropriate cost information. One concern expressed was that the cost of oxidation catalyst control for diesel engines was based on the cost of oxidation catalyst control for gas engines. Commenters also said that not all existing engines have hour meters. Commenters believed that EPA has underestimated the total cost of this rule by underestimating the number of engines requiring the addition of catalyst; assuming that catalysts can simply be added to effectively control existing engines; overlooking the significant cost of field installation; and underestimating the complexity of and administrative/operational burdens added by this rule.

Several commenters provided comments about the economic impact of the rule on emergency units. One commenter stated that overall the cost per ton of HAP or CO removal would be excessive for emergency CI engines since emissions were well below a ton/yr and the units use is very limited and intermittent. Another commenter noted that engine manufacturers do not recommend the use of after treatment devices for emergency engines, and that EPA appeared to support that position in the Regulatory Impact Analysis (RIA), which states that cost per ton removal of HAP ranged from $1 million to $2.8 million for engines larger than 500 HP and from $3.7 million to $8.7 million for engines between 50 and 500 HP. One commenter said EPA does not appear to consider any costs associated with testing emergency engines, even though owners may deem it prudent to test to confirm they are meeting the standard rather than risk an enforcement action if the unit does not meet the standard. Testing to comply with the 100 percent load requirement will require owners to purchase or rent load banks to meet the conditions contemplated in the standard, which can cost up to $10,000 per site. The load bank costs alone could add up to as much as $973 million. In addition, equipment modifications (sample ports) would be necessary to test emissions, and EPA has not included these costs in its calculations.

One commenter said that the proposed rule for existing CI engines greater than 300 HP at area sources is cost prohibitive for facilities with peak shaving engines with low operating hours. The commenter estimated that the cost per ton of HAP removed from these units would range from $200,000 to $1 million, similar to the cost for emergency generators.

While reducing HAP is an important goal, one commenter believed that the overbroad approach taken by EPA in subjecting all the RICE equipment in question to the requirements proposed, regardless of whether the equipment is located in urban or rural areas, particularly when considering the Congressional intent of reducing HAP in urban areas given the potential risks to public health, and the imposition of costs in excess of $528 million to reduce 13,000 tons of HAP a year (*i.e.,* a cost of $40,615 per ton) should be carefully scrutinized.

One commenter noted an additional concern with the proposed rule is the potential impact of parasitic load resulting from the use of catalytic diesel particulate filters (CDPF) and oxidation catalysts. Some back pressure penalty is associated with the use of both CDPF and oxidation catalysts methods to control HAP, the back pressure can increase with time, which may require regeneration of the catalyst or changing filters. The commenter believed that for those utilities that operate RICE with only marginal excess capacity, addition of either type of control could require installation of additional RICE capacity to maintain the needed reliability level. The commenter noted that it will not be possible to design around the pressure drop for existing engines and that the penalty should have been addressed and included by EPA in the cost assessment of retrofit and operation for the control devices.

Another commenter indicated that EPA's estimates are low for the capital and operating costs associated with the use of catalytic control, and are based on pricing data from one vendor and a limited number of data points. The commenter asserted that EPA's capital estimate and annual operating cost estimate for catalytic controls are each low by an order of magnitude of 2 to 3. The commenter also stated that because beyond-the-floor standards (which require catalytic controls) are based on the cost per ton of HAP removed and EPA significantly underestimated capital and operating costs of catalytic controls, EPA must reanalyze the proposed rule with better cost data to determine when catalysts are economically practical.

One commenter said the cost information contained in the docket for test costs is not representative of the sampling costs required to comply with the standards as proposed. Members of the commenter's organization indicated that the cost per sample run using Methods 1, 3, 4, and 10 could easily exceed $10,000, excluding costs to prepare for the sampling (*i.e.,* scaffolding, stack extensions, *etc.*). In addition to these cost considerations, as a practical matter, there would be significant difficulty in performing these EPA test methods on engine exhaust.

The commenter claimed that EPA has proposed compliance requirements that are more stringent than GACT requirements or management practices and that EPA has decided to institute MACT. However, even under MACT EPA can consider cost and energy impacts. The commenter disagreed with EPA's conclusion in the RIA that the rule will not likely have a significant impact on the supply, distribution, or use of energy. The commenter said that the proposed standards could have a

very detrimental impact on energy reliability, and many units may have to be shut down due to the cost of compliance.

*Response:* EPA used the information it had available at the time of proposal to estimate the cost impacts associated with the rule. This information included cost data obtained for the development of previous stationary engine rulemakings, which EPA believed would be appropriate to use for this rulemaking. Based on the significant number of comments received on the proposed rule costs, EPA revisited its cost analysis and assumptions underlying the proposed rule and revised that analysis and assumptions in the final rule.

EPA has made several attempts to obtain more current cost information, including through an advance notice of proposed rulemaking for this rule. EPA agrees with the commenters that it is inappropriate to base the cost for a diesel oxidation catalyst on the costs for oxidation catalysts for spark ignition engines. Therefore, EPA has based the catalyst cost estimate in the final rule on cost data for diesel oxidation catalysts obtained from a CARB study. More information on the cost estimate can be found in the memorandum entitled "Control Costs for Existing Stationary CI RICE." The cost estimates are based on the use of diesel oxidation catalyst rather than CDPF because we believe that sources will choose to use oxidation catalyst control because they are less costly than CDPF and achieve similar reduction in HAP. Based on a reanalysis of the MACT floor data and above-the-floor options, taking variability into account, the final rule requires engines equipped with catalysts to achieve 70 percent reduction rather than the 90 percent that was proposed.

Regarding the comment that catalysts cannot be added to existing engines, the commenter did not provide any information to show what engines would not be able to be retrofit. Regarding the concerns expressed about backpressure increases, the commenter did not provide any data to support the claim that the backpressure increases are so high that they would severely impact the engine output.

EPA does not agree with the claim that the rule will put a strain on hospitals. The stationary diesel engines at hospitals are typically emergency engines and EPA has determined that emergency engines located at institutional facilities such as hospitals that are area sources are not part of the listed source category and are therefore not subject to the final rule. EPA does not agree with the commenters that it is not appropriate to require peaking units and stationary diesel engines that are located in rural areas to install controls. This is discussed in more detail in the summary of comments and responses. EPA has specified in the final rule that performance testing is not limited to 100 percent load, so it should not be necessary to include the cost of a load bank in the performance testing cost. EPA has incorporated the costs for testing, monitoring, recordkeeping, and reporting in the cost analysis and believes that its estimates for these costs are appropriate. The costs for testing are based on information from source testing companies. As a result of the comments on testing costs, EPA reevaluated the estimate of how many engines could be tested in a single day and determined that two engines could be tested at a facility in one day, rather than three as was estimated in the proposal.

Regarding the concerns expressed by the commenters about the impact of the rule on emergency engines, the final rule requires existing stationary emergency engines to meet work practice or management practice standards, rather than numeric emission limitations; these work practices and management practices do not require that these engines be retrofit with aftertreatment controls or be performance tested to determine compliance. Information provided to EPA by engine manufacturers indicates that most engines are already equipped with an hour meter; therefore, EPA did not add this cost into the rule. EPA does not believe that the final rule will cause owners/operators to replace their emergency engines. The final rule imposes work or management practices on these engines, which EPA believes will not be overly burdensome to facilities and will not cause the retirement of existing stationary emergency engines.

## VI. Summary of Environmental, Energy and Economic Impacts

### *A. What are the air quality impacts?*

The final rule is expected to reduce total HAP emissions from stationary RICE by 1,010 tons per year (tpy) beginning in the year 2013 or the first year the rule will become effective. EPA estimates that over 900,000 stationary CI engines will be subject to the rule. These estimates include stationary engines located at major and area sources; however, not all stationary engines are subject to numerical emission standards. Further information regarding the estimated reductions of the final rule can be found in the memorandum entitled "Impacts Associated with NESHAP for Existing Stationary RICE," which is available in the docket.

In addition to HAP emissions reductions, the final rule will reduce other pollutants such as CO, PM, $SO_X$, and volatile organic compounds (VOC). The final rule is expected to reduce emissions of CO by 14,000 tpy in the year 2013. Reductions of PM are estimated at 2,800 tpy in the year 2013. Emissions of VOC are estimated to be reduced by 27,000 tpy in the year 2013. The final rule will also reduce emissions of $SO_X$ through the use of ULSD. We have not quantified the $SO_X$ reductions that would occur as a result of engines switching to ULSD because we are unable to estimate the number of engines that already use ULSD and therefore we are unable to estimate the percentage of engines that may switch to ULSD due to this rule. If none of the affected engines would use ULSD without this rule, then we estimate the $SO_X$ reductions are 31,000 tpy in the year 2013. If all of the affected engines would use ULSD regardless of the rule, then the additional $SO_X$ reductions would be zero.

### *B. What are the cost impacts?*

The total national capital cost for the final rule for existing stationary RICE is estimated to be $744 million, with a total national annual cost of $373 million in year 2013 (the first year the rule is implemented). Further information regarding the estimated cost impacts of this proposed rule can be found in the memorandum entitled "Impacts Associated with NESHAP for Existing Stationary CI RICE," which is available in the docket.

### *C. What are the benefits?*

We calculated the benefits of this rule in terms of the co-benefits associated with reducing fine particulate matter (PM) rather than calculating the benefits associated with reducing hazardous air pollutants (HAPs). These PM reductions are a consequence of the technologies installed to reduce HAP emissions from RICE. We estimate the monetized $PM_{2.5}$ co-benefits of this final regulatory action to be $940 million to $2.3 billion (2008$, 3 percent discount rate) in the fifth year (2013). The $PM_{2.5}$ co-benefits at a 7 percent discount rate are $850 million to $2.1 billion (2008$). Because the magnitude of the $PM_{2.5}$ co-benefits is largely driven by the concentration-response function for premature mortality, we examined alternate relationships between $PM_{2.5}$ and premature mortality supplied by

experts. Higher and lower co-benefits estimates are plausible, but most of the expert-based estimates fall between these two estimates above.[4]

A summary of the monetized co-benefits estimates at discount rates of 3 percent and 7 percent is in Table 4 of this preamble.

TABLE 4—SUMMARY OF THE MONETIZED $PM_{2.5}$ CO-BENEFITS ESTIMATES FOR FINAL RICE NESHAP

[Millions of 2008$]

| Pollutant | Emission reductions (tons) | Total monetized co-benefits (3% discount) | Total monetized co-benefits (7% discount) |
|---|---|---|---|
| Direct $PM_{2.5}$ | 2,844 | $910 to $2,200 | $820 to $2,000. |
| $PM_{2.5}$ Precursors: | | | |
| VOC | 27,395 | $33 to $82 | $30 to $74. |
| Total | | $940 to $2,300 | $850 to $2,100. |

**Note:** All estimates are for the analysis year (the fifth year), and are rounded to two significant figures so numbers may not sum across rows. All fine particles are assumed to have equivalent health effects, but the benefit-per-ton estimates vary between precursors because each ton of precursor reduced has a different propensity to form $PM_{2.5}$. We assume that all PM reductions for this rule are $PM_{2.5}$ reductions. Benefits from reducing hazardous air pollutants (HAPs) are not included.

The benefits estimates of population-level improvements to human health from reductions in $PM_{2.5}$ air pollution. We generated estimates that represent the total monetized human health co-benefits (the sum of premature mortality and morbidity) of reducing a ton of $PM_{2.5}$ and $PM_{2.5}$ precursor emissions. We base the estimate of human health co-benefits derived from the $PM_{2.5}$ and $PM_{2.5}$ precursor emission reductions on the general approach and methodology laid out in the Technical Support Document that accompanied the RIA for the 2008 National Ambient Air Quality Standard for Ground-level Ozone (NAAQS) and Fann *et al.* (2009).[5]

To generate the benefit-per-ton estimates, we used a model to convert emissions of direct $PM_{2.5}$ and $PM_{2.5}$ precursors into changes in $PM_{2.5}$ air quality and another model to estimate the changes in human health based on that change in air quality. Finally, the monetized health co-benefits were divided by the emission reductions to create the benefit-per-ton estimates. Even though we assume that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors because each ton of precursor reduced has a different propensity to form $PM_{2.5}$. For example, $SO_X$ has a lower benefit-per-ton estimate than direct $PM_{2.5}$ because it does not form as much $PM_{2.5}$, thus the exposure would be lower, and the monetized health co-benefits would be lower.

For context, it is important to note that the magnitude of the PM benefits is largely driven by the concentration response function for premature mortality. Experts have advised EPA to consider a variety of assumptions, including estimates based both on empirical (epidemiological) studies and judgments elicited from scientific experts, to characterize the uncertainty in the relationship between $PM_{2.5}$ concentrations and premature mortality. For this final rule we cite two key empirical studies, one based on the American Cancer Society cohort study[6] and the extended Six Cities cohort study.[7]

EPA strives to use the best available science to support our benefits analyses. We recognize that interpretation of the science regarding air pollution and health is dynamic and evolving. The question of whether or not to assume a threshold in calculating the co-benefits associated with reductions in $PM_{2.5}$ is an issue that affects the benefits calculations for many EPA rulemakings and analyses. Due to these implications, we solicited comment on appropriateness of both the no-threshold and threshold model for PM benefits analysis as part of the Portland Cement NESHAP (May 2009). The comment period closed on September 4, 2009, and EPA is still reviewing those comments. Since then, EPA finalized the *Integrated Science Assessment for Particulate Matter*,[8] which was reviewed by EPA's Clean Air Scientific Advisory Committee. Based on EPA's review of the body of scientific literature and the *Integrated Science Assessment,* EPA has concluded that the no-threshold model most adequately portrays the relationship between fine particles and premature mortality. Although this document does not necessarily represent agency policy, it provides a basis for reconsidering the application of thresholds in $PM_{2.5}$ concentration-response functions used in EPA's RIAs.

The $PM_{2.5}$ co-benefits for the incremental emission reductions from this final regulatory action reflect EPA's most current interpretation of the scientific literature, including four key changes from previous analyses for refineries: (1) A no-threshold model for $PM_{2.5}$ that calculates incremental co-benefits down to the lowest modeled air quality levels; (2) a revised Value of a Statistical Life (VSL); (3) two technical updates to the population dataset and aggregation method; and (4) presentation of results derived from Pope *et al.* (2002) and Laden *et al.* (2006) instead of using the extremes of EPA's Expert Elicitation on PM Mortality (Roman *et al.,* 2008). For more information on the updates to the benefit estimates, please refer to the RIA for this rule, which is available in the docket.

It should be noted that the $PM_{2.5}$ co-benefits estimates provided above do not include benefits from reduced hazardous air pollutants, improved

[4] Roman *et al.,* 2008. Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S. Environ. Sci. Technol., 42, 7, 2268–2274.

[5] Fann, N., C.M. Fulcher, B.J. Hubbell. 2009. The influence of location, source, and emission type in estimates of the human health benefits of reducing a ton of air pollution. Air Qual Atmos Health (2009) 2:169–176.

[6] Pope *et al,* 2002. "Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution." Journal of the American Medical Association 287:1132–1141.

[7] Laden *et al,* 2006. "Reduction in Fine Particulate Air Pollution and Mortality." *American Journal of Respiratory and Critical Care Medicine.* 173: 667–672.

[8] U.S. Environmental Protection Agency (U.S. EPA). 2009. Integrated Science Assessment for Particulate Matter (Final Report). EPA–600–R–08–139F. National Center for Environmental Assessment—RTP Division. December. Available on the Internet at *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=216546.*

visibility, reduced aquatic and terrestrial acidification. The benefits from reducing 1,014 tons of HAPs each year have not been monetized in this analysis. We do not have sufficient information or modeling available to provide such estimates for this rulemaking. In addition, we have not quantified the benefits attributable to the $SO_2$ reductions that would occur as a result of these engines switching to ULSD. Although we are confident that some $SO_2$ reductions would occur as a result of this rule, we are unable to estimate the percentage of engines that may switch to ULSD in the absence of this rule or the number of engines that already use ULSD. As a $PM_{2.5}$ precursor, these $SO_2$ emission reductions would lead to fewer $PM_{2.5}$-related health effects. Because of uncertainty in the magnitude of the attributable $SO_2$ reductions and to avoid the appearance of double-counting, we have chosen to not include these estimates in the results table shown above. If none of the affected engines would use ULSD without this rule, then we estimate the additional monetized $PM_{2.5}$-related health co-benefits would be $720 million to $1.8 billion in 2013 (2008$, 3% discount rate). If all of the affected engines would use ULSD regardless of the rule, then the additional monetized co-benefits from $SO_2$ reductions would be zero.

This analysis does not include the type of detailed uncertainty assessment found in the 2006 $PM_{2.5}$ NAAQS RIA because we lack the necessary air quality input and monitoring data to run the benefits model. However, the 2006 $PM_{2.5}$ NAAQS benefits analysis provides an indication of the sensitivity of our results to the use of alternative concentration response functions, including those derived from the PM expert elicitation study.

The costs of this rulemaking are estimated to be $373 million (2008$) in the fifth year, and the monetized $PM_{2.5}$ co-benefits are estimated at $940 million to $2.3 billion (2008$, 3 percent discount rate) for that same year. The co-benefits at a 7 percent discount rate are $850 million to $2.1 billion (2008$). Thus, net benefits of this rulemaking are estimated at $570 million to $1.9 billion (2008$, 3 percent discount rate) and $480 million to $1.7 billion (2008$, 7 percent discount rate). Using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower co-benefits estimates are plausible, but most of the expert-based estimates fall between the two estimates we present above. EPA believes that the co-benefits are likely to exceed the costs even when taking into account the uncertainties in the cost and benefit estimates.

For more information on the benefits analysis, please refer to the RIA for this rulemaking, which is available in the docket.

*D. What are the economic impacts?*

The economic impact analysis (EIA) that is included in the RIA indicates that prices of affected output from the affected industries will increase as a result of the rule, but the changes will be small. The largest impacts are on the electric power generating industry because it bears more costs from the rule than any other affected industry (nearly 80 percent of the total annualized costs). For all affected industries, annualized compliance costs are 0.6 percent or less on average of sales for firms. Thus, output prices will not increase more than 0.6 percent for consumers and producers affected by this rule.

Based on the estimated compliance costs associated with this rule and the predicted changes in prices and output in affected markets, the estimated social costs are $373 million (2008 dollars), which is the same as the estimated compliance costs.

For more information on the benefits analysis, please refer to the RIA for this rulemaking, which is available in the docket.

*E. What are the non-air health, environmental and energy impacts?*

EPA does not anticipate any significant non-air health, environmental or energy impacts as a result of the final rule.

## VII. Statutory and Executive Order Reviews

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

Under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), this action is an "economically significant regulatory action" because it is likely to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

*B. Paperwork Reduction Act*

The information collection requirements in the final rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

The information collection activities in this final rule include performance testing for non-emergency engines larger than 100 HP, one-time notifications and periodic reports, recording information, monitoring and the maintenance of records. The information generated by these activities will be used by EPA to ensure that affected facilities comply with the emission limits and other requirements. Records and reports are necessary to enable EPA or States to identify affected facilities that may not be in compliance with the requirements. Based on reported information, EPA will decide which units and what records or processes should be inspected. The amendments do not require any notifications or reports beyond those required by the General Provisions. The recordkeeping requirements require only the specific information needed to determine compliance. These recordkeeping and reporting requirements are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to EPA for which a claim of confidentiality is made will be safeguarded according to EPA policies in 40 CFR part 2, subpart B, Confidentiality of Business Information.

The annual monitoring, reporting, and recordkeeping burden for this collection (averaged over the first 3 years after sources must comply) is estimated to be 2,232,379 labor hours per year at a total annual cost of $4,200,492. This estimate includes notifications of compliance and performance tests, engine performance testing, semiannual compliance reports, continuous monitoring, and recordkeeping. The total capital costs associated with the requirements over the 3-year period of the ICR is estimated to be $20,444,316 per year. There are no additional operation and maintenance costs for the requirements over the 3-year period of the ICR. Burden is defined at 5 CFR 1320.3(b).

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical

amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The companies owning facilities with affected RICE can be grouped into small and large categories using Small Business Administration (SBA) general size standard definitions. Size standards are based on industry classification codes (*i.e.,* North American Industrial Classification System, or NAICS) that each company uses to identify the industry or industries in which they operate in. The SBA defines a small business in terms of the maximum employment, annual sales, or annual energy-generating capacity (for electricity generating units—EGUs) of the owning entity. These thresholds vary by industry and are evaluated based on the primary industry classification of the affected companies. In cases where companies are classified by multiple NAICS codes, the most conservative SBA definition (*i.e.,* the NAICS code with the highest employee or revenue size standard) was used.

As mentioned earlier in this preamble, facilities across several industries use affected RICE; therefore, a number of size standards are utilized in this analysis. For the 9 industries identified at the 6-digit NAICS code represented in this analysis, the employment size standard varies from 500 to 1,000 employees. The annual sales standard is as low as 0.75 million dollars and as high as 34 million dollars. In addition, for the electric power generation industry, the small business size standard is an ultimate parent entity defined as having a total electric output of 4 million megawatt-hours (MW-hr) in the previous fiscal year. The specific SBA size standard is identified for each affected industry within the industry profile to support this economic analysis.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This certification is based on the economic impact of this final action to all affected small entities across all industries affected. We estimate that all small entities will have annualized costs of less than 1 percent of their sales in all industries except NAICS 2211 (electric power generation, transmission, and distribution) and NAICS 111 (Crop and Animal Production). For these industries, the number of small entities having annualized costs of greater than 1 percent of their sales is less than 5 percent. Hence, we conclude that there is no significant economic impact on a substantial number of small entities (SISNOSE) for this rule.

For more information on the small entity impacts associated with the final rule, please refer to the Economic Impact and Small Business Analyses in the public docket. These analyses can be found in the Regulatory Impact Analysis for this final rule.

Although the final rule would not have a significant economic impact on a substantial number of small entities, EPA nonetheless tried to reduce the impact of the final rule on small entities. When developing the revised standards, EPA took special steps to ensure that the burdens imposed on small entities were minimal. EPA conducted several meetings with industry trade associations to discuss regulatory options and the corresponding burden on industry, such as recordkeeping and reporting. In this rule, we are applying the minimum level of control (*i.e.,* the MACT floor) to small engines and emergency engines located at major HAP sources and the minimum level of testing, monitoring, recordkeeping, and reporting to affected RICE sources, both major and area, allowed by the CAA. Other alternatives considered that provided more than the minimum level of control were deemed as not technically feasible or cost-effective for EPA to implement for small engines and emergency engines as explained earlier in the preamble.

*D. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. This final rule contains a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. Accordingly, EPA has prepared under section 202 of the UMRA a written statement which is summarized below.

As discussed previously in this preamble, the statutory authority for the final rule is section 112 of the CAA. Section 112(b) lists the 189 chemicals, compounds, or groups of chemicals deemed by Congress to be HAP. These toxic air pollutants are to be regulated by NESHAP. Section 112(d) of the CAA directs us to develop NESHAP based on MACT, which require existing and new major sources to control emissions of HAP. EPA is required to address HAP emissions from stationary RICE located at area sources under section 112(k) of the CAA, based on criteria set forth by EPA in the Urban Air Toxics Strategy previously discussed in this preamble. These NESHAP apply to existing stationary CI RICE less than or equal to 500 HP located at major sources of HAP emissions, existing non-emergency stationary CI RICE greater than 300 HP, and existing stationary CI RICE located at area sources of HAP emissions.

In compliance with section 205(a), we identified and considered a reasonable number of regulatory alternatives. EPA carefully examined the regulatory alternatives, and selected the lowest cost/least burdensome alternative that EPA deems adequate to achieve the statutory requirements of Clean Air Act section 112 and effectively reduce emissions of HAP.

1. Social Costs and Benefits

The RIA prepared for the final rule, including the Agency's assessment of costs and benefits, is detailed in the "Regulatory Impact Analysis for the Final RICE NESHAP" in the docket. Based on estimated compliance costs on all sources associated with the final rule and the predicted change in prices and production in the affected industries assuming passthrough of costs to affected consumers, the estimated social costs of the final rule are $373 million (2008 dollars). It is estimated that by 2013, HAP will be reduced by 1,010 tpy

due to reductions in formaldehyde, acetaldehyde, acrolein, methanol and other HAP from existing stationary RICE. Formaldehyde and acetaldehyde have been classified as "probable human carcinogens." Acrolein and the other HAP are not considered carcinogenic, but produce several other toxic effects. The final rule is expected to reduce emissions of CO by more than 14,000 tpy in the year 2013. Reductions of PM are estimated at 2,800 tpy in the year 2013. Emissions of VOC are estimated to be reduced by 27,000 tpy in the year 2013. Exposure to CO can affect the cardiovascular system and the central nervous system.

The total monetized benefits of the final rule range from $940 million to $2.3 billion (2008 dollars).

2. Future and Disproportionate Costs

The UMRA requires that we estimate, where accurate estimation is reasonably feasible, future compliance costs imposed by the rule and any disproportionate budgetary effects. Our estimates of the future compliance costs of the final rule are discussed previously in this preamble. We do not believe that there will be any disproportionate budgetary effects of the final rule on any particular areas of the country, State or local governments, types of communities (*e.g.,* urban, rural), or particular industry segments.

3. Effects on the National Economy

The UMRA requires that we estimate the effect of the final rule on the national economy. To the extent feasible, we must estimate the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of the U.S. goods and services if we determine that accurate estimates are reasonably feasible and that such effect is relevant and material. The nationwide economic impact of the final rule is presented in the "Regulatory Impact Analysis for RICE NESHAP" in the docket. This analysis provides estimates of the effect of the final rule on most of the categories mentioned above. The results of the economic impact analysis were summarized previously in this preamble. In addition, we have determined that the final rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, this rule is not subject to the requirements of section 203 of the UMRA.

*E. Executive Order 13132: Federalism*

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The final rule primarily affects private industry, and does not impose significant economic costs on State or local governments. Thus, Executive Order 13132 does not apply to the final rule.

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

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on Tribal governments, 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, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to the final rule.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

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

This final rule is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse impact on the supply, distribution, or use of energy. EPA has prepared an analysis of energy impacts that explains this conclusion as follows below.

With respect to energy supply and prices, our analysis suggests that at the industry level, the annualized costs represent a very small fraction of revenue (generally less than 0.6 percent). As a result, we can conclude supply and price impacts on affected energy producers and consumers should be small.

To enhance understanding regarding the regulation's influence on energy consumption, we examined publicly available data describing energy consumption for the electric power sector. The electric power sector is expected to incur about 80 percent of the $373 million in compliance costs associated with the final rule, and is the industry expected to incur the greatest share of the costs relative to other affected industries. The Annual Energy Outlook 2010 (EIA, 2009) provides energy consumption data. Since this final rule only affects diesel-fired RICE, our analysis focuses on impacts of consumption of these fuels. As shown in Table 5 of this preamble, the electric power sector accounts for less than 0.5 percent of the U.S. total liquid fuels (which includes diesel fuel). As a result, any energy consumption changes attributable to the final rule should not significantly influence the supply, distribution, or use of energy nationwide.

TABLE 5—U.S. ELECTRIC POWER[a] SECTOR ENERGY CONSUMPTION

[Quadrillion BTUs]: 2013

| | Quantity | Share of total energy use (percent) |
|---|---|---|
| Distillate fuel oil | 0.12 | 0.1 |
| Residual fuel oil | 0.34 | 0.3 |
| Liquid fuels subtotal | 0.45 | 0.5 |
| Natural gas | 5.17 | 5.1 |
| Steam coal | 20.69 | 20.6 |
| Nuclear power | 8.59 | 8.5 |
| Renewable energy[b] | 6.06 | 6.0 |

TABLE 5—U.S. ELECTRIC POWER [a] SECTOR ENERGY CONSUMPTION—Continued

[Quadrillion BTUs]: 2013

| | Quantity | Share of total energy use (percent) |
|---|---|---|
| Electricity Imports | 0.09 | 0.1 |
| Total Electric Power Energy Consumption [c] | 41.18 | 40.9 |
| Delivered Energy Use | 72.41 | 72.0 |
| Total Energy Use | 100.59 | 100.0 |

[a] Includes consumption of energy by electricity-only and combined heat and power plants whose primary business is to sell electricity, or electricity and heat, to the public. Includes small power producers and exempt wholesale generators.

[b] Includes conventional hydroelectric, geothermal, wood and wood waste, biogenic municipal solid waste, other biomass, petroleum coke, wind, photovoltaic and solar thermal sources. Excludes net electricity imports.

[c] Includes non-biogenic municipal waste not included above.

Source: U.S. Energy Information Administration. 2009. Supplemental Tables to the Annual Energy Outlook 2010.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. 104–113, Section 12(d), 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. The VCS are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency does not use available and applicable VCS.

This final rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

Under § 63.7(f) and § 63.8(f) of Subpart A of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required or referenced testing methods, performance specifications, or procedures.

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This rule is a nationwide standard that reduces air toxics emissions from existing stationary CI engines, thus decreasing the amount of such emissions to which all affected populations are exposed.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, 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 final 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 a "major rule" as defined by 5 U.S.C. 804(2). The final rule will be effective on May 3, 2010.

**List of Subjects in 40 CFR Part 63**

Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 17, 2010.

**Lisa P. Jackson,**

*Administrator.*

■ For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

## PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

## Subpart A—[Amended]

■ 2. Section 63.6590 is amended by revising paragraphs (b)(1) and (3) to read as follows:

### § 63.6590 What parts of my plant does this subpart cover?

* * * * *

(b) * * *

(1) An affected source which meets either of the criteria in paragraph (b)(1)(i) through (ii) of this section does not have to meet the requirements of this subpart and of subpart A of this part except for the initial notification requirements of § 63.6645(f).

* * * * *

(3) A stationary RICE which is an existing spark ignition 4 stroke rich burn (4SRB) stationary RICE located at an area source of HAP emissions; an existing spark ignition 4SRB stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions; an existing spark ignition 2 stroke lean burn (2SLB) stationary RICE; an existing spark ignition 4 stroke lean burn (4SLB) stationary RICE; an existing compression ignition emergency stationary RICE with a site rating of more than 500 brake HP located at a

major source of HAP emissions; an existing spark ignition emergency or limited use stationary RICE; an existing limited use stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions; an existing stationary RICE that combusts landfill gas or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis; or an existing stationary residential, commercial, or institutional emergency stationary RICE located at an area source of HAP emissions, does not have to meet the requirements of this subpart and of subpart A of this part. No initial notification is necessary.

* * * * *

■ 3. Section 63.6595 is amended by revising paragraph (a)(1) to read as follows:

**§ 63.6595 When do I have to comply with this subpart?**

(a) * * *

(1) If you have an existing stationary RICE, excluding existing non-emergency CI stationary RICE, with a site rating of more than 500 brake HP located at a major source of HAP emissions, you must comply with the applicable emission limitations and operating limitations no later than June 15, 2007. If you have an existing non-emergency CI stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, an existing stationary CI RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions, or an existing stationary CI RICE located at an area source of HAP emissions, you must comply with the applicable emission limitations and operating limitations no later than May 3, 2013.

* * * * *

■ 4. Section 63.6600 is amended by adding an introductory paragraph, revising paragraph (c) and adding paragraph (d) to read as follows:

**§ 63.6600 What emission limitations and operating limitations must I meet if I own or operate a stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions?**

Compliance with the numerical emission limitations established in this subpart is based on the results of testing the average of three 1-hour runs using the testing requirements and procedures in § 63.6620 and Table 4 to this subpart.

* * * * *

(c) If you own or operate any of the following stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, you do not need to comply with the emission limitations in Tables 1a, 2a, 2c, and 2d to this subpart or operating limitations in Tables 1b and 2b to this subpart: an existing 2SLB stationary RICE; an existing 4SLB stationary RICE; a stationary RICE that combusts landfill gas or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis; an emergency stationary RICE; or a limited use stationary RICE.

(d) If you own or operate an existing non-emergency stationary CI RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, you must comply with the emission limitations in Table 2c to this subpart and the operating limitations in Table 2b to this subpart which apply to you.

■ 5. Section 63.6601 is amended by adding a sentence at the beginning of the section to read as follows:

**§ 63.6601 What emission limitations must I meet if I own or operate a 4SLB stationary RICE with a site rating of greater than or equal to 250 brake HP and less than 500 brake HP located at a major source of HAP emissions?**

Compliance with the numerical emission limitations established in this subpart is based on the results of testing the average of three 1-hour runs using the testing requirements and procedures in § 63.6620 and Table 4 to this subpart.

* * *

■ 6. Section 63.6602 is added to read as follows:

**§ 63.6602 What emission limitations must I meet if I own or operate an existing stationary CI RICE with a site rating of equal to or less than 500 brake HP located at a major source of HAP emissions?**

If you own or operate an existing stationary CI RICE with a site rating of equal to or less than 500 brake HP located at a major source of HAP emissions, you must comply with the emission limitations in Table 2c to this subpart which apply to you. Compliance with the numerical emission limitations established in this subpart is based on the results of testing the average of three 1-hour runs using the testing requirements and procedures in § 63.6620 and Table 4 to this subpart.

■ 7. Section 63.6603 is added to read as follows:

**§ 63.6603 What emission limitations and operating limitations must I meet if I own or operate an existing stationary CI RICE located at an area source of HAP emissions?**

Compliance with the numerical emission limitations established in this subpart is based on the results of testing the average of three 1-hour runs using the testing requirements and procedures in § 63.6620 and Table 4 to this subpart.

(a) If you own or operate an existing stationary CI RICE located at an area source of HAP emissions, you must comply with the requirements in Table 2d to this subpart and the operating limitations in Table 2b to this subpart which apply to you.

(b) If you own or operate an existing stationary non-emergency CI RICE greater than 300 HP located at area sources in areas of Alaska not accessible by the Federal Aid Highway System (FAHS) you do not have to meet the numerical CO emission limitations specified in Table 2d to this subpart. Existing stationary non-emergency CI RICE greater than 300 HP located at area sources in areas of Alaska not accessible by the FAHS must meet the management practices that are shown for stationary non-emergency CI RICE less than or equal to 300 HP in Table 2d to this subpart.

■ 8. Section 63.6604 is added to read as follows:

**§ 63.6604 What fuel requirements must I meet if I own or operate an existing stationary CI RICE?**

If you own or operate an existing non-emergency CI stationary RICE with a site rating of more than 300 brake HP with a displacement of less than 30 liters per cylinder that uses diesel fuel, you must use diesel fuel that meets the requirements in 40 CFR 80.510(b) for nonroad diesel fuel. Existing non-emergency CI stationary RICE located in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or at area sources in areas of Alaska not accessible by the FAHS are exempt from the requirements of this section.

■ 9. Section 63.6605 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 63.6605 What are my general requirements for complying with this subpart?**

(a) You must be in compliance with the emission limitations and operating limitations in this subpart that apply to you at all times.

(b) At all times you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. The general duty to minimize emissions does not require you to make any further efforts to

reduce emissions if levels required by this standard have been achieved. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

* * * * *

■ 10. Section 63.6612 is added to read as follows:

**§ 63.6612 By what date must I conduct the initial performance tests or other initial compliance demonstrations if I own or operate an existing stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions or an existing stationary RICE located at an area source of HAP emissions?**

If you own or operate an existing CI stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions or an existing stationary CI RICE located at an area source of HAP emissions you are subject to the requirements of this section.

(a) You must conduct any initial performance test or other initial compliance demonstration according to Tables 4 and 5 to this subpart that apply to you within 180 days after the compliance date that is specified for your stationary RICE in § 63.6595 and according to the provisions in § 63.7(a)(2).

(b) An owner or operator is not required to conduct an initial performance test on a unit for which a performance test has been previously conducted, but the test must meet all of the conditions described in paragraphs (b)(1) through (4) of this section.

(1) The test must have been conducted using the same methods specified in this subpart, and these methods must have been followed correctly.

(2) The test must not be older than 2 years.

(3) The test must be reviewed and accepted by the Administrator.

(4) Either no process or equipment changes must have been made since the test was performed, or the owner or operator must be able to demonstrate that the results of the performance test, with or without adjustments, reliably demonstrate compliance despite process or equipment changes.

■ 11. Section 63.6620 is amended by revising paragraphs (b) and (c) to read as follows:

**§ 63.6620 What performance tests and other procedures must I use?**

* * * * *

(b) Each performance test must be conducted according to the requirements that this subpart specifies in Table 4 to this subpart. If you own or operate a non-operational stationary RICE that is subject to performance testing, you do not need to start up the engine solely to conduct the performance test. Owners and operators of a non-operational engine can conduct the performance test when the engine is started up again.

(c) [Reserved]

* * * * *

12. Section 63.6625 is amended by revising the section heading and adding new paragraphs (e) through (i) to read as follows:

**§ 63.6625 What are my monitoring, installation, collection, operation, and maintenance requirements?**

* * * * *

(e) If you own or operate an existing stationary RICE with a site rating of less than 100 brake HP located at a major source of HAP emissions, an existing stationary emergency RICE, or an existing stationary RICE located at an area source of HAP emissions not subject to any numerical emission standards shown in Table 2d to this subpart, you must operate and maintain the stationary RICE and after-treatment control device (if any) according to the manufacturer's emission-related written instructions or develop your own maintenance plan which must provide to the extent practicable for the maintenance and operation of the engine in a manner consistent with good air pollution control practice for minimizing emissions.

(f) If you own or operate an existing emergency stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions or an existing emergency stationary RICE located at an area source of HAP emissions, you must install a non-resettable hour meter if one is not already installed.

(g) If you own or operate an existing non-emergency CI engine greater than or equal to 300 HP that is not equipped with a closed crankcase ventilation system, you must comply with either paragraph (g)(1) or paragraph (g)(2) of this section. Owners and operators must follow the manufacturer's specified maintenance requirements for operating and maintaining the open or closed crankcase ventilation systems and replacing the crankcase filters, or can request the Administrator to approve different maintenance requirements that are as protective as manufacturer requirements. Existing CI engines located at area sources in areas of Alaska not accessible by the FAHS do not have to meet the requirements of paragraph (g) in this section.

(1) Install a closed crankcase ventilation system that prevents crankcase emissions from being emitted to the atmosphere, or

(2) Install an open crankcase filtration emission control system that reduces emissions from the crankcase by filtering the exhaust stream to remove oil mist, particulates, and metals.

(h) If you operate a new or existing stationary engine, you must minimize the engine's time spent at idle during startup and minimize the engine's startup time to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the emission standards applicable to all times other than startup in Tables 1a, 2a, 2c, and 2d to this subpart apply.

(i) If you own or operate a stationary engine that is subject to the work, operation or management practices in items 1, 2, or 4 of Table 2c to this subpart or in items 1 or 4 of Table 2d to this subpart, you have the option of utilizing an oil analysis program in order to extend the specified oil change requirement in Tables 2c and 2d to this subpart. The oil analysis must be performed at the same frequency specified for changing the oil in Table 2c or 2d to this subpart. The analysis program must at a minimum analyze the following three parameters: Total Base Number, viscosity, and percent water content. The condemning limits for these parameters are as follows: Total Base Number is less than 30 percent of the Total Base Number of the oil when new; viscosity of the oil has changed by more than 20 percent from the viscosity of the oil when new; or percent water content (by volume) is greater than 0.5. If all of these condemning limits are not exceeded, the engine owner or operator is not required to change the oil. If any of the limits are exceeded, the engine owner or operator must change the oil before continuing to use the engine. The owner or operator must keep records of the parameters that are analyzed as part of the program, the results of the analysis, and the oil changes for the engine. The analysis program must be part of the maintenance plan for the engine.

■ 13. Section 63.6640 is amended by:

■ (a) Revising paragraph (a);

■ (b) Revising paragraph (b);

■ (c) Revising paragraph (d);

■ (d) Revising paragraph (e); and
■ (e) Adding paragraph (f) to read as follows:

**§ 63.6640 How do I demonstrate continuous compliance with the emission limitations and operating limitations?**

(a) You must demonstrate continuous compliance with each emission limitation and operating limitation in Tables 1a and 1b, Tables 2a and 2b, Table 2c, and Table 2d to this subpart that apply to you according to methods specified in Table 6 to this subpart.

(b) You must report each instance in which you did not meet each emission limitation or operating limitation in Tables 1a and 1b, Tables 2a and 2b, Table 2c, and Table 2d to this subpart that apply to you. These instances are deviations from the emission and operating limitations in this subpart. These deviations must be reported according to the requirements in § 63.6650. If you change your catalyst, you must reestablish the values of the operating parameters measured during the initial performance test. When you reestablish the values of your operating parameters, you must also conduct a performance test to demonstrate that you are meeting the required emission limitation applicable to your stationary RICE.

* * * * *

(d) For new, reconstructed, and rebuilt stationary RICE, deviations from the emission or operating limitations that occur during the first 200 hours of operation from engine startup (engine burn-in period) are not violations. Rebuilt stationary RICE means a stationary RICE that has been rebuilt as that term is defined in 40 CFR 94.11(a).

(e) You must also report each instance in which you did not meet the requirements in Table 8 to this subpart that apply to you. If you own or operate a new or reconstructed stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions (except new or reconstructed 4SLB engines greater than or equal to 250 and less than or equal to 500 brake HP), a new or reconstructed stationary RICE located at an area source of HAP emissions, or any of the following RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, you do not need to comply with the requirements in Table 8 to this subpart: An existing 2SLB stationary RICE, an existing 4SLB stationary RICE, an existing emergency stationary RICE, an existing limited use stationary RICE, or an existing stationary RICE which fires landfill gas or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis. If you own or operate any of the following RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, you do not need to comply with the requirements in Table 8 to this subpart, except for the initial notification requirements: a new or reconstructed stationary RICE that combusts landfill gas or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis, a new or reconstructed emergency stationary RICE, or a new or reconstructed limited use stationary RICE.

(f) If you own or operate an existing emergency stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions, a new emergency stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions that was installed on or after June 12, 2006, or an existing emergency stationary RICE located at an area source of HAP emissions, you must operate the engine according to the conditions described in paragraphs (f)(1) through (4) of this section.

(1) For owners and operators of emergency engines, any operation other than emergency operation, maintenance and testing, and operation in non-emergency situations for 50 hours per year, as permitted in this section, is prohibited.

(2) There is no time limit on the use of emergency stationary RICE in emergency situations.

(3) You may operate your emergency stationary RICE for the purpose of maintenance checks and readiness testing, provided that the tests are recommended by Federal, State or local government, the manufacturer, the vendor, or the insurance company associated with the engine. Maintenance checks and readiness testing of such units is limited to 100 hours per year. The owner or operator may petition the Administrator for approval of additional hours to be used for maintenance checks and readiness testing, but a petition is not required if the owner or operator maintains records indicating that Federal, State, or local standards require maintenance and testing of emergency RICE beyond 100 hours per year.

(4) You may operate your emergency stationary RICE up to 50 hours per year in non-emergency situations, but those 50 hours are counted towards the 100 hours per year provided for maintenance and testing. The 50 hours per year for non-emergency situations cannot be used for peak shaving or to generate income for a facility to supply power to an electric grid or otherwise supply power as part of a financial arrangement with another entity; except that owners and operators may operate the emergency engine for a maximum of 15 hours per year as part of a demand response program if the regional transmission organization or equivalent balancing authority and transmission operator has determined there are emergency conditions that could lead to a potential electrical blackout, such as unusually low frequency, equipment overload, capacity or energy deficiency, or unacceptable voltage level. The engine may not be operated for more than 30 minutes prior to the time when the emergency condition is expected to occur, and the engine operation must be terminated immediately after the facility is notified that the emergency condition is no longer imminent. The 15 hours per year of demand response operation are counted as part of the 50 hours of operation per year provided for non-emergency situations. The supply of emergency power to another entity or entities pursuant to financial arrangement is not limited by this paragraph (f)(4), as long as the power provided by the financial arrangement is limited to emergency power.

■ 14. Section 63.6645 is amended by revising paragraph (a) to read as follows:

**§ 63.6645 What notifications must I submit and when?**

(a) You must submit all of the notifications in §§ 63.7(b) and (c), 63.8(e), (f)(4) and (f)(6), 63.9(b) through (e), and (g) and (h) that apply to you by the dates specified if you own or operate any of the following;

(1) An existing stationary CI RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions.

(2) An existing stationary CI RICE located at an area source of HAP emissions.

(3) A stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions.

(4) A new or reconstructed 4SLB stationary RICE with a site rating of greater than or equal to 250 HP located at a major source of HAP emissions.

(5) This requirement does not apply if you own or operate an existing stationary CI RICE less than 100 HP, an existing stationary emergency CI RICE, or an existing stationary CI RICE that is not subject to any numerical emission standards.

* * * * *

■ 15. Section 63.6650 is amended by revising paragraphs (b) and (c)(4) to read as follows:

**§ 63.6650 What reports must I submit and when?**

* * * * *

(b) Unless the Administrator has approved a different schedule for submission of reports under § 63.10(a), you must submit each report by the date in Table 7 of this subpart and according to the requirements in paragraphs (b)(1) through (b)(9) of this section.

(1) For semiannual Compliance reports, the first Compliance report must cover the period beginning on the compliance date that is specified for your affected source in § 63.6595 and ending on June 30 or December 31, whichever date is the first date following the end of the first calendar half after the compliance date that is specified for your source in § 63.6595.

(2) For semiannual Compliance reports, the first Compliance report must be postmarked or delivered no later than July 31 or January 31, whichever date follows the end of the first calendar half after the compliance date that is specified for your affected source in § 63.6595.

(3) For semiannual Compliance reports, each subsequent Compliance report must cover the semiannual reporting period from January 1 through June 30 or the semiannual reporting period from July 1 through December 31.

(4) For semiannual Compliance reports, each subsequent Compliance report must be postmarked or delivered no later than July 31 or January 31, whichever date is the first date following the end of the semiannual reporting period.

(5) For each stationary RICE that is subject to permitting regulations pursuant to 40 CFR part 70 or 71, and if the permitting authority has established dates for submitting semiannual reports pursuant to 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6 (a)(3)(iii)(A), you may submit the first and subsequent Compliance reports according to the dates the permitting authority has established instead of according to the dates in paragraphs (b)(1) through (b)(4) of this section.

(6) For annual Compliance reports, the first Compliance report must cover the period beginning on the compliance date that is specified for your affected source in § 63.6595 and ending on December 31.

(7) For annual Compliance reports, the first Compliance report must be postmarked or delivered no later than January 31 following the end of the first calendar year after the compliance date that is specified for your affected source in § 63.6595.

(8) For annual Compliance reports, each subsequent Compliance report must cover the annual reporting period from January 1 through December 31.

(9) For annual Compliance reports, each subsequent Compliance report must be postmarked or delivered no later than January 31.

(c) * * *

(4) If you had a malfunction during the reporting period, the compliance report must include the number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 63.6605(b), including actions taken to correct a malfunction.

* * * * *

■ 16. Section 63.6655 is amended by:

■ (a) Revising paragraph (a) introductory text;

■ (b) Revising paragraph (a)(2);

■ (c) Adding paragraph (a)(4);

■ (d) Adding paragraph (a)(5);

■ (e) Adding paragraph (e); and

■ (f) Adding paragraph (f) to read as follows:

**§ 63.6655 What records must I keep?**

* * * * *

(a) If you must comply with the emission and operating limitations, you must keep the records described in paragraphs (a)(1) through (a)(5), (b)(1) through (b)(3) and (c) of this section.

(1) * * *

(2) Records of the occurrence and duration of each malfunction of operation (*i.e.,* process equipment) or the air pollution control and monitoring equipment.

(3) * * *

(4) Records of all required maintenance performed on the air pollution control and monitoring equipment.

(5) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 63.6605(b), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

* * * * *

(e) You must keep records of the maintenance conducted on the stationary RICE in order to demonstrate that you operated and maintained the stationary RICE and after-treatment control device (if any) according to your own maintenance plan if you own or operate any of the following stationary RICE;

(1) An existing stationary CI RICE with a site rating of less than 100 brake HP located at a major source of HAP emissions.

(2) An existing stationary emergency CI RICE.

(3) An existing stationary CI RICE located at an area source of HAP emissions subject to management practices as shown in Table 2d to this subpart.

(f) If you own or operate any of the stationary RICE in paragraphs (f)(1) or (2) of this section, you must keep records of the hours of operation of the engine that is recorded through the non-resettable hour meter. The owner or operator must document how many hours are spent for emergency operation, including what classified the operation as emergency and how many hours are spent for non-emergency operation. If the engines are used for demand response operation, the owner or operator must keep records of the notification of the emergency situation, and the time the engine was operated as part of demand response.

(1) An existing emergency stationary CI RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions that does not meet the standards applicable to non-emergency engines.

(2) An existing emergency stationary CI RICE located at an area source of HAP emissions that does not meet the standards applicable to non-emergency engines.

■ 17. Section 63.6660 is amended by revising paragraph (c) to read as follows:

**§ 63.6660 In what form and how long must I keep my records?**

* * * * *

(c) You must keep each record readily accessible in hard copy or electronic form for at least 5 years after the date of each occurrence, measurement, maintenance, corrective action, report, or record, according to § 63.10(b)(1).

■ 18. Section 63.6665 is revised to read as follows:

**§ 63.6665 What parts of the General Provisions apply to me?**

Table 8 to this subpart shows which parts of the General Provisions in §§ 63.1 through 63.15 apply to you. If you own or operate a new or reconstructed stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions (except new or reconstructed 4SLB engines greater than or equal to 250 and less than or equal

to 500 brake HP), a new or reconstructed stationary RICE located at an area source of HAP emissions, or any of the following RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, you do not need to comply with any of the requirements of the General Provisions specified in Table 8: An existing 2SLB stationary RICE, an existing 4SLB stationary RICE, an existing stationary RICE that combusts landfill or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis, an existing emergency stationary RICE, or an existing limited use stationary RICE. If you own or operate any of the following RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, you do not need to comply with the requirements in the General Provisions specified in Table 8 except for the initial notification requirements: A new stationary RICE that combusts landfill gas or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis, a new emergency stationary RICE, or a new limited use stationary RICE.

■ 19. Section 63.6675 is amended:

■ (a) By revising the definition of Diesel fuel;

■ (b) By revising the definition of Emergency stationary RICE;

■ (c) By adding the definition of Black start engine;

■ (d) By adding the definition of Engine startup; and

■ (e) By adding the definition of Residential/commercial/institutional emergency stationary RICE, in alphabetical order, to read as follows:

**§ 63.6675 What definitions apply to this subpart?**

* * * * *

*Black start engine* means an engine whose only purpose is to start up a combustion turbine.

* * * * *

*Diesel fuel* means any liquid obtained from the distillation of petroleum with a boiling point of approximately 150 to 360 degrees Celsius. One commonly used form is fuel oil number 2. Diesel fuel also includes any non-distillate fuel with comparable physical and chemical properties (*e.g.* biodiesel) that is suitable for use in compression ignition engines.

* * * * *

*Emergency stationary RICE* means any stationary internal combustion engine whose operation is limited to emergency situations and required testing and maintenance. Examples include stationary ICE used to produce power for critical networks or equipment (including power supplied to portions of a facility) when electric power from the local utility (or the normal power source, if the facility runs on its own power production) is interrupted, or stationary ICE used to pump water in the case of fire or flood, *etc.* Stationary CI ICE used for peak shaving are not considered emergency stationary ICE. Stationary CI ICE used to supply power to an electric grid or that supply non-emergency power as part of a financial arrangement with another entity are not considered to be emergency engines, except as permitted under § 63.6640(f). Emergency stationary RICE with a site-rating of more than 500 brake HP located at a major source of HAP emissions that were installed prior to June 12, 2006, may be operated for the purpose of maintenance checks and readiness testing, provided that the tests are recommended by the manufacturer, the vendor, or the insurance company associated with the engine. Required testing of such units should be minimized, but there is no time limit on the use of emergency stationary RICE in emergency situations and for routine testing and maintenance. Emergency stationary RICE with a site-rating of more than 500 brake HP located at a major source of HAP emissions that were installed prior to June 12, 2006, may also operate an additional 50 hours per year in non-emergency situations. All other emergency stationary RICE must comply with the requirements specified in § 63.6640(f).

*Engine startup* means the time from initial start until applied load and engine and associated equipment reaches steady state or normal operation. For stationary engine with catalytic controls, engine startup means the time from initial start until applied load and engine and associated equipment, including the catalyst, reaches steady state or normal operation.

* * * * *

*Residential/commercial/institutional emergency stationary RICE* means an emergency stationary RICE used in residential establishments such as homes or residences, commercial establishments such as office buildings, hotels, or stores, or institutional establishments such as medical centers, research centers, and institutions of higher education.

* * * * *

■ 20. Table 1a to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 1a to Subpart ZZZZ of Part 63. Emission Limitations for Existing, New, and Reconstructed Spark Ignition, 4SRB Stationary RICE >500 HP Located at a Major Source of HAP Emissions**

As stated in §§ 63.6600 and 63.6640, you must comply with the following emission limitations for existing, new and reconstructed 4SRB stationary RICE at 100 percent load plus or minus 10 percent:

| For each . . . | You must meet the following emission limitation, except during periods of startup . . . | During periods of startup you must . . . |
|---|---|---|
| 1. 4SRB stationary RICE ..... | a. Reduce formaldehyde emissions by 76 percent or more. If you commenced construction or reconstruction between December 19, 2002 and June 15, 2004, you may reduce formaldehyde emissions by 75 percent or more until June 15, 2007 or.<br>b. Limit the concentration of formaldehyde in the stationary RICE exhaust to 350 ppbvd or less at 15 percent $O_2$. | Minimize the engine's time spent at idle and minimize the engine's startup time at startup to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the non-startup emission limitations apply.[1] |

[1] Sources can petition the Administrator pursuant to the requirements of 40 CFR 63.6(g) for alternative work practices.

■ 21. Table 2a to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 2a to Subpart ZZZZ of Part 63. Emission Limitations for New and Reconstructed 2SLB and Compression Ignition Stationary RICE >500 HP and New and Reconstructed 4SLB Stationary RICE ≥250 HP Located at a Major Source of HAP Emissions**

As stated in §§ 63.6600 and 63.6640, you must comply with the following emission limitations for new and reconstructed lean burn and new and reconstructed compression ignition stationary RICE at 100 percent load plus or minus 10 percent:

| For each . . . | You must meet the following emission limitation, except during periods of startup . . . | During periods of startup you must . . . |
|---|---|---|
| 1. 2SLB stationary RICE | a. Reduce CO emissions by 58 percent or more; or<br>b. Limit concentration of formaldehyde in the stationary RICE exhaust to 12 ppmvd or less at 15 percent $O_2$. If you commenced construction or reconstruction between December 19, 2002 and June 15, 2004, you may limit concentration of formaldehyde to 17 ppmvd or less at 15 percent $O_2$ until June 15, 2007. | Minimize the engine's time spent at idle and minimize the engine's startup time at startup to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the non-startup emission limitations apply.[1] |
| 2. 4SLB stationary RICE | a. Reduce CO emissions by 93 percent or more; or<br>b. Limit concentration of formaldehyde in the stationary RICE exhaust to 14 ppmvd or less at 15 percent $O_2$. | |
| 3. CI stationary RICE | a. Reduce CO emissions by 70 percent or more; or<br>b. Limit concentration of formaldehyde in the stationary RICE exhaust to 580 ppbvd or less at 15 percent $O_2$. | |

[1] Sources can petition the Administrator pursuant to the requirements of 40 CFR 63.6(g) for alternative work practices.

■ 22. Table 2b to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 2b to Subpart ZZZZ of Part 63. Operating Limitations for New and Reconstructed 2SLB and Compression Ignition Stationary RICE >500 HP Located at a Major Source of HAP Emissions, Existing Non-Emergency Compression Ignition Stationary RICE >500 HP, and New and Reconstructed 4SLB Burn Stationary RICE ≥250 HP Located at a Major Source of HAP Emissions**

As stated in §§ 63.6600, 63.6601, 63.6630, and 63.6640, you must comply with the following operating limitations for new and reconstructed lean burn and existing, new and reconstructed compression ignition stationary RICE:

| For each . . . | You must meet the following operating limitation . . . |
|---|---|
| 1. 2SLB and 4SLB stationary RICE and CI stationary RICE complying with the requirement to reduce CO emissions and using an oxidation catalyst; or 2SLB and 4SLB stationary RICE and CI stationary RICE complying with the requirement to limit the concentration of formaldehyde in the stationary RICE exhaust and using an oxidation catalyst. | a. Maintain your catalyst so that the pressure drop across the catalyst does not change by more than 2 inches of water at 100 percent load plus or minus 10 percent from the pressure drop across the catalyst that was measured during the initial performance test; and<br>b. Maintain the temperature of your stationary RICE exhaust so that the catalyst inlet temperature is greater than or equal to 450 °F and less than or equal to 1350 °F.[1] |
| 2. 2SLB and 4SLB stationary RICE and CI stationary RICE complying with the requirement to reduce CO emissions and not using an oxidation catalyst; or 2SLB and 4SLB stationary RICE and CI stationary RICE complying with the requirement to limit the concentration of formaldehyde in the stationary RICE exhaust and not using an oxidation catalyst. | Comply with any operating limitations approved by the Administrator. |

[1] Sources can petition the Administrator pursuant to the requirements of 40 CFR 63.8(g) for a different temperature range.

■ 23. Add Tables 2c and 2d to Subpart ZZZZ of Part 63 to read as follows:

**Table 2c to Subpart ZZZZ of Part 63. Requirements for Existing Compression Ignition Stationary Rice Located at Major Sources of HAP Emissions**

As stated in §§ 63.6600 and 63.6640, you must comply with the following requirements for existing compression ignition stationary RICE:

| For each . . . | You must meet the following requirement, except during periods of startup . . . | During periods of startup you must . . . |
|---|---|---|
| 1. Emergency CI and black start CI.[1] ..... | a. Change oil and filter every 500 hours of operation or annually, whichever comes first;[2]<br>b. Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first;<br>c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.[3] | Minimize the engine's time spent at idle and minimize the engine's startup time at startup to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the non-startup emission limitations apply.[3] |
| 2. Non-Emergency, non-black start CI < 100 HP. | a. Change oil and filter every 1,000 hours of operation or annually, whichever comes first;[2]<br>b. Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first;<br>c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.[3] | |
| 3. Non-Emergency, non-black start CI RICE 100≤HP≤300 HP. | Limit concentration of CO in the stationary RICE exhaust to 230 ppmvd or less at 15 percent $O_2$. | |
| 4. Non-Emergency, non-black start CI 300<HP≤500. | a. Limit concentration of CO in the stationary RICE exhaust to 49 ppmvd or less at 15 percent $O_2$; or<br>b. Reduce CO emissions by 70 percent or more. | |
| 5. Non-Emergency, non-black start CI>500 HP | a. Limit concentration of CO in the stationary RICE exhaust to 23 ppmvd or less at 15 percent $O_2$; or<br>b. Reduce CO emissions by 70 percent or more. | |

[1] If an emergency engine is operating during an emergency and it is not possible to shut down the engine in order to perform the work practice requirements on the schedule required in Table 2c of this subpart, or if performing the work practice on the required schedule would otherwise pose an unacceptable risk under Federal, State, or local law, the work practice can be delayed until the emergency is over or the unacceptable risk under Federal, State, or local law has abated. The work practice should be performed as soon as practicable after the emergency has ended or the unacceptable risk under Federal, State, or local law has abated. Sources must report any failure to perform the work practice on the schedule required and the Federal, State or local law under which the risk was deemed unacceptable.

[2] Sources have the option to utilize an oil analysis program as described in § 63.6625(i) in order to extend the specified oil change requirement in Table 2c of this subpart.

[3] Sources can petition the Administrator pursuant to the requirements of 40 CFR 63.6(g) for alternative work practices.

**Table 2d to Subpart ZZZZ of Part 63. Requirements for Existing Compression Ignition Stationary RICE Located at Area Sources of HAP Emissions**

As stated in §§ 63.6600 and 63.6640, you must comply with the following emission and operating limitations for existing compression ignition stationary RICE:

| For each . . . | You must meet the following requirement, except during periods of startup . . . | During periods of startup you must . . . |
|---|---|---|
| 1. Non-Emergency, non-black start CI ≤ 300 HP. | a. Change oil and filter every 1,000 hours of operation or annually, whichever comes first;[1]<br>b. Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first;<br>c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary. | Minimize the engine's time spent at idle and minimize the engine's startup time at startup to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the non-startup emission limitations apply. |

| For each . . . | You must meet the following requirement, except during periods of startup . . . | During periods of startup you must . . . |
|---|---|---|
| 2. Non-Emergency, non-black start CI 300<HP≤500. | a. Limit concentration of CO in the stationary RICE exhaust to 49 ppmvd at 15 percent $O_2$; or<br>b. Reduce CO emissions by 70 percent or more. | |
| 3. Non-Emergency, non-black start CI > 500 HP. | a. Limit concentration of CO in the stationary RICE exhaust to 23 ppmvd at 15 percent $O_2$; or<br>b. Reduce CO emissions by 70 percent or more. | |
| 4. Emergency CI and black start CI.[2] ..... | a. Change oil and filter every 500 hours of operation or annually, whichever comes first;[1]<br>b. Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first; and<br>c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary. | |

[1] Sources have the option to utilize an oil analysis program as described in § 63.6625(i) in order to extend the specified oil change requirement in Table 2d of this subpart.

[2] If an emergency engine is operating during an emergency and it is not possible to shut down the engine in order to perform the management practice requirements on the schedule required in Table 2d of this subpart, or if performing the management practice on the required schedule would otherwise pose an unacceptable risk under Federal, State, or local law, the management practice can be delayed until the emergency is over or the unacceptable risk under Federal, State, or local law has abated. The management practice should be performed as soon as practicable after the emergency has ended or the unacceptable risk under Federal, State, or local law has abated. Sources must report any failure to perform the management practice on the schedule required and the Federal, State or local law under which the risk was deemed unacceptable.

■ 24. Table 3 to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 3 to Subpart ZZZZ of Part 63. Subsequent Performance Tests**

As stated in §§ 63.6615 and 63.6620, you must comply with the following subsequent performance test requirements:

| For each . . . | Complying with the requirement to . . . | You must . . . |
|---|---|---|
| 1. 2SLB and 4SLB stationary RICE with a brake horsepower >500 located at major sources and new or reconstructed CI stationary RICE with a brake horsepower >500 located at major sources. | Reduce CO emissions and not using a CEMS | Conduct subsequent performance tests semiannually.[1] |
| 2. 4SRB stationary RICE with a brake horsepower ≥5,000 located at major sources. | Reduce formaldehyde emissions ..... | Conduct subsequent performance tests semiannually.[1] |
| 3. Stationary RICE with a brake horsepower >500 located at major sources. | Limit the concentration of formaldehyde in the stationary RICE exhaust. | Conduct subsequent performance tests semiannually.[1] |
| 4. Existing non-emergency, non-black start CI stationary RICE with a brake horsepower >500 that are not limited use stationary RICE. | Limit or reduce CO or formaldehyde emissions. | Conduct subsequent performance tests every 8,760 hrs or 3 years, whichever comes first. |
| 5. Existing non-emergency, non-black start CI stationary RICE with a brake horsepower >500 that are limited use stationary RICE. | ..... | Conduct subsequent performance tests every 8,760 hrs or 5 years, whichever comes first. |

[1] After you have demonstrated compliance for two consecutive tests, you may reduce the frequency of subsequent performance tests to annually. If the results of any subsequent annual performance test indicate the stationary RICE is not in compliance with the CO or formaldehyde emission limitation, or you deviate from any of your operating limitations, you must resume semiannual performance tests.

■ 25. Table 4 to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 4 to Subpart ZZZZ of Part 63. Requirements for Performance Tests**

As stated in §§ 63.6610, 63.6611, 63.6612, 63.6620, and 63.6640, you must comply with the following requirements for performance tests for stationary RICE for existing sources:

| For each . . . | Complying with the requirement to . . . | You must . . . | Using . . . | According to the following requirements . . . |
|---|---|---|---|---|
| 1. 2SLB, 4SLB, and CI stationary RICE. | a. Reduce CO emissions. | i. Measure the $O_2$ at the inlet and outlet of the control device; and | (1) Portable CO and $O_2$ analyzer. | (a) Using ASTM D6522–00 (2005)[a] (incorporated by reference, *see* § 63.14). Measurements to determine $O_2$ must be made at the same time as the measurements for CO concentration. |

| For each . . . | Complying with the requirement to . . . | You must . . . | Using . . . | According to the following requirements . . . |
|---|---|---|---|---|
| | | ii. Measure the CO at the inlet and the outlet of the control device. | (1) Portable CO and $O_2$ analyzer. | (a) Using ASTM D6522–00 (2005) [a,b] (incorporated by reference, *see* § 63.14) or Method 10 of 40 CFR appendix A. The CO concentration must be at 15 percent $O_2$, dry basis. |
| 2. 4SRB stationary RICE. | a. Reduce formaldehyde emissions. | i. Select the sampling port location and the number of traverse points; and | (1) Method 1 or 1A of 40 CFR part 60, appendix A § 63.7(d)(1)(i). | (a) Sampling sites must be located at the inlet and outlet of the control device. |
| | | ii. Measure $O_2$ at the inlet and outlet of the control device; and | (1) Method 3 or 3A or 3B of 40 CFR part 60, appendix A, or ASTM Method D6522–00 (2005). | (a) Measurements to determine $O_2$ concentration must be made at the same time as the measurements for formaldehyde concentration. |
| | | iii. Measure moisture content at the inlet and outlet of the control device; and | (1) Method 4 of 40 CFR part 60, appendix A, or Test Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03. | (a) Measurements to determine moisture content must be made at the same time and location as the measurements for formaldehyde concentration. |
| | | iv. Measure formaldehyde at the inlet and the outlet of the control device. | (1) Method 320 of 40 CFR part 63, appendix A; or ASTM D6348–03 [c], provided in ASTM D6348–03 Annex A5 (Analyte Spiking Technique), the percent R must be greater than or equal to 70 and less than or equal to 130.. | (a) Formaldehyde concentration must be at 15 percent $O_2$, dry basis. Results of this test consist of the average of the three 1-hour or longer runs. |
| 3. Stationary RICE ..... | a. Limit the concentration of formaldehyde or CO in the stationary RICE exhaust. | i. Select the sampling port location and the number of traverse points; and | (1) Method 1 or 1A of 40 CFR part 60, appendix A § 63.7(d)(1)(i). | (a) If using a control device, the sampling site must be located at the outlet of the control device. |
| | | ii. Determine the $O_2$ concentration of the stationary RICE exhaust at the sampling port location; and | (1) Method 3 or 3A or 3B of 40 CFR part 60, appendix A, or ASTM Method D6522–00 (2005). | (a) Measurements to determine $O_2$ concentration must be made at the same time and location as the measurements for formaldehyde concentration. |
| | | iii. Measure moisture content of the stationary RICE exhaust at the sampling port location; and | (1) Method 4 of 40 CFR part 60, appendix A, or Test Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03. | (a) Measurements to determine moisture content must be made at the same time and location as the measurements for formaldehyde concentration. |
| | | iv. Measure formaldehyde at the exhaust of the stationary RICE; or | (1) Method 320 of 40 CFR part 63, appendix A; or ASTM D6348–03 [c], provided in ASTM D6348–03 Annex A5 (Analyte Spiking Technique), the percent R must be greater than or equal to 70 and less than or equal to 130. | (a) Formaldehyde concentration must be at 15 percent $O_2$, dry basis. Results of this test consist of the average of the three 1-hour or longer runs. |
| | | v. Measure CO at the exhaust of the stationary RICE. | (1) Method 10 of 40 CFR part 60, appendix A, ASTM Method D6522–00 (2005) [a], Method 320 of 40 CFR part 63, appendix A, or ASTM D6348–03. | (a) CO concentration must be at 15 percent $O_2$, dry basis. Results of this test consist of the average of the three 1-hour longer runs. |

[a] You may also use Methods 3A and 10 as options to ASTM–D6522–00 (2005). You may obtain a copy of ASTM–D6522–00 (2005) from at least one of the following addresses: American Society for Testing and Materials, 100 Barr Harbor Drive, West Conshohocken, PA 19428–2959, or University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106. ASTM–D6522–00 (2005) may be used to test both CI and SI stationary RICE.

[b] You may also use Method 320 of 40 CFR part 63, appendix A, or ASTM D6348–03.

[c] You may obtain a copy of ASTM–D6348–03 from at least one of the following addresses: American Society for Testing and Materials, 100 Barr Harbor Drive, West Conshohocken, PA 19428–2959, or University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106.

■ 25. Table 5 to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 5 to Subpart ZZZZ of Part 63. Initial Compliance With Emission Limitations and Operating Limitations**

As stated in §§ 63.6612, 63.6625 and 63.6630, you must initially comply with the emission and operating limitations as required by the following:

| For each . . . | Complying with the requirement to . . . | You have demonstrated initial compliance if . . . |
|---|---|---|
| 1. 2SLB and 4SLB stationary RICE >500 HP located at a major source and new or reconstructed CI stationary RICE >500 HP located at a major source. | a. Reduce CO emissions and using oxidation catalyst, and using a CPMS. | i. The average reduction of emissions of CO determined from the initial performance test achieves the required CO percent reduction; and<br>ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b); and<br>iii. You have recorded the catalyst pressure drop and catalyst inlet temperature during the initial performance test. |
| 2. 2SLB and 4SLB stationary RICE >500 HP located at a major source and new or reconstructed CI stationary RICE >500 HP located at a major source. | a. Reduce CO emissions and not using oxidation catalyst. | i. The average reduction of emissions of CO determined from the initial performance test achieves the required CO percent reduction; and<br>ii. You have installed a CPMS to continuously monitor operating parameters approved by the Administrator (if any) according to the requirements in § 63.6625(b); and<br>iii. You have recorded the approved operating parameters (if any) during the initial performance test. |
| 3. 2SLB and 4SLB stationary RICE >500 HP located at a major source and new or reconstructed CI stationary RICE >500 HP located at a major source. | a. Reduce CO emissions, and using a CEMS | i. You have installed a CEMS to continuously monitor CO and either $O_2$ or $CO_2$ at both the inlet and outlet of the oxidation catalyst according to the requirements in § 63.6625(a); and<br>ii. You have conducted a performance evaluation of your CEMS using PS 3 and 4A of 40 CFR part 60, appendix B; and<br>iii. The average reduction of CO calculated using § 63.6620 equals or exceeds the required percent reduction. The initial test comprises the first 4-hour period after successful validation of the CEMS. Compliance is based on the average percent reduction achieved during the 4-hour period. |
| 4. 4SRB stationary RICE >500 HP located at a major source. | a. Reduce formaldehyde emissions and using NSCR. | i. The average reduction of emissions of formaldehyde determined from the initial performance test is equal to or greater than the required formaldehyde percent reduction; and<br>ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b); and<br>iii. You have recorded the catalyst pressure drop and catalyst inlet temperature during the initial performance test. |
| 5. 4SRB stationary RICE >500 HP located at a major source. | a. Reduce formaldehyde emissions and not using NSCR. | i. The average reduction of emissions of formaldehyde determined from the initial performance test is equal to or greater than the required formaldehyde percent reduction; and<br>ii. You have installed a CPMS to continuously monitor operating parameters approved by the Administrator (if any) according to the requirements in § 63.6625(b); and<br>iii. You have recorded the approved operating parameters (if any) during the initial performance test. |
| 6. Stationary RICE >500 HP located at a major source. | a. Limit the concentration of formaldehyde in the stationary RICE exhaust and using oxidation catalyst or NSCR. | i. The average formaldehyde concentration, corrected to 15 percent $O_2$, dry basis, from the three test runs is less than or equal to the formaldehyde emission limitation; and<br>ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b); and |

| For each . . . | Complying with the requirement to . . . | You have demonstrated initial compliance if . . . |
|---|---|---|
| | | iii. You have recorded the catalyst pressure drop and catalyst inlet temperature during the initial performance test. |
| 7. Stationary RICE >500 HP located at a major source. | a. Limit the concentration of formaldehyde in the stationary RICE exhaust and not using oxidation catalyst or NSCR. | i. The average formaldehyde concentration, corrected to 15 percent $O_2$, dry basis, from the three test runs is less than or equal to the formaldehyde emission limitation; and<br>ii. You have installed a CPMS to continuously monitor operating parameters approved by the Administrator (if any) according to the requirements in § 63.6625(b); and<br>iii. You have recorded the approved operating parameters (if any) during the initial performance test. |
| 8. Existing stationary non-emergency RICE ≥100 HP located at a major source, existing non-emergency CI stationary RICE >500 HP, and existing stationary non-emergency RICE ≥100 HP located at an area source. | a. Reduce CO or formaldehyde emissions ..... | i. The average reduction of emissions of CO or formaldehyde, as applicable determined from the initial performance test is equal to or greater than the required CO or formaldehyde, as applicable, percent reduction. |
| 9. Existing stationary non-emergency RICE ≥100 HP located at a major source, existing non-emergency CI stationary RICE >500 HP, and existing stationary non-emergency RICE ≥100 HP located at an area source. | a. Limit the concentration of formaldehyde or CO in the stationary RICE exhaust. | i. The average formaldehyde or CO concentration, as applicable, corrected to 15 percent $O_2$, dry basis, from the three test runs is less than or equal to the formaldehyde or CO emission limitation, as applicable. |

■ 26. Table 6 to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 6 to Subpart ZZZZ of Part 63. Continuous Compliance With Emission Limitations and Operating Limitations**

As stated in § 63.6640, you must continuously comply with the emissions and operating limitations as required by the following:

| For each . . . | Complying with the requirement to . . . | You must demonstrate continuous compliance by . . . |
|---|---|---|
| 1. 2SLB and 4SLB stationary RICE >500 HP located at a major source and CI stationary RICE >500 HP located at a major source. | a. Reduce CO emissions and using an oxidation catalyst, and using a CPMS. | i. Conducting semiannual performance tests for CO to demonstrate that the required CO percent reduction is achieved [a]; and<br>ii. Collecting the catalyst inlet temperature data according to § 63.6625(b); and<br>iii. Reducing these data to 4-hour rolling averages; and<br>iv. Maintaining the 4-hour rolling averages within the operating limitations for the catalyst inlet temperature; and<br>v. Measuring the pressure drop across the catalyst once per month and demonstrating that the pressure drop across the catalyst is within the operating limitation established during the performance test. |
| 2. 2SLB and 4SLB stationary RICE >500 HP located at a major source and CI stationary RICE >500 HP located at a major source. | a. Reduce CO emissions and not using an oxidation catalyst, and using a CPMS. | i. Conducting semiannual performance tests for CO to demonstrate that the required CO percent reduction is achieved [a]; and<br>ii. Collecting the approved operating parameter (if any) data according to § 63.6625(b); and<br>iii. Reducing these data to 4-hour rolling averages; and<br>iv. Maintaining the 4-hour rolling averages within the operating limitations for the operating parameters established during the performance test. |
| 3. 2SLB and 4SLB stationary RICE >500 HP located at a major source and CI stationary RICE >500 HP located at a major source. | a. Reduce CO emissions and using a CEMS | i. Collecting the monitoring data according to § 63.6625(a), reducing the measurements to 1-hour averages, calculating the percent reduction of CO emissions according to § 63.6620; and<br>ii. Demonstrating that the catalyst achieves the required percent reduction of CO emissions over the 4-hour averaging period; and |

| For each . . . | Complying with the requirement to . . . | You must demonstrate continuous compliance by . . . |
|---|---|---|
| | | iii. Conducting an annual RATA of your CEMS using PS 3 and 4A of 40 CFR part 60, appendix B, as well as daily and periodic data quality checks in accordance with 40 CFR part 60, appendix F, procedure 1. |
| 4. 4SRB stationary RICE >500 HP located at a major source. | a. Reduce formaldehyde emissions and using NSCR. | i. Collecting the catalyst inlet temperature data according to § 63.6625(b); and<br>ii. reducing these data to 4-hour rolling averages; and<br>iii. Maintaining the 4-hour rolling averages within the operating limitations for the catalyst inlet temperature; and<br>iv. Measuring the pressure drop across the catalyst once per month and demonstrating that the pressure drop across the catalyst is within the operating limitation established during the performance test. |
| 5. 4SRB stationary RICE >500 HP located at a major source. | a. Reduce formaldehyde emissions and not using NSCR. | i. Collecting the approved operating parameter (if any) data according to § 63.6625(b); and<br>ii. Reducing these data to 4-hour rolling averages; and<br>iii. Maintaining the 4-hour rolling averages within the operating limitations for the operating parameters established during the performance test. |
| 6. 4SRB stationary RICE with a brake HP ≥5,000 located at a major source. | Reduce formaldehyde emissions ..... | Conducting semiannual performance tests for formaldehyde to demonstrate that the required formaldehyde percent reduction is achieved.[a] |
| 7. Stationary RICE >500 HP located at a major source. | Limit the concentration of formaldehyde in the stationary RICE exhaust and using oxidation catalyst or NSCR. | i. Conducting semiannual performance tests for formaldehyde to demonstrate that your emissions remain at or below the formaldehyde concentration limit[a]; and<br>ii. Collecting the catalyst inlet temperature data according to § 63.6625(b); and<br>iii. Reducing these data to 4-hour rolling averages; and<br>iv. Maintaining the 4-hour rolling averages within the operating limitations for the catalyst inlet temperature; and<br>v. Measuring the pressure drop across the catalyst once per month and demonstrating that the pressure drop across the catalyst is within the operating limitation established during the performance test. |
| 8. Stationary RICE >500 HP located at a major source. | Limit the concentration of formaldehyde in the stationary RICE exhaust and not using oxidation catalyst or NSCR. | i. Conducting semiannual performance tests for formaldehyde to demonstrate that your emissions remain at or below the formaldehyde concentration limit[a]; and<br>ii. Collecting the approved operating parameter (if any) data according to § 63.6625(b); and<br>iii. Reducing these data to 4-hour rolling averages; and<br>iv. Maintaining the 4-hour rolling averages within the operating limitations for the operating parameters established during the performance test. |
| 9. Existing stationary CI RICE not subject to any numerical emission limitations. | a. Work or Management practices ..... | i. Operating and maintaining the stationary RICE according to the manufacturer's emission-related operation and maintenance instructions; or<br>ii. Develop and follow your own maintenance plan which must provide to the extent practicable for the maintenance and operation of the engine in a manner consistent with good air pollution control practice for minimizing emissions. |

| For each . . . | Complying with the requirement to . . . | You must demonstrate continuous compliance by . . . |
|---|---|---|
| 10. Existing stationary RICE >500 HP that are not limited use stationary RICE, except 4SRB >500 HP located at major sources. | a. Reduce CO or formaldehyde emissions; or<br>b. Limit the concentration of formaldehyde or CO in the stationary RICE exhaust. | i. Conducting performance tests every 8,760 hours or 3 years, whichever comes first, for CO or formaldehyde, as appropriate, to demonstrate that the required CO or formaldehyde, as appropriate, percent reduction is achieved or that your emissions remain at or below the CO or formaldehyde concentration limit. |
| 11. Existing limited use stationary RICE >500 HP that are limited use CI stationary RICE. | a. Reduce CO or formaldehyde emissions; or<br>b. Limit the concentration of formaldehyde or CO in the stationary RICE exhaust. | i. Conducting performance tests every 8,760 hours or 5 years, whichever comes first, for CO or formaldehyde, as appropriate, to demonstrate that the required CO or formaldehyde, as appropriate, percent reduction is achieved or that your emissions remain at or below the CO or formaldehyde concentration limit. |

[a] After you have demonstrated compliance for two consecutive tests, you may reduce the frequency of subsequent performance tests to annually. If the results of any subsequent annual performance test indicate the stationary RICE is not in compliance with the CO or formaldehyde emission limitation, or you deviate from any of your operating limitations, you must resume semiannual performance tests.

■ 27. Table 7 to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 7 to Subpart ZZZZ of Part 63. Requirements for Reports**

As stated in § 63.6650, you must comply with the following requirements for reports:

| You must submit a(n) . . . | The report must contain . . . | You must submit the report . . . |
|---|---|---|
| 1. Compliance report | a. If there are no deviations from any emission limitations or operating limitations that apply to you, a statement that there were no deviations from the emission limitations or operating limitations during the reporting period. If there were no periods during which the CMS, including CEMS and CPMS, was out-of-control, as specified in § 63.8(c)(7), a statement that there were not periods during which the CMS was out-of-control during the reporting period; or | i. Semiannually according to the requirements in § 63.6650(b)(1)–(5) for engines that are not limited use stationary CI RICE subject to numerical emission limitations; and<br>ii. Annually according to the requirements in § 63.6650(b)(6)–(9) for engines that are limited use stationary CI RICE subject to numerical emission limitations. |
| | b. If you had a deviation from any emission limitation or operating limitation during the reporting period, the information in § 63.6650(d). If there were periods during which the CMS, including CEMS and CPMS, was out-of-control, as specified in § 63.8(c)(7), the information in § 63.6650(e); or | i. Semiannually according to the requirements in § 63.6650(b). |
| | c. If you had a malfunction during the reporting period, the information in § 63.6650(c)(4). | i. Semiannually according to the requirements in § 63.6650(b). |
| 2. Report | a. The fuel flow rate of each fuel and the heating values that were used in your calculations, and you must demonstrate that the percentage of heat input provided by landfill gas or digester gas, is equivalent to 10 percent or more of the gross heat input on an annual basis; and | i. Annually, according to the requirements in § 63.6650. |
| | b. The operating limits provided in your Federally enforceable permit, and any deviations from these limits; and | i. *See* item 2.a.i. |
| | c. Any problems or errors suspected with the meters. | i. *See* item 2.a.i. |

■ 28. Table 8 to Subpart ZZZZ of Part 63 is revised to read as follows:

**Table 8 to Subpart ZZZZ of Part 63. Applicability of General Provisions to Subpart ZZZZ.**

As stated in § 63.6665, you must comply with the following applicable general provisions.

| General provisions citation | Subject of citation | Applies to subpart | Explanation |
|---|---|---|---|
| § 63.1 | General applicability of the General Provisions. | Yes. | |
| § 63.2 | Definitions | Yes | Additional terms defined in § 63.6675. |
| § 63.3 | Units and abbreviations | Yes. | |
| § 63.4 | Prohibited activities and circumvention | Yes. | |
| § 63.5 | Construction and reconstruction | Yes. | |
| § 63.6(a) | Applicability | Yes. | |
| § 63.6(b)(1)–(4) | Compliance dates for new and reconstructed sources. | Yes. | |
| § 63.6(b)(5) | Notification | Yes. | |
| § 63.6(b)(6) | [Reserved] | | |
| § 63.6(b)(7) | Compliance dates for new and reconstructed area sources that become major sources. | Yes. | |
| § 63.6(c)(1)–(2) | Compliance dates for existing sources | Yes. | |
| § 63.6(c)(3)–(4) | [Reserved] | | |
| § 63.6(c)(5) | Compliance dates for existing area sources that become major sources. | Yes. | |
| § 63.6(d) | [Reserved] | | |
| § 63.6(e) | Operation and maintenance | No. | |
| § 63.6(f)(1) | Applicability of standards | No. | |
| § 63.6(f)(2) | Methods for determining compliance | Yes. | |
| § 63.6(f)(3) | Finding of compliance | Yes. | |
| § 63.6(g)(1)–(3) | Use of alternate standard | Yes. | |
| § 63.6(h) | Opacity and visible emission standards | No | Subpart ZZZZ does not contain opacity or visible emission standards. |
| § 63.6(i) | Compliance extension procedures and criteria. | Yes. | |
| § 63.6(j) | Presidential compliance exemption | Yes. | |
| § 63.7(a)(1)–(2) | Performance test dates | Yes | Subpart ZZZZ contains performance test dates at §§ 63.6610, 63.6611, and 63.6612. |
| § 63.7(a)(3) | CAA section 114 authority | Yes. | |
| § 63.7(b)(1) | Notification of performance test | Yes | Except that § 63.7(b)(1) only applies as specified in § 63.6645. |
| § 63.7(b)(2) | Notification of rescheduling | Yes | Except that § 63.7(b)(2) only applies as specified in § 63.6645. |
| § 63.7(c) | Quality assurance/test plan | Yes | Except that § 63.7(c) only applies as specified in § 63.6645. |
| § 63.7(d) | Testing facilities | Yes. | |
| § 63.7(e)(1) | Conditions for conducting performance tests. | No. | Subpart ZZZZ specifies conditions for conducting performance tests at § 63.6620. |
| § 63.7(e)(2) | Conduct of performance tests and reduction of data. | Yes | Subpart ZZZZ specifies test methods at § 63.6620. |
| § 63.7(e)(3) | Test run duration | Yes. | |
| § 63.7(e)(4) | Administrator may require other testing under section 114 of the CAA. | Yes. | |
| § 63.7(f) | Alternative test method provisions | Yes. | |
| § 63.7(g) | Performance test data analysis, recordkeeping, and reporting. | Yes. | |
| § 63.7(h) | Waiver of tests | Yes. | |
| § 63.8(a)(1) | Applicability of monitoring requirements | Yes | Subpart ZZZZ contains specific requirements for monitoring at § 63.6625. |
| § 63.8(a)(2) | Performance specifications | Yes. | |
| § 63.8(a)(3) | [Reserved] | | |
| § 63.8(a)(4) | Monitoring for control devices | No. | |
| § 63.8(b)(1) | Monitoring | Yes. | |
| § 63.8(b)(2)–(3) | Multiple effluents and multiple monitoring systems. | Yes. | |
| § 63.8(c)(1) | Monitoring system operation and maintenance. | Yes. | |
| § 63.8(c)(1)(i) | Routine and predictable SSM | Yes. | |
| § 63.8(c)(1)(ii) | SSM not in Startup Shutdown Malfunction Plan. | Yes. | |

| General provisions citation | Subject of citation | Applies to subpart | Explanation |
|---|---|---|---|
| § 63.8(c)(1)(iii) | Compliance with operation and maintenance requirements. | Yes. | |
| § 63.8(c)(2)–(3) | Monitoring system installation | Yes. | |
| § 63.8(c)(4) | Continuous monitoring system (CMS) requirements. | Yes | Except that subpart ZZZZ does not require Continuous Opacity Monitoring System (COMS). |
| § 63.8(c)(5) | COMS minimum procedures | No | Subpart ZZZZ does not require COMS. |
| § 63.8(c)(6)–(8) | CMS requirements | Yes | Except that subpart ZZZZ does not require COMS. |
| § 63.8(d) | CMS quality control | Yes. | |
| § 63.8(e) | CMS performance evaluation | Yes | Except for § 63.8(e)(5)(ii), which applies to COMS. Except that § 63.8(e) only applies as specified in § 63.6645. |
| § 63.8(f)(1)–(5) | Alternative monitoring method | Yes | Except that § 63.8(f)(4) only applies as specified in § 63.6645. |
| § 63.8(f)(6) | Alternative to relative accuracy test | Yes | Except that § 63.8(f)(6) only applies as specified in § 63.6645. |
| § 63.8(g) | Data reduction | Yes | Except that provisions for COMS are not applicable. Averaging periods for demonstrating compliance are specified at §§ 63.6635 and 63.6640. |
| § 63.9(a) | Applicability and State delegation of notification requirements. | Yes. | |
| § 63.9(b)(1)–(5) | Initial notifications | Yes | Except that § 63.9(b)(3) is reserved. Except that § 63.9(b) only applies as specified in § 63.6645. |
| § 63.9(c) | Request for compliance extension | Yes | Except that § 63.9(c) only applies as specified in § 63.6645. |
| § 63.9(d) | Notification of special compliance requirements for new sources. | Yes | Except that § 63.9(d) only applies as specified in § 63.6645. |
| § 63.9(e) | Notification of performance test | Yes | Except that § 63.9(e) only applies as specified in § 63.6645. |
| § 63.9(f) | Notification of visible emission (VE)/opacity test. | No | Subpart ZZZZ does not contain opacity or VE standards. |
| § 63.9(g)(1) | Notification of performance evaluation | Yes | Except that § 63.9(g) only applies as specified in § 63.6645. |
| § 63.9(g)(2) | Notification of use of COMS data | No | Subpart ZZZZ does not contain opacity or VE standards. |
| § 63.9(g)(3) | Notification that criterion for alternative to RATA is exceeded. | Yes | If alternative is in use. Except that § 63.9(g) only applies as specified in § 63.6645. |
| § 63.9(h)(1)–(6) | Notification of compliance status | Yes | Except that notifications for sources using a CEMS are due 30 days after completion of performance evaluations. § 63.9(h)(4) is reserved. Except that § 63.9(h) only applies as specified in § 63.6645. |
| § 63.9(i) | Adjustment of submittal deadlines | Yes. | |
| § 63.9(j) | Change in previous information | Yes. | |
| § 63.10(a) | Administrative provisions for recordkeeping/reporting. | Yes. | |
| § 63.10(b)(1) | Record retention | Yes. | |
| § 63.10(b)(2)(i)–(v) | Records related to SSM | No. | |
| § 63.10(b)(2)(vi)–(xi) | Records | Yes. | |
| § 63.10(b)(2)(xii) | Record when under waiver | Yes. | |
| § 63.10(b)(2)(xiii) | Records when using alternative to RATA | Yes | For CO standard if using RATA alternative. |
| § 63.10(b)(2)(xiv) | Records of supporting documentation | Yes. | |
| § 63.10(b)(3) | Records of applicability determination | Yes. | |
| § 63.10(c) | Additional records for sources using CEMS. | Yes | Except that § 63.10(c)(2)–(4) and (9) are reserved. |
| § 63.10(d)(1) | General reporting requirements | Yes. | |
| § 63.10(d)(2) | Report of performance test results | Yes. | |
| § 63.10(d)(3) | Reporting opacity or VE observations | No | Subpart ZZZZ does not contain opacity or VE standards. |
| § 63.10(d)(4) | Progress reports | Yes. | |
| § 63.10(d)(5) | Startup, shutdown, and malfunction reports | No. | |
| § 63.10(e)(1) and (2)(i) | Additional CMS Reports | Yes. | |
| § 63.10(e)(2)(ii) | COMS-related report | No | Subpart ZZZZ does not require COMS. |
| § 63.10(e)(3) | Excess emission and parameter exceedances reports. | Yes. | Except that § 63.10(e)(3)(i) (C) is reserved. |

| General provisions citation | Subject of citation | Applies to subpart | Explanation |
|---|---|---|---|
| § 63.10(e)(4) | Reporting COMS data | No | Subpart ZZZZ does not require COMS. |
| § 63.10(f) | Waiver for recordkeeping/reporting | Yes. | |
| § 63.11 | Flares | No. | |
| § 63.12 | State authority and delegations | Yes. | |
| § 63.13 | Addresses | Yes. | |
| § 63.14 | Incorporation by reference | Yes. | |
| § 63.15 | Availability of information | Yes. | |

[FR Doc. 2010–3508 Filed 3–2–10; 8:45 am]

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# Part III

# Federal Communications Commission

**47 CFR Part 76**

**Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements; Final Rule**

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 76**

**[MB Docket No. 07–198; FCC 10–17]**

## Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The FCC establishes rules, policies, and procedures for the consideration of complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming in violation of Section 628(b) of the Communications Act of 1934, as amended. This action will provide competitors to incumbent cable operators with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer their subscribers, thereby promoting competition in the delivery of video to consumers.

**DATES:** Effective April 2, 2010, except for §§ 76.1001(b)(2) and 76.1003(l), and the amendment to § 76.1003(c)(3), which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections.

**FOR FURTHER INFORMATION CONTACT:** For additional information on this proceeding, contact David Konczal, *David.Konczal@fcc.gov;* or Diana Sokolow, *Diana.Sokolow@fcc.gov;* of the Media Bureau, Policy Division, (202) 418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or via the Internet at *PRA@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *First Report and Order* ("*Order*"), FCC 10–17, adopted and released on January 20, 2010, and the Erratum thereto, FCC 10–30, adopted on February 5, 2010 and released on February 16, 2010. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Paperwork Reduction Act of 1995 Analysis

This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501–3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program access complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis ("FRFA") below.

### Summary of the Report and Order

### I. Introduction

1. In this *Order,* we take an important step to further promote competition in the video distribution market. We establish rules to address unfair acts, including exclusive contracts, involving terrestrially delivered, cable-affiliated programming. Throughout this *Order,* we use the terms "cable-affiliated programming" and "cable-affiliated programmer" to refer to a cable programming vendor in which a cable operator has an attributable interest, as defined by the Commission's cable attribution rules. *See* 47 CFR 76.1000(b); *see also* 47 CFR 76.501, Notes 1–5.

2. The rules established herein will provide competitors to incumbent cable operators with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer to their subscribers, thereby promoting competition in the delivery of video to consumers. Our existing program access rules have been a boon to such competition, and we anticipate that the rules we adopt today will have similar procompetitive effects. Our efforts to spur competition in the marketplace for video programming are also aimed at increasing consumer benefits, including better services, innovations in technology, and lower prices. Moreover, we believe broadband adoption to be a further benefit from increased competition and diversity in video programming distribution. Specifically, today we adopt rules permitting complainants to pursue program access claims involving terrestrially delivered, cable-affiliated programming similar to the claims that they may pursue with respect to satellite-delivered, cable-affiliated programming, where the purpose or effect of the challenged act is to significantly hinder or prevent the complainant from providing satellite cable programming or satellite broadcast programming. The types of claims potentially involved include challenges to: (i) Exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; (ii) discrimination in the prices, terms, and conditions for the sale of programming among multichannel video programming distributors ("MVPDs") by a provider of terrestrially delivered programming that is wholly owned by, controlled by, or under common control with one or more of the following: a cable operator or operators, a satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or a satellite broadcast programming vendor or vendors; and (iii) efforts by a cable operator to unduly influence the decision of its affiliated provider of terrestrially delivered programming to sell its programming to a competitor.

3. The Commission has previously established goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and

within nine months for all other program access complaints, such as price discrimination cases. *See 2007 Program Access Order,* 72 FR 56645, October 4, 2007, *appeal pending sub nom. Cablevision Systems Corp. et al* v. *FCC,* No. 07–1425 et al (D.C. Cir). These goals will also apply to complaints filed pursuant to the rules established in this *Order.*

4. MVPDs seeking to compete with incumbent cable operators have provided the Commission with examples of actions by cable operators involving terrestrially delivered, cable-affiliated programming that they allege have harmed competition in the video distribution market. In light of these claims, the Commission adopted a Notice of Proposed Rulemaking (the "*NPRM*") in September 2007 seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming. *See* 72 FR 61590, October 31, 2007. In the *NPRM,* the Commission stated its belief that unfair acts involving terrestrially delivered, cable-affiliated programming are a significant concern because they can adversely impact competition. Since adoption of the *NPRM* in September 2007, MVPDs have filed three program access complaints involving terrestrially delivered, cable-affiliated programming. This *Order* addresses only the issues of terrestrially delivered, cable-affiliated programming and a temporary standstill of an existing contract pending resolution of a program access complaint. This *Order* does not address the other issues raised in the *NPRM.*

5. We find below that Section 628 of the Communications Act of 1934, as amended (the "Act"), grants the Commission authority to address unfair acts involving terrestrially delivered, cable-affiliated programming. Section 628 was passed as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). *See* Cable Television Consumer Protection and Competition Act of 1992, Public Law 102–385, 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 102–628 (1992); S. Rep. No. 102–92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133; H.R. Rep. No. 102–862 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231. Congress expressly declared that a purpose of Section 628 was "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market. * * *" *See* 47 U.S.C. 548(a). Congress found that the "cable industry has become vertically integrated" and that "[v]ertically integrated program suppliers * * * have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies." *See* H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 2, *reprinted in* 1992 U.S.C.C.A.N. 1231. Congress "expect[s] the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies." *See id.* at 93, *reprinted in* 1992 U.S.C.C.A.N. at 1275. To arm the Commission for that effort, Congress granted the Commission broad authority in Sections 628(b) and 628(c)(1) of the Act to prohibit unfair acts of cable operators that significantly hinder or prevent their competitors from providing video programming to consumers.

6. Section 628(b) provides that it shall be unlawful for a cable operator to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." *See* 47 U.S.C. 548(b). Section 628(c)(1) authorizes the Commission to prescribe regulations to specify the particular conduct prohibited by Section 628(b). *See* 47 U.S.C. 548(c)(1). Throughout this *Order,* we use the term "unfair act" as shorthand for the phrase "unfair methods of competition or unfair or deceptive acts or practices."

7. In addition to the broad grant of authority, Congress in Section 628(c)(2) required the Commission to adopt specific regulations partly implementing Section 628(b) by prohibiting cable operators or affiliates from engaging in unfair acts involving cable-affiliated programming that is delivered to cable operators via satellite ("satellite-delivered programming"). *See* 47 U.S.C. 548(c)(2). Section 628(c)(2) pertains only to "satellite cable programming" and "satellite broadcast programming." *See* 47 U.S.C. 548(c)(2)(A)–(D). Both terms are defined to include only programming transmitted or retransmitted by satellite for reception by cable operators. *See* 47 U.S.C. 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. 605); *id.* 548(i)(3).

8. The three unfair acts Congress required the Commission to address were: (i) Exclusive contracts between a cable operator and a cable-affiliated programmer; (ii) discrimination by a cable-affiliated programmer in the prices, terms, and conditions for sale of programming among MVPDs; and (iii) efforts by a cable operator to unduly influence the decision of its affiliated programmer to sell programming to competitors. *See* 47 U.S.C. 548(c)(2)(A)–(D). The Commission has adopted rules to carry out that congressional command (the "program access rules"). *See* 47 CFR 76.1000–1004. Those rules are a success. While competitors to incumbent cable operators served less than five percent of video subscribers nationwide when the program access provision of the 1992 Cable Act was passed (*see Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992,* Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, 17326 (2001)), that percentage has increased to over 30 percent today. Competitors to incumbent cable operators widely credit the program access rules for this increase in competition.

9. An outgrowth of this increase in competition is an increase in employment in the video programming sector of the economy. The relationship between competition and employment in an industry is an obvious one. Firms maximize profits in a concentrated industry by reducing output in order to increase prices. This exertion of market power has, as a natural outcome, a negative effect on industry employment. Increasing the level of competition in an industry increases output, reduces prices, and increases employment. This intuitive result has been shown to hold in practice. Christoph Weiss found a negative relationship between the long-run equilibrium level of employment and the level of concentration in U.S. industries. *See* Christoph Weiss, "Is Imperfect Competition in the Product Market Relevant for Labour Markets?" *Labour,* Vol. 12 No. 3, at 451–71 (1998).

10. Congress did not require the Commission to adopt program access rules for cable-affiliated programming that is delivered to cable operators via terrestrial means, such as programming transmitted to cable operators by fiber ("terrestrially delivered programming"). While an earlier version of the legislation that became Section 628(c)(2) would have encompassed terrestrially delivered programming, Congress did not explain why the final version of its bill removed this provision. This gap in the coverage of Section 628(c)(2) is commonly referred to as the "terrestrial loophole." *See, e.g., 2002 Program Access Order,* 67 FR 49247, July 30, 2002. Under Sections 628(b) and 628(c)(1), however, Congress granted the Commission broad authority to address

this "loophole" by adopting additional regulations beyond those listed in Section 628(c)(2) to address unfair acts of cable operators.

11. As discussed below, we take action pursuant to Sections 628(b) and 628(c)(1) of the Act to facilitate competition in the video distribution market by establishing rules for the consideration of complaints alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming. Our action today attempts to chart a middle course between two extremes proposed by commenters. On one hand, vertically integrated cable operators argue that there is no need and no statutory authority for the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming. In their view, exclusive arrangements for terrestrially delivered, cable-affiliated programming should be permitted because they enhance innovation, programming diversity, and competition. On the other hand, competing MVPDs urge the Commission to adopt a per se prohibition on exclusive arrangements involving most, if not all, terrestrially delivered, cable-affiliated programming. In their view, all such exclusive arrangements should be prohibited because they hamper competition. The case-by-case approach we adopt today establishes a fair process to address those situations in which MVPDs may be significantly hindered from competing, while at the same time allowing cable operators to use exclusive arrangements in cases where competition is not significantly harmed.

12. We begin by analyzing the statutory language and legislative history of Section 628 as well as the Commission's program access rules. We discuss our statutory authority under that section to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. We then discuss the bases for our conclusion that there is a need for Commission action to address such complaints: Cable operators have an incentive and ability to engage in unfair acts involving their affiliated programming; record evidence indicates that cable operators have engaged in unfair acts involving certain terrestrially delivered, cable-affiliated programming; and these unfair acts have impacted competition in the video distribution market in certain cases. We conclude, however, that there is insufficient record evidence to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming will have the purpose or effect set forth in Section 628(b) in every case. Accordingly, we adopt a case-by-case approach rather than a per se rule for addressing these unfair acts. We then explain how addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.

13. We next set forth the requirements for complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. A complainant alleging such an unfair act will have the burden of proof that the defendant's activities have the purpose or effect set forth in Section 628(b). We conclude that a complainant is unlikely to satisfy this burden when seeking access to readily replicable programming, such as local news and local community or educational programming. We also explain, however, that some programming may be non-replicable and sufficiently valuable to consumers that an unfair act regarding this programming presumptively—but not conclusively—has the purpose or effect set forth in Section 628(b). Based on Commission precedent in which the Commission has considered certain Regional Sports Networks ("RSNs") and the record in this proceeding, we find that such networks fall within this category. In program access cases alleging an unfair act involving such programming, the defendant will be required to overcome the presumption that arises from our precedent and the record evidence here. In all program access cases involving terrestrially delivered, cable-affiliated programming, we provide the defendant with 45 days—rather than the usual 20 days—from the date of service of the complaint to file an Answer to ensure that the defendant has adequate time to develop a full, case-specific response.

14. This distinction between replicable and non-replicable programming will promote innovation and continued investment in programming. If particular programming is replicable, our policies should encourage MVPDs or others to create competing programming, rather than relying on the efforts of others, thereby encouraging investment and innovation in programming and adding to the diversity of programming in the marketplace. Conversely, when programming is non-replicable and valuable to consumers, such as regional sports programming, no amount of investment can duplicate the unique attributes of such programming, and denial of access to such programming can significantly hinder an MVPD from competing in the marketplace. In addition, in light of the growing importance of high definition ("HD") programming in the marketplace today and its distinctive characteristics, we will analyze the HD version of a network separately from the standard definition ("SD") version with similar content for purposes of the statutory analysis. Thus, the fact that a complainant offers the SD version of a network to subscribers will not alone be sufficient to refute the complainant's showing that lack of access to the HD version has the purpose or effect set forth in Section 628(b). Similarly, in cases involving the category of RSN programming addressed by our precedent and the evidence here, withholding the HD feed will be rebuttably presumed to cause significant hindrance even if an SD version of the network is made available to competitors.

15. We next describe how the rules applicable to terrestrially delivered, cable-affiliated programming will differ from the rules applicable to satellite-delivered, cable-affiliated programming. We also discuss how these rules will be applied to common carriers and terrestrially delivered programming that is subject to the program access rules as a result of merger conditions. In addition, we explain that the new rules will apply to existing contracts, but not to the unfair acts of cable operators involving terrestrially delivered, cable-affiliated programming that preceded the effective date of these rules. With respect to pending complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming, complainants may continue to prosecute these complaints pursuant to Section 628(d) of the Communications Act. In addition, a complainant that wants a currently pending complaint considered under the new rules can submit a supplemental filing alleging that the defendant has engaged in an unfair act after the effective date of the rules. Finally, we establish procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

## II. Background

### *A. Section 628*

16. Congress enacted Section 628 as part of the 1992 Cable Act to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video

programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." 47 U.S.C. 548(a). The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. 548(i)(1) (incorporating the definition of "satellite cable programming" as used in 47 U.S.C. 605). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. 548(i)(3).

17. To advance Congress' goals, Sections 628(b) and 628(c)(1) grant the Commission broad authority to adopt rules to prohibit unfair acts of cable operators that have the purpose or effect of preventing or hindering significantly an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. *See* 47 U.S.C. 548(b), (c)(1). Section 628(b) provides that:

> [I]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 U.S.C. 548(b). Section 628(c)(1) provides that "the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by" Section 628(b). 47 U.S.C. 548(c)(1). A federal court of appeals recently held that Section 628(b) is written in "broad and sweeping terms" and therefore "should be given broad, sweeping application." *Nat'l Cable & Telecomm. Ass'n* v. *FCC,* 567 F.3d 659, 664 (D.C. Cir. 2009) (quoting *Consumer Elecs. Ass'n* v. *FCC,* 347 F.3d 291, 298 (D.C. Cir. 2003)).

18. We find no merit in Cablevision's argument that the Commission cannot rely on Section 628(c)(1) because that provision "limits" rulemaking authority to the 180 days after the date of enactment of Section 628(c)(1). The Commission has an obligation to consider, on an on-going basis, whether its rules should be modified in response to changed circumstances. As the Supreme Court has observed: "'An initial agency interpretation is not instantly carved in stone. On the contrary, the agency * * * must consider varying interpretations and the wisdom of its policy on a continuing basis,' *Chevron, supra,* at 863–864, 104 S.Ct. 2778, for example, in response to changed factual circumstances, or a change in administrations. * * *" *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 981 (2005) (*quoting Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863–64 (1984)). That is precisely what the Commission is doing in this *Order.* Cablevision's interpretation would prevent the Commission from fulfilling its obligation to consider whether its rules should be revised based on new evidence that has come to light. There is no evidence that Congress intended to tie the Commission's hands in this manner by carving its initial regulations, which were adopted back in 1993, "in stone." *See 1993 Program Access Order,* 8 FCC Rcd 3359 (1993), *recon.,* 10 FCC Rcd 1902 (1994), *further recon.,* 10 FCC Rcd 3105 (1994). Nor is there any indication Congress intended to strip the Commission of its rulemaking power under Sections 4(i) and 303(r) after 180 days. *See* 47 U.S.C. 154(i), 303(r).

19. Moreover, Cablevision's interpretation is at odds with judicial precedent regarding statutory deadlines. Statutory deadlines are generally considered directory, rather than mandatory, and even where an agency has failed to meet such a deadline—which is not the case here—it has not been found to remove an agency's authority to act or impose any other penalty, unless the statute delineates a specific remedy for agency inaction. *See Thomas* v. *Barry,* 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984) (*quoting Fort Worth Nat'l Corp.* v. *Fed. Savings & Loan Ins. Corp.,* 469 F.2d 47, 58 (5th Cir. 1972)); *see also Brock* v. *Pierce County,* 476 U.S. 253, 260, 262 (1986) (mere use of the word "shall" not enough to remove Secretary of Labor's power to act after lapse of a deadline, and "[w]hen * * * there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act"); *Gottlieb* v. *Peña,* 41 F.3d 730 (D.C. Cir. 1994) (statute mandating Secretary of Transportation to act by certain deadline was directory, not mandatory); *Ralpho* v. *Bell,* 569 F.2d 607, 627 (D.C. Cir. 1977) ("Statutes that, for guidance of a government official's discharge of duties, propose 'to secure order, system, and dispatch in proceedings' are usually construed as directory, whether or not worded in the imperative, especially when the alternative is harshness or absurdity." (citations omitted)). Here, there is no indication in the statute that Congress intended the Commission's rulemaking authority to lapse after the 180-day deadline.

20. In addition to the broad grant of authority, Congress in Section 628(c)(2) directed the Commission to include "minimum contents" in its regulations specifying certain unfair acts, relating to satellite-delivered programming, that are among those prohibited by Section 628(b). *See* 47 U.S.C. 548(c)(2). First, Congress required the Commission to prohibit efforts by cable operators to unduly influence the decision of cable-affiliated programming vendors that provide satellite-delivered programming to sell their programming to competitors ("undue or improper influence"). *See* 47 U.S.C. 548(c)(2)(A).

21. Second, Congress required the Commission to address discrimination by cable-affiliated programming vendors that provide satellite-delivered programming in the prices, terms, and conditions for sale of programming among MVPDs ("discrimination"). *See* 47 U.S.C. 548(c)(2)(B).

22. Third, Congress required the Commission to prohibit exclusive contracts between cable operators and cable-affiliated programming vendors that provide satellite-delivered programming subject to certain exceptions in areas served by a cable operator as of October 5, 1992 (the "exclusive contract prohibition"). *See* 47 U.S.C. 548(c)(2)(D). These exceptions are: (i) Exclusive contracts entered into prior to June 1, 1990 are not subject to the exclusive contract prohibition (*see* 47 U.S.C. 548(h)(1); *see also* 47 CFR 76.1002(e)(1)); (ii) exclusive contracts that the Commission deems to be in the public interest based on the factors set forth in the statute are not subject to the exclusive contract prohibition (*see* 47 U.S.C. 548(c)(4); *see also* 47 CFR 76.1002(c)(4)); and (iii) the exclusive contract prohibition will cease to be effective after October 5, 2002 unless the Commission finds that it "continues to be necessary to preserve and protect

competition and diversity in the distribution of video programming" (*see* 47 U.S.C. 548(c)(5); *see also* 47 CFR 76.1002(c)(6)). The public interest factors are: (i) The effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets; (ii) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable; (iii) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (iv) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and (v) the duration of the exclusive contract. *See* 47 U.S.C. 548(c)(4); *see also* 47 CFR 76.1002(c)(4). In areas that were not served by a cable operator as of October 5, 1992, the exclusive contract prohibition is absolute and is not subject to exceptions. *See* 47 U.S.C. 548(c)(2)(C).

23. Section 628 was intended to address Congress' concern that cable operators or their affiliates would engage in unfair acts, including acts involving programming they own, that impede competition in the video distribution market. *See* H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275; S. Rep. No. 102–92 (1991), at 26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159.

24. The 1992 Cable Act and its legislative history reflect Congressional findings that increased horizontal concentration of cable operators, combined with extensive vertical integration of cable operators and program suppliers, created an imbalance of power between incumbent cable operators and their multichannel competitors. *See* 1992 Cable Act § 2(a)(4); *id.* section 2(a)(5); S. Rep. No. 102–92 (1991), at 24–29, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1157–62; H.R. Rep. No. 102–628 (1992), at 41–43. Congress concluded that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over other MVPDs, including direct broadcast satellite ("DBS") providers. *See* 1992 Cable Act section 2(a)(5); S. Rep. No. 102–92 (1991), at 26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159; *1993 Program Access Order,* 8 FCC Rcd at 3365–67, ¶ 21.

25. Through Section 628, Congress intended to encourage entry and facilitate competition in the video distribution market by existing or potential competitors to traditional cable systems by, among other things, making available to those entities the programming they need to compete in the video distribution market. *See* H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275; S. Rep. No. 102–92 (1991), at 28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161. As discussed above, competitors to incumbent cable operators credit the program access rules promulgated under Sections 628(b) and (c) for the increased competition to incumbent cable operators that has emerged since passage of the 1992 Cable Act.

*B. Program Access Rules Applicable to Satellite-Delivered, Cable-Affiliated Programming*

26. As required by Section 628(c)(2), the Commission has adopted program access rules which specifically prohibit undue or improper influence (*see* 47 CFR 76.1002(a)), discrimination (*see* 47 CFR 76.1002(b)), and exclusive contracts (*see* 47 CFR 76.1002(c)-(e)) involving cable operators and cable-affiliated programmers that provide satellite-delivered programming. The Commission has also established a complaint process to address claims that a cable operator or a cable-affiliated programmer that provides satellite-delivered programming has violated the program access rules. *See* 47 CFR 76.7, 76.1003. Consistent with the definitions in the 1992 Cable Act, the Commission's rules define the "satellite cable programming" and "satellite broadcast programming" to which the rules apply to include only programming transmitted or retransmitted by satellite for reception by cable operators. *See* 47 CFR 76.1000(f), (h). The Commission has previously concluded that terrestrially delivered programming is outside of the direct coverage of Section 628(c)(2) and the Commission's program access rules under Section 628(c)(2). *See DIRECTV, Inc. and EchoStar Commc'ns Corp.* v. *Comcast Corp. et al.,* 15 FCC Rcd 22802, 22807 (2000), *aff'd sub nom. EchoStar Commc'ns Corp.* v. *FCC,* 292 F.3d 749 (D.C. Cir. 2002); *see also 2007 Program Access Order; 2002 Program Access Order.*

*C. NPRM*

27. In September 2007, the Commission adopted an *NPRM* seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming. The Commission noted examples of withholding of terrestrially delivered, cable-affiliated RSNs in San Diego and Philadelphia. The Commission stated its belief that "withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market." To address this concern, the *NPRM* sought comment on whether it would be appropriate to address the terrestrial loophole in the current program access rules pursuant to provisions other than Section 628(c)(2) of the Act, such as Section 628(b) of the Act. The *NPRM* also sought comment on whether extension of program access requirements to terrestrially delivered, cable-affiliated programming by way of a general statutory provision such as Section 628(b) would be barred by the more specific provision in Section 628(c)(2) that requires the promulgating of rules relating only to conduct involving satellite-delivered programming.

28. In their comments filed in response to the *NPRM,* non-incumbent MVPDs contend that the Commission has statutory authority to address the terrestrial loophole in the current rules. They also argue that applying the program access rules to terrestrially delivered, cable-affiliated programming would promote competition in the video distribution market and broadband deployment. Conversely, vertically integrated cable operators contend that the Commission does not have the statutory authority to address the terrestrial loophole. Moreover, they argue that the market for video distribution is competitive and that additional regulations are not justified.

*D. Pending Program Access Complaints*

29. Since adoption of the *NPRM* in September 2007, MVPDs have filed three program access complaints involving terrestrially delivered, cable-affiliated programming. First, in September 2008, AT&T filed a program access complaint alleging that Cox is withholding a terrestrially delivered RSN (Cox-4) from AT&T in San Diego. In March 2009, the Media Bureau issued a decision denying this complaint without prejudice because (i) there was no precedent finding that withholding of terrestrially delivered programming is a violation of Section 628(b); and (ii) the pending *NPRM,* rather than an adjudicatory proceeding, is the correct forum for addressing this issue. *See AT&T Services Inc. et al* v. *Coxcom, Inc.,* Memorandum Opinion and Order, 24 FCC Rcd 2859, 2864 (MB, 2009), *application for review pending.* AT&T has filed an Application for Review of this decision, which is pending. In July 2009, Verizon filed a program access complaint alleging that Cablevision is

withholding the terrestrially delivered HD feeds of its RSNs (MSG and MSG+) from Verizon in New York. In August 2009, AT&T filed a program access complaint against Cablevision making a similar claim regarding the withholding of the terrestrially delivered HD feeds of MSG and MSG+ from AT&T in Connecticut. The latter two complaints are pending.

30. We note that redacted versions of both of AT&T's complaints, the defendants' answers, AT&T's replies, and Cox's response to a declaration and survey included in AT&T's reply were filed in the record of this proceeding. We do not reach a decision in this *Order* on the merits of these complaints, including whether AT&T has demonstrated that the defendants' conduct violated Section 628(b).

**III. Discussion**

31. In Section A below, we begin with a discussion of our statutory authority under Section 628(b) to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. In Section B, we explain the bases for our conclusion that there is a need for Commission action to address such complaints. In Section C, we explain how addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment. In Section D, we set forth the requirements for complaints alleging such unfair acts. In Section E, we discuss how these rules will be applied to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions. In Section F, we establish procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

*A. The Commission's Statutory Authority To Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming*

32. In this Section, we discuss our statutory authority under Section 628(b) to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming in the circumstances described in that provision. Section 628(b) gives the Commission authority to promulgate rules applicable to unfair acts of cable operators (and certain other entities), including acts involving terrestrially delivered programming that have the purpose or effect of hindering significantly or preventing an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. *See* 47 U.S.C. 548(b). Section 628(c)(1) authorizes the Commission to prescribe regulations to specify particular conduct prohibited by Section 628(b). *See* 47 U.S.C. 548(c)(1). Our analysis reflects the Commission's interpretation of Section 628(b) in the *MDU Order,* where the Commission held that it has authority pursuant to Section 628(b) to adopt rules prohibiting exclusive contracts between cable operators and owners of multiple dwelling units ("MDUs") because those contracts prevent or significantly hinder the ability of competing MVPDs to provide all programming, including "satellite cable programming" and "satellite broadcast programming," in those markets. *See MDU Order,* 73 FR 1080, January 7, 2008, *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n* v. *FCC,* 567 F.3d 659 (D.C. Cir. 2009). This interpretation was recently upheld by a federal court of appeals. *See NCTA,* 567 F.3d 659. Several commenters argue that applying the program access rules to terrestrially delivered, cable-affiliated programming pursuant to Section 628(b) is consistent with the Commission's analysis in the *MDU Order.*

33. Vertically integrated cable operators note that Section 628(c)(2) requires the Commission to prohibit unfair acts involving only satellite-delivered programming and assert that this specific mandate precludes the Commission from addressing terrestrially delivered programming pursuant to the general authority provided in Section 628(b). While Section 628(c)(2) lists specific unfair acts that the Commission is required to address as "minimum contents" in its regulations, the United States Court of Appeals for the District of Columbia Circuit has explained that this list does not preclude the Commission from adopting rules to address additional conduct that also is prohibited under Section 628(b). *See NCTA,* 567 F.3d at 664–65. As the court stated, "Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission's power solely to that version of the problem." *Id.* at 665; *see also MDU Order* ("nothing in these provisions indicate that they were intended to establish the outer limits of the Commission's authority under Section 628(b)"). The court also held that (i) the title of Section 628(c)(2), "Minimum Contents of Regulations," demonstrates that the Commission's rules must at least address the unfair acts listed in Section 628(c)(2), but are not limited to addressing those acts (47 U.S.C. 548(c)(2); *see NCTA,* 567 F.3d at 665; *see also MDU Order*) and (ii) this interpretation of Section 628(b) is confirmed by Section 628(c)(1), which grants the Commission wide latitude to "specify particular conduct that is prohibited by [Section 628(b)]" (*see NCTA,* 567 F.3d at 665 (quoting 47 U.S.C. 548(c)(1)); *see also MDU Order*). The Commission too has explained previously that it is not limited to addressing only the specific unfair acts listed in Section 628(c)(2); rather, "Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action * * * should additional types of conduct emerge as barriers to competition." *See 1993 Program Access Order,* 8 FCC Rcd at 3374.

34. Here, the record reflects evidence that unfair acts involving terrestrially delivered, cable-affiliated programming have occurred; such conduct is likely to persist absent Commission action; and this conduct can have the effect in some cases of hindering significantly an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers and consumers. Thus, the plain language of Section 628(b), along with the authority provided by Section 628(c)(1) to adopt rules addressing conduct prohibited by Section 628(b), provide us with authority to adopt rules for the consideration of complaints alleging unfair acts with respect to terrestrially delivered, cable-affiliated programming.

35. Moreover, despite the principle of statutory interpretation that, by mentioning one thing, Congress may have implied the exclusion of another, an explicit congressional directive to ban certain activities does not prevent the agency "from taking similar action with respect to activities that pose a similar danger." *See Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.,* 940 F.2d 685, 694 (D.C. Circ. 1991)); *see also Oncale* v. *Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). The fact that Congress singled out a subset of practices with which it was particularly concerned in Section 628(c)(2) and required the Commission to focus on those practices expeditiously does not limit the broader rulemaking authority

expressly granted to the Commission through Sections 628(b) and 628(c)(1). Here, we find that unfair acts involving cable-affiliated programming, regardless of whether that programming is satellite-delivered or terrestrially delivered, pose the danger of significantly hindering MVPDs from providing satellite cable programming or satellite broadcast programming, thereby harming competition in the video distribution market and limiting broadband deployment. As the Commission recognized in the *Adelphia Order,* competitive harm from withholding of programming can occur regardless of how that programming is delivered to MVPDs. *See* 21 FCC Rcd 8203, 8276 (2006). Thus, we conclude that Congress' decision to require the Commission to adopt within 180 days program access rules to address unfair acts involving satellite-delivered, cable-affiliated programming does not preclude us from exercising our authority under Section 628(b) to take similar action where appropriate to address unfair acts involving terrestrially delivered, cable-affiliated programming.

36. Section 628(c)(2)(B)(iv) does not conflict with this interpretation. This provision provides that a cable-affiliated programmer that provides satellite-delivered programming does not violate the program access discrimination prohibition by entering into "an exclusive contract that is permitted under [Section 628(c)(2)(D)]." *See* 47 U.S.C. 548(c)(2)(B)(iv). The Commission has interpreted the phrase "an exclusive contract that is permitted under [Section 628(c)(2)(D)]" to mean an exclusive contract for which the Commission has granted an exception pursuant to the public interest factors listed in Section 628(c)(4). *See 1996 OVS Order,* 11 FCC Rcd 18223, 18319 (1996); *see also* 47 U.S.C. 548(c)(4); 47 CFR 76.1002(c)(4). The Commission has declined to interpret this phrase more broadly to mean any exclusive contract that is not expressly prohibited by Section 628(c)(2)(D). *See 1996 OVS Order,* 11 FCC Rcd at 18319.

37. We are aware that the former Cable Services Bureau stated that Section 628(b) may not be used categorically to preclude programming practices that are related to practices prohibited under Section 628(c)(2), but not themselves reached by Section 628(c)(2). *See Everest Midwest Licensee* v. *Kansas City Cable Partners,* 18 FCC Rcd 26679, 26683–84 (CSB, 2003); *RCN Telecom Servs.* v. *Cablevision Sys. Corp.,* 14 FCC Rcd 17093, 17105–06 (CSB, 1999); *EchoStar Commc'ns Corp.* v. *Comcast Corp.,* 14 FCC Rcd 2089, 2102 (CSB, 1999); *Dakota Telecom, Inc.* v. *CBS Broad., Inc.,* 14 FCC Rcd 10500, 10507–08 (CSB, 1999); *DIRECTV, Inc.* v. *Comcast Corp.,* 13 FCC Rcd 21822, 21837 (CSB, 1998). The Cable Services Bureau qualified these statements, however, by explaining that Section 628(b) may not be used "without more," "standing alone," or "on a per se basis" against conduct that is permitted under Section 628(c). *See Everest Midwest Licensee,* 18 FCC Rcd at 26683–84; *RCN,* 14 FCC Rcd at 17105–06; *EchoStar,* 14 FCC Rcd at 2103; *Dakota Telecom,* 14 FCC Rcd at 10507–08; *DIRECTV,* 13 FCC Rcd at 21838; *see also American Cable Co.* v. *TeleCable of Columbus, Inc.,* 11 FCC Rcd 10090, 10117 (CSB, 1996). In other words, complainants under Section 628(b) are required to show that a covered entity has engaged in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent an MVPD from providing satellite programming to consumers. Our holding today is consistent with that understanding.

38. Moreover, staff-level decisions are not binding on the Commission. *See Comcast Corp.* v. *FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008). The Commission itself has specifically held that unfair acts involving terrestrially delivered, cable-affiliated programming can be cognizable under Section 628(b). *See RCN Telecom Servs.* v. *Cablevision Sys. Corp.,* 16 FCC Rcd 12048, 12053 (2001) ("[T]here may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming. However, we agree with the Bureau that the facts alleged are not sufficient to constitute such a violation here."); *DIRECTV, Inc. and EchoStar Commc'ns Corp.* v. *Comcast Corp. et al.,* 15 FCC Rcd 22802, 22807 (2000) (same), *aff'd sub nom. EchoStar Commc'ns Corp.* v. *FCC,* 292 F.3d 749 (D.C. Cir. 2002); *1996 OVS Order,* 11 FCC Rcd at 18325 ("[W]e do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."). In any event, to the extent prior decisions could be read as precluding the consideration of program access complaints involving terrestrially delivered, cable-affiliated programming under Section 628(b), we reject that view. Section 628(b), by its plain language, allows the Commission to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis where the other elements of Section 628(b) are satisfied.

39. The legislative history of the 1992 Cable Act also is consistent with our decision to adopt rules addressing unfair acts involving terrestrially delivered, cable-affiliated programming. For example, the Conference Report on Section 628 specifically states an expectation that the Commission will "address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies." H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 91, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273; *see also MDU Order.* The Conference Report further indicates "that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable." H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 91, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1273. The action we take today fulfills this Congressional mandate by providing a process by which unfair acts involving terrestrially delivered, cable-affiliated programming may be addressed, thereby fostering competition in the video distribution market.

40. We recognize that the Senate version of what became Section 628(c)(2) would have pertained to all programmers, including those that provide terrestrially delivered programming, but that language was, without explanation, removed in the final version of the bill. The Senate version of the legislation that became Section 628(c)(2) would have applied the program access provisions to all "national and regional cable programmers who are affiliated with cable operators." H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 91–93, *reprinted in* 1992 U.S.C.C.A.N. at 1273–75; *see also* S. Rep. No. 102–92 (1991), at 64, 77–78, 121–22, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1197, 1210–11. The House amendment, by contrast, expressly limited the provisions to "satellite cable programming vendor[s] affiliated with a cable operator." *See* H.R. Rep. No. 102–862 (1992) (Conf. Rep.), at 91–93, *reprinted in* 1992 U.S.C.C.A.N. at 1273–75. The Conference agreement adopted the House version with amendments. *See id.*

41. Contrary to the claims of cable operators, however, we do not find this unexplained change in Section 628(c)(2) relevant in determining Congress' intent with respect to Section 628(b)'s broadly worded prohibition. *See, e.g., Drummond Coal Co.* v. *Watt,* 735 F.2d 469, 474 (11th Cir. 1984) ("Unexplained changes made in committee are not reliable indicators of congressional intent."), *quoted in Save Our Cumberland Mountains, Inc.* v. *Lujan,* 963 F.2d 1541, 1548 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 911 (1993); *Trailmobile Co.* v. *Whirls,* 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." (citation omitted)); *see also Mead Corp.* v. *Tilley,* 490 U.S. 714, 723 (1989).

42. The change related specifically to the minimum contents of the program access rules that were required to be issued under Section 628(c)(2). Congress did not make any similar limiting amendment to Section 628(b) during its deliberations in 1992, and the inclusive language of Section 628(b) therefore is controlling here, just as it was in the *MDU Order.* Removal of the references to all "national and regional cable programmers" in the final version of the bill relate to Section 628(c)(2), which is thus expressly limited to satellite-delivered programming. We do not believe that this change to Section 628(c)(2) indicates a Congressional intent to limit the broad statutory language of Section 628(b), which contains no such limitation. We find no significance in earlier characterizations of the legislative history, such as that presented in the *2002 Program Access Order,* which viewed the removal of terrestrially delivered programming from the final version of the bill as an "express decision by Congress to limit the scope of the program access provisions to satellite delivered programming." Those discussions were considering the scope of Section 628(c)(2), not Section 628(b), and thus did not address the issue we address here.

43. AT&T contends that Congress chose the term "satellite cable programming" because Congress was unaware of, and thus had no reason to consider, unfair acts involving terrestrially delivered programming. While Comcast notes some examples of terrestrially delivered programming that existed at the time the 1992 Cable Act was drafted, we agree with AT&T's broader point that "there is nothing to suggest that the phrase 'satellite cable programming' was anything other than a statement of the nature of the specific problem to be addressed at that time," and that Congress could not be expected to predict future trends in programming delivery.

*B. The Need for Commission Action to Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming*

44. Having established that we possess authority to address unfair acts involving terrestrially delivered, cable-affiliated programming, in this Section we discuss whether there is a need for such action. As discussed below, we find three reasons for taking action in this area: (i) Cable operators continue to have an incentive and ability to engage in unfair acts or practices involving their affiliated programming, regardless of whether this programming is satellite-delivered or terrestrially delivered; (ii) our judgment regarding this incentive and ability is supported by real-world evidence that vertically integrated cable operators have withheld certain terrestrially delivered, cable-affiliated programming from their MVPD competitors; and (iii) there is evidence that, in some cases, this withholding may significantly hinder MVPDs from providing satellite cable programming and satellite broadcast programming to subscribers.

1. Incentive and Ability to Engage in Unfair Acts

45. Cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market. *See 2007 Program Access Order* (concluding that vertically integrated cable operators continue to have the ability to withhold affiliated programming from competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected absent extension of the ban on exclusive contracts); *see also id.* (concluding that vertically integrated cable operators continue to have the incentive to withhold affiliated programming from competitive MVPDs); *Adelphia Order,* 21 FCC Rcd at 8271; *2002 Program Access Order.* This incentive and ability do not vary based on whether the cable-affiliated programming is delivered to cable operators by satellite or by terrestrial means. A vertically integrated cable operator may raise the costs of its MVPD competitors by increasing the price of its affiliated programming or may choose not to sell its affiliated programming to rival MVPDs. This strategy is commonly referred to as the "raising rivals' costs" theory. *See Adelphia Order,* 21 FCC Rcd at 8256 (citing Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach,* 63 Antitrust L.J. 513, 523–27 (1995)); *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 Yale L.J. 209, 234–38 (1986). As the Commission noted in the *Adelphia Order,* "the integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete." 21 FCC Rcd at 8256.

46. Unfair acts involving cable-affiliated programming may harm the ability of MVPDs to compete with incumbent cable operators, thereby resulting in less competition in the marketplace to the detriment of consumers. For example, the Commission has noted previously that, although competitors have entered the video distribution market, there is evidence that cable prices have risen in excess of inflation. *See 2007 Program Access Order* (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* Report on Cable Industry Prices, 21 FCC Rcd 15087, 15087–88 (2006)); *see also Cable Price Report,* 24 FCC Rcd 259, 260 (MB, 2009) (concluding that from 1995 to 2008, the price of expanded basic service has grown from $22.35 to $49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period).

47. In the *2007 Program Access Order,* the Commission analyzed the incentive and ability of cable operators and their affiliates to engage in one type of unfair act—withholding of affiliated programming from rival MVPDs. If the vertically integrated cable operator engages in withholding, it can recoup profits lost at the upstream level (*i.e.,* by licensing programming) by increasing the number of subscribers of its downstream MVPD division. *See Adelphia Order,* 21 FCC Rcd at 8256; *see also 2007 Program Access Order; 2002 Program Access Order.* The Commission explained that, particularly "where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy." *2007 Program Access Order.* Although the cable

industry's share of MVPD subscribers nationwide has decreased since the 1992 Cable Act was passed, the Commission in the *2007 Program Access Order* concluded that the cable industry's 67 percent share of MVPD subscribers nationwide remained sufficient to enable vertically integrated cable firms to make withholding a profitable strategy. There is no evidence in this proceeding that market shares have changed materially since that time. To the contrary, the cable industry has elsewhere stated that its share of MVPD subscribers nationwide has declined only slightly since the *2007 Program Access Order,* to approximately 63.5 percent at the end of 2008. Moreover, the Commission observed that the regional market shares of cable operators sometimes exceed the national average. This makes withholding of local and regional programming, which is often terrestrially delivered and therefore beyond the reach of the program access rules, potentially an even more profitable strategy. *See 2007 Program Access Order* ("the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming").

48. NCTA and Comcast state that cable operators are losing subscribers to competitors. CA2C disagrees, noting that "major cable operators dominate" the MVPD market, with regional market shares of 65 percent to 90 percent. Based on data from Nielsen Media Research, as of July 2009, the share of MVPD subscribers held by wired cable operators exceeds 70 percent in 78 out of 210 DMAs. *See* DMA Household Universe Estimates July 2009: Cable And/Or ADS (Alternate Delivery Systems), *http://www.tvb.org/nav/build_frameset.asp* (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink). These include 27 of the Top 50 most-populated DMAs and the following 13 of the Top 20 most-populated DMAs: New York (No. 1; 88.5 percent cable market share); Chicago (No. 3; 77.1 percent cable market share); Philadelphia (No. 4; 83 percent cable market share); San Francisco-Oakland-San Jose (No. 6; 72.9 percent cable market share); Boston (No. 7; 87.5 percent cable market share); Washington, DC (No. 9; 72.2 percent cable market share); Detroit (No. 11; 76.3 percent cable market share); Tampa-St. Pete (No. 13; 84.2 percent cable market share); Seattle (No. 14; 78.9 percent cable market share); Minneapolis-St. Paul (No. 15; 70.3 percent cable market share); Miami-Ft. Lauderdale (No. 16; 70.4 percent cable market share); Cleveland-Akron (No. 17; 77.1 percent cable market share); Orlando (No. 19; 76.7 percent cable market share). We note that the data refer to the market share held by "wired cable operators," and thus reflect market share data for incumbent cable operators as well as cable overbuilders. Given the minimal market share held by overbuilders, however, we believe the data provide a useful estimate of the market share held by incumbent cable operators. *See 13th Annual Report,* 24 FCC Rcd 542, 591 and 684, Table B–1 (2009) (concluding that broadband service providers, most of which are overbuilders that compete with incumbent cable operators, serve only 1.46 percent of MVPD subscribers). While Cox notes that it has met the "effective competition" test in certain markets, that test is not relevant here. The Media Bureau's review of data from Cox's effective competition petitions indicated that the DBS penetration rates in nine out of 54 San Diego franchise areas served by Cox exceeded 15 percent, and that a local exchange carrier ("LEC") offered service in other franchise areas. *See Cox Communications San Diego: Petition for Determination of Effective Competition in 27 Communities in California,* 23 FCC Rcd 7106, 7110–11, App. A, B (MB, 2008). These numbers do not demonstrate that the entire San Diego DMA is competitive nor that this level of competition deprives cable operators of the incentive to withhold or to take other anticompetitive actions with their affiliated programming.

49. The Commission has also found that the grouping of commonly owned cable systems into regional clusters enhances the ability and incentive of vertically integrated cable firms to engage in unfair acts with their affiliated programming. *See 2007 Program Access Order.* Recent data indicates that over 77 percent of cable subscribers are served by systems that are part of regional clusters. *See 13th Annual Report,* 24 FCC Rcd at 684 (Table B–1) and 686 (Table B–2). In the *2007 Program Access Order,* the Commission relied on data indicating that the percentage of cable subscribers that are served by systems that are part of regional clusters was between 85 and 90 percent. Commenters explain that clustering of a cable operator's systems makes terrestrial delivery of affiliated regional programming more feasible. And the Commission has previously demonstrated through empirical analyses that clustering enhances the potential profitability of withholding regional programming from rival distributors. *See 2007 Program Access Order* ("[I]n many cities where cable [multiple system operators ("MSOs")] have clusters, the market penetration of competitive MVPDs is much lower and cable market penetration is much higher than their nationwide penetration rates. . . . As a result, the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming. Moreover, the affiliated cable operator will obtain a substantial share of the benefits of a withholding strategy because its share of subscribers within the cluster is likely to be inordinately high."); *see id.* (concluding that withholding of an RSN would be profitable in a significant range of cases).

50. The Commission has also concluded that the recent emergence of new wireline entrants in the video distribution market enhances the incentive of incumbent cable operators to engage in unfair acts with their affiliated programming. *See id.* Data indicate that DBS operators do not constrain the price of cable service to the extent that wireline MVPDs do, thereby implying that incumbent cable operators perceive wireline MVPDs as a more significant competitive threat. *See Cable Price Report,* 24 FCC Rcd at 261. In addition, unlike DBS operators, wireline MVPDs can offer combinations of video, voice, and data services similar to those that incumbent cable operators offer to customers (the "triple play"), thus posing a greater competitive threat than DBS to cable operators. (The Commission has noted a "shift from competition between stand-alone services to that between service bundles." *See Promotion of Competitive Networks in Local Telecommunications Markets,* Report and Order, 23 FCC Rcd 5385, 5388–89 (2008). Although DBS operators offer triple play packages to their customers, they partner with outside vendors to do so.) Moreover, because recent wireline entrants have relatively small subscriber bases in most areas at this time, withholding affiliated programming from these new entrants would not cause programmers to lose a significant current source of revenue. *See 2007 Program Access Order* ("Because recent entrants have minimal subscriber bases at this time, the costs that a cable-affiliated programmer would incur from withholding programming from recent entrants are negligible."); *see also 13th Annual Report,* 24 FCC Rcd at 591 and 684, Table B–1 (concluding that broadband

service providers, most of which are overbuilders that compete with incumbent cable operators, serve only 1.46 percent of MVPD subscribers).

51. In the *2007 Program Access Order,* the Commission noted the argument that, because of the non-discrimination provision of the program access rules, a vertically integrated programmer that withholds programming from one competitive MVPD in a market (such as a new entrant with a minimal subscriber base) would generally need to withhold the programming from all other competitive MVPDs in the market (such as an established competitor with a significant number of subscribers), thereby increasing the foregone revenues resulting from a withholding strategy. This condition does not apply in the case of terrestrially delivered, cable-affiliated programming, however, because the program access rules do not currently apply to this programming. Thus, the non-discrimination provision of the program access rules applicable to satellite-delivered, cable-affiliated programming does not preclude a vertically integrated programmer from withholding its terrestrially delivered programming from a new entrant in a market but providing the same programming to established competitors in the market. Moreover, even if the non-discrimination rule applied to terrestrially delivered, cable-affiliated programming, the Commission nonetheless found in the *2007 Program Access Order* that this rule would not deter withholding because the long-term benefits to the vertically integrated cable operator would outweigh any short-term costs.

2. Evidence of Unfair Acts

52. Our judgment that cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming, including terrestrially delivered programming, is supported by real-world evidence. Because the program access rules currently apply only to satellite-delivered programming, terrestrial distribution allows a cable-affiliated programmer to bypass the program access rules. The record here, as well as our discussion in the *2007 Program Access Order,* reflects substantial evidence that cable firms withhold affiliated programming from competitors when not barred from doing so. Moreover, the record reflects that terrestrial distribution is becoming more cost effective, and that its use is likely to continue and possibly increase in the future. Below, we provide several examples of withholding of terrestrially delivered, cable-affiliated programming. Although we provide examples of terrestrially delivered, cable-affiliated programming networks that have been withheld from competitive MVPDs, we do not conclude in this *Order* that the withholding of any of these networks is currently significantly hindering or preventing any MVPD from providing satellite cable programming or satellite broadcast programming in violation of Section 628(b). Rather, that would be a point of fact to be proven or rebutted in each case. As discussed below, we will consider on a case-by-case basis whether an unfair act involving terrestrially delivered, cable-affiliated programming is significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming.

53. *HD Feeds of MSG and MSG+.* Cablevision has withheld the terrestrially delivered HD feeds of its affiliated MSG and MSG+ RSNs from certain competitors in New York City, Buffalo, and Connecticut. *See 2007 Program Access Order.* Consumers Union states that, even though Cablevision does not provide cable service in Buffalo, Cablevision has "chosen to make this content available only to select MVPDs and has denied access to Verizon."

54. *Cox-4 San Diego.* Cox has withheld the terrestrially delivered Cox-4 channel, which has exclusive rights to the San Diego Padres baseball games, from DIRECTV, EchoStar, and AT&T. *See 2007 Program Access Order.* As discussed above, the Media Bureau has denied without prejudice a program access complaint regarding access to this programming because (i) there is no precedent finding that withholding of terrestrially delivered programming is a violation of Section 628(b); and (ii) the pending rulemaking, rather than an adjudicatory proceeding, is the correct forum for addressing this issue. *See AT&T* v. *Coxcom,* 24 FCC Rcd at 2864.

55. *Comcast SportsNet Philadelphia.* Comcast has withheld this terrestrially delivered RSN, which carries regional professional sports programming in Philadelphia, from DBS firms. *See Adelphia Order,* 21 FCC Rcd at 8276; *see also 2007 Program Access Order.* This RSN was the subject of previous program access complaints, which were denied because (i) the programming was terrestrially delivered and thus beyond the scope of the program access rules established pursuant to Section 628(c)(2) and (ii) there were not sufficient facts alleged to find that Comcast delivered the programming terrestrially to evade the program access rules. *See DIRECTV, Inc.* v. *Comcast Corp.,* 13 FCC Rcd 21822 (CSB, 1998) and *EchoStar Commc'ns Corp.* v. *Comcast Corp.,* 14 FCC Rcd 2089 (CSB, 1999), *aff'd., DIRECTV, Inc. and EchoStar Commc'ns Corp.* v. *Comcast Corp. et al.,* 15 FCC Rcd 22802 (2000), *aff'd EchoStar Commc'ns Corp.* v. *FCC,* 292 F.3d 749 (D.C. Cir. 2002). As a result of merger conditions adopted in the *Adelphia Order,* Comcast SportsNet Philadelphia is currently subject to the program access rules applicable to satellite-delivered programming with respect to some but not all of the competing MVPDs in Philadelphia. *See Adelphia Order,* 21 FCC Rcd at 8276 ("[W]e do not require that Comcast SportsNet Philadelphia be subject to [the program access] conditions to the extent it is not currently available to MVPDs. With regard to MVPDs that currently have contracts for SportsNet Philadelphia, both the program access and arbitration conditions will apply as set forth above.").

56. *Sports Programming in New York City.* The Commission previously noted evidence that Cablevision withheld certain sports programming from RCN after Cablevision revised its distribution system from satellite to terrestrial delivery. *See 2007 Program Access Order.* RCN's program access complaint regarding this dispute was denied because (i) the programming was terrestrially delivered and thus beyond the scope of the program access rules established pursuant to Section 628(c)(2) and (ii) Cablevision did not change its distribution system from satellite to terrestrial delivery to evade the Commission's rules. *See RCN Telecom Servs.* v. *Cablevision Sys. Corp.,* 14 FCC Rcd 17093 (CSB, 1999), *aff'd RCN Telecom Servs.* v. *Cablevision Sys. Corp.,* 16 FCC Rcd 12048 (2001).

57. *New England Cable News.* The Commission previously noted claims that this terrestrially delivered, Comcast-affiliated regional news network had been withheld temporarily from RCN. *See 2007 Program Access Order.*

58. *CN8—The Comcast Network.* The Commission previously noted claims that this terrestrially delivered, Comcast-affiliated local news and information channel is available only to Comcast and Cablevision subscribers and is withheld from competitors to incumbent cable operators. *See id.*

59. *iN DEMAND.* The Commission previously noted claims that this terrestrially delivered, cable-affiliated network has been withheld from certain MVPD competitors. *See id.*

3. Evidence of the Impact of Unfair Acts

60. As discussed below, Commission action to address unfair acts involving

terrestrially delivered, cable-affiliated programming is also needed because (i) there is evidence suggesting that such conduct has significantly hindered MVPDs from providing satellite cable programming and satellite broadcast programming in some cases and (ii) by significantly hindering MVPDs from providing video programming to subscribers, such conduct may significantly hinder the ability of competitive MVPDs to provide broadband services, particularly in rural areas.

*a. Impact on Competition in the Video Distribution Market*

61. Our previous decisions, as well as the record here, demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming may "hinder significantly" MVPDs from providing satellite cable programming and satellite broadcast programming in some cases, thereby harming competition in the video distribution market. *See 2007 Program Access Order; Adelphia Order,* 21 FCC Rcd at 8271. We note that AT&T and Verizon have submitted studies (some of which contain redacted information) and other evidence in the record of this proceeding to support their view that withholding of the MSG HD and Cox-4 networks has had the purpose or effect that triggers Section 628(b). These studies and other evidence were submitted previously in pending complaint proceedings. We will assess the merits of those studies and other evidence in addressing the relevant complaints.

62. In 2006, the Commission performed a regression analysis which concluded that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been. *See Adelphia Order,* 21 FCC Rcd at 8271; *see also 2007 Program Access Order.* The regression analysis also concluded that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than it otherwise would have been. *See Adelphia Order,* 21 FCC Rcd at 8271; *2007 Program Access Order.* This provides evidence that unfair acts involving terrestrially delivered, cable-affiliated programming can have the effect in some cases of significantly hindering MVPDs from providing satellite cable programming and satellite broadcast programming.

63. The empirical model was based on the Wise and Duwadi model, which examines DBS penetration and the variables that affect it. *See* Andrew S. Wise and Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks,* 1 J. COMPETITION L. & ECON. 679 (2005). The data used in the analysis came from the Commission's 2005 Cable Price Survey, Nielsen Media Research, and Comcast and Time Warner filings. *See Adelphia Order,* 21 FCC Rcd at 8344–47, App. D. In the *2007 Program Access Order,* the Commission responded to and refuted criticisms of the Commission's regression analysis.

64. We note that more than three years have passed since the Commission performed its regression analysis in the *Adelphia Order* regarding the impact of withholding of Comcast SportsNet Philadelphia and Cox-4 on the market shares of DBS operators in Philadelphia and San Diego, respectively. Commenters claim that there have been important developments in the video distribution markets in Philadelphia and San Diego since this time. Our reliance here on the Commission's analysis in the *Adelphia Order* to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming can significantly hinder MVPDs from providing video service in some cases should not be read to imply that withholding of Comcast SportsNet Philadelphia or Cox-4 is currently significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming in Philadelphia or San Diego, respectively. Rather, as discussed below, we establish a rebuttable presumption that an unfair act involving certain terrestrially delivered, cable-affiliated RSNs has the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming. A defendant to a program access complaint alleging an unfair act involving an RSN will have the opportunity to rebut this presumption.

65. While the Commission concluded in the *1998 Program Access Order* (63 FR 45740, August 27, 1998) that the record developed in that proceeding did not demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming were having a "significant anticompetitive effect," that conclusion was based on the limited data that were available more than ten years ago. (In that decision, the Commission also noted that Congress was considering legislation at the time which, if enacted, would "introduce important changes to the program access provisions, including clarification of the Commission's jurisdiction over terrestrially-delivered programming." The Commission, however, never stated or implied that it did not have jurisdiction over such programming absent such clarification.) We now have evidence that unfair acts involving terrestrially delivered, cable-affiliated programming may well have the effect in some cases of significantly hindering MVPDs from providing all programming to subscribers and consumers. Moreover, while the Commission concluded in the *1998 Program Access Order* that the record developed in that proceeding did not demonstrate that programming was being shifted from satellite to terrestrial delivery, the record here demonstrates that the MVPD marketplace has evolved, such that terrestrial distribution is becoming more cost effective and its use is likely to increase for new as well as established programming networks. Indeed, the record reflects that competitively significant networks, such as RSNs, are being delivered terrestrially today.

66. Comcast argues that the percentage of vertically integrated programming networks affiliated with a cable operator has dropped from 57 percent in 1992 to less than 15 percent today and contends that no program owner has market power. Moreover, cable operators contend that the digital transition will likely foster the development of more programming and that Internet programming is starting to develop as a competitive alternative. In addition, NCTA notes that competitors to incumbent cable operators market themselves as offering superior programming, and contends that such marketing undermines any justification for "retention of the existing regulation of cable-affiliated programming, let alone expansion of those regulations."

67. Accordingly, vertically integrated cable operators argue that MVPDs are not dependent on vertically integrated cable programming because multiple programming options exist. But that is not always the case. As the Commission concluded in the *2007 Program Access Order,* cable operators own programming for which there may be no good substitutes, and this "must-have" programming is necessary for viable competition in the video distribution market. The Commission explained that this includes both satellite-delivered and terrestrially delivered programming. *See 2007 Program Access Order* (discussing withholding of terrestrially delivered, cable-affiliated RSNs in Philadelphia and San Diego). As the

Commission stated in the *2002 Program Access Order,* "cable programming—be it news, drama, sports, music, or children's programming—is not akin to so many widgets." The salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators, but rather the popularity of the particular programming that is withheld and how the inability of competitive MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service. *See 2007 Program Access Order.*

68. Cable operators claim that unfair acts involving terrestrially delivered, cable-affiliated programming have not significantly hindered their competitors from providing satellite cable programming or satellite broadcast programming. For example, some commenters note that DBS operators continue to attract subscribers in San Diego and Philadelphia, despite the fact that cable operators in those markets have withheld the local RSN from the DBS operators. Cox and Cablevision also note that competitors to incumbent cable operators have entered the video distribution market despite the terrestrial loophole. Other commenters contend that withholding of certain terrestrially delivered, cable-affiliated programming, such as local news and community programming, does not raise competitive concerns. One new entrant MVPD, Verizon, urged the Commission to extend the program access rules only to (i) terrestrially delivered RSNs; and (ii) terrestrially delivered HD feeds of programming that is otherwise satellite-delivered.

69. We believe that the cable operators' general, sweeping claims are refuted by the Commission's conclusion in the *Adelphia Order* that DBS market penetration was significantly reduced as a result of the denial of access to certain terrestrially delivered, cable-affiliated programming. *See 2007 Program Access Order; Adelphia Order,* 21 FCC Rcd at 8271. We do not believe, however, that significant hindrance will result in every case. The Commission concluded in the *Adelphia Order,* based on the record evidence in that case, that lack of access to certain terrestrially delivered RSNs had a significant competitive impact. *See* 21 FCC Rcd at 8271 (concluding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been; concluding that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than what it otherwise would have been); *see also 2007 Program Access Order.* Lack of access to certain other programming, however, did not have a significant hindering effect. *See Adelphia Order,* 21 FCC Rcd at 8271–72 (concluding that withholding of a terrestrially delivered RSN in Charlotte did not show a statistically significant effect on predicted market share, and noting that the RSN showed the games of the Charlotte Bobcats, a relatively new team that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs); *id.* at 8279 (concluding that the record did not indicate that an MVPD's lack of access to terrestrially delivered non-sports regional programming would harm competition or consumers).

70. Thus, we believe that the potential impact on competition in some cases justifies a case-by-case consideration of the competitive impact of unfair acts involving specific terrestrially delivered, cable-affiliated programming. Rather than adopting a general conclusion about the effect of these unfair acts, we believe that case-by-case consideration of the impact on competition in the video distribution market is necessary to address whether unfair practices significantly hinder competition in particular cases.

71. We note that the Commission adopted a different approach in the *MDU Order,* where it concluded that it would be unnecessarily burdensome for the Commission and parties to assess exclusive contracts between cable operators and MDU owners on a case-by-case basis. In that case, however, the Commission explained that "exclusivity clauses protect cable operators from competition in MDUs from new entrants into the MVPD business." By definition, exclusive agreements in the MDU context prevent competitors from providing service. *See also NCTA,* 567 F.3d at 664 ("cable operators execute them precisely so that they can be the sole company serving a building. . ."). Thus, the Commission categorically proscribes such agreements. In contrast, while some unfair acts involving terrestrially delivered, cable-affiliated programming can and historically have significantly hindered MVPDs from providing satellite cable programming and satellite broadcast programming, the record here indicates that others may not. Accordingly, a case-by-case approach to implementing Section 628(b) is necessary in the present context based on the current record, whereas it was not necessary in the *MDU Order.* We note, however, that on an appropriate record the Commission would have authority to adopt a per se ban on particular unfair acts prohibited by Section 628(b). *See* 47 U.S.C. 548(b), (c)(1); *NTCA,* 567 F.3d 659. Nothing in this *Order* forecloses the Commission from adopting such a per se ban on unfair acts involving terrestrially delivered, cable-affiliated programming in the future. We will continue to monitor marketplace developments regarding terrestrially delivered, cable-affiliated programming, as well as the impact of the rules adopted in this *Order* on potential complainants. Based on these developments, we may initiate a new proceeding in the future that explores the adoption of a per se ban on unfair acts involving terrestrially delivered, cable-affiliated programming or certain classes of such programming.

b. Impact on Ability To Provide Broadband Services

72. Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming will have additional benefits, not specifically envisioned by Congress in 1992, because such acts have the potential to limit the ability of MVPDs to provide broadband services, particularly in rural areas. The Commission has previously concluded that a wireline firm's decision to deploy broadband is linked to its ability to offer video. *See Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132–33 (2006), *aff'd., Alliance for Community Media* v. *FCC,* 529 F.3d 763 (6th Cir. 2008). Thus, by impeding the ability of MVPDs to provide video service, unfair acts involving terrestrially delivered, cable-affiliated programming can also impede the ability of MVPDs to provide broadband services. Allowing unfair acts involving terrestrially delivered, cable-affiliated programming to continue where they have this effect would undermine the goal of promoting the deployment of advanced services that Congress established as a priority for the Commission. *See* Telecommunications Act of 1996, Public Law 104–104, section 706, 110 Stat. 56, 153 (codified at 47 U.S.C. 157 note). This secondary

effect heightens the urgency for Commission action.

73. We disagree with Cablevision's contention that addressing the terrestrial loophole will not impact broadband deployment because AT&T and Verizon have already invested in broadband infrastructure. The record here contains no evidence that AT&T and Verizon have already deployed broadband networks throughout their service territories or that these providers will not face decisions regarding whether to upgrade existing networks. Moreover, Congress directed the Commission to promote the deployment of broadband throughout the nation, including in markets outside of the service areas of AT&T and Verizon. *See* American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009) (authorizing the Commission to create the National Broadband Plan that "shall seek to ensure that all people of the United States have access to broadband capability"); Telecommunications Act of 1996, Public Law 104–104, section 706, 110 Stat. 56, 153 (codified at 47 U.S.C. 157 nt. (2008)) (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

c. Impact on Investment in Programming and Product Differentiation

74. Vertically integrated cable operators argue that the Commission should refrain from addressing denials of terrestrially delivered, cable-affiliated programming because exclusive distribution contracts for this programming can promote investment in programming and product differentiation. Advance/Newhouse notes that it has developed regional non-sports programming that is terrestrially delivered and therefore not subject to the program access rules applicable to satellite-delivered programming. Advance/Newhouse states that its affiliated cable operators offer this programming exclusively, thereby differentiating their service offerings from MVPD competitors. Advance/Newhouse contends that applying program access requirements to this programming would force its affiliated cable operators to share this programming with their competitors, thereby eliminating any economic incentive to create this programming. Advance/Newhouse states that it is unlikely to continue investing in such programming unless its affiliated cable operators can offer the programming on an exclusive basis.

75. We note that the Commission in the *2007 Program Access Order* found unpersuasive arguments that the program access rules, including the exclusive contract prohibition, have reduced the incentives for cable operators and competitive MVPDs to create and invest in programming. While cable operators claim without empirical support that regional networks are less likely to be created if they are subject to the complaint procedure established in this *Order,* we find no basis for assuming that the impact of the case-by-case approach adopted here on the incentives to create programming will be different than the impact of the per se rule applicable to satellite-delivered programming. The Commission noted that the number of vertically integrated satellite-delivered national programming networks has in fact more than doubled since 1994 when the rule implementing the exclusive contract prohibition took effect. *See 2007 Program Access Order.* While evidence was submitted in that proceeding that the percentage of vertically integrated satellite-delivered national programming networks had decreased over time, competitive MVPDs characterized the decrease as "meaningless because it is attributable to an increase in the number of total programming networks available, most of which they contend have minimal subscriber bases and are targeted towards niche markets." *See id.* Competitive MVPDs argued that the more relevant fact was the control of cable MSOs over "must have" programming, access to which is necessary to compete in the video distribution market. *See id.* The Commission agreed: "What is most significant to our analysis is not the percentage of total available programming that is vertically integrated with cable operators, but rather the popularity of programming that is vertically integrated and how the inability of competitive MVPDs to access this programming will affect the preservation and protection of competition in the video distribution marketplace." *See id.* A similar analysis applies to the present matter, given our goal of increasing competition and diversity in the video distribution market. In addition, while vertically integrated cable operators claim that exclusive deals and other unfair acts are justified because they allow a cable operator to differentiate its services from other MVPDs, Section 628(b) specifically precludes such acts where they have the purpose or effect set forth in Section 628(b).

76. In sum, Sections 628(b) and 628(c)(1) of the Act give the Commission authority to address unfair acts of cable operators that have the purpose or effect of hindering significantly or preventing any MVPD from providing "satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. 548(b); *see* 47 U.S.C. 548(c)(1). The focus of the statute is not on the ability of an MVPD to provide a particular terrestrially delivered programming network, but on the ability of the MVPD to compete in the video distribution market by selling satellite cable and satellite broadcast programming to subscribers and consumers. To be sure, unfair acts involving terrestrially delivered, cable-affiliated programming generally do not absolutely bar an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. For example, an incumbent cable operator's exclusive contract with a terrestrially delivered, cable-affiliated RSN does not totally preclude a rival MVPD from providing other programming, including satellite cable programming and satellite broadcast programming, to subscribers or consumers.

77. As discussed above, however, in some cases the effect of denying an MVPD the ability to provide certain terrestrially delivered, cable-affiliated programming may be to significantly hinder the MVPD from providing video programming in general, including satellite cable programming and satellite broadcast programming, as well as terrestrially delivered programming. *See 2007 Program Access Order; Adelphia Order,* 21 FCC Rcd at 8271. The result of this conduct may be to discourage MVPDs from entering new markets or to limit the ability of MVPDs to provide a competitive alternative to the incumbent cable operator. The reduction in robust competition in the video distribution market that results may allow cable operators to raise rates and to refrain from innovating, thereby adversely impacting consumers. Consumers Union, for instance, asserts that large cable operators use the terrestrial loophole "to hold consumers hostage * * *." This is consistent with the Commission's analysis in the *MDU Order.* In that decision, the Commission found that exclusivity clauses significantly hinder MVPDs from providing satellite cable programming and satellite broadcast programming throughout a market, including to subscribers who do not reside in MDUs, because exclusivity clauses "deter[ ]

new entry into the MVPD market in many areas because they put a significant number of new customers off limits to new entrants." *MDU Order* ("Even if exclusivity clauses do not completely bar new entrants from the MVPD market everywhere, they foreclose new entrants from many millions of households, a significant part of the national marketplace. Such clauses could therefore deter new entrants from attempting to enter the market in many areas.").

78. In addition to satisfying the plain language of Section 628(b), our action here will also further the goals established by Congress in Sections 628(a) and 628(c)(1) of the Act. *See* 47 U.S.C. 548(a), (c)(1); *1993 Program Access Order,* 8 FCC Rcd at 3360. First, our action will increase competition and diversity in the video distribution market by providing MVPDs with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer. *See* 47 U.S.C. 548(a), (c)(1). Second, our action will increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and unserved areas by eliminating a barrier to entry in the video distribution market. *See* 47 U.S.C. 548(a). Third, our action will spur the development of communications technologies by promoting the provision of broadband services by MVPDs. *See* 47 U.S.C. 548(a), (c)(1).

*C. Constitutional Issues*

79. We conclude that addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment. As the D.C. Circuit explained in rejecting a facial challenge to the constitutionality of the program access provisions dictated by Section 628(c)(2) and applicable to satellite-delivered, cable-affiliated programming, these provisions will survive intermediate scrutiny if they "further[ ] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Time Warner Entertainment Co. L.P.* v. *FCC,* 93 F.3d 957, 978 (D.C. Cir. 1996) (quoting *Turner Broadcasting System, Inc.* v. *FCC,* 512 U.S. 622, 662 (1994) (quoting *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968))). We conclude that the rules we adopt today with respect to terrestrially delivered, cable-affiliated programming comport with the First Amendment.

80. First, in *Time Warner,* the court found that the governmental interest Congress intended to serve in enacting the program access provisions was "the promotion of fair competition in the video marketplace," and that this interest was substantial. *Id.* Moreover, one of Congress' express findings in enacting the 1992 Cable Act was that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." 1992 Cable Act, § 2(a)(6). Additionally, the court noted Congress' conclusion that "the benefits of these provisions—the increased speech that would result from fairer competition in the video programming marketplace—outweighed the disadvantages [resulting in] the possibility of reduced economic incentives to develop new programming." *Time Warner,* 93 F.3d at 979 (citing S. Rep. No. 102–92 (1991), at 26–28, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159–61). We find that this governmental interest remains substantial today. As the Commission concluded in the *2007 Program Access Order,* cable operators still have a dominant share of MVPD subscribers, there is evidence that cable prices have risen in excess of inflation, and cable operators still own significant programming. These factors lead us to believe that regulations intended to promote competition in the video distribution market in accordance with the objectives of Congress are still warranted. Our decision here furthers this substantial governmental interest by providing competitive MVPDs with an opportunity to obtain access to certain cable-affiliated programming that they are currently unable to offer, thereby promoting competition in the video distribution market for the benefit of consumers.

81. We note that a federal court of appeals in recently vacating the Commission's horizontal cable ownership cap stated that competition has increased in the video distribution market since the 1992 Cable Act was passed. *See Comcast Corp.* v. *FCC,* 579 F.3d 1, 8 (D.C. Cir. 2009). While competition has increased since the 1992 Cable Act was passed, cable operators still control close to two-thirds of all pay television subscribers, and their market share exceeds 70 percent in many markets. Accordingly, we believe that promoting competition in the video marketplace remains a substantial governmental interest. *See 2007 Program Access Order.*

82. Second, in *Time Warner,* the court held that the governmental objective served by the statutory program access provisions was unrelated to the suppression of free expression. *See* 93 F.3d at 978 ("[T]he vertically integrated programming provisions apply to only a limited number of companies for a perfectly legitimate reason: The antitrust concerns underlying the statute arise precisely because the number of vertically integrated companies is small. The vertically integrated programmer provisions are thus not 'structured in a manner that raise[s] suspicions that their objective was, in fact, the suppression of certain ideas.'" (*quoting Turner,* 512 U.S. at 660)). Similarly, our decision to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis is not based on programming content but is instead intended to address significant hindrances to competition in the video distribution market. It responds to concerns about competition, not content. Thus, the regulations are content-neutral and unrelated to the suppression of free speech.

83. Third, any alleged restriction on speech resulting from our decision "is no greater than is essential to the furtherance" of Congress' interest in promoting competition in the video distribution market. *Id.* The analysis in *Time Warner* applies here as well. Indeed, *Time Warner* upheld as narrowly tailored the categorical, prophylactic program access rules, whereas here we adopt a tailored case-by-case approach that examines actual competitive harms in each instance. Noting the Commission's decision in the *2007 Program Access Order,* Comcast contends that applying an exclusive contract prohibition to all cable-affiliated programming is overinclusive because it regulates at least some programming that is not competitively significant. But that argument misconceives the action we take today. In the *2007 Program Access Order,* the Commission was implementing Section 628(c)(2)(D), which establishes a broad prophylactic rule that subjects all satellite-delivered, cable-affiliated programming to an exclusive contract prohibition, subject to a procedure whereby individual programmers can seek Commission approval to enter into exclusive arrangements. *See* 47 U.S.C. 548(c)(2)(D), 548(c)(4). Here, we are not implementing the statutory scheme set forth in Section 628(c)(2)(D). Rather, we act pursuant to Sections 628(b) and 628(c)(1), which give the Commission broad authority to adopt rules to address unfair acts of cable operators that have

the purpose or effect of hindering significantly any MVPD from providing satellite cable programming or satellite broadcast programming. *See* 47 U.S.C. 548(b), (c)(1). We decline to adopt a broad prophylactic rule that subjects all terrestrially delivered, cable-affiliated programming to the program access rules because we lack sufficient record evidence to reach general conclusions that unfair acts involving terrestrially delivered, cable-affiliated programming will always prevent or significantly hinder an MVPD from providing video services. Rather, we adopt rules whereby the Commission will consider on a case-by-case basis whether an unfair act involving terrestrially delivered, cable-affiliated programming has the purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers, as required by Section 628(b). The complaint process we establish today requires showings over and above those required by the program access rules applicable to satellite-delivered programming, and these additional showings (including a purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable or satellite broadcast programming) prevent overinclusiveness. In short, our action today addresses any legitimate concerns about tailoring by adopting a case-by-case evaluation rather than a broad prophylactic rule.

84. Again noting the Commission's decision in the *2007 Program Access Order,* Comcast contends that an exclusive contract prohibition that covers only cable-affiliated programming is underinclusive because it exempts programmers affiliated with non-cable MVPDs and unaffiliated programmers that may offer "must have" programming. We are in fact considering in this proceeding whether to expand the exclusive contract prohibition to apply to programmers affiliated with non-cable MVPDs. *See NPRM.* We do not resolve this issue in this *Order.* We also note that program-access-type conditions already apply to DIRECTV by virtue of its merger with Liberty Media. *See Liberty/DIRECTV Order,* 23 FCC Rcd 3265, 3340–41, Appendix B, section III (2008). Finally, with respect to unaffiliated programmers, the Commission in the *2007 Program Access Order* found no record evidence to conclude that exclusive arrangements involving unaffiliated programmers have harmed competition in the video distribution market. Commenters offer no evidence in the record of this proceeding that would cause us to revisit this conclusion. While some commenters express concern with DIRECTV's exclusive arrangements for certain out-of-market, non-regional sports programming, they fail to provide evidence in the record of this proceeding of any harm to competition resulting from these arrangements.

*D. Complaint Filing Requirements*

85. In this Section, we review the types of complaints that MVPDs may file regarding unfair acts involving terrestrially delivered, cable-affiliated programming pursuant to the rules we establish in this *Order.* The rules we adopt herein do not limit the right of aggrieved parties to file complaints pursuant to Section 628(d) alleging other violations of Section 628(b). *See* 47 U.S.C. 548(d). We also discuss below four related ways in which the rules we adopt to address unfair acts involving terrestrially delivered, cable-affiliated programming differ from the program access rules applied to satellite-delivered, cable-affiliated programming: (i) There is no per se prohibition on exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; rather, the Commission will assess such contracts on a case-by-case basis in response to a program access complaint; (ii) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption, as explained below) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers; (iii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides terrestrially delivered programming (rather than an entity specifically listed in Section 628(b)), the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; and (iv) defendants will have 45 days—rather than the usual 20 days—from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint.

1. Types of Claims

86. Section 628(c)(1) gives the Commission authority to adopt regulations defining "particular conduct" that is within the scope of the "unfair methods of competition or unfair or deceptive acts or practices" prohibited by Section 628(b). 47 U.S.C. 548(b), (c)(1). In Section 628(c)(2), Congress itself defined certain conduct that must be included in the Commission's implementing regulations. Congress thereby made a conclusive legislative judgment that the categories of conduct involving satellite-delivered programming that are enumerated in Section 628(c)(2) satisfy the requirements of Section 628(b), including the requirement of constituting an "unfair method[] of competition or unfair or deceptive act[] or practice[]." 47 U.S.C. 548(b). The unfair or deceptive conduct that Congress specifically identified in Section 628(c)(2) is: (i) An exclusive contract between a cable operator and a cable-affiliated programmer (*see* 47 U.S.C. 548(c)(2)(C)–(D)); (ii) discrimination by a cable-affiliated programmer in the prices, terms, and conditions for sale of programming among MVPDs (*see* 47 U.S.C. 548(c)(2)(B)); and (iii) efforts by a cable operator to unduly influence the decision of its affiliated programmer to sell programming to a competitor (*see* 47 U.S.C. 548(c)(2)(A)). In the *1993 Program Access Order,* the Commission explained that the undue or improper influence provision of the program access rules "can play a supporting role where information is available (such as might come from an internal 'whistleblower') that evidences 'undue influence' between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding. Although such conduct may be difficult for the Commission or complainants to establish, its regulation provides a useful support for direct discrimination and contracting regulation." *See* 8 FCC Rcd at 3424.

87. In this *Order,* we adopt rules specifically permitting complainants to pursue case-by-case claims involving conduct with respect to terrestrially delivered, cable-affiliated programming that is similar to the categorically prohibited conduct concerning satellite-delivered, cable-affiliated programming. We determine that this conduct constitutes "unfair methods of

competition or unfair or deceptive acts or practices" under Section 628(b). Congress has already established that these can be unfair acts for purposes of Section 628(b) by including them in Section 628(c)(2). The record here, moreover, indicates that these acts involving terrestrially delivered programming—like comparable acts involving satellite-delivered programming—have the potential to impede entry into the video distribution market and to hinder existing competition in the market. *See MDU Order.* We note that our determination here is consistent with the *MDU Order,* in which the Commission generally defined an "unfair method of competition or unfair act or practice" to include an act that "can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." *Id.* ("[A]lthough we have never specifically defined what constitutes an 'unfair method of competition' or 'unfair * * * act or practice' beyond that conduct specifically proscribed in Section 628(c)(2), we have recognized that there is additional conduct that could be proscribed under Section 628(b). * * * [T]he use of an exclusivity clause by a cable operator to 'lock up' a MDU owner is an unfair method of competition or unfair act or practice because it can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." (citations omitted)).

88. Cablevision asks the Commission to add an additional element to the definition of an "unfair act," specifically that the "conduct complained of was undertaken other than in pursuit of legitimate business or competitive purposes." The Commission did not include this additional element in the *MDU Order* when it previously defined the term "unfair act" for purposes of Section 628(b). In that decision, despite acknowledging that contracts granting cable operators exclusive access to MDUs may have legitimate business purposes, such as helping to obtain financing to wire an entire building, the Commission nonetheless concluded that such contracts are "unfair acts" because they "can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." *See id.*

89. We thus conclude that actions by cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendors involving terrestrially delivered, cable-affiliated programming that would be prohibited by the program access rules under Section 628(c)(2) but for the terrestrial loophole (*i.e.,* exclusive contracts, discrimination, and undue or improper influence) are "unfair methods of competition or unfair or deceptive acts or practices" within the meaning of Section 628(b). We note that there may be other acts or practices that are "unfair methods of competition or unfair acts or practices" under Section 628(b). *See, e.g., MDU Order* (holding that the use of an exclusivity clause by a cable operator to "lock up" an MDU owner is an unfair method of competition). This *Order* pertains only to exclusive contracts, discrimination, and undue or improper influence involving programming that is both terrestrially delivered and, consistent with Section 628(c)(2), cable-affiliated. We do not reach any conclusions in this *Order,* nor do we foreclose potential complaints, regarding other acts that may be "unfair methods of competition or unfair acts or practices" under Section 628(b). For example, the rules established by this *Order* do not address exclusive contracts between a cable operator and a non-cable-affiliated programmer.

90. Accordingly, an MVPD may initiate a complaint proceeding alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor has engaged in one or more of these three unfair acts involving terrestrially delivered, cable-affiliated programming, with the purpose or effect of preventing or significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. Cable operators argue that a "cable operator" and a "satellite cable programming vendor" cannot violate Section 628(b) by withholding terrestrial programming. They claim that these entities are "captured" by Section 628(b) only to the extent that they are engaged in activities that meet the statutory definition of "cable operator" and "satellite cable programming vendor" (which do not include distribution of terrestrial programming). *See* 47 U.S.C. 522(5) ("the term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system"); 548(i)(2) (the "term 'satellite broadcast programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor"); *see also* 47 U.S.C. 522(6) (defining "cable service"); 522(7) (defining "cable system"); 548(i)(1) (defining "satellite broadcast programming"). They claim that to the extent they are engaged in other activities, such as the distribution of terrestrial programming, they are not covered under that section. This argument effectively reads into the statute an additional condition that is not there. Nothing in the statute excludes an otherwise covered entity from the reach of Section 628(b) simply because the conduct at issue is not covered by the statutorily defined activities of a "cable operator" or "satellite cable programming vendor." To the contrary, under Section 628(b), so long as the provider itself meets the statutory definition of a covered entity, it is prohibited from engaging in any unfair or deceptive acts or practices that hinder significantly or prevent any MVPD from providing satellite cable or satellite broadcast programming to consumers. In contrast, when Congress intends to restrict the circumstances under which an entity is covered under a category of providers, it has done so expressly. *See* 47 U.S.C. 153(44) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services"). There is no such restriction contained in Section 628(b). For this reason, we reject this argument.

91. While our program access procedural rules provide a defendant with 20 days after service to file an Answer to a complaint (*see* 47 CFR 76.1003(e)), we will provide the defendant with 45 days from the date of service of the complaint to file an Answer to a complaint involving terrestrially delivered programming to ensure that the defendant has adequate time to develop a response. We believe that additional time is appropriate because program access complaints involving terrestrially delivered programming, unlike complaints involving satellite-delivered programming, entail an additional factual inquiry regarding whether the unfair act has the purpose or effect set forth in Section 628(b). With the exception of the additional burdens described below and the additional time for defendants to file an Answer, these proceedings will be subject to the same

procedures set forth in Sections 76.7 and 76.1003 of the Commission's rules that apply to program access complaints involving satellite-delivered, cable-affiliated programming. 47 CFR 76.7, 76.1003. Among other things, these rules provide for pre-filing notices, discovery, remedies, potential defenses, and the required contents of and deadlines for filing the complaint, answer, and reply. *See id.; see generally 1993 Program Access Order,* 8 FCC Rcd 3359. We remind potential complainants that filing a frivolous program access complaint is unlawful and an abuse of process subject to sanctions. *See* 47 CFR 76.6(c); *see also* 47 U.S.C. 548(f)(3); *1993 Program Access Order,* 8 FCC Rcd at 3426–28; *1998 Biennial Regulatory Review,* Report and Order, 1999 WL 4984 (1999) (adopting 47 CFR 76.6(c)).

2. Additional Burdens in Program Access Complaint Proceedings Alleging Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming

92. We are adopting rules to address unfair acts involving terrestrially delivered, cable-affiliated programming pursuant to the authority Congress provided the Commission in Sections 628(b) and 628(c)(1) of the Act. Unlike the program access rules for satellite-delivered programming, which the Commission adopted pursuant to Section 628(c)(2), Section 628(b) requires that the "purpose or effect" of the unfair act is "to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. 548(b); *see 2002 Program Access Order* ("Section 628(b) addresses 'unfair or deceptive acts or practices' generally and carries with it an added burden 'to demonstrate that the purpose or effect of the conduct complained of was to 'hinder significantly or to prevent' an MVPD from providing programming to subscribers or customers.' " (*quoting 1993 Program Access Order,* 8 FCC Rcd at 3377–78)). The unfair acts listed in Section 628(c)(2) pertaining to satellite-delivered programming are presumed to harm competition, and complainants alleging such unfair acts are not required to demonstrate harm. *See 1993 Program Access Order,* 8 FCC Rcd at 3377–78; *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage,* Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1930 (1994).

93. Accordingly, to run afoul of Section 628(b), an unfair act involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order,* includes an exclusive contract, discrimination, or undue or improper influence) must have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. The prohibition in Section 628(b) makes unlawful any unfair or deceptive act or practice that has the "purpose or effect" of hindering significantly or preventing competitors from providing service. 47 U.S.C. 548(b). Under the broad language of the statute, a case involving only a prohibited purpose, even without a likelihood of material effects, may nonetheless support a finding of a violation of Section 628(b). In the antitrust context, however, courts have found that a "desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws." *Ocean State Physicians Health Plan* v. *Blue Cross & Blue Shield,* 883 F.2d 1101, 1113 (1st Cir. 1989), *cert. denied,* 494 U.S. 1027 (1990); *see also Wisconsin Music Network* v. *Muzak Ltd. P'ship,* 5 F.3d 218, 222 (7th Cir. 1993) (under rule of reason standard in antitrust context, "the factfinder must determine from all of the circumstances of a case whether a practice unreasonably restrains competition"); *Alliance Shippers* v. *Southern Pac. Transp. Co.,* 858 F.2d 567, 570 (9th Cir. 1988) (essential element in antitrust context is injury to competition); *United States Football League* v. *NFL,* 842 F.2d 1335, 1359 (2d Cir. 1988) ("hopes and dreams alone cannot support a Section 2 claim of monopolization"). We leave for another day the question whether some additional showing analogous to that required under the antitrust standard should be required when a complainant under Section 628(b) alleges only a prohibited purpose to hinder or prevent competition, and not a prohibited effect.

94. For most terrestrially delivered, cable-affiliated programming, the record contains no evidence that unfair acts involving such programming generally have the purpose or effect of significantly hindering or preventing MVPDs from providing satellite cable programming or satellite broadcast programming. Nonetheless, such an act may have the purpose or effect set forth in Section 628(b) in a particular case, especially given predictions that programming will increasingly shift to terrestrial delivery. Accordingly, in a program access complaint alleging an unfair act involving terrestrially delivered, cable-affiliated programming, the complainant will have the burden of proving that the unfair act has the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming. This burden under Section 628(b) is in addition to any other burdens imposed by the Commission's rules on a complainant pursuing a program access complaint regarding an exclusive contract, discrimination, or undue or improper influence. *See* 47 CFR 76.1003; *see also 1993 Program Access Order,* 8 FCC Rcd at 3390 (discussing complainant's burden in a program access complaint alleging an exclusive contract); *id.* at 3416–17 (discussing complainant's burden in a program access complaint alleging discrimination); *id.* at 3425 (discussing complainant's burden in a program access complaint alleging undue or improper influence).

95. We note that to satisfy its burden, a complainant cannot, consistent with the statute, simply rely on the fact that some impairment to providing service may have occurred because of its lack of access to cable-affiliated, terrestrially delivered programming. *Cf. AT&T Corp.* v. *Iowa Utilities Bd.,* 525 U.S. 366, 389 (1999). Rather, the statute requires a complainant to show that it was "hindered significantly" or "prevented" from providing service. We will thus review individual complaints in light of the higher standard imposed under Section 628(b). It is not our intent, moreover, to remove incentives for MVPDs to improve their program offerings in order to differentiate themselves in the marketplace as long as such efforts do not have the purpose or effect of significantly hindering or preventing an MVPD from providing satellite cable programming or satellite broadcast programming. For example, we believe it highly unlikely that an unfair act involving local news and local community or educational programming will have the prescribed purpose or effect under Section 628(b). Unlike RSN programming, local news and local community or educational programming is readily replicable by competitive MVPDs. Indeed, the record indicates that at least one competitive MVPD, Verizon, has created its own local news channels. Moreover, the Commission previously found that exclusivity plays an important role in the growth and viability of local cable news networks and that permitting such

exclusivity "should not * * * dissuade new MVPDs from developing their own competing regional programming services." *See New England Cable News Channel,* Memorandum Opinion and Order, 9 FCC Rcd 3231, 3236 and 3237 (1994).

96. We do identify one class of programming that, as shown by both Commission precedent and record evidence in this proceeding, is very likely to be both non-replicable and highly valued by consumers. In the *Adelphia Order,* the Commission analyzed the impact of the withholding of three terrestrially delivered, cable-affiliated RSNs on the market shares of DBS operators. In two cases, the Commission found a significant impact on predicted market share. *See Adelphia Order,* 21 FCC Rcd at 8271 (concluding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been; concluding that Cox's withholding of the terrestrially delivered Cox-4 RSN from DBS operators in San Diego caused the percentage of television households subscribing to DBS in that city to be 33 percent lower than what it otherwise would have been); *see also 2007 Program Access Order* (addressing comments concerning the *Adelphia Order* study). In the third case, the Commission found no statistically significant impact where the RSN showed the games of a relatively new team "that did not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs." *See Adelphia Order,* 21 FCC Rcd at 8271–72 (concluding that withholding of a terrestrially delivered RSN in Charlotte did not show a statistically significant effect on predicted market share). Other evidence supports the conclusion that RSNs typically offer non-replicable content and are considered "must have" programming by MVPDs. *See 2007 Program Access Order; Liberty/DIRECTV Order,* 23 FCC Rcd at 3305 and 3306–07; *Adelphia Order,* 21 FCC Rcd at 8258–59; *News/Hughes Order,* 19 FCC Rcd 473, 535 (2004). Both the Commission and commenters have noted that RSN programming is unique and cannot be duplicated. *See Adelphia Order,* 21 FCC Rcd at 8287; *News/Hughes Order,* 19 FCC Rcd at 535. The Commission on two prior occasions has extended the sunset date of the per se ban established by Congress on exclusive contracts involving satellite-delivered, cable-affiliated programming. *See generally 2002 Program Access Order* (extending the exclusive contract prohibition until October 5, 2007); *2007 Program Access Order* (extending the exclusive contract prohibition until October 5, 2012). In the most recent decision, the Commission stated that "the record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes." *See 2007 Program Access Order.* In that decision, the Commission was implementing Section 628(c)(5), which requires the Commission to assess the marketplace and extend the per se ban if it finds it "necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. 548(c)(5). The Commission did not consider the question at issue here: Whether there are specific categories of programming that are non-replicable and sufficiently valuable to consumers such that an unfair act involving such programming has the "purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming." 47 U.S.C. 548(b).

97. Although we reject the argument that the empirical evidence concerning RSNs is so uniform that it supports a per se rule that an unfair act involving a terrestrially delivered, cable-affiliated RSN always significantly hinders or prevents the MVPD from providing satellite cable programming or satellite broadcast programming, we will not require litigants and the Commission staff to undertake repetitive examinations of our RSN precedent and the relevant historical evidence. Instead, we recognize the weight of the existing precedent and categorical evidence concerning RSNs by allowing complainants to invoke a rebuttable presumption that an unfair act involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect set forth in Section 628(b). Cablevision maintains that adopting special rules for implementing Section 628(b) in the context of RSNs, based on the content of the programming, would violate the First Amendment. Here, however, we place no content-related burden on a defendant in a case brought under Section 628(b) that involves RSN programming. We only recognize the import of existing precedent and record evidence before us in this matter.

98. In a program access complaint alleging an unfair act involving a terrestrially delivered, cable-affiliated RSN, the defendant may overcome the presumption by establishing that the unfair act does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming, as required by the language of Section 628(b). Except in the situation of a temporary standstill order, a terrestrially delivered, cable-affiliated RSN is not required to provide its programming to an MVPD under the rules we establish in this *Order* unless and until the Commission (or Bureau on delegated authority) concludes that the complainant is entitled to relief that includes access to the programming. We reiterate that we are adopting a case-by-case approach that allows us to consider the facts and circumstances of each case. Moreover, as discussed above, while our program access procedural rules provide a defendant with 20 days after service to file an Answer to a complaint (*see* 47 CFR 76.1003(e)), we will provide the defendant with 45 days from the date of service of the complaint to file an Answer in all cases involving terrestrially delivered, cable-affiliated programming, to ensure that the defendant has adequate time to develop a full, case-specific response.

99. For purposes of the foregoing paragraphs, we define "RSN" in the same way the Commission has defined that term in previous merger proceedings for purposes of adopting program access conditions: "Any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball, Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer League's First Division and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." (In the *Liberty/DIRECTV Order,* the Commission expanded the definition of an RSN originally adopted in the *Adelphia Order* to include sports programming likely to be valued highly by residents of Puerto Rico. *See* 23 FCC

Rcd at 3308–09; *see also Adelphia Order,* 21 FCC Rcd at 8275.) The Commission has recently reaffirmed the appropriateness of the RSN definition for purposes of program access merger conditions. *See TAC Order,* 22 FCC Rcd 17938, 17946–47 (2007); *Liberty/DIRECTV Order,* 23 FCC Rcd at 3308–09. (The Commission suspended the program carriage merger condition for reasons that are not at issue here. *See TAC Order,* 22 FCC Rcd at 17946–47.) A complainant would have the burden of showing that the network at issue satisfies this definition.

100. One commenter has further urged a per se ban on unfair acts and practices involving terrestrially delivered HD "feeds" of programming. According to Verizon, vertically integrated programmers are seeking to compete unfairly by withholding from competitive providers the HD version of programming subject to the program access rules by transporting the "HD feed" terrestrially, thus allowing the affiliated cable operator to offer a more robust line-up of HD programming. There is substantial evidence regarding consumers' preference for HD programming in the context of MVPD services, and the record shows that MVPD subscribers do not consider SD programming to be an acceptable substitute for HD programming. The SD and HD versions of the same network have different technical characteristics and sometimes even different content. HD programming has thus become an important part of a competitive MVPD offering.

101. Based on the record evidence described above, in particular the fact that SD and HD versions of the same network have different technical characteristics and sometimes even different content, we conclude that the HD version of a particular programming channel should be treated as a distinct service from the SD version of the same network. Thus, in considering a complaint regarding an unfair act involving terrestrially delivered HD programming, the mere fact that the complainant offers the SD version of the same network to subscribers will not alone be sufficient to refute a claim under Section 628(b); and, in the case of a covered RSN, it will not establish that the unfair act lacks the purpose or effect set forth in Section 628(b). In that regard, nothing in the statute requires a competitive provider to show complete foreclosure from particular programming to make a claim under Section 628(b). Rather, the competitive provider must show that a covered entity was engaged in an unfair act or practice that has the purpose or effect of hindering significantly or preventing a competitor from providing service. We note that in two pending complaints, the complainant is seeking access to the HD feed of a cable-affiliated RSN; at this time, only the satellite-delivered SD version of the programming is being made available to the competitive provider. *See* Verizon Telephone Companies *et al*, Program Access Complaint, File No. CSR–8185–P (filed July 7, 2009); AT&T Services, Inc. *et al,* Program Access and Section 628(b) Complaint, File No. CSR–8196–P (filed Aug. 13, 2009). As explained below, to the extent the complainants do not supplement their pleadings in the pending adjudicatory matter, their claims fall outside the framework established in this rulemaking, and we do not prejudge whether the records in those cases are sufficient to state a case under Section 628(b) based on the facts alleged.

102. We will also treat other terrestrially delivered formats of programming, such as VOD, 3D, and other new formats, as distinct services subject to the rules established in this *Order.* We do not have precedents or record evidence at this point with respect to such new formats on which to base a conclusion whether any presumption should apply to complaints involving them, thus no presumptions will apply to them at this time.

103. We decline to adopt specific evidentiary requirements with respect to proof, in a complaint brought under Section 628(b), that the defendant's alleged activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming. The evidence required to satisfy this burden will vary based on the facts and circumstances of each case and may depend on, among other things, whether the complainant is a new entrant or an established competitor and whether the programming the complainant seeks to access is new or existing programming. In order to provide some guidance to potential litigants, however, we provide the following illustrative examples of evidence that they might consider providing. A litigant might rely on an appropriately crafted regression analysis that estimates what the complainant's market share in the MVPD market would be if it had access to the programming and how that compares to its actual market share. *See, e.g., Adelphia Order,* 21 FCC Rcd at 8343–50, Appendix D; *2007 Program Access Order.* A regression analysis might be particularly appropriate for an MVPD that is an established competitor operating in a large number of geographic areas that seeks access to an established programming network. Operation in a large number of geographic areas allows for an assessment in the variation in the MVPD's penetration levels between areas where programming is withheld and where it is available to estimate the effect of withholding. Moreover, a regression analysis might be particularly appropriate for an established competitor, where it can be assumed that its market penetration may be approaching an equilibrium level, rather than a recent entrant, where it can be assumed that its market penetration will increase as consumers become more familiar with its service. A litigant might also rely on statistically reliable survey data indicating the likelihood that customers would choose not to subscribe to or switch to an MVPD that did not carry the withheld programming.

104. We recognize that not all potential complainants will have the resources to perform a regression analysis or market survey, thus, we reiterate that these examples should be considered illustrative only. We will assess the reliability of the regression analysis, survey data, or other empirical data on a case-by-case basis. In that regard, we note that defendants, as well as complainants, are likely to have unique access to certain relevant evidence. For instance, although a competing MVPD seeking access to a cable-affiliated RSN has unique access to information about its own subscribership and the reasons consumers give for declining or terminating the MVPD's service, a defendant cable operator or cable-affiliated programmer is likely to have the best information about the competitive significance of its RSN (*e.g.,* value of subscribers and local demand for the RSN). Moreover, both complainants and defendants are capable of compiling survey data to assess the likelihood that customers would choose not to subscribe to or switch to an MVPD that did not carry the withheld programming. The discovery process enables parties to obtain additional evidence needed to satisfy their burdens. *See* 47 CFR 76.1003(j).

105. We note that the language of Section 628(b) requires the Commission to address the unfair acts of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors, but not the unfair acts of other programmers

delivering programming only by terrestrial means. *See* 47 U.S.C. 548(b). We conclude that Section 628(b) allows complaints against the entities listed in Section 628(b) based on the unfair acts of their affiliated programmers delivering programming by terrestrial means, where the facts establish that the programmer is wholly owned by, controlled by, or under common control with one or more of these entities. (If two or more cable operators each have a minority interest in a terrestrial programmer but those interests exceed 50 percent in the aggregate, we will consider the programmer to be cable-controlled. For example, if three cable operators each have a 20 percent ownership interest in a terrestrial programmer, we would consider the programmer to be cable-controlled, despite the fact that no individual cable operator has a controlling interest, because the aggregate interests held by the cable operators exceed 50 percent.) Under these circumstances, the cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor can appropriately be held responsible for the discriminatory acts of its program supplier affiliate because it controls the supplier and the supplier's unfair actions are designed to benefit these entities.

106. This coverage is necessary to give Section 628(b) practical effect. For example, absent a Commission rule to address such discrimination, a cable-controlled terrestrial program supplier could insist that a competitive MVPD pay an exorbitant rate for carriage that far exceeds the rate charged to the incumbent cable system, thereby precluding the MVPD from obtaining the programming on reasonable terms and achieving the same result as an exclusive contract. We believe that we have authority under Section 628(b) to prevent this and similar situations in which a terrestrial programmer that is wholly owned by, controlled by, or under common control with an entity covered by Section 628(b) acts presumptively to further the interests of such an entity. Accordingly, in program access complaints alleging that a cable-affiliated programmer that provides only terrestrially delivered programming has discriminated against an MVPD, the complainant will have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors.

107. If it appears that a regulated entity has been organized in a manner to shield its terrestrial programming activities from the reach of Section 628(b) and the Commission's regulations, we may look beyond the corporate structural formalities to ensure that the goals of the statute and rules are not frustrated. Moreover, in cases where one or more of the entities listed in Section 628(b) does not have de jure control of a terrestrial programmer, we do not foreclose complaints alleging that one or more of the entities listed in Section 628(b) has nonetheless influenced the programmer to engage in discrimination. We will assess such claims of alleged influence on a case-by-case basis. In addition, as noted above, there may be acts or practices other than those specified in this *Order* that are "unfair methods of competition or unfair acts or practices" under Section 628(b). For example, nothing in this *Order* forecloses a complaint alleging that the execution or enforcement of a discriminatory contract by one of the entities listed in Section 628(b) violates this section.

3. Exclusive Contracts

108. The rules we adopt here pursuant to Section 628(b) to address exclusive contracts between cable operators and cable-affiliated programmers that provide terrestrially delivered programming differ from the rules applicable to satellite-delivered, cable-affiliated programming pursuant to Section 628(c)(2)(C)–(D). The program access rules applicable to cable-affiliated programmers that provide satellite-delivered programming generally prohibit exclusive contracts with a cable operator subject to certain exceptions. Because we are adopting rules for terrestrially delivered, cable-affiliated programming pursuant to the authority provided in Sections 628(b) and 628(c)(1), we do not apply here the statutory scheme set forth in Section 628(c)(2)(C)–(D) for satellite-delivered, cable-affiliated programming. Our approach to exclusive contracts for terrestrially delivered, cable-affiliated programming will differ from the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming in the following ways.

109. First, the Commission's program access rules applicable to satellite-delivered, cable-affiliated programming generally prohibit exclusive contracts unless the cable operator or cable-affiliated programmer demonstrates that an exclusive contract serves the public interest based on the factors set forth in Section 76.1002(c)(4). 47 CFR 76.1002(c)(4); *see 2002 Program Access Order.* The rules we adopt in this *Order,* however, assign the burden of proof to the complainant to demonstrate (sometimes with the benefit of a presumption) that the exclusive contract has the purpose or effect set forth in Section 628(b).

110. Second, while the Commission's rules applicable to satellite-delivered, cable-affiliated programming draw distinctions between exclusive contracts in served areas and unserved areas (*see* 47 CFR 76.1002(c)(1)–(2); *see also* 47 U.S.C. 548(c)(2)(C)–(D)), the rules we adopt in this *Order* for terrestrially delivered, cable-affiliated programming do not. Section 628(b) does not draw such a distinction, and our case-by-case approach will enable us to take into account relevant factual circumstances of a particular case.

111. Third, while the exclusive contract prohibition generally applicable to satellite-delivered, cable-affiliated programming will sunset on a Commission determination that the categorical prohibition is no longer necessary to preserve and protect competition (*see* 47 CFR 76.1002(c)(6); *see also* 47 U.S.C. 548(c)(5)), the rules we adopt in this *Order* for terrestrially delivered, cable-affiliated programming do not contain a sunset provision because Section 628(b) does not contain such a provision. If the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets, we will still consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis unless and until we repeal the rule with respect to terrestrially delivered programming. Of course, the facts supporting a sunset of the exclusive contract prohibition under Section 628(c)(2) may bear on a particular complaint brought under Section 628(b).

112. By contrast, with the exception of the additional burdens and the additional response time for defendants to file an Answer described above, we will apply the same rules, policies, and procedures to address claims of discrimination and undue or improper influence involving terrestrially delivered, cable-affiliated programming that currently apply to such claims involving satellite-delivered, cable-affiliated programming. *See* 47 CFR 76.1002(b)(1)–(3) (listing actions that a cable-affiliated programmer is not

precluded from taking under the discrimination provision of the program access rules); *id.* § 76.1003(c)(4)–(5) (listing specific requirements for a program access complaint alleging discrimination); *id.* § 76.1003(e)(3)–(4) (listing specific requirements for an answer to a program access complaint alleging discrimination); *see also 1993 Program Access Order,* 8 FCC Rcd at 3400–23 (adopting rules, policies, and procedures for complaints alleging program access discrimination); *see id.* at 3423–26 (adopting rules, policies, and procedures for complaints alleging undue or improper influence).

*E. Application of the Rules*

113. In this Section, we discuss how the rules adopted here apply to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions.

1. Common Carriers

114. The rules we adopt in this *Order* will apply to common carriers and open video systems as well as cable operators because the Act so requires. Although Section 628(b) requires the Commission to address the unfair acts of cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors, Section 628(j) states that "[a]ny provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers." 47 U.S.C. 548(j). Similarly, Section 653(c)(1)(A) provides that "[a]ny provision that applies to a cable operator under [Section 628] of this title shall apply * * * to any operator of an open video system [OVS]." 47 U.S.C. 573(c)(1)(A). Thus, pursuant to Sections 628(j) and 653(c)(1)(A), the rules we adopt to address unfair acts involving terrestrially delivered, cable-affiliated programming must also apply to common carriers and OVS operators, and their affiliated programmers, to the extent that these entities provide video programming to subscribers or consumers. Accordingly, we are amending Section 76.1004(a) of our rules, which contains a limitation on what constitutes an attributable interest held by a common carrier in a satellite cable programming vendor, to also apply to an attributable interest held by a common carrier in a terrestrial cable programming vendor. *See* 47 CFR 76.1004(a); *see also* 47 U.S.C. 628(j); *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996,* Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, 5956–57 (1996).

2. Existing Contracts

115. Given the potential harms to video competition and broadband deployment that arise from unfair acts involving terrestrially delivered, cable-affiliated programming, we conclude that the public interest requires us to apply the rules adopted in this *Order* to existing contracts or other arrangements for terrestrially delivered, cable-affiliated programming, to the extent a cable operator's reliance on or enforcement of those contracts or arrangements following the effective date of the rules is found to violate Section 628(b). Accordingly, although a cable operator may have entered into an exclusive contract prior to the effective date of the rules adopted in this *Order,* an MVPD may file a program access complaint after the effective date of the rules alleging that the cable operator's continued reliance on or enforcement of this contract violates these rules. We decline, however, to apply the rules adopted in this *Order* to the unfair acts of cable operators involving terrestrially delivered, cable-affiliated programming that preceded the effective date of these rules. Thus, to the extent a terrestrially delivered, cable-affiliated programmer refused to deal with an MVPD prior to (and not after) the effective date of these rules, we would not entertain a program access complaint alleging that such conduct is unlawful under the rules adopted in this *Order.* Rather, an MVPD filing a program access complaint pursuant to the rules adopted in this *Order* regarding the allegedly unlawful conduct would need to demonstrate that the unfair act occurred after the effective date of the rules.

116. Applying the rules to existing contracts in this manner is not impermissibly retroactive. *See, e.g., Celtronix Telemetry, Inc.* v. *FCC,* 272 F.3d 585, 588 (D.C. Cir. 2001) (changing the grace period on auction debt was not impermissibly retroactive where new rule applied to payment delays occurring after the rule's adoption; although it altered the future effect of the initial license issuance, it did not alter past legal consequences); *Bell Atl. Tel. Cos.* v. *FCC,* 79 F.3d 1195, 1207 (D.C. Cir. 1996) (a regulation that governs future rates "is not made retroactive merely because it draws upon antecedent facts for its operation") (quotations and citations omitted); *see also Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 269–70 and n. 24 (1994) (a law does not act retrospectively merely because it is applied in a case arising from conduct antedating its enactment or upsets expectations based in prior law; rather, the issue is whether the new provision attaches new legal consequences to events completed before its enactment); *Chemical Waste Mgmt., Inc.* v. *EPA,* 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking").

117. As discussed above, program access complaints filed pursuant to Section 628(d) are pending before the Commission that allege unfair acts involving terrestrially delivered, cable-affiliated programming that have the purpose or effect set forth in Section 628(b). *See* Verizon Telephone Companies *et al,* Program Access Complaint, File No. CSR–8185–P (filed July 7, 2009); AT&T Services, Inc. *et al.,* Program Access and Section 628(b) Complaint, File No. CSR–8196–P (filed Aug. 13, 2009). Complainants may continue to prosecute these complaints pursuant to Section 628(d). Because these complaints allege unfair acts that occurred before the effective date of the rules adopted in this *Order,* they will not be considered pursuant to these rules, unless supplemented as described below. A complainant that wants a currently pending complaint considered under these rules must submit a supplemental filing alleging that the defendant has engaged in an unfair act (such as a further refusal to provide programming) after the effective date of the rules. In such case, the complaint and supplement will be considered pursuant to the rules adopted in this *Order,* including the rebuttable presumption for RSNs. The defendant will have an opportunity to answer the supplemental filing within 45 days of service, and the complainant will have an opportunity to reply, as set forth in the rules. *See* 47 CFR 76.1003(f).

118. Additionally, application of the rules to existing contracts will not pose economic hardship on cable operators or their affiliated programmers or constitute a "regulatory taking" under the Fifth Amendment. The Supreme Court has outlined the following framework to evaluate regulatory takings claims: "'In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this

determination, however, we have identified three factors which have particular significance: (1) The economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.'" *MDU Order* (quoting *Connolly* v. *Pension Ben. Guaranty Corp.,* 475 U.S. 211, 224–25 (1986) (citations and internal quotation marks omitted)). None of these factors counsels in favor of finding a regulatory taking here. Moreover, because our decision does not involve the permanent condemnation of physical property, it does not constitute a per se taking. *Cf. Loretto* v. *Teleprompter Manhattan City Corp.,* 458 U.S. 419, 427 (1982) ("when faced with a constitutional challenge to a permanent physical occupation of real property, this court has invariably found a taking"); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency,* 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

119. Under the first prong of the regulatory takings test, applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above would not have a material adverse economic impact on cable operators or their affiliated programmers. Specifically, these rules would not interfere with the ability of cable operators to provide this programming to their subscribers or potential subscribers or the ability of cable-affiliated programmers to sell programming to MVPDs. Our decision may in fact expand the number of customers (*i.e.,* MVPDs) to whom terrestrially delivered, cable-affiliated programmers sell their programming. This will result in increased revenues for the cable-affiliated programmer, which can be used to partially offset the decreased revenues its affiliated cable operator will experience as some subscribers switch to competitive MVPDs that now have access to the formerly withheld programming. Moreover, as the record demonstrates, unfair acts involving terrestrially delivered, cable-affiliated programming have in some cases enabled cable firms to significantly hinder competition in the video distribution market. Thus, under the first prong of the takings analysis, any economic impact on cable operators and terrestrially delivered, cable-affiliated programmers arising from compliance with these rules stems from correcting current market failures, and is outweighed by our public interest objective of promoting competition in the video distribution market.

120. Under the second prong of the Supreme Court's test, applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above would not interfere with distinct investment-backed expectations. Several of the Commission's prior decisions have reflected a concern about unfair acts involving terrestrially delivered, cable-affiliated programming, and our desire to craft appropriate remedies. The Commission has stated in previous program access complaint proceedings that vertically integrated cable operators that migrate their programming to terrestrial delivery could violate Section 628(b) in some instances. *See RCN,* 16 FCC Rcd at 12053; *DIRECTV,* 15 FCC Rcd at 22807; *EchoStar,* 14 FCC Rcd at 2102–03; *RCN,* 14 FCC Rcd at 17104–06; *DIRECTV,* 13 FCC Rcd at 21837; *see also 1996 OVS Order,* 11 FCC Rcd at 18325.

121. Moreover, past Commission Orders in program access rulemaking proceedings have demonstrated continued concern with the harms associated with the terrestrial loophole. *See 2002 Program Access Order* (noting that withholding of terrestrially delivered, cable-affiliated programming "could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market" but finding that the specific language of Section 628(c) applies only to satellite-delivered programming); *1998 Program Access Order* (concluding that the record developed in this proceeding did not demonstrate that unfair acts involving terrestrially delivered, cable-affiliated programming were having a significant anticompetitive effect, but stating that "we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace" and that "the Commission will continue to monitor this issue and its impact on competition in the video marketplace"); *see also 2007 Program Access Order.* Moreover, the Commission noted in the *1993 Program Access Order* that the objectives of Section 628(b) were to proscribe conduct "beyond those more specifically referenced in 628(c). The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition * * *. Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming." 8 FCC Rcd at 3373–73.

122. The Commission has also stated in Annual Reports to Congress on the status of competition in the video distribution market that unfair acts involving terrestrially delivered, cable-affiliated programming could have a substantial impact on the ability of competitive MVPDs to compete and that the Commission will "continue to monitor this issue and its impact on the competitive marketplace." *6th Annual Report,* 15 FCC Rcd 978 (2000); *see 3rd Annual Report,* 12 FCC Rcd 4358 (1997); *see also 7th Annual Report,* 16 FCC Rcd 6005 (2001); *8th Annual Report,* 17 FCC Rcd 1244 (2002); *9th Annual Report,* 17 FCC Rcd 26901 (2002); *10th Annual Report,* 19 FCC Rcd 1606 (2004); *11th Annual Report,* 20 FCC Rcd 2755 (2005); *12th Annual Report,* 21 FCC Rcd 2503 (2006).

123. In the *Adelphia Order,* the Commission demonstrated that it would act to mitigate the harm to competition resulting from withholding of terrestrially delivered, cable-affiliated programming. In the *Adelphia Order,* the Commission applied the program access rules, as well as arbitration conditions, to terrestrially delivered RSNs affiliated with the merger applicants based on record evidence demonstrating that withholding of terrestrially delivered, cable-affiliated programming had an adverse impact on competition in the video distribution market. *See* 21 FCC Rcd at 8275. Moreover, in the *News/Hughes Order,* the Commission noted that it has "long recognized that the terrestrial distribution of programming—particularly RSN programming—by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming." 19 FCC Rcd at 535 (citations omitted). In addition, in September 2007, the Commission adopted the *NPRM* in this proceeding, seeking comment on, among other things, whether to extend the program access rules to terrestrially delivered, cable-affiliated programming. Thus, for many years now, cable operators and their affiliated programmers have been on notice that withholding of

terrestrially delivered, cable-affiliated programming is a source of concern for the Commission, and that any programming investments had the potential to be impacted by the rules we adopt in this *Order.* Moreover, as the Commission explained in the *MDU Order,* a cable operator does not have a legitimate investment-backed expectation in profits obtained through anticompetitive behavior. *See MDU Order* (citing *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 380 (1973) (antitrust law proscribing monopolies "assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency," and a monopolist may not "substitute for competition anticompetitive uses of its dominant power"); *Delaware & Hudson Ry. Co.* v. *Consolidated Rail Corp.,* 902 F.2d 174, 178 (2d Cir. 1990) ("A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.")).

124. Under the third prong of the regulatory takings test, we find that applying these rules to existing contracts for terrestrially delivered, cable-affiliated programming to the extent described above substantially advances the legitimate governmental interest in protecting consumers from " 'unfair methods of competition or unfair acts or practices'—an interest Congress has explicitly recognized and protected by statute * * * and commanded the Commission to vindicate by adopting appropriate regulations." *See MDU Order* (quoting 47 U.S.C. 548(b)). It also comports with Congress' directive to spur the development of communications technologies and to encourage the deployment of advanced telecommunications capabilities. *See* 47 U.S.C. 157 nt. (2008); 47 U.S.C. 548(a). The rules we adopt here will further these governmental interests by promoting competition in the video distribution market and facilitating efforts to deploy broadband.

3. *Adelphia Order* Merger Conditions

125. Pursuant to merger conditions adopted in the *Adelphia Order,* certain terrestrially delivered RSNs ("Covered RSNs") affiliated with Comcast or Time Warner Cable are currently required to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming. *See Adelphia Order,* 21 FCC Rcd at 8274 (requiring terrestrially delivered RSNs in which Comcast or Time Warner has or acquires an attributable interest to comply with the program access rules applicable to satellite-delivered cable-affiliated programming, citing 47 CFR 76.1002), 8276 and 8336, Appendix B, § B(1) (citing 47 CFR 76.1002); *see also Applications for Consent to the Assignment and/or Transfer Control, Time Warner Inc., Assignor/Transferor, and Time Warner Cable Inc., Assignee/Transferee,* Memorandum Opinion and Order, 24 FCC Rcd 879, 893 (MB, WCB, WTB, IB, 2009) (approving transaction separating Time Warner from Time Warner Cable and explaining that the *Adelphia Order* program access conditions will continue to apply to Time Warner Cable post-restructuring but will no longer apply to Time Warner). A Covered RSN as defined in the *Adelphia Order* is "any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." *See Adelphia Order,* 21 FCC Rcd at 8336, Appendix B, section A.

126. These Covered RSNs continue to be subject to these conditions until they expire or the program access rules applicable to satellite-delivered, cable-affiliated programming are modified. *See Adelphia Order,* 21 FCC Rcd at 8336, Appendix B, section B(1)(d) ("These exclusive contracts and practices, non-discrimination, and undue or improper influence requirements of the program access rules will apply to Comcast, Time Warner, and their Covered RSNs for six years, provided that if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission."); *see also id.* at 8274 (noting that the merger conditions could be modified if the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets). The rules we adopt in this *Order* do not trigger modification of these conditions. The Covered RSNs subject to the *Adelphia Order* merger conditions are required to comply with the program access rules applicable to satellite-delivered, cable-affiliated programming. With the exception of the procedure for requesting a standstill discussed below, this *Order* does not modify the program access rules applicable to satellite-delivered, cable-affiliated programming; rather, we adopt new rules that address unfair acts of cable operators involving a class of programmers that are not currently subject to the rules: Cable-affiliated programmers that provide terrestrially delivered programming. Accordingly, the rules adopted in this *Order* do not trigger modification of the merger conditions adopted in the *Adelphia Order.* The program access conditions adopted in the *Liberty/DIRECTV Order* contain a similar modification clause. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3341, Appendix B, section III(6) ("if the program access rules are modified these commitments shall be modified, as the Commission deems appropriate, to conform to any revised rules adopted by the Commission"). For the reasons stated above, because the program access rules are not modified by this *Order,* this modification clause is not triggered.

127. Accordingly, exclusive contracts, discrimination, and undue influence involving these Covered RSNs continue to be prohibited without the need for any showing as to whether the purpose or effect of the unfair act is to significantly hinder or prevent the complainant from providing satellite cable programming or satellite broadcast programming. If the conditions expire or the exclusive contract prohibition applicable to satellite-delivered, cable-affiliated programming sunsets, then exclusive contracts for these Covered RSNs will not be precluded. Rather, in accordance with the rules we adopt in this *Order,* we will consider exclusive contracts for these RSNs on a case-by-case basis in response to a program access complaint, where we will assess whether the defendant has rebutted the presumption that an exclusive contract for the RSN has the purpose or effect of significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming.

128. Moreover, any terrestrially delivered network affiliated with Comcast or Time Warner Cable that is not a Covered RSN may be the subject of a complaint pursuant to the rules we adopt in this *Order* upon the effectiveness of these rules.

129. We also note that the Commission in the *Adelphia Order* exempted Comcast SportsNet Philadelphia from these conditions to the extent that it was not available to an MVPD at the time of the *Adelphia Order. See* 21 FCC Rcd at 8276 ("we do not require that Comcast SportsNet Philadelphia be subject to those

conditions to the extent it is not currently available to MVPDs"). With regard to MVPDs that had contracts for Comcast SportsNet Philadelphia at the time of the *Adelphia Order,* the program access conditions adopted in the *Adelphia Order* apply. *See id.* Because Comcast SportsNet Philadelphia was delivered terrestrially before it was acquired by Comcast, the Commission found no anticompetitive "purpose" in Comcast's decision to deliver this network terrestrially. *See id.* Section 628(b), however, requires the Commission to prohibit unfair acts of cable operators that have the "purpose or effect" of significantly hindering an MVPD from providing satellite cable programming or satellite broadcast programming. 47 U.S.C. 548(b). Accordingly, although Comcast SportsNet Philadelphia was not available to certain MVPDs at the time of the *Adelphia Order* and the program access conditions adopted in the *Adelphia Order* accordingly do not apply to its dealings with those MVPDs, it may be the subject of a complaint pursuant to the rules we adopt in this *Order* upon the effectiveness of these rules. Thus, an MVPD that did not have access to Comcast SportsNet Philadelphia at time of the *Adelphia Order* may file a program access complaint alleging an unfair act in accordance with the rules adopted in this *Order.* As discussed above, the complainant would need to demonstrate that the defendant engaged in an unfair act after the effective date of the rules. Comcast argues that the doctrine of res judicata precludes DIRECTV and DISH Network from bringing program access complaints alleging an unfair act involving Comcast SportsNet Philadelphia under Section 628(b) because they have previously brought such claims and were denied. Comcast would have an opportunity to present such claim-specific arguments in the context of a specific complaint proceeding involving Comcast SportsNet Philadelphia, should such a complaint be filed.

*F. Temporary Standstill of Existing Contract Pending Resolution of a Program Access Complaint*

130. We establish specific procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract. *See NPRM.* The specific procedures adopted herein only apply to requests for a standstill involving program access complaints filed pursuant to Sections 76.1001 or 76.1003 of the Commission's rules. Thus, a complainant may use these procedures to seek a temporary standstill in program access complaint proceedings involving terrestrially, cable-affiliated delivered programming as well as satellite-delivered, cable-affiliated programming. We note that of particular concern would be a situation where a cable-affiliated network that is satellite-delivered, and therefore subject to the per se prohibitions in Section 76.1002, moves to terrestrial delivery and threatens to withhold the programming from an MVPD that formerly had access to the network. In such a case, absent a standstill, the MVPD's subscribers would be deprived of the programming unless and until the Commission resolves a program access complaint in favor of the MVPD and grants relief to the MVPD, including carriage of the network.

131. As competitive MVPDs note, such a process will have several benefits, such as minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint; limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (i.e., withholding programming to extract concessions from an MVPD during renewal negotiations); encouraging settlement; and increasing the usefulness of the program access complaint process. Regarding temporary foreclosure strategies, the Commission explained in the *Adelphia Order* that "by temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier. In order for a vertically integrated firm successfully to employ temporary foreclosure or the threat of temporary foreclosure as a strategy to increase its bargaining position, there must be a credible risk that subscribers would switch MVPDs to obtain the programming for a long enough period to make the strategy profitable." *See* 21 FCC Rcd at 8262.

132. The Commission has statutory authority to impose a temporary standstill of an existing contract in appropriate cases pending resolution of a program access complaint. The Commission is authorized to "make such rules and regulations * * * as may be necessary in the execution of its functions," and to "[m]ake such rules and regulations * * * not inconsistent with law, as may be necessary to carry out the provisions of this Act." 47 U.S.C. 154(i), 303(r). The Supreme Court has affirmed the Commission's authority to impose interim injunctive relief, in the form of a standstill order, pursuant to Section 4(i). *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 181 (1968); *see also AT&T Corp.* v. *Ameritech Corp.,* Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998) (standstill order issued pursuant to 47 U.S.C. 154(i) temporarily preventing Ameritech from enrolling additional customers in, and marketing and promoting, a "teaming" arrangement with Qwest Corporation pending a decision concerning the lawfulness of the program); *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers,* Report and Order, 12 FCC Rcd 22497, 22566 (1997) (stating that the Commission has authority under section 4(i) of the Act to award injunctive relief); *Time Warner Cable,* Order on Reconsideration, 21 FCC Rcd 9016 (MB, 2006) (standstill order issued pursuant to section 4(i) denying a stay and reconsideration of the Media Bureau's order requiring Time Warner temporarily to reinstate carriage of the NFL Network on systems that it recently acquired from Adelphia Communications and Comcast Corporation until the Commission could resolve on the merits the Emergency Petition for Declaratory Ruling filed by the NFL).

133. Pursuant to the rules we adopt herein, a complainant may submit along with its program access complaint a petition for a temporary standstill of its existing programming contract pending resolution of the complaint. We encourage complainants to file the petition and complaint sufficiently in advance of the expiration of the existing contract to provide the Commission with sufficient time to act prior to expiration. In its petition, the complainant must demonstrate how grant of the standstill will meet the following four criteria: (i) The complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay. *See, e.g., Virginia Petroleum Jobbers Ass'n* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours,* 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n* v. *FPC*); *Hispanic Information and Telecomm. Network,*

*Inc.,* 20 FCC Rcd 5471, 5480 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted). As part of a showing of irreparable harm, a complainant may discuss, among other things, the impact on subscribers and the likelihood that subscribers will switch MVPDs to obtain the programming in dispute. In order to ensure an expedited decision, the defendant will have ten days after service to file an answer to the petition for a standstill order. In acting on the petition, the Commission may limit the length of the standstill to a defined period or may specify that the standstill will continue until the Commission resolves the program access complaint. In any event, the Commission may lift the temporary standstill to the extent that it finds that the stay is having a negative effect on settlement negotiations or is otherwise no longer in the public interest.

134. If the Commission grants the temporary standstill, its decision acting on the complaint will make the terms of the new agreement between the parties, if any, retroactive to the expiration date of the previous agreement. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3347–48, Appendix B, section IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, section 3(h); *News/Hughes Order,* 19 FCC Rcd at 554. For example, if carriage of the programming has continued uninterrupted during resolution of the complaint, and if the Commission's decision requires a higher amount to be paid than was required under the terms of the expired contract, the MVPD will make an additional payment to the programmer in an amount representing the difference between the amount that is required to be paid pursuant to the decision and the amount actually paid under the terms of the expired contract during resolution of the complaint. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3347–48, Appendix B, § IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, section 3(h); *News/Hughes Order,* 19 FCC Rcd at 554. Conversely, if carriage of the programming has continued uninterrupted during resolution of the complaint, and if the Commission's decision requires a lesser amount to be paid than was required under the terms of the expired contract, the programmer will credit the MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during resolution of the complaint and the amount that is required to be paid pursuant to the Commission's decision. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3347–48, Appendix B, section IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, section 3(h).

135. Vertically integrated cable operators contend that the Commission should not adopt a temporary standstill process, claiming that such an option will tilt the balance of negotiating leverage in favor of MVPDs; encourage MVPDs to file program access complaints to guarantee continued access to programming; and impede parties from settling disputes by removing any incentive for the MVPD to negotiate. On balance, we conclude that the benefits of establishing a temporary stay process outweigh these purported harms. We expect parties to deal and negotiate with one another in good faith to come to settlement while the program access complaint is pending at the Commission. Moreover, there is no reason to assume that carriage negotiations and attempts at a settlement during a temporary stay will necessarily be protracted. In this regard, we note that in three previous merger orders, the Commission adopted a standstill requirement in connection with arbitration of program access disputes. *See Liberty/DIRECTV Order,* 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order,* 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order,* 19 FCC Rcd at 554. Commenters, however, provide no evidence that any of the purported harms actually resulted from the standstill in those cases. Moreover, the standstill requirement imposed in connection with those merger conditions is automatic upon notice of the MVPD's intent to arbitrate (*see Liberty/DIRECTV Order,* 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order,* 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order,* 19 FCC Rcd at 554, whereas the process we adopt here requires a complainant to seek Commission approval based on the four-criteria test described above. Thus, the Commission will be able to take into account all relevant facts in each case. Moreover, because the new carriage terms will be applied retroactively to the expiration of the previous contract, we believe that complainants will not have an incentive to seek a temporary standstill solely to continue the status quo or to gain leverage.

136. Time Warner claims that, depending on the terms of the contract, it may be impractical to apply those terms beyond the expiration date of the contract. In addition, Time Warner notes unique concerns regarding a standstill imposed on a contract for a premium network. DISH Network states that Time Warner has overstated the complexity of a standstill, because the existing contract terms—including rate, carriage terms, as well as marketing and promotion provisions—would apply during the pendency of the complaint proceeding. To the extent difficulties arise, we believe we will be able to resolve such issues on a case-by-case basis when acting on a petition for a standstill.

## IV. Procedural Matters

### *A. Final Paperwork Reduction Act Analysis*

137. This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501–3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program access complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA below.

### *B. Congressional Review Act*

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

### *C. Final Regulatory Flexibility Analysis*

139. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"), 5 U.S.C. 604, the Commission

has prepared the following FRFA relating to the *Order.* An Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *NPRM* in MB Docket No. 07–198 (72 FR 61590, October 31, 2007). The Commission sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA. *See* 5 U.S.C. 604.

Need for, and Objectives of, the Rules Adopted

140. Section 628(a) of the Communications Act establishes that the goals of Section 628 are to increase competition and diversity in the video distribution market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies. 47 U.S.C. 548(a). Section 628(b) of the Act prohibits unfair acts and practices of cable operators that have the purpose or effect of hindering significantly any multichannel video programming distributor ("MVPD") from providing satellite cable programming or satellite broadcast programming to consumers. 47 U.S.C. 548(b) ("it shall be unlawful for a cable operator * * * to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers"). Section 628(c)(1) provides the Commission with authority to adopt rules to specify the conduct prohibited by Section 628(b). 47 U.S.C. 548(c)(1). As required by Section 628(c)(2) of the Act (47 U.S.C. 548(c)(2)), the Commission adopted rules in 1993 (the "program access rules") which specifically prohibit: (i) A cable operator from unduly or improperly influencing the decision of its affiliated satellite cable programming vendor to sell, or unduly or improperly influencing the vendor's prices, terms, and conditions for the sale of, satellite cable programming to any unaffiliated MVPD (the "undue or improper influence" rule) (*see* 47 CFR 76.1002(a)); (ii) a cable-affiliated satellite cable programming vendor from discriminating in the prices, terms, and conditions of sale or delivery of satellite cable programming among or between competing MVPDs (the "non-discrimination" rule) (*see* 47 CFR 76.1002(b)); and (iii) a cable operator from entering into an exclusive contract for satellite cable programming with a cable-affiliated satellite cable programming vendor, subject to certain exceptions (the "exclusive contract prohibition") (*see* 47 CFR 76.1002(c)–(e)). The Commission has also adopted procedures for resolving complaints alleging a violation of these program access rules. *See* 47 CFR 76.1003.

141. Consistent with the text of Section 628(c)(2), the Commission's program access rules currently apply to "satellite cable programming" and "satellite broadcast programming." 47 U.S.C. 548(c)(2). The Act and the Commission's rules define both terms to apply only to programming transmitted or retransmitted by satellite for reception by cable operators. The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. 548(i)(1); 47 U.S.C. 605(d)(1); *see also* 47 CFR 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. 548(i)(3); *see also* 47 CFR 76.1000(f).

142. The Commission has previously concluded that terrestrially delivered, cable-affiliated programming (such as programming transmitted to cable operators by fiber) is outside of the direct coverage of Section 628(c)(2) and the Commission's program access rules under Section 628(c)(2). *See DIRECTV, Inc. and EchoStar Commc'ns Corp.* v. *Comcast Corp. et al.,* 15 FCC Rcd 22802, 22807 (2000), *aff'd sub nom. EchoStar Commc'ns Corp.* v. *FCC,* 292 F.3d 749 (D.C. Cir. 2002); *see also 2007 Program Access Order,* 72 FR 56645, October 4, 2007, *appeal pending sub nom. Cablevision Systems Corp. et al* v. *FCC,* No. 07–1425 (D.C. Cir); *2002 Program Access Order,* 67 FR 49247, July 30, 2002. This is commonly referred to as the "terrestrial loophole," because it allows cable-affiliated programmers to transmit their programming to cable operators via terrestrial means and thereby avoid application of the program access rules. *See 2002 Program Access Order.*

143. In the *Order* adopted herein, the Commission establishes rules for the consideration of complaints on a case-by-case basis alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order,* includes exclusive contracts, discrimination, and undue or improper influence). The *Order* notes that there may be other acts or practices that are "unfair" under Section 628(b). The *Order,* however, pertains only to exclusive contracts, discrimination, and undue or improper influence involving programming that is both terrestrially delivered and, consistent with Section 628(c)(2), cable-affiliated. The *Order* does not reach any conclusions regarding other acts that may be "unfair" under Section 628(b), nor does it foreclose potential complaints. The *Order* discusses the Commission's statutory authority for adopting rules to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. The Commission concludes that Section 628(b) grants the Commission authority to address unfair acts involving terrestrially delivered, cable-affiliated programming.

144. The *Order* next establishes the following reasons for Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming: (i) Cable operators continue to have an incentive and ability to engage in unfair acts involving their affiliated programming, regardless of whether this programming is satellite-delivered or terrestrially delivered; (ii) the Commission's judgment regarding this incentive and ability is supported by real-world evidence that cable operators have withheld certain terrestrially delivered, cable-affiliated programming from their MVPD competitors; and (iii) there is evidence that this withholding may significantly hinder MVPDs from providing video service in some cases. The *Order* concludes that Commission action to address unfair acts involving terrestrially delivered, cable-affiliated programming will facilitate broadband deployment and promote the goals of Section 628 to increase competition and diversity in the video distribution market. The *Order* also concludes that addressing unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis comports with the First Amendment.

145. The *Order* next explains that complainants may pursue similar claims involving terrestrially delivered, cable-affiliated programming that they may

pursue with respect to satellite-delivered, cable-affiliated programming under the program access rules: exclusive contracts, discrimination, and undue or improper influence. The *Order* also describes four ways in which the rules adopted to address unfair acts involving terrestrially delivered, cable-affiliated programming differ from the program access rules applied to satellite-delivered, cable-affiliated programming: (i) A complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption when the unfair act involves a terrestrially delivered, cable-affiliated regional sports network) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers; (ii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides only terrestrially delivered programming, the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; (iii) there is no per se prohibition on exclusive contracts between a cable operator and a cable-affiliated programmer that provides terrestrially delivered programming; rather, the Commission will assess such contracts on a case-by-case basis in response to a program access complaint; and (iv)defendants will have 45 days—rather than the usual 20 days—from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint. The *Order* then discusses how these rules will be applied to common carriers, existing contracts, and terrestrially delivered programming that is subject to the program access rules applicable to satellite-delivered programming as a result of merger conditions. Finally, the *Order* establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

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

146. In its Comments on the *NPRM,* the National Telecommunications Cooperative Association ("NTCA") stated that program access rules may have a significant economic impact on a substantial number of small entities, such as small rural MVPDs. NTCA stated further that its proposed amendments to the Commission's program access rules, which would include extending the program access rules to terrestrially delivered, cable-affiliated programming, would reduce the impact on small rural MVPDs. NTCA also stated that its proposed amendments will "promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market and spur development of new communications technologies." We conclude that allowing MVPDs to pursue program access claims involving terrestrially delivered, cable-affiliated programming will reduce the impact on small rural MVPDs by promoting competition and diversity in the MVPD market.

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

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

148. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers." Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year. Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

149. *Wired Telecommunications Carriers—Cable and Other Program Distribution.* This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The data we have available as a basis for estimating the number of such entities were gathered under a superseded SBA small business size standard formerly titled Cable and Other Program Distribution. The former Cable and Other Program Distribution category is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, we believe that a substantial number of entities included in the former Cable and Other Program Distribution category may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other

Program Distribution. With respect to OVS, the Commission has approved approximately 120 OVS certifications with some OVS operators now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2006, BSPs served approximately 1.4 million subscribers, representing 1.46 percent of all MVPD households. *See 13th Annual Report,* 24 FCC Rcd 542, 684, Table B–1 (2009). Among BSPs, however, those operating under the OVS framework are in the minority. OPASTCO reports that fewer than 3 percent of its members provide service under OVS certification. *See id.* at 607. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

150. *Cable System Operators (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. As of 2006, 7,916 cable operators qualify as small cable companies under this standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers. Thus, under this standard, most cable systems are small.

151. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." There are approximately 65.3 million cable subscribers in the United States today. Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

152. *Wired Telecommunications Carriers—Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS is now included in the category of Wired Telecommunications Carriers. The size standard for that definition is 1,500 employees. The majority of services in this category can be considered small under both the current SBA size standard definition and the superseded size standard definition, i.e., Cable and Other Program Distribution. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts. Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See 13th Annual Report,* 24 FCC Rcd at 580. All three currently offer subscription services. Two of these three DBS operators, DIRECTV and EchoStar Communications Corporation ("EchoStar"), report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than 500,000 subscribers. *See id.* at 581. Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee.

153. *Wired Telecommunications Carriers—Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. PCOs are now included in the category of Wired Telecommunications Carriers. The size standard for that definition is 1,500 employees. The majority of services in this category can be considered small under both the current SBA size standard definition and the superseded size standard definition, i.e., Cable and Other Program Distribution. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts. The Independent Multi-Family Communications Council ("IMCC"), the trade association that represents PCOs, indicates that PCOs serve about 1 to 2 percent of the MVPD marketplace. *See id.* at 609. Individual PCOs often serve approximately 3,000–4,000 subscribers, but the larger operations serve as many as 15,000–55,000 subscribers. In total, PCOs currently serve approximately 900,000 subscribers. *See id.* at 684. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution.

154. *Wired Telecommunications Carriers—Home Satellite Dish ("HSD") Service.* HSD is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small. The data we use herein to estimate the number of HSD services is based on a superseded SBA-recognized definition. Because HSD provides subscription services, HSD fell within the SBA-recognized definition of Cable and Other Program Distribution, which has been superseded by the category of Wired Telecommunications Carriers. The definition of Cable and Other Program Distribution provided that a small entity was one with $13.5 million or less in annual receipts. HSD or the large dish segment of the satellite

industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2005 and June 2006, HSD subscribership fell from 206,538 subscribers to 111,478 subscribers. *See id.* at 684, Table B–1. The Commission has no information regarding the annual revenue of the four C–Band distributors.

155. *Wireless Telecommunications Carriers (except Satellite)—Broadband Radio Service and Educational Broadband Service.* Since 2007, the Census Bureau has placed wireless firms, including those providing wireless video service, within the new category of Wireless Telecommunications Carriers (except Satellite). Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. The Broadband Radio Service (BRS) is composed of Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS). MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)). We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Previously, wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution. The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts.

156. *Broadband Radio Service and Educational Broadband Service—Auction Data.* The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934. 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of $13.5 million or less).

157. *Broadband Radio Service and Educational Broadband Service—Licenses Not Received Via Auction.* MDS (now BRS) licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall within the new category of Wireless Telecommunications Carriers (except Satellite). Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Previously, wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution. The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers under the now superseded SBA small business size standard for Cable and Other Program Distribution.

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

159. *Wireless Telecommunications Carriers (except Satellite)—Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. Since 2007, the Census Bureau has placed wireless firms, including those providing wireless video service, within the new category of Wireless Telecommunications Carriers (except Satellite). Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Previously, LMDS providing wireless cable fell within the SBA-recognized definition of Cable and Other Program Distribution. The definition of Cable and Other Program Distribution provided that a small entity is one with $13.5 million or less in annual receipts.

160. *Wireless Telecommunications Carriers (except Satellite)—Local Multipoint Distribution Service (Auctions).* The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years. These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the Commission's auction rules and the now superseded SBA small business size standard for Cable and Other Program Distribution.

161. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of

programs on a subscription or fee basis. * * * These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers." The SBA has developed a small business size standard for firms within this category, which is all firms with $15 million or less in annual receipts. According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year. Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

162. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials." The SBA has developed a small business size standard for firms within this category, which is all firms with $29.5 million or less in annual receipts. According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year. Of this total, 7,685 firms had annual receipts of under $24,999,999 and 45 firms had annual receipts of between $25,000,000 and $49,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

163. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors." The SBA has developed a small business size standard for firms within this category, which is all firms with $29.5 million or less in annual receipts. According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year. Of this total, 365 firms had annual receipts of under $24,999,999 and 7 firms had annual receipts of between $25,000,000 and $49,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

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

165. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

166. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

167. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) Operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer." The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours." According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year. Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

Description of Reporting, Recordkeeping and Other Compliance Requirements

168. The rules adopted in the *Order* will impose additional reporting, recordkeeping, and compliance requirements on MVPDs, cable

operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors. The *Order* allows MVPDs to file complaints with the Commission alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in an unfair act involving terrestrially delivered, cable-affiliated programming (which, as defined in this *Order,* includes exclusive contracts, discrimination, and undue or improper influence). The complaint proceeding will be subject to the same procedures set forth in Sections 76.7 and 76.1003 of the Commission's rules that apply to program access complaints involving satellite-delivered, cable-affiliated programming (*see* 47 CFR 76.7, 76.1003), except that (i) a complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof (sometimes with the aid of a presumption when the unfair act involves a terrestrially delivered, cable-affiliated regional sports network) that the defendant's activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers; (ii) in program access complaints alleging discrimination by a cable-affiliated programmer that provides only terrestrially delivered programming, the complainant shall have the additional burden of proof that the programmer that is alleged to have engaged in discrimination is wholly owned by, controlled by, or under common control with the defendant cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; and (iii) defendants will have 45 days—rather than the usual 20 days—from the date of service of a program access complaint involving terrestrially delivered, cable-affiliated programming to file an Answer to the complaint. In addition, these rules provide for pre-filing notices, discovery, remedies, potential defenses, and the required contents of and deadlines for filing the complaint, answer, and reply. *See* 47 CFR 76.7, 76.1003. The *Order* also establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

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

169. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The *NPRM* invited comment on issues that had the potential to have significant economic impact on some small entities.

170. As discussed above, the decision to establish rules to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis, and to establish procedures for the Commission's consideration of requests for a temporary standstill, will facilitate competition in the video distribution market and promote broadband deployment. The decision therefore confers benefits upon various MVPDs, including those that are smaller entities. Thus, the decision benefits smaller entities as well as larger entities. In general, because the decision confers these benefits on smaller entities, a discussion of alternatives to the adopted rules is of secondary importance. We note that in the *Order,* the Commission found a lack of record evidence to reach a general conclusion that unfair acts involving this programming will significantly hinder an MVPD from providing video services in every case. A case-by-case approach is less burdensome than declining to consider complaints alleging that a cable operator has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming, because small MVPDs would lack relief in such situations. Moreover, while the *Order* provides illustrative examples of evidence a complainant may provide, such as a regression analysis or market survey, it also recognizes that not all potential complainants will have the resources to provide this type of evidence. In addition, a case-by-case approach is consistent with the First Amendment.

Report to Congress

171. The Commission will send a copy of the *First Report and Order* in MB Docket No. 07–198, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *First Report and Order* in MB Docket No. 07–198, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *First Report and Order* in MB Docket No. 07–198 and FRFA (or summaries thereof) will also be published in the **Federal Register.**

## V. Ordering Clauses

172. *It is ordered* that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, this *First Report and Order Is Adopted.*

173. *It is ordered* that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, the Commission's rules *Are Hereby Amended* as set forth in the Rules Changes below.

174. *It is ordered* that the rules adopted herein are effective April 2, 2010, except for Sections 76.1001(b)(2), 76.1003(c)(3), and 76.1003(l) which contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA) and will become effective after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

175. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *First Report and Order* in MB Docket No. 07–198, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

176. *It is further ordered* that the Commission shall send a copy of this *First Report and Order* in MB Docket No. 07–198 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

## List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Political candidates, and Reporting and recordkeeping requirements.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

## Rule Changes

■ For the reasons stated in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

## PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

**Authority:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Section 76.1000 is amended by revising the first sentence of paragraph (b), (c)(1), the first sentence of paragraph (j), and adding paragraphs (l) and (m) to read as follows:

### § 76.1000 Definitions.

* * * * *

(b) *Cognizable interests.* In applying the provisions of this subpart, ownership and other interests in cable operators, satellite cable programming vendors, satellite broadcast programming vendors, or terrestrial cable programming vendors will be attributed to their holders and may subject the interest holders to the rules of this subpart. * * *

* * * * *

(c) * * *

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming, or terrestrial cable programming contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

* * * * *

(j) *Similarly situated.* The term "similarly situated" means, for the purposes of evaluating alternative programming contracts offered by a defendant programming vendor or by a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1)(ii), that an alternative multichannel video programming distributor has been identified by the defendant as being more properly compared to the complainant in order to determine whether a violation of § 76.1001(a) or § 76.1002(b) has occurred. * * *

* * * * *

(l) *Terrestrial cable programming.* The term "terrestrial cable programming" means video programming which is transmitted terrestrially or by any means other than satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming or satellite cable programming.

(m) *Terrestrial cable programming vendor.* The term "terrestrial cable programming vendor" means a person engaged in the production, creation, or wholesale distribution for sale of terrestrial cable programming, but does not include a satellite broadcast programming vendor or a satellite cable programming vendor.

■ 3. Section 76.1001 is revised to read as follows:

### § 76.1001 Unfair practices generally.

(a) *Unfair practices generally.* No cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

(b) *Unfair practices involving terrestrial cable programming and terrestrial cable programming vendors.* (1) The phrase "unfair methods of competition or unfair or deceptive acts or practices" as used in paragraph (a) of this section includes, but is not limited to, the following:

(i) Any effort or action by a cable operator that has an attributable interest in a terrestrial cable programming vendor to unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms, and conditions for the sale of, terrestrial cable programming to any unaffiliated multichannel video programming distributor.

(ii) Discrimination in the prices, terms, or conditions of sale or delivery of terrestrial cable programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors, or their agents or buying groups, by a terrestrial cable programming vendor that is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors; except that the phrase does not include the practices set forth in § 76.1002(b)(1) through (3). The cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors that wholly own or control, or are under common control with, such terrestrial cable programming vendor shall be deemed responsible for such discrimination and any complaint based on such discrimination shall be filed against such cable operator, satellite cable programming vendor, or satellite broadcast programming vendor.

(iii) Exclusive contracts, or any practice, activity, or arrangement tantamount to an exclusive contract, for terrestrial cable programming between a cable operator and a terrestrial cable programming vendor in which a cable operator has an attributable interest.

(2) Any multichannel video programming distributor aggrieved by conduct described in paragraph (b)(1) of this section that it believes constitutes a violation of paragraph (a) of this section may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7, as modified by § 76.1003, with the following additions or changes:

(i) The defendant shall answer the complaint within forty-five (45) days of service of the complaint, unless otherwise directed by the Commission.

(ii) The complainant shall have the burden of proof that the defendant's alleged conduct described in paragraph (b)(1) of this section has the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. An answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden.

(iii) A complainant alleging that a terrestrial cable programming vendor has engaged in conduct described in paragraph (b)(1)(ii) of this section shall have the burden of proof that the terrestrial cable programming vendor is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors

in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors. An answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden.

■ 4. Section 76.1002 is amended by revising paragraph (b)(2) introductory text (the note remains unchanged) to read as follows:

**§ 76.1002 Specific unfair practices prohibited.**

* * * * *

(b) * * *

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming, satellite broadcast programming, or terrestrial cable programming; * * *

* * * * *

■ 5. Section 76.1003 is amended by revising paragraph (c)(3), the first sentence of paragraph (e)(1), paragraphs (g)(1) through (3), and by adding paragraph (l) to read as follows:

**§ 76.1003 Program access proceedings.**

* * * * *

(c) * * *

(3) Evidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming or satellite broadcast programming vendor or a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1);

* * * * *

(e) * * *

(1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint. * * *

* * * * *

(g) * * *

(1) The satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) The satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, and such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor; or

(3) The complainant has notified a cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor that it intends to file a complaint with the Commission based on a request to purchase or negotiate to purchase satellite cable programming, satellite broadcast programming, or terrestrial cable programming, or has made a request to amend an existing contract pertaining to such programming pursuant to § 76.1002(f) of this part that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

* * * * *

(l) *Petitions for temporary standstill.* (1) A program access complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. In addition to the requirements of § 76.7, the complainant shall have the burden of proof to demonstrate the following in its petition:

(i) The complainant is likely to prevail on the merits of its complaint;

(ii) The complainant will suffer irreparable harm absent a stay;

(iii) Grant of a stay will not substantially harm other interested parties; and

(iv) The public interest favors grant of a stay.

(2) The defendant cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the Commission's decision acting on the complaint will provide for remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous programming contract.

■ 6. Section 76.1004 is amended by revising the last sentence of paragraph (a) to read as follows:

**§ 76.1004 Applicability of program access rules to common carriers and affiliates.**

(a) * * * For the purposes of this section, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company) or a terrestrial cable programming vendor (or its parent company).

* * * * *

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# Part IV

# Federal Trade Commission

## 16 CFR Part 610

## Free Annual File Disclosures; Final Rule

**FEDERAL TRADE COMMISSION**

**16 CFR Part 610**

**RIN 3084–AA94**

## Free Annual File Disclosures

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule.

**SUMMARY:** Section 205 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 requires the Federal Trade Commission to issue a rule to prevent deceptive marketing of free credit reports. To that end, the Commission amends the Free Annual File Disclosures Rule to require certain advertisements for "free credit reports" to include prominent disclosures designed to prevent consumers from confusing these "free" offers with the federally mandated free annual file disclosures available through the single centralized source. In addition, the final amended Rule requires nationwide consumer reporting agencies to delay advertisements for products and services through the centralized source until after consumers receive their free annual file disclosures, and prohibits other practices that may interfere with the free annual file disclosure process. The final amended Rule also implements certain technical changes to the original Rule.

**DATES:** The effective date is April 2, 2010, except for § 610.4(b)(1)(i) and (2), which are effective September 1, 2010.

**ADDRESSES:** Requests for copies of the final amended Rule and this document should be sent to: Public Records Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The public record of this proceeding is also available at that address. Relevant portions of the proceeding, including the final amended Rule and this document, are available at (*http://www.ftc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Katherine Armstrong, Steven Toporoff, or Tiffany George, Attorneys, Division of Privacy and Identity Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, (202) 326-2252.

**SUPPLEMENTARY INFORMATION:**

## I. Background

This final Rule amends the Free Annual File Disclosures Rule ("Free Reports Rule" or "original Rule"),[1] which went into effect in 2004. The original Rule set out the procedures that nationwide consumer reporting agencies ("CRAs")[2] and nationwide specialty CRAs[3] must follow to comply with section 612 of the Fair Credit Reporting Act ("FCRA"),[4] which gives consumers the right to obtain free annual file disclosures from the nationwide CRAs through a single centralized source. The final amended Rule modifies the original Rule by implementing section 205 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Act"), which directs the Federal Trade Commission ("FTC" or "Commission") to promulgate a rule, within nine months from the date of enactment of the Act, requiring certain disclosures in the advertising for "free credit reports" to reduce consumer confusion.[5] The final amended Rule also addresses certain practices that interfere with or detract from consumers' ability to obtain their free annual file disclosures and makes certain technical changes to the original Rule described below.

### *A. The Free Annual File Disclosures Rule*

The Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") amended the FCRA and directed the Commission to promulgate a rule specifying the procedures for consumers to obtain free annual file disclosures from nationwide CRAs and nationwide specialty CRAs.[6] To carry out this directive, the Commission promulgated the Free Reports Rule, which took effect in a structured roll-out beginning on the West Coast in December 2004 and ending on the East Coast in September 2005.[7] The purpose of the original Rule was to enable consumers to detect and dispute inaccurate or incomplete information in the files of nationwide CRAs by providing consumers with the opportunity to obtain annual file disclosures free of charge.

The original Rule required that the nationwide CRAs jointly establish and operate a centralized source from which consumers can obtain free annual file disclosures through a single dedicated Internet website (AnnualCreditReport.com),[8] a toll-free telephone number, or a postal address.[9] Consumers may request and obtain their free annual file disclosures from each nationwide CRA at one time or stagger their requests throughout the year.

### *B. The Advertising of "Free Credit Reports"*

As discussed in the Notice of Proposed Rulemaking ("NPRM") in this proceeding,[10] since issuance of the original Rule, there has been a proliferation of confusing advertising regarding where consumers can obtain their free annual file disclosures. Some nationwide CRAs and others have advertised "free credit reports" in connection with the purchase of products and services, such as credit scores and credit monitoring. Although some advertising predated the original Rule, the bulk of the advertising for "free credit reports" now takes advantage of consumers' general knowledge that free annual file disclosures are available under federal law. These advertisements direct consumers not to AnnualCreditReport.com, the authorized source for free annual file disclosures, but to commercial websites operated by nationwide CRAs or others that sell a variety of products and services. Further, when a consumer uses an Internet search engine to locate the website for free annual file disclosures, the search engine will usually list "sponsored" links – again, selling products and services – such as "FreeCreditReport.com" first.[11]

As a result of this advertising, consumers are often misled and confused about where to obtain the free annual file disclosure mandated by federal law. Indeed, the Commission has received numerous consumer

[1] 16 CFR Part 610.

[2] Section 603(p) of the FCRA defines a "nationwide consumer reporting agency" as a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. 15 U.S.C. 1681a(p). At this time, there are three nationwide consumer reporting agencies – Equifax Inc. ("Equifax"), Experian Information Solutions, Inc. ("Experian"), and TransUnion LLC ("TransUnion").

[3] Nationwide specialty consumer reporting agencies are defined in section 603(w) of the FCRA. 15 U.S.C. 1681a(w). Specifically, section 603(w) defines "nationwide specialty consumer reporting agency" as a CRA that compiles and maintains files on consumers on a nationwide basis relating to: (1) medical records or payments; (2) residential or tenant history; (3) check writing history; (4) employment history; or (5) insurance claims.

[4] 15 U.S.C. 1681j.

[5] Pub. L. 111-24, 123 Stat. 1734 (May 22, 2009).

[6] Prior to the FACT Act, consumers could purchase file disclosures from consumer reporting agencies, but could receive a free file disclosure only under limited circumstances. For example, section 615 of the FCRA provides that consumers denied credit or employment based upon information contained in a consumer report may obtain a free file disclosure from the CRA that provided the report. 15 U.S.C. 1681m.

[7] 16 CFR 610.2(h). The Commission staggered implementation of the original Rule across the country to manage requests for free annual file disclosures.

[8] Most requests for free annual file disclosures through the centralized source occur through the AnnualCreditReport.com website. AnnualCreditReport.com is the only federally authorized website for obtaining free annual file disclosures.

[9] 16 CFR 610.2(a).

[10] 74 FR 52915 (Oct. 15, 2009).

[11] "FreeCreditReport.com" is owned and operated by Consumerinfo.com, Inc., an Experian company.

complaints demonstrating confusion and frustration about how and where to obtain a free annual file disclosure. As discussed below, comments received during this proceeding further illustrate both consumer confusion with and frustration in obtaining "free annual file disclosures" and "free credit reports."[12]

*C. Section 205 of the Act*

To dispel this consumer confusion, Congress enacted section 205 of the Act ("section 205"). Section 205 directs the Commission to promulgate a rule, within nine months from the date of enactment of the Act, that would require advertisements for "free credit reports" in any medium to include certain prominent disclosures. For television and radio advertisements, section 205 specifies the language for the required disclosure: "This is not the free credit report provided for by Federal law." This disclosure must appear in both the audio and visual portion of the advertisement. For all other media, section 205 directs the Commission to issue a rule determining the content and placement of the disclosures. Finally, section 205 requires the following interim advertising disclosure if a rule is not finalized within nine months: "Free credit reports are available under Federal law at: AnnualCreditReport.com."

## II. Overview of the Proposed Rule and Comments Received

On October 15, 2009, the Commission published an NPRM, setting forth the text of a proposed amended Rule.[13] The NPRM sought to achieve three goals.

First, it implemented section 205 of the Act by proposing a new section 610.4 in the Free Reports Rule that would require prominent disclosures to prevent consumer confusion and deceptive marketing of "free credit reports."[14] The proposed section 610.4 included general requirements to ensure that the disclosures were sufficiently prominent; it also included media-specific requirements for the disclosures. For example, the NPRM proposed that the required disclosures for Internet websites offering "free credit reports" appear on a separate landing page.

Second, the NPRM proposed amendments to section 610.2 of the original Rule to prohibit practices that interfere with consumers' ability to obtain free annual file disclosures from the centralized source. Specifically, it required a delay in advertising for products and services through the centralized source until after the consumer obtained his or her free annual file disclosure. It also: (1) prohibited the placement of hyperlinks to the nationwide CRAs' websites that transported consumers away from the AnnualCreditReport.com website; (2) prohibited the nationwide CRAs from requiring consumers to establish an account to obtain a file disclosure through the centralized source; and (3) prohibited the nationwide CRAs from imposing any "terms and conditions" on consumers' access to their file disclosures.

Third, the NPRM proposed technical amendments that would eliminate now obsolete roll-out provisions in the original Rule.[15]

In response to the NPRM, the Commission received over 1,080 comments, submitted by consumers; nationwide CRAs; consumer report resellers; businesses and trade organizations; State Attorneys General; consumer advocates; law firms; members of Congress; and academics.[16] Of the comments submitted, over 1,000 came from consumers. Appendix A contains a list of each of the non-consumer commenters, with the abbreviations used to identify them in this document. Some general comments are summarized below. Comments addressing particular issues relating to the proposed Rule are discussed in greater detail in the Section-by-Section discussion below.

Overall, industry and business groups, as well as Representatives Boozman and Ross, opposed one or more of the NPRM's proposals, such as the delay in advertising on AnnualCreditReport.com until after the consumer has obtained a free annual file disclosure, the prohibition on hyperlinks on the AnnualCreditReport.com website, and the proposed separate landing page requirement for Internet websites.

In contrast, consumer advocates, NAAG, the States of Florida and Minnesota, and Senators Levin and Schumer either supported the proposed Rule or urged the Commission to strengthen it. For example, some commenters asserted that the Commission should ban all advertising on AnnualCreditReport.com, rather than delaying it as the Commission had proposed.[17] These commenters also generally supported the proposed disclosures for "free credit report" advertisements, as well as the separate landing page proposal for disclosures on Internet websites.

Almost all individual consumers responding to the NPRM urged Commission action in this area.[18] Many consumers explicitly supported the proposed Rule, in many instances relating personal stories of confusion when trying to obtain their free annual file disclosure. Similarly, many consumers said that they unwittingly paid various sums for unwanted services when they attempted to obtain what they thought was their free annual file disclosure.[19] Other consumers stated that the current process for

[12] As discussed in the NPRM, the Commission has undertaken enforcement and extensive education to address these practices. For example, in 2005, the Commission filed an action against Consumerinfo.com, Inc., a marketer of "free credit reports." *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal. Aug. 15, 2005). In that action, the Commission alleged that Consumerinfo.com, Inc., which advertised "free credit reports" to consumers on the Internet, through emails, and through television and radio advertisements, engaged in deceptive acts or practices in violation of section 5 of the FTC Act. 15 U.S.C. 45(a). These deceptive practices included failing to disclose or to disclose adequately that the "free" credit reports they were offering were not associated with the federally-mandated annual free credit report program, but rather were part of a commercial promotion. The settlement required Consumerinfo.com, Inc., to pay consumer redress, prohibited it from making deceptive and misleading claims about "free" reports, and required disclosure of the terms and conditions of any "free" offers. The defendant also agreed to forgo $950,000 in ill-gotten gains. Two years later, the Commission entered a second order with Consumerinfo.com, Inc., settling allegations that it violated the 2005 order. *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal., Jan. 8, 2007) (prohibiting defendant from failing to make required disclosures mandated by the 2005 order and requiring $300,000 payment for consumer redress).

[13] 74 FR 52915 (Oct. 15, 2009). The Commission released a version of the NPRM on its website on October 7, 2009.

[14] *Id.* at 52918-22.

[15] *Id.* at 52922.

[16] The comments are available at (*http://www.ftc.gov/os/comments/freeannualfilenprm/index.shtm*).

[17] NCLC at 3; State of Florida at 4; State of Minnesota at 3.

[18] Only a few consumers stated that Commission action is unnecessary. *See* M. Buckley; K. Hix; P. Johnson.

[19] *E.g.*, C. Thompson ("I signed up for freecreditreport.com, and couldn't find out [how] to cancel the membership I didn't want in the first place because I had to join just to get 1 report, and never could get all 3 reports."); B. Meyer ("Experian automatically signs you up for a $14.95/month credit report with the provision you have seven days to cancel the subscription .... Please end the ability of these companies to sign consumers to a contract/subscription they have no interest in."); E. Julbar ("I was deceptively led into providing my credit card number (falsely understanding that it was needed to prove identity) and then received multiple billings on my credit card from the 'service' provider."); K. Foster ("I was charged $14.99. This is NOT FREE, this is a lie, I was deceived ...."); L. Falk ("I have a Master's degree and I got scammed by these people. Free does not mean you pay $14.95!"); LaRosa ("I consider myself a generally savvy consumer, yet I still fell into their trap and was fraudulently charged over $100 by them before I realized what happened.").

obtaining a free annual file disclosure is confusing.[20]

Many consumers agreed that there should be no advertising on AnnualCreditReport.com until *after* consumers have received the requested file disclosure.[21] Consumers also agreed with the proposal that hyperlinks from AnnualCreditReport.com to the CRAs' proprietary websites should be eliminated.[22] In addition, several consumers agreed with the proposed Internet website disclosures for free credit reports.[23] In particular, over 170 consumers supported the proposed separate landing page for Internet websites offering free credit reports.[24]

In addition to commenting on the proposed changes and additions to the original Rule, many consumers, as well as certain States, urged the Commission to prohibit the advertising of "free" credit reports, unless such reports come with no strings attached.[25] A typical consumer comment is: "These reports should not be marketed as 'free' if they are contingent upon the purchase of a product."[26]

The Commission acknowledges the many comments questioning the use of the word "free" when associated with the offer of "free credit reports" that require the purchase of additional products and services. In response, the Commission notes that it will continue to scrutinize offers for "free credit reports" on a case-by-case basis to determine whether such offers are unfair or deceptive under the FTC Act.[27]

The Commission does not, however, have the authority to ban advertising of "free credit reports" altogether under the Act. Congress was aware of the consumer confusion in the marketplace over use of the phrase "free credit reports."[28] It chose to enact a disclosure law, directing the Commission to prescribe specific disclosures in advertisements for "free credit reports." Congress did not, however, prohibit the advertising of "free credit reports;" nor did it authorize the Commission to prohibit such advertising. Therefore, the Commission declines to do so. In any event, the Commission believes that the prominent disclosure requirements of section 610.4, as described below, will alleviate much of the consumer confusion in connection with the offer of "free credit reports."

## III. Section-by-Section Discussion of Final Amended Rule

### *A. Section 610.2(g): Communications provided through centralized source*

Section 610.2 of the original Free Reports Rule permitted the nationwide CRAs to advertise their proprietary products and services through the centralized source. When it promulgated the original Rule, the Commission recognized the potential for confusion from such advertising and marketing, but chose not to forbid it.[29] Instead, to address concerns about confusion from such advertising, the Commission restricted communications on the centralized source to the extent that they "interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source."[30]

Section 610.2(g) of the proposed Rule retained this requirement from the original Rule.[31] It proposed to modify the original Rule, however, by requiring that the nationwide CRAs delay advertising or marketing for products or services through the centralized source until after the consumer has obtained his or her free annual file disclosure. The final amended Rule adopts section 610.2(g) as proposed with certain modifications discussed below.

#### 1. Delay in advertising

The Commission's proposal to amend section 610.2(g)(1) of the original Rule to delay advertising on the centralized source until after the consumer has

[20] *E.g.*, M. Neal ("The phony 'free' credit report come-ons are confusing and thwart citizens who are trying to exercise their right to obtain an annual credit report."); G. Albelo ("[T]he free credit report site is guaranteed to manipulate one into paying for a service that should be free. The site is a maze of confusing sites, words and suggestions that the average person probably won't get through without paying for something, or falling prey to identity theft.").

[21] *E.g.*, F. Colantuono ("Have you ever tried to get your 'free' credit report online? . . . [Y]ou are bombarded with sales offers to sign up for ALL MANNER of products before you can request your credit report . . . . [B]anning all advertising until AFTER you make your request for your free report. This one is a winner!"); J. Ellis ("[A]gencies should be able to ask those requesting reports if they wish to receive additional information or services for a fee . . . only . . . after the fact . . . ."); F. Martin ("If advertising is allowed at all, it should be AFTER the consumer obtains the free report.").

[22] *E.g.*, J. Matey ("The link from the main annual report page should NOT LINK to anything except the free report."). Mr. Matey added that he would agree to "a single link [on] the form 'FOR ADDITIONAL SERVICES FOR WHICH YOU WILL BE CHARGED, PRESS THIS BUTTON.'" Otherwise, "[t]here should be absolutely NO INTERWEAVING between the free report and any other service."); S. Ratkowski ("There should be . . . no hyperlinks to commercial sites."); *see also* M. Neal ("The links to the big three credit reporting agencies only serve to distract or confuse consumers in their quest to obtain their credit reports."); J. Nielsen ("It should be criminal to attach links away from the free website.").

[23] M. Neal ("Any website purporting to offer a free credit report should be required to display a disclaimer that it is NOT the official site, and to give user a link to the real site."); *see also* K. Morris ("Requiring ads for sites that are not the centralized free access site to carry prominent notice that they are advertising a for-profit site is a good idea."); C. Thompson ("All advertisements for 'free credit reporting' should be clearly stated that they are private firms and not Government mandated."); D. Enfield ("[T]here should be a clear warning to me that I have landed on a page that is irrelevant to the task of getting my free report."); Young ("I also support that certain blatantly misleading ADS for 'free credit reports' be required to include PROMINENT disclosures about the official source to prevent confusion and/or to stop indicating that the advertised credit reports are in fact free.").

[24] *E.g.*, M. Baldissero; Professor K. Guenther; S. McGechie; B. Miller; C. Peltz; M. Ronsonette; Dr. J. Sitomer ("I support your proposal to require a separate landing page on sites that advertise free reports which explains that the reports are NOT the free reports guaranteed by the federal government.").

[25] *See, e.g.*, State of Minnesota at 3. *Cf.* Professor D. Friedman (attaching *Free Offers: A New Look*, 38 N.M.L. Rev. 49 (2008), which suggests the Commission reconsider approaches addressing free offers).

[26] W. Marciniak; *see also* T. Rusch ("[I] find it personally disgusting and certainly unethical that some company can advertise 'free credit reports' on the backstop of a Dodgers' baseball game when I know that there's not much free about it."); D. Wadsworth ("Websites that use the word 'free' should in fact be free, no charge for any services."); Miller ("Either credit reports are free or they are not free. The current advertising which relates to 'free credit reports' is misleading at best, in truth such ads are disingenuous, false and dishonest on their face."); A. Drew ("I REALLY don't think the credit report companies should try and bamboozle people into paying for their free report!"); M. Kramer ("These services are NOT FREE and extremely DECEPTIVE."). Numerous other consumers complained about deceptive or misleading advertising by credit companies. *E.g.*, H. Bagao ("The hidden trap of a free trial with automatic charges is tantamount to fraud and thievery. In fact, deceiving names such as FreeCreditReport should be prohibited, as it is a clear, blatant form of false advertisement."); K. Noreen ("Getting people to sign up for surprise credit-card charges is predatory lending, pure and simple."); M. Wunderli ("False advertising regarding free financial services that are not free perpetuates mistrust of financial systems.").

[27] *Cf. FTC v. Berkeley Premium Nutraceuticals, Inc.*, No. 1:06-CV-51 (S.D. Ohio Feb. 2, 2006) (alleging that marketers offered consumers "free" samples of dietary supplements only to enroll them in an automatic shipment program and bill them without their authorization); *FTC v. Conversion Marketing, Inc.*, No. SACV 04-1264 (C.D. Cal. Jan 17, 2006) (alleging that advertisers offered "free samples" of weight loss and tooth-whitening products and then debited consumers' accounts and enrolled them in automatic shipment programs without their knowledge or authorization).

[28] *See* 155 Cong. Rec. S6178, S6179 (June 4, 2009) (statement of Sen. Levin) ("Mandatory disclosures will help ensure that consumers are given accurate information about how to obtain a free credit report with no strings attached. It is an effort to end the deceptive activities of companies that attempt to trick people into buying something that they are entitled by Federal law to receive for free.").

[29] Among other things, the Commission reasoned that the FACT Act required nationwide CRAs to inform consumers of the availability of credit scores when providing file disclosures to them and that there was a benefit to those consumers wishing to purchase a credit score to do so at the same time that they obtain their annual file disclosures. *See* Statement of Basis and Purpose for Original Free Reports Rule, 69 FR 35468, 35486 (June 24, 2004).

[30] 16 CFR 610.2(g)(1).

[31] The original restriction found in section 610.2(g)(1) has been renumbered as section 610.2(g)(2) in the final amended Rule.

obtained his or her free annual file disclosure generated a substantial number of comments. Consumer advocates and many consumers either supported the proposal, or stated that it did not go far enough. For example, NAAG, as well as over 255 consumers, supported the proposal.[32] Others, including NCLC, the States of Florida and Minnesota, as well as over 250 consumers, recommended a complete ban of all advertising on the centralized source. A typical consumer comment stated: "The FTC should remove all advertising and marketing by the credit bureaus before, during and even after the process of getting a free credit report. People should be able to get their reports and exit the Web site without having to go through a gauntlet of sales pitches."[33] Similarly, another consumer stated: "Why aren't the free reports on a commercial-free site where I can go in, give the information I need without worrying who I'm giving it to, without a gauntlet of commercials and confusing links that send me to more places that want to get my money?"[34]

Industry and business groups, in contrast, opposed the proposal. One CRA noted that the centralized source is a springboard for providing consumers with beneficial credit-related products and services.[35] This commenter also argued that the proposed delay of advertising would prevent CRAs from complying with section 609(a)(6) of the FCRA, which requires CRAs to provide a statement that consumers can request a credit score when a consumer requests a credit file.[36] CDIA suggested that a better approach would be to require that advertisements for additional products or services on the centralized source be "no more conspicuous" than the centralized source's features for obtaining free annual file disclosures.[37]

The Commission has carefully considered these comments and has retained the restriction on advertising until after the consumer has obtained his or her file disclosure. As noted in the NPRM, the general standard contained in the original Rule, that advertising not "interfere with, detract from, contradict, or otherwise undermine" the centralized source, has not been effective in ensuring that consumers have an unfettered, easy-to-use mechanism for obtaining their free annual file disclosure. Consumers have been subjected to substantial amounts of advertising for the nationwide CRAs' proprietary products or services while navigating AnnualCreditReport.com to obtain their free annual file disclosures. Indeed, when consumers access the website, they encounter offers for a variety of add-on goods or services – such as credit scores and credit monitoring services – which they must purchase or decline, one by one, before obtaining their free annual file disclosures. These advertisements make it cumbersome and time consuming for consumers to exercise their right to obtain their free annual file disclosures.[38]

A substantial number of commenters confirmed that existing advertising impedes consumers' ability to obtain their free annual file disclosures on AnnualCreditReport.com. As one consumer noted, "[a]s a user of the annualcreditreport website, I feel it is like tiptoeing through a minefield to try to get past all the paid offers to the actual free credit report guaranteed by Federal law."[39] Another consumer stated that "If you are not extremely careful it is almost impossible to avoid ordering a product that is available only for a fee."[40] The comments confirm the problems the Commission articulated in the NPRM, and thus, the Commission continues to believe that a delay in advertising is necessary to ensure that consumers can exercise their federal right to obtain their free annual file disclosures, without unnecessary obstruction and delay.

The Commission recognizes that prohibiting all advertising on AnnualCreditReport.com would advance the Commission's interest in restricting aggressive advertising that impedes consumers' ability to obtain free file disclosures. The Commission believes, however, that the less restrictive approach of delaying advertising would achieve its goal of improving "the ease by which consumers should be able to contact consumer reporting agencies with respect to access to such consumer reports."[41] Delaying such advertising or other communications[42] enables consumers to focus first on obtaining their free annual file disclosure and decide thereafter whether to purchase additional products or services, including credit scores pursuant to section 609(a)(6) of the FCRA.[43]

2. Definition of "obtained"

Proposed section 610.2(g)(1)(i) clarified when consumers have "obtained" a free annual file disclosure for purposes of the delay in advertising by providing that, for telephone and written requests for free annual file disclosures, the consumer "has obtained" the file disclosure when the file disclosure is mailed to the consumer. Similarly, proposed section 610.2(g)(1)(ii) provided that, for free annual file disclosures requested through the Internet, the consumer "has obtained" the file disclosure when it is delivered to the consumer through the Internet.[44]

[32] *See, e.g.*, NAAG at 2; *see also* Empire Justice at 4 (urging the Commission to "[r]emove all 'pop-up ads' and any other advertising on the pages that a consumer must use to access his or her credit report.").

[33] N. Guzman.

[34] B. Irwin; *see also*, J. Matey ("There should be NO ADVERTISING on the free report pages."); R. Robinson ("[P]lease make them take all forms of advertising for a paid service completely off the 'free' website."); P. Wilson ("There should be no selling involved with the request for a free credit file review. There is no need to sell anything. Let's make the process transparent and just provide what is requested."); B. Meyer ("AnnualCreditReport.com should be commercial free!"); C. Epley ("Remove all advertisements! This page exists for me, the public, not for the firms who sell credit reports."); Munsch ("Remove all advertising and marketing by credit bureaus entirely before, during and after the process of getting the free credit report. One should be able to obtain the report(s) and exit without enduring sales pitches.").

[35] TransUnion at 3.

[36] *Id.*

[37] CDIA at 5.

[38] 74 FR at 52917. The Commission also noted that consumers reported feeling compelled to purchase the advertised products or services in order to obtain their free annual file disclosure.

[39] *See* T. Hillegass.

[40] *See* W. Stuart; *see also* K. Graham ("This site is currently the best example of 'limiting access by obfuscation' that I have ever seen.").

[41] 15 U.S.C. 1681j(a)(1)(C)(ii)(III). CDIA asserted that the Commission lacks any statutory authority to implement the proposal to delay advertising. CDIA at 3 ("The FTC lacks the authority to prescribe rules that prohibit the consumer reporting agency's advertising or marketing of products or services after the consumer's request has been received and when the consumer reporting agency is fulfilling that request."). In response, the Commission notes that its authority for amending this provision in the original Rule derives from the rulemaking authority in the FACT Act amendments to the FCRA and the Commission's authority to amend its rules under the Administrative Procedure Act. 15 U.S.C. 1681j; 5 U.S.C. 551(5) and 553. Congress initially authorized the Commission to promulgate the Free Reports Rule to establish the centralized source. In promulgating this Rule, Congress required the Commission to consider "the ease by which consumers should be able to contact consumer reporting agencies . . . ." The proliferation of distracting or confusing advertising and marketing on the centralized source affects its "ease" of use, and it is therefore within the Commission's authority to amend the original Rule to address this issue.

[42] As discussed below, the final amended Rule revises proposed section 610.2(g)(1) to restrict any request by a CRA to establish an account until after the consumer has obtained his or her file disclosure.

[43] The Commission will monitor and evaluate the effectiveness of this provision and may take additional action, as necessary.

[44] As stated in the NPRM, a file disclosure is "delivered" for purposes of this section when it is provided in a form that permits the consumer to store, download, print, or otherwise maintain the

Continued

Some commenters objected to the NPRM's proposed definition of when a consumer has "obtained" his or her free annual file disclosure. Schwartz & Ballen, a law firm, asserted that the CRAs should be prohibited from promoting additional products and services during the same telephone or website session or in the same envelope as the requested file disclosure because consumers may misinterpret the importance of material that accompanies information requested pursuant to a federally mandated right.[45] NCLC asserted that, for Internet requests, consumers should only be shown advertising after they have their "report in hand," so that "there is a clear separation in time and activity that gives the consumer adequate chance to reflect on whether he or she really wants to purchase other products."[46] In contrast, TransUnion objected to the proposal with respect to mail or telephone requests, asserting that CRAs should be permitted to advertise other products or services after the consumer has requested his or her file disclosure and the CRA has indicated that it will provide the file disclosure through the mail, asserting that it is easier for consumers to request products such as credit scores at the time of their request for their file disclosure.[47]

The final amended Rule adopts section 610.2(g)(1) as proposed. The Commission believes that the final amended Rule strikes the appropriate balance, by minimizing the risk that consumers may be misled before obtaining their free annual file disclosure, while still allowing the CRAs to offer additional products and services. The approach proposed by Schwartz & Ballen – that CRAs be prohibited from advertising during the same "website session" – would essentially ban advertising through the centralized source. As discussed above, the Commission believes a ban is more restrictive than necessary at this time.[48] The approach proposed by NCLC would require a CRA to be sure that the consumer has his or her report "in hand" before delivering advertising to that consumer. The Commission questions the feasability of this approach, as it is unclear whether a CRA would be able to ascertain, in all instances, when the consumer has the report "in hand." With respect to TransUnion's request to modify the proposal for mail and telephone requests to allow advertising before the report is placed in the mail, the Commission believes that, for example, allowing advertising messages to be relayed in the same telephone call during which the free credit report order is placed would cause the same consumer confusion and obfuscation described above. In addition, the Commission notes that the final amended Rule applies a consistent approach regardless of how the consumer obtains his or her report – advertising may be provided at the time the report is delivered or later. Therefore, the final amended Rule adopts section 610.2(g)(1) as proposed, with minor non-substantive changes.[49]

*B. Section 610.2(h): Additional prohibited practices*

Proposed section 610.2(h) prohibited three types of conduct on the centralized source: (1) hyperlinks to commercial or proprietary websites on the centralized source Internet website; (2) any request or requirement that consumers establish an account in order to obtain their free annual file disclosures; and (3) any request or requirement that consumers agree to terms and conditions in order to obtain their free annual file disclosures. In the NPRM, the Commission proposed to prohibit these types of conduct because they interfere with and undermine consumers' ability to obtain their free annual file disclosures through the centralized source. The final amended Rule adopts section 610.2(h) with certain modifications discussed below.

1. Section 610.2(h)(1): Prohibition on hyperlinks to commercial websites

In the NPRM, the Commission noted that, currently, the initial page of AnnualCreditReport.com contains hyperlinks to the websites of the three nationwide CRAs. If a consumer clicks on one of the CRA's hyperlinks on the initial page of AnnualCreditReport.com, the consumer is transported to that CRA's commercial website, where the consumer is unable to obtain his or her free annual file disclosure provided by federal law. For these reasons, the Commission proposed to prohibit such hyperlinks to reduce the possibility that consumers attempting to obtain their free annual file disclosures will be transferred to commercial websites that do not provide the federally mandated free annual file disclosures but instead sell various products or services.

A number of comments addressed the proposed prohibition of hyperlinks on the centralized source. Several commenters noted that the proposal will better protect consumers and reduce confusion as consumers attempt to access their free annual file disclosures.[50] Industry commenters objected to the proposal, asserting that the hyperlinks do not confuse consumers.[51] CDIA noted that, from a technical standpoint, the centralized source must transfer consumers to each of the CRA's individual websites to facilitate the fulfillment of the free annual file disclosures requests.[52]

In response to the comments, the final amended Rule retains the prohibition of hyperlinks, with two clarifications. First, it permits hyperlinks to a fulfillment web page on which consumers can order their annual file disclosure. Aside from fulfillment, the Commission finds no reason why hyperlinks should appear on the centralized source web site before a consumer orders his or her annual file disclosure, and in view of the potential for confusion, believes that the restriction is necessary. Second, consistent with the provision allowing advertising after the consumer has obtained his or her annual file disclosure, the CRAs may include hyperlinks in such advertising.

2. Section 610.2(h)(2): Prohibition on requiring the establishment of accounts

Proposed section 610.2(h)(2) prohibited nationwide CRAs from requesting or requiring a consumer to establish an account as a prerequisite to obtaining a free annual file disclosure through the centralized source. A number of commenters, including the BBB and NAAG, supported this proposal. The BBB noted that it has received thousands of complaints from consumers who complain about having to set up accounts before obtaining their free annual file disclosure: "Permitting this practice to continue places an

file disclosure for future reference. 74 FR at 52917-918. *Cf.* Franchise Rule, 16 CFR 436.6(b) (addressing disclosure in an online environment).

[45] Schwartz & Ballen at 3.

[46] NCLC at 4.

[47] TransUnion at 4.

[48] The Commission will continue to monitor carefully consumers' experiences with the centralized source. If the Commission finds that the delayed advertising permitted by the final amended Rule results in significant consumer confusion, it will revisit the issue of a ban.

[49] The Commission changed the language of proposed section 610.2(g)(1)(ii) to make it parallel with section 610.2(g)(1)(i). As in the proposed Rule, sections 610.2(g)(2) and (3) of the final amended Rule retain the original Rule requirement that any advertising on the centralized source shall not "interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source."

[50] *See, e.g.*, NAAG at 2; *see also* J. Smallwood ("at every turn there were confusing links, questions, and other chaff tossed in my way all designed to confuse and confound a consumer who simply wanted what was promised: an honest to goodness free credit report.").

[51] TransUnion at 5-6; CDIA at 5-6.

[52] CDIA at 5.

unnecessary barrier between consumers and their free annual credit report."[53]

In contrast, TransUnion and CDIA noted that the setting up of accounts could be beneficial to consumers. TransUnion stated that, among other things, establishing an account allows consumers to access their free annual file disclosure online for a period of time and makes the authentication process easier when consumers seek to obtain their file disclosures the following year.[54]

The Commission has determined that requiring the establishment of an account as a prerequisite to obtaining a free annual file disclosure interferes with the intent of the original Rule because it imposes a condition on the consumer's ability to obtain free annual file disclosures.[55] Further, because creating an account generally necessitates the collection of additional personally identifiable information, "requiring" such an account runs counter to the prohibition in section 610.2(2)(b)(ii) of the original Rule, which limits the collection of information to that which is reasonably necessary to properly identify the consumer and to process the consumer's transaction(s). Accordingly, the Commission has determined to retain the proposed prohibition against CRAs requiring consumers to set up an account to obtain a free annual file disclosure.

The Commission, however, agrees with TransUnion that consumers may derive a benefit from the establishment of accounts with CRAs when they obtain their free annual file disclosures and does not want to foreclose this option. As a result, the final amended Rule eliminates the NPRM's proposed prohibition on "asking" consumers to set up an account and allows CRAs to give consumers the option to establish an account. The Commission believes that such an option should be provided only *after* the consumer has obtained his or her file disclosure, in order to reduce the potential that a consumer may be confused into believing that an account is required to access his or her free file disclosure. Accordingly, the Commission has amended section 610.2(g)(1) to allow CRAs to provide an option to establish an account, but only after a consumer has obtained his or her file disclosure.

3. Section 610.2(h)(3): Prohibition on requiring terms or conditions

Proposed section 610.2(h)(3) prohibited CRAs from requesting or requiring consumers to agree to terms and conditions as a prerequisite to obtaining their free annual file disclosures through the centralized source. NAAG and Schwartz & Ballen supported prohibiting terms and conditions on consumers' access to their file disclosures.[56] CDIA and TransUnion objected to the proposal. TransUnion asserted that the terms and conditions required for consumers requesting their free annual file disclosure via the Internet are intended to deter consumers from accessing someone else's file disclosure.[57]

The Commission believes that a consumer's right to obtain a free annual file disclosure should be unfettered and without any restrictions or conditions, apart from providing appropriate identifying information, as is required under the FCRA.[58] Further, after reviewing the comments, the Commission does not believe that there is any reason to permit CRAs to ask or require consumers, including those who attempt to access their free annual file disclosures through the Internet, to agree to terms and conditions.[59] The Commission has determined, therefore, to retain the proposed Rule's prohibition on requiring or requesting that consumers agree to terms and conditions in connection with obtaining a free annual file disclosure.

The final amended Rule, however, revises the proposed language in two respects. First, consistent with comments received, it eliminates the term "prerequisite" to clarify that *any* request or requirement to agree to terms or conditions in connection with obtaining free annual file disclosures is prohibited, even one made after the consumer obtains his or her file disclosure. The Commission believes that, even if such terms and conditions are presented after the consumer obtains his or her file disclosure, the consumer might reasonably believe that accepting the terms and conditions is required. Second, the final amended Rule substitutes "terms *or* conditions" for "terms and conditions." The Commission believes this revision is necessary to clarify that the prohibition does not extend only to documents or text labeled "terms and conditions." Rather, it extends to any legal impediment on consumers' access to a free annual file disclosure, regardless of whether that impediment is presented as "terms and conditions," "notice," "legal notice," or another term.

*C. Section 610.4: Prevention of deceptive marketing of "free credit reports"*

Section 610.4 implements the Congressional directive in section 205 of the Act to combat the deceptive marketing of "free credit reports" through "prominent" disclosures in advertisements for "free credit reports." Proposed section 610.4 included general requirements to ensure that the disclosures are sufficiently prominent, such as requiring that all audio disclosures be delivered in a slow and deliberate manner and providing specific guidance to ensure that visual disclosures are prominent. This section also included disclosure requirements specific to each of the various media in which advertising may occur. Where possible, the disclosure standards in the proposed Rule were drawn from comparable FTC or other federal law addressing the prominence of specific required disclosures – in particular the Prescreen Opt Out Notice Rule[60] and the Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("Pay Per Call Rule").[61] The standards also were drawn from relevant Commission law enforcement actions and business education materials. Proposed section 610.4 consisted of three sections: definitions, general disclosure requirements, and media-specific requirements. These are discussed below in turn.

1. Definitions

a. Section 610.4(a)(1): The term "AnnualCreditReport.com and 877-322-8228"

Proposed section 610.4 defined the term "AnnualCreditReport.com and 877-322-8228" to mean the Uniform Resource Locator and toll-free telephone number currently used by the

[53] BBB at 3; *see also* NAAG at 2; E-Commerce at 2 (supporting a provision barring sites from requiring consumers to register in order to obtain the annual file disclosure).

[54] TransUnion at 6-7; *see also* CDIA at 6.

[55] Requiring the establishment of an account is contrary to existing Commission commentary on the provision of file disclosures. *See* FTC Commentary on the Fair Credit Reporting Act, 16 CFR 600 Appendix, comment 610-2 ("A consumer reporting agency may not add conditions not set out in the FCRA as a prerequisite to the required disclosure.").

[56] NAAG at 2; Schwartz & Ballen at 3-4.

[57] TransUnion at 7 (asserting that terms and conditions are justified because consumers are obtaining immediate access to file disclosure).

[58] *See* 15 U.S.C. 1681h(a)(1).

[59] In response to TransUnion's comment, if a consumer is determined to access someone else's file disclosure, it is unclear how requiring that person to agree to terms and conditions will serve as a deterrent. In any event, TransUnion does not require terms and conditions for mail or telephone requests for free credit reports; thus, requiring such terms and conditions does not seem necessary for Internet transactions.

[60] 16 CFR Part 642.

[61] 16 CFR Part 308.

centralized source. Proposed section 610.4 also provided that if the centralized source's website (currently AnnualCreditReport.com) or toll-free telephone number (currently 877-322-8228) were to change, the centralized source must substitute the new website or toll-free telephone number in all disclosures required by this section of the Rule. In response to the NPRM, the Commission received only one comment. CDIA agreed with the proposed definition, but urged the Commission to include a reference to a "reasonable time" in order to provide the centralized source an opportunity to update the disclosures.[62] The Commission believes this modification is appropriate and has revised the proposed Rule accordingly.

b. Section 610.4(a)(2): The term "free credit report"

Proposed section 610.4 set forth the following definition of "free credit report":

> *Free credit report*. For the purposes of this section, "free credit report" means a consumer report or file disclosure that is prepared by or obtained, directly or indirectly, from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act); that is represented, either expressly or impliedly, to be available to the consumer free of charge; and that is, in any way, tied to the purchase of a product or service.

As noted in the NPRM, the term "free credit report" is undefined in section 205 of the Act, the FCRA, or the Free Reports Rule.[63] The Commission defined the phrase in the proposed Rule, however, in order to clarify the scope of the Rule's disclosure requirements. As explained more fully below, based on the comments received, the Commission has revised the proposed definition of "free credit reports" as follows:

> *Free credit report* means a file disclosure prepared by or obtained, directly or indirectly, from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act), that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.

i. Scope of the term "free credit report"

Proposed section 610.4 defined "free credit report" to include "a consumer report or file disclosure prepared by or obtained . . . from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act)." NCLC and TransUnion urged the Commission to broaden the definition to include reports offered by nationwide specialty CRAs.[64] In that regard, TransUnion stated: "As a general matter, it is not clear why this provision pertains to Free Reports involving only nationwide CRAs. If an entity is advertising a 'free credit report,' it would seem that the disclosures are appropriate regardless of the provider or source of information."[65] NCLC also observed that the statutory language of the Act is not limited to nationwide CRAs.[66]

On the other hand, several commenters, including CDIA and Experian, urged the Commission to narrow the definition of "free credit report," asserting that section 610.4 should cover only file disclosures of the type that the nationwide CRAs must make available through the centralized source. For example, Experian's comment states:

> [The statute] seeks to assure that consumers will be able to distinguish between a free credit report offered by a commercial entity and the free annual file disclosures available at [AnnualCreditReport.com]. The statute does not cover other aspects of the consumer credit system such as credit scores or the many other types of information that can qualify as 'consumer reports' under the FCRA.[67]

The Commission agrees that the NPRM's inclusion of the term "consumer report" in the proposed definition of "free credit report" was too broad, sweeping in the offer of reports that go beyond the requirements of section 205 of the Act, and potentially adding to consumer confusion. Section 205 was intended to address the confusion between the information offered through the centralized source and similar information offered from private or other commercial sources. Indeed, the disclosures contemplated by section 205 of the Act would not be useful, for example, for advertising of offers of consumer reports from nationwide specialty CRAs, as those reports are not available through the centralized source. Similarly, the term "consumer report" would include "credit scores;" thus, under the proposed Rule, an advertisement for a "free credit score" would have triggered the requirement to disclose the existence of AnnualCreditReport.com. Consumers seeing an advertisement for a free credit score might be confused if they are directed to AnnualCreditReport.com, only to find that they could not get a free credit score on that site. Accordingly, section 610.4 of the final amended Rule is limited in scope to reports of the type disseminated through the centralized source.

ii. Applicability of the term "free credit report" to trial offers

The definition of "free credit report" in proposed section 610.4 applied to an offer of free credit reports "that is, in any way, tied to the purchase of a product or service." Several commenters objected to the use of the phrase "in any way, tied to the purchase of a product or service." NAAG suggested that the term "purchase" might be interpreted to exclude negative option offers, where the consumer may cancel the purchase before having paid anything: "If a consumer receives a free credit report and cancels any service within the allotted time without paying anything, some may argue that the report is not technically 'tied to the purchase of a product or service.'"[68]

The Commission agrees and has changed the definition of "free credit report" to better clarify the types of "free credit report" offers intended to be covered by the Rule – those "represented, either expressly or

[62] CDIA at 9 ("[T]he FTC should clarify in the Rule that covered entities will be provided with a reasonable opportunity to update the information.").

[63] 74 FR at 52918.

[64] NCLC at 4; TransUnion at 8. At the same time, NCLC noted that the disclosures set forth in the Act for nationwide CRAs would have to be modified if applied to nationwide specialty CRAs by omitting references to AnnualCreditReport.com. NCLC at 4.

[65] TransUnion at 8.

[66] NCLC at 4.

[67] Experian at 28-29; *see also* Schwartz & Ballen at 2 ("CRAs . . . offer their services in connection with their sponsorship of the website AnnualCreditReport.com, which is where consumers may obtain their free credit reports under Federal law."); CDIA at 8 (asserting that the proposed definition would "apply to many products and services that are not in direct competition with the credit file disclosures required to be made available through the centralized source because the Free Annual File Disclosures Rule cannot and does not require similar options.").

[68] NAAG at 2-3. Similarly, the States of Florida and Minnesota urged that the definition cover trial offers or trial periods. State of Florida at 6 ("The definition of 'free credit report' should encompass . . . trial subscriptions to make it abundantly clear that trial offers are covered."); State of Minnesota at 3 ("The FTC should adopt a broad definition of 'free credit report' that explicitly covers . . . 'trial periods.'"). Other commenters expressed confusion about the phrase "tied to" the purchase of a product or service. For example, NCLC noted that the term "tied to" could be confused with the antitrust concept of "tying," where a seller conditions the sale of one product or service on the customer's agreement to take a second product or service. NCLC at 5.

impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation." This language clarifies that a "free credit report" offered in connection with a trial offer of another product or service will fall within the scope of the Rule and trigger the disclosure requirement.[69]

iii. Bundled offerings that include credit reports

Several commenters urged the Commission to clarify that section 610.4 does not apply to advertisements for every bundle of products or services that may include a "free credit report."[70] For example, CDIA contended that "where a company offers a package of services together with a credit report – such as combined credit monitoring, identity theft assistance, or other products or services – the disclosure requirements should not apply if a complimentary credit report is not a dominant part of the offer."[71] These commenters asserted that there is no confusion between the offering of bundled products and services and the federally mandated dissemination of free annual file disclosures through the centralized source. In that regard, Intersections, a business commenter, stated: "If a consumer were to compare an offer for a free trial of Intersection's Bundled Products with the annual federally mandated disclosure, it would be clear to the consumer even upon a cursory review that he or she was reviewing separate and wholly unrelated products."[72] In addition, American Express noted that it offers a complimentary credit score and report once a year as part of a package of Cardmember services and that the disclosure requirement should not apply to this service.[73]

The Commission declines to modify the proposed Rule in response to these comments. The Commission disagrees that the types of bundled products mentioned by commenters do not cause consumer confusion. Indeed, the Commission believes that advertising for bundled products that promote free credit reports, in addition to other products and services, such as credit monitoring, is the very type of advertising that is likely to confuse consumers. Thus, the final amended Rule does not include any type of exemption for bundled products. With respect to the free credit reports offered by American Express as a benefit of membership, the Commission notes that the advertising of a free credit report to a non-member in this instance would fall within the Rule's definition of "free credit report." However, once a consumer becomes a member, a statement that a no-strings-attached "free credit report" is a benefit of membership does not fall within the Rule's definition because such a free credit report is not being advertised "in connection with the purchase of a product or service."[74]

2. Section 610.4(a)(3): General requirements for disclosures

Section 610.4(a)(3) of the final amended Rule implements the Act's mandate that the required disclosures for "free credit reports" be "prominent." It also sets forth general requirements for, among other things, visual, audio, and program-length advertisements.[75] These requirements are designed to ensure that the mandated disclosures can be readily seen and/or heard by consumers.[76] In addition, the final amended Rule clarifies that the disclosures must be limited to the prescribed text with no other content to ensure that the consumer is not distracted from the message contained in the disclosure.

a. Section 610.4(a)(3)(i): Prominent

Section 610.4(a)(3)(i) of the final amended Rule revises the NPRM by adding a new section incorporating the statutory mandate that all disclosures for "free credit reports" be "prominent." In response to the NPRM, the Commission received numerous comments on how the final Rule should address prominence, including comments on the placement, format, and timing of the required disclosures, as discussed in detail below. Accordingly, the Commission has added in the final amended Rule a general requirement that all disclosures must be "prominent," consistent with the language of section 205.[77] This general "prominence" requirement applies to all disclosures in any medium.

b. Section 610.4(a)(3)(iii): Language usage

Proposed section 610.4 required that any disclosure mandated by this section be provided in the same language as that principally used in the advertisement. The proposed requirement drew from identical language in section 308.3(a)(1) of the Pay Per Call Rule and the Commission's belief that a disclosure in a language different from that which is principally used in an advertisement would be deceptive.[78] No comments addressed this issue. Accordingly, the final amended Rule adopts this section, as proposed in the NPRM.

c. Section 610.4(a)(3)(iii): Visual disclosures

Proposed section 610.4(a)(4) provided that visual disclosures "shall be of a color or shade that readily contrasts with the background of the advertisement, in a font easily read by a reasonable consumer, and be parallel to the base of the advertisement." The proposed section drew from the Pay Per Call Rule, which requires disclosures to be (1) in "a color or shade that readily contrasts with the background of the

[69] Section 610.4(a) of the final amended Rule makes clear that representations made both expressly and impliedly about an offer of a "free credit report" will trigger the Rule's disclosure obligations. Schwartz & Ballen contended that the word "impliedly" is vague, ambiguous, and "will unnecessarily result in significant uncertainty in its application." Schwartz & Ballen at 4. The Commission believes that the use of the term "impliedly" is consistent with well-established advertising law under section 5 of the FTC Act. *See generally* FTC Policy Statement on Deception ("Deception Statement"), Appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) ("In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions. In other situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claims.").

[70] *See* Intersections at 1; American Express at 2; Schwartz & Ballen at 4; TransUnion at 8.

[71] CDIA at 9 ("The FTC does not further the goal of preventing consumer confusion between the federally mandated annual disclosure and commercial 'free credit report' offers by applying these disclosures to advertisements for these packages.").

[72] Intersections at 2 and 7.

[73] American Express at 1.

[74] An offer of a "free credit report if you extend your membership" would be made "in connection with a purchase" and therefore covered by the Rule.

[75] These general disclosure standards are drawn from several Commission trade regulation rules. *See* Pay Per Call Rule, 16 CFR Part 308; Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations ("Cooling-Off Rule"), 16 CFR Part 429; Franchise Rule, 16 CFR Part 436; Business Opportunity Rule, 16 CFR Part 437; and Regulations under the Fair Packaging and Labeling Act, 16 CFR Part 500.

[76] The Commission also recognizes that States and individuals have the ability to enforce parts of the FCRA. By setting forth these requirements, section 610.4(a)(4) of the final amended Rule is intended to avoid a patchwork of differing interpretations of what constitutes "prominent" disclosures.

[77] Commission precedent establishes that disclosures in fine print or buried in dense blocks of text are not prominent. The mandate that disclosures be "clear and conspicuous" or "clear and prominent" dates back more than 60 years. *See, e.g., Hillman Periodicals v. FTC*, 174 F.2d 122 (2d Cir. 1949) (upholding Commission order that company selling shortened versions of books disclose that its publications are abridged "in immediate connection with the title and in clear, conspicuous type").

[78] *See also* 16 CFR 429.1(a) (requiring disclosure of right to cancel door-to-door sales "in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation").

advertisement" and (2) "parallel to the base of the advertisement."[79]

Several commenters offered suggestions on how to add specificity to ensure that the visual disclosures are prominent. For example, the State of Florida recommended that print and Internet disclosures appear within "a border similar to the Surgeon General's cigarette warning. . . ."[80] NYCPB recommended that print disclosures "be presented in a box and/or in a contrasting color to help ensure its prominence."[81] The Commission agrees that more specificity is required to ensure that all visual disclosures are prominent.

Thus, the Commission has modified the proposed section to add specific requirements to strengthen the prominence of visual disclosures. First, the Commission has added a general requirement that visual disclosures be easily readable. For example, as noted in the NPRM, a disclosure in an Old English Text font would not be "easily readable," even if it were sufficiently large. In addition, manipulating the letter width, letter spacing, word spacing, or line height so that the letters of the disclosure appear to be condensed in comparison to the rest of the text on the page or screen would violate the requirement for the disclosure to be "easily readable."[82] Similarly, a disclosure presented in all italics or underlined would likely be difficult to read; if so, it would not comply with the requirement to be "easily readable."

Second, instead of merely requiring visual disclosures that "readily contrast with the background" of the disclosure, the final amended Rule requires that there be a "high degree of contrast." The Commission believes that such a clarification is necessary to ensure prominence. As an example, a disclosure in which the text contrasts slightly with the background (*e.g.*, light gray on dark gray) would not constitute a sufficiently "high degree of contrast" to satisfy this requirement.[83]

Third, drawing from the Commission's Prescreen Opt-Out Rule, the final amended Rule requires that visual disclosures be distinct from other text, such as inside a border.[84] Fourth, the final Rule requires that the disclosure be "in a distinct type style, such as bold."[85] Finally, because the final amended Rule addresses disclosures beyond print, such as television and Internet websites, the Commission has modified the requirement that the disclosure be "parallel to the base of the advertisement" to state that the disclosure must be "parallel to the base of the advertisement or screen."[86]

d. Section 610.4(a)(3)(iv): Audio disclosures

Proposed section 610.4 required that audio disclosures be delivered in a slow and deliberate manner and in a reasonably understandable volume. In response to the NPRM, a few commenters suggested additional specificity for this section, such as requirements for pitch and a particular volume level.[87] The Commission agrees that adding a requirement that the audio disclosure be at a reasonable pitch will further ensure that audio disclosures can be heard by consumers. The Commission has modified the final amended Rule accordingly. The Commission, however, believes that adding a specific volume level is unnecessary, given that the Rule already requires the disclosure to be made at "a reasonably understandable volume."

One commenter suggested that the audio disclosure be made each time the triggering term "free credit report" is used.[88] The Commission believes that multiple disclosures in a short audio advertisement could make all of the messages in the advertisement (including the disclosure) difficult for consumers to understand; therefore, the Commission declines to make this change. For program-length advertisements, however, section 610.4(a)(3)(v) of the final amended Rule does require multiple audio disclosures, as discussed below.

e. Section 610.4(a)(3)(v): Program-length advertisements

Proposed section 610.4 required that any program-length television, radio, or Internet-hosted multi-media advertisement for "free credit reports" provide the required disclosures at the beginning, near the middle, and at the end of the advertisement. No substantive comments addressed this provision. Accordingly, the final amended Rule adopts this proposal.[89]

f. Section 610.4(a)(3)(vi): Inconsistent and contrary information

Proposed section 610.4 provided that "nothing contrary to, inconsistent with, or in mitigation of the required disclosures shall be used in any advertisement in any medium . . . ." The proposed section also prohibited any audio, visual, or print technique that is likely to detract significantly from the communication of any required disclosure. This provision was drawn from section 308.3(a)(5) of the Pay Per Call Rule and was designed to prevent circumvention of the Rule requirements through the conveyance of contrary or inconsistent information, or other actions that undermine the disclosures to consumers.[90]

In its comment, Schwartz & Ballen asserted that the phrase "in mitigation" fails to provide sufficient guidance as to what language is prohibited by this section.[91] The Commission agrees that the term "in mitigation" is vague; thus, the final amended Rule substitutes the

[79] *See also In re Swisher Int'l, Inc.*, C-3964 (2000) (requiring warnings on cigar advertisements to appear "parallel . . . to the base of the advertisement"); Regulation under Section 4 of the Fair Packaging and Labeling Act, 16 CFR 500.4 (requiring statement of identity for packaged goods to appear "in lines generally parallel to the base on which the packaging or commodity rests as it is designed to be displayed"). "Parallel to the base" means that a consumer need not turn his or her head in order to read the disclosure. Accordingly, swirling or diagonal text, for example, will not be parallel to the base of the advertisement or screen.

[80] *See* State of Florida at 7.

[81] *See* NYCPB at 2.

[82] *See* Final Model Privacy Form Under the Gramm Leach Bliley Act, 74 FR 62889, at 62899 -900 (Dec. 1, 2009) (setting forth general guidance for easily readable type).

[83] The Pay Per Call Rule required only that the disclosure "readily contrast" with the background. In this rulemaking, modification of the Pay Per Call Rule standard is warranted in light of changes in technology that have developed since promulgation of that rule. Indeed, as CDIA noted, the Pay Per Call Rule does not address Internet disclosures at all. CDIA at 12-13.

[84] *See* 16 CFR 642.3(a)(2).

[85] As noted above, although text in, italics, or underlined may be "in a distinct type style," if they are difficult to read, they would not satisfy the "easily readable" requirement.

[86] The final amended Rule also eliminates the term "color" in recognition of the fact that certain advertising, such as newspaper advertising, often contains no color.

[87] *See* NAAG at 4 (suggesting that audio disclosure be made "every time the triggering term is used and at the same decibel"); State of Florida at 7 (suggesting that "audio disclosures should parallel the volume and approximate pitch of the primary advertisement or be at least as audible as the primary advertisement").

[88] *See* NAAG at 4 (suggesting that audio disclosure be made "every time the triggering term is used . . .").

[89] The Commission notes that this provision is identical to section 308.3(a)(6) of the Pay Per Call Rule, and is designed to enable consumers tuning in to the program-length advertisement at different stages of the broadcast to receive the required disclosure. *Cf. In re Synchronal Corp.,* 116 FTC 1189 (1993) (requiring video or commercial advertisements 15 minutes or longer to disclose that program is a paid advertisement within the first 30 seconds and immediately before presentation of ordering instructions).

[90] *Cf.* Franchise Rule, 16 CFR 436.9(a) and Business Opportunity Rule, 16 CFR 437.1(a)(21) (prohibiting the making of any claim or representation, orally or visually, or in writing, that contradicts the information required to be disclosed by the Rule); Guides for Environmental Marketing Claims, 16 CFR 260.6(a) (noting that an absence of contrary claims will help make disclosures clear and prominent).

[91] Schwartz & Ballen at 5.

phrase "that undermines" for the phrase "in mitigation."[92] Accordingly, the relevant portion of section 610.4(a)(3)(vi) of the final amended Rule reads, "nothing that is contrary to, inconsistent with, or undermines the required disclosures shall be used in any advertisement in any medium . . . ."

3. Section 610.4(b): Medium-specific advertising disclosures

Proposed section 610.4(b) set forth the statutory requirements relating to prominence in specific media. The wording and presentation of required disclosures for each medium are described below.

a. Section 610.4(b)(1): Disclosures for television advertisements

Section 205 of the Act prescribes the specific wording of the disclosures for television, requires that the disclosures be made in both audio and video formats, and requires the audio and video disclosures to be made at the same time.[93] Accordingly, consistent with the Act, proposed section 610.4(b)(1) required that all advertisements for "free credit reports" broadcast on television include the following disclosure: "This is not the free credit report provided for by Federal law" in the audio and visual parts of the advertisement at the same time. Proposed section 610.4(b)(1) also required that the disclosure be at least four percent of the vertical picture height, and appear for a minimum of four seconds. This requirement is consistent with comparable Federal Election Commission requirements for the disclosure of the funding source of a political advertisement on television.[94]

The Commission received few comments on this proposed section. NAAG suggested that the Commission add the following statement to the disclosure: "This report is only free if you make a purchase."[95] As noted above, however, the statute specifies the wording of the disclosure for television and radio advertisements, and the Commission's Rule follows this wording.

One commenter disagreed with the proposed Rule's use of the Federal Election Commission requirements for the size of the visual disclosure, asserting that the standard is "overly rigid and excessively burdensome."[96] The commenter did not provide any additional information or support; nor did it offer an alternative standard. The Commission continues to believe that the Federal Election Commission requirements provide a useful standard for prominent disclosures in television advertisements. Accordingly, the Commission retains this standard in the final amended Rule.

In addition, NAAG, the State of Florida, and NYCPB offered several suggestions regarding the timing of the disclosure. For example, the State of Florida suggested that the visual disclosure appear throughout the entire advertisement and that the size of the disclosure be at least as large as the company name.[97] NYCPB suggested that the disclosure "should be provided at the front or beginning of the advertisement" to be consistent with the proposed Internet website disclosure.[98] NAAG suggested that the disclosure be "equally prominent and in close proximity to the triggering claim . . . ."[99]

The Commission agrees that, consistent with long-standing Commission interpretations of prominence, the audio and video disclosure should appear in close proximity to the first mention of a free credit report. Indeed, as FTC staff has stated in its prior business guidance, "[a] disclosure is more effective if it is placed near the claim it qualifies or other relevant information. Proximity increases the likelihood that consumers will see the disclosures and relate it to the relevant claim or product."[100] In keeping with this principle, section 610.4(b)(1)(i) now reads, "all advertisements for free credit reports broadcast on television shall include the following disclosure in close proximity to the first mention of a free credit report: 'This is not the free credit report provided for by Federal law.'"[101]

b. Section 610.4(b)(2): Disclosures for radio advertisements

Proposed section 610.4(b)(2) also incorporated the section 205 disclosure for all advertisements for "free credit reports" broadcast on radio: "This is not the free credit report provided for by Federal law."

Similar to the television disclosure, NAAG suggested that the Commission add to the disclosure the following statement: "This report is only free if you make a purchase."[102] As noted above, the statute specifies the wording of the disclosure for television and radio advertisements, and the Commission's Rule follows this wording.

With respect to the timing of the disclosure, NAAG suggested that it appear "in close proximity to the triggering claim . . . ."[103] Another commenter suggested that the disclosure "should be provided at the front or beginning of the advertisement" to be consistent with the proposed Internet website disclosure.[104] The Commission agrees that a timing requirement would be appropriate. Rather than mandating the disclosure up front, however, the Commission has decided to add a requirement that the disclosure be made in close proximity to the first mention of "free credit report," consistent with the requirement for television advertising discussed above. Thus, the final amended Rule section 610.4(b)(2) states that "all advertisements for free credit reports broadcast on radio shall include the following disclosure in close proximity to the first mention of free credit report: 'This is not the free credit report provided for by Federal law.'"

c. Section 610.4(b)(3): Disclosures for print advertisements

Proposed section 610.4(b)(3) provided that all print advertisements for "free credit reports" include the following disclosure: "This is not the free credit report provided for by Federal law. To get your free report, visit (*www.AnnualCreditReport.com*) or call 877-322-8228." Further, it required that each letter of the disclosure be, at a minimum, one half the size of the largest letter or numeral used in the name of the website or the telephone number to which consumers are referred

[92] Further, the phrase "that undermines" is drawn from and parallel to other sections of the original Rule. *See* 16 CFR 610.2(g)(1), renumbered as section 610.2(g)(2) in the final amended Rule (prohibiting "communications . . . [that] undermine the purpose of the centralized source").

[93] Section 205(a)(2): "In the case of an advertisement broadcast by television or radio, the disclosure required under paragraph (1) "shall be included in the audio and visual part of such advertisement."

[94] *See* 11 CFR 110.11(c)(3)(iii)(B).

[95] NAAG at 3.

[96] Schwartz & Ballen at 5.

[97] State of Florida at 7.

[98] NYCPB at 2.

[99] NAAG at 3.

[100] *See* Federal Trade Commission Guidance, Dot Com Disclosures: Information about Online Advertising, at 6, *available at* (*http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf*) ("Dot Com Disclosures").

[101] In response to commenters' additional suggestions to address prominence in television advertising, the Commission notes that, rather than adding specific requirements to this section, it has tried to tighten the prominence requirements for all disclosures, as discussed above.

[102] NAAG at 3.

[103] *Id.* In addition, NAAG and the State of Florida offered suggestions regarding the placement and/or audibility of the disclosures. These comments are addressed in the discussion of the general requirements for prominent advertising disclosures above.

[104] NYCPB at 2.

to receive what is advertised as a free credit report.[105]

States and consumer advocates generally supported the proposal and offered suggestions to make the disclosure more prominent. For example, NAAG suggested that the disclosure should be equally prominent and in close proximity to the triggering claim of "free" or "free credit report."[106] The State of Florida and NYCPB suggested that the Rule include formatting requirements, such as the use of a border or contrasting color.[107] NCLC suggested that the Rule include placement requirements for the disclosure, such as near the most prominent listing of the website or telephone number for the commercial entity and, for multi-page advertisements, on the front side of the first page of the principal promotional document.[108] In addition, Schwartz & Ballen suggested that the second sentence of the disclosure should be the same as the language for the interim disclosure specified in the Act because it is more clear than the disclosure proposed in the NPRM.[109]

The Commission agrees that the print disclosures should be made more prominent, and accordingly has modified the proposal in several ways. First, the Commission has added a general prominence requirement and strengthened the general requirements for visual disclosures in the final amended Rule, as discussed above. All of these requirements apply to print advertising.

Second, proposed section 610.4(d)(3) required only that the disclosure text be one-half the size of the largest letter or numeral *used in the website address or telephone number* to which consumers are referred to obtain their "free credit report" listed in the print advertisement. Section 610.4(b)(3) of the final amended Rule provides that each letter of the disclosure text shall be, at minimum, one-half the size of the largest character *used in the advertisement*. Linking the type size of the disclosure to the largest character used in the entire advertisement (as opposed to only the website address or the telephone number), combined with the general requirements of section 610.4(a) of the final amended Rule, will strengthen the prominence of the print disclosure.

Third, the Commission agrees with the comments suggesting inclusion of a requirement that the disclosure be in close proximity to the free report claim. As with the radio and television disclosures, this modification is consistent with longstanding FTC practice requiring disclosures be made in close proximity to the triggering claim. Thus, the final amended Rule provides that the required disclosure appear in close proximity to the first mention of a "free credit report."[110]

With respect to the comment on the text of the disclosure, the Commission agrees that the text could be clearer. Particularly when the disclosure is made in close proximity to the offer of a free credit report, the consumer might be confused by conflicting messages. For example, a consumer might see an advertisement saying "get a free credit report" and, in close proximity, the consumer would see the disclosure that begins with the phrase "This is not the free credit report . . . ." The Commission believes that the juxtaposition of the two messages – particularly when placed in close proximity – would likely cause consumer confusion, and has changed the disclosure text in two respects to address this issue.

First, the Commission has added a requirement that the disclosure include the following header centered on the first line of the disclosure: "THIS NOTICE IS REQUIRED BY LAW." This header clarifies that the disclosure is coming from a source other than the commercial entity advertising a free credit report. In addition, the requirement to include a header is consistent with numerous other Commission rules that title disclosures to alert consumers to the importance of the message delivered.[111]

Second, rather than starting the disclosure with the sentence "This is not the free credit report provided by federal law.", the final amended Rule's disclosure includes only the affirmative statement: "You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the ONLY authorized source under federal law." The Commission notes that beginning the disclosure with the phrase "This is not the free credit report" could be confusing in that it may be unclear what the term "this" refers to. Thus, the Commission believes that these changes make the required disclosure clearer for consumers.[112]

d. Section 610.4(b)(4): Disclosures for Internet websites

Proposed section 610.4(b)(4) required any website offering "free credit reports" to first display on a separate landing page the following visual disclosure: "This is not the free credit report provided for by Federal law. To get your free report, visit (*www.AnnualCreditReport.com*) or call 877-322-8228." Proposed section 610.4(b)(4) also required that the separate landing page contain no other information aside from the statement: "Go to [hyperlink to company's website.]" Further, the disclosure was to: (1) be visible to consumers without requiring them to scroll down the webpage; (2) contain an operational hyperlink directing consumers to (*www.AnnualCreditReport.com*) that appears before the hyperlink to the advertised company's commercial website; and (3) be in a type at least twice the size as the hyperlink to the company's website or display of the company's Uniform Resource Locator. Finally, proposed section 610.4(b)(4) provided that the separate landing page must occupy the full screen and that no other information, graphics, or material could be shown to the consumer unless and until the consumer affirmatively selected one of the two hyperlinks described above.[113]

Consumer advocates such as NCLC, as well as NAAG, the States of Florida and Minnesota, Senator Levin, and many individual consumers generally supported the proposed separate landing page requirement. Some consumer advocates recommended strengthening the proposed separate landing page. For example, NCLC commented that the separate landing page should appear in multiple

[105] As noted in the NPRM, this approach is identical to that of the Pay Per Call Rule, section 308.3(b)(v)(2)(i).

[106] NAAG at 4.

[107] State of Florida at 7; NYCPB at 2.

[108] NCLC at 5.

[109] Schwartz & Ballen at 6. Section 205(b)(3) of the Act provides that the interim disclosure shall include "Free credit reports are available under Federal law at: 'AnnualCreditReport.com'.". In addition, CDIA commented that the proposed disclosure exceeds the Commission's statutory authority because of the inclusion of the first sentence and suggested that the disclosure should be limited to the second sentence. CDIA at 13. As stated in the NPRM, section 205 of the Act does not specify the wording of the advertising disclosure required in print advertisements. Rather, it only requires that the disclosure be "prominent" and authorizes the Commission to determine the appropriate wording of the advertising disclosure through this rulemaking.

[110] For example, a print advertisement that features a "free credit report" offer at the top of the page, intervening text, and the disclosure at the bottom of the page would not satisfy the close proximity requirement.

[111] *See, e.g.*, Cooling Off Rule, 16 CFR Part 429 (requiring a form captioned either "NOTICE OF RIGHT TO CANCEL" or "NOTICE OF CANCELLATION"); Prescreen Rule, 16 CFR Part 642 (requiring a form captioned "PRESCREEN AND OPT-OUT NOTICE").

[112] The potential for confusion with the disclosure in the proposed Rule text is also discussed in the section on Internet website disclosures below. The text of the disclosure for all media, except for television and radio (for which the text of the disclosure is statutorily mandated), has been modified in a similar way, for consistency.

[113] 74 FR at 52927.

locations, including on the purchase confirmation page, to prevent circumvention.[114]

Businesses and industry groups, as well Representatives Boozman and Ross, opposed the separate landing page.[115] These commenters raised one or more arguments, including that requiring a separate landing page: (1) exceeds the FTC's statutory authority; (2) impermissibly restricts truthful commercial speech, thereby implicating First Amendment concerns; (3) departs from longstanding FTC policy on "prominent" disclosures in close proximity to the relevant advertised claim; and (4) would confuse consumers or may discourage them from seeking their file disclosure. As to this final point, Experian submitted market research that tested consumers' experiences with a separate landing page similar to what was proposed in the NPRM. Experian presented research suggesting a high rate of consumer confusion as evidenced by, among other things, consumers spending a long time on the landing page, few consumers continuing on to AnnualCreditReport.com, and indeed, many consumers abandoning the separate landing page without continuing on either to AnnualCreditReport.com or Experian's commercial website.[116] In addition, some commenters noted that consumers unfamiliar with a separate landing page may believe it is suspect, such as an illegal "phishing site."[117]

The Commission is particularly concerned with the data suggesting that the separate landing page, as proposed, would cause consumer confusion. Indeed, based on the comments submitted, the Commission is persuaded that the separate landing page, which would not be in close proximity to the relevant claims, has the potential to confuse consumers and create suspicion about the legitimacy of the disclosure in this context.[118] Because the very purpose of section 205 of the Act and the amendments to section 610.2 of the original Rule is to reduce such confusion, the Commission has determined to eliminate the separate landing page in favor of a prominent disclosure on the website page(s) where the free credit report claim appears, as well as on each page of the ordering process.[119]

As described below, the Commission also has added certain specific requirements to ensure the prominence of the Internet website disclosures. Given that the final amended Rule does not require a separate landing page, the disclosure will now compete with additional content on an existing Internet web page, such as eye-catching graphics, banners, buttons, images, colors, and text. Thus, the final amended Rule contains several additional requirements, which are necessary to strengthen prominence. Finally, as with print disclosures, the Commission has modified the text of the disclosure to make it clearer for consumers. Taken together, the Commission believes that the requirements for Internet website disclosures in the final amended Rule provide clearer, more prominent, and, ultimately, a more effective disclosure than that of the proposed Rule.

(i) Placement of the disclosure

With respect to placement, section 610.4(b)(4) of the final amended Rule requires that any website offering free credit reports make the required disclosure on "each page that mentions a free credit report and on each page of the ordering process." As discussed in the NPRM, based on its experience, the Commission has found that certain disclosures are most effective when given at the moment that a consumer is making a decision regarding a product or service.[120] Here, the disclosure will occur both at the moment that a vendor is making a claim about a "free credit report"[121] and at the moment that a consumer is seeking to place an order for a "free credit report" online[122] – critical times to prevent deception and the possible purchase of unwanted goods and services. The final amended Rule's requirement that the disclosure appear on each page mentioning "free credit reports" also ensures that consumers seeking a "free credit report" will see the disclosure regardless of their point of entry into a website.[123] The requirement to provide the disclosure on each page of the ordering process will further ensure that consumers receive a prominent disclosure. Requiring the disclosure to be displayed to the consumer at multiple locations on the website is similar to the Act's requirement for dual-modality disclosures for television advertisements, which "have been found to achieve much higher levels of message recall than single-modality disclosures."[124] The Commission has determined that the required disclosures for Internet websites must reflect the same clarity and prominence that are the hallmarks of the dual-modality disclosure Congress mandated for television advertisements.[125]

Further, section 610.4(b)(4) requires that the disclosure be visible across the top of each web page where the

[114] NCLC at 6; *see also* State of Florida at 8.

[115] *See, e.g.*, Experian, CDIA, TransUnion, IAB, ANA, Intersections, Schwartz & Ballen, E-Commerce, and U.S. Chamber of Commerce, Representatives Boozman and Ross.

[116] Experian at 9-12; *see also* AOL, Microsoft, Yahoo! (jointly) at 2 ("Because the separate landing page is unprecedented and unfamiliar, it will perplex consumers who visit an affected website for the first time."); DMA at 2 ("[R]equiring a separate landing page . . . could actually increase consumer confusion."); Schwartz & Ballen at 6 ("[S]eparate landing page will prove confusing to consumers."); IAB at 5 (asserting that a separate landing page "will likely confuse and annoy consumers."); TransUnion at 9 (asserting that consumers seeing an "unrelated splash page" will be confused).

[117] Representatives Boozman and Ross at 1; CDIA at 11 (asserting that consumers may simply think that they clicked on a faulty link, or even a phishing site, and shut down their browser); U.S. Chamber of Commerce at 3 ("When presented with such a landing page that covers the entire screen, consumers could think they run [sic] into a scam or could be concerned that such a page is malware.").

[118] The Commission notes that the decision to abandon the separate landing page in this rulemaking is based on the existing record at this time. It may revisit the concept of a separate landing page in this or other contexts at a later time.

[119] Although the Act contemplated that the disclosures could appear on Internet advertisements, the Commission believes that a disclosure on the website would be more useful to consumers in this instance. As noted in the NPRM, based on its experience in designing disclosures, the Commission has found that certain disclosures are most effective when given at the moment that a consumer is making a decision regarding a product or service. 74 FR at 52920. In addition, some Internet advertising, such as buttons, "sponsored links," and banner ads, are size restricted. In light of such restrictions, it would be difficult to design a disclosure in this context that would satisfy the statutory "prominence" requirement. The Commission notes, however, that Internet-hosted multi-media advertising will require disclosures under section 610.4(b)(5), as this type of advertising is similar to television advertising because it contains both audio and visual components. Finally, the Commission will monitor and evaluate the effectiveness of disclosures on Internet websites and will consider additional changes as necessary, including requiring disclosures on Internet advertisements, to achieve the purpose of the Act.

[120] *See* Dot Com Disclosures at 11 (disclosures are more likely to be effective if they are provided when the consumer is considering the purchase).

[121] *See generally FTC v. TALX Corp.*, Civ. No. 4:09-cv-01071 (E.D. Mo. 2009) (requiring "clear and prominent" disclosures on the principal website screen or landing page where the disclosures are most relevant).

[122] The requirement that the disclosure appear on the first page of the ordering process applies to any website, including order fulfillment websites, where a request for a "free credit report" is processed.

[123] *See* NCLC at 6 ("The proposed rule should have a goal of placing the disclosure in multiple locations so as to prevent concealment of the consumer's right to obtain a free consumer report from the centralized source. . .").

[124] Michael B. Mazis and Louis A. Morris, *Channel*, in *Warnings and Risk Communication*, 106 (Michael S. Wogalter, *et al.*, eds., 1999) (citations omitted).

[125] *See* Dot Com Disclosures at 3 (noting that general advertising law principles apply regardless of the medium used).

disclosure is required to appear.[126] "Visible" means that the disclosure must be unavoidable. Thus, it must appear in the viewable portion of the screen when the consumer opens the web page. Similarly, it must not be obscured by other features such as pop-ups or graphics and cannot be a flashing or dissolving image. "Across the top" means that the disclosure shall appear before any content, such as advertisements, other text, images, logos, or navigation links.

(ii) Content of the disclosure

In order to ensure that the disclosure is prominent, consumers must be drawn to it and must be able to distinguish the federally mandated free credit report contained in the disclosure from the competing commercial offers on the website. To achieve these goals, the Commission has modified the content of the disclosure, as described below.[127] To assist in designing disclosures that will comply with this section, the Commission has provided examples for Internet website disclosures at (*www.ftc.gov/freereportsdisclosure*).

First, the final amended Rule requires that the disclosure appear inside a box; that the background of the box be a solid color in a high degree of contrast from the background of the web page; and that the color of the box not appear elsewhere on the page. These requirements strengthen prominence of the disclosure. If the disclosure were not in a box, or if the background color of the box were to blend in with other colors on the page, the Commission believes that the disclosure would likely not catch the viewer's eye. Second, the Rule requires that all text contained in the disclosure be displayed as plain text, not as an image or banner, and be in a sans serif font, such as Arial. This requirement ensures that entities subject to the Rule do not use highly-stylized or highly-condensed fonts that would be difficult to read. Third, the Rule includes specific requirements for line spacing and top, bottom, left, and right margins for the disclosures, to ensure readability.[128] Finally, all text contained in the box must be in a high degree of contrast with the immediate background on which it is placed, to strengthen prominence and readability.

Beyond these requirements, the disclosure contained in the final amended Rule consists of three elements: a disclosure header, disclosure text, and a disclosure button. This section describes requirements applicable to each in turn.

(A) Disclosure Header

As set forth in paragraph 610.4(b)(4)(i), the first element of the disclosure shall consist of the following header: "THIS NOTICE IS REQUIRED BY LAW. Read more at *FTC.GOV*". The reference to *FTC.GOV* shall be an operational hyperlink to (*www.ftc.gov/freereports*). As discussed in the print disclosures section above, the use of a header: (1) alerts the viewer that the message being delivered is from a source other than the commercial entity offering free credit reports on the page; and (2) is consistent with other Commission rules that title disclosures to alert consumers to the importance of the message delivered.

In addition, for Internet websites, the Commission has added a second sentence to the header informing consumers that they can "Read more at *FTC.GOV*". The Rule requires that *FTC.GOV* be an operational hyperlink to an FTC web page where consumers can obtain more information about the availability of free credit reports under federal law. The Commission believes that adding a .gov domain name in the header – that consumers can click immediately to reach an official government website – will add to consumer confidence that the disclosure is coming from the federal government. Indeed, in arguing that the centralized source itself should use a .gov domain name, several commenters suggested that the .gov domain name creates legitimacy.[129] Although the centralized source is operated by the nationwide CRAs and is thus not eligible for a .gov domain name,[130] the Commission is persuaded that adding a .gov domain name to the disclosure will bolster the legitimacy of the message.

The header must be centered on its own line and be one-half the size of the rest of the required disclosure text. These requirements are intended to enhance readability of the disclosure in a medium where there will be a multiplicity of competing text, fonts, content, and images. A smaller header centered on its own line will ensure sufficient negative space around the text to enhance readability of the header, and at the same time, will ensure that the header does not overpower the text of the disclosure.[131] Having most of the text of the header in all capital letters, in contrast with the actual disclosure text, which will be primarily in lower-case, will further enhance readability of the header.

(B) Disclosure Text

As set forth in paragraph 610.4(b)(4)(ii), the second element of the disclosure shall contain the following language and appear below the header: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law."[132] The Commission believes that the text of this disclosure – which is identical to the disclosure for print advertisements – is clearer than that of the proposed Rule, for the reasons stated above. In particular, because the Internet website disclosure requirement has moved from a separate landing page to an existing web page, the disclosure will be in close proximity to other mentions of "free" reports; to avoid confusion, the Commission believes the more straightforward, simpler disclosure telling consumers where they can obtain the free annual file disclosures *authorized by law* will be more effective.

The final amended Rule contains two additional requirements applicable specifically to the disclosure text. First, to emphasize the hyperlink to *AnnualCreditReport.com*, the final amended Rule requires it to be underlined and in a color that is in a high degree of contrast to both the color

[126] The Commission has deleted the requirement that the disclosure be "visible to consumers without requiring them to scroll down the webpage." The Commission believes that the general "prominence" requirement addresses this point; in addition, the Commission understands that, as computer devices get smaller, consumers may have to scroll to view any content on a web page.

[127] *See* 155 Cong. Rec. S6178, S6179 (June 4, 2009) (statement of Sen. Levin) ("The goal of section 205 is to eliminate consumer confusion and deception by preventing commercial promotions from posing as the Federal free annual report program, and by ensuring that consumers know how to get their truly free annual reports.").

[128] *See* Final Model Privacy Form Under the Gramm Leach Bliley Act, 74 FR 62889, at 62898 (stating that "the guidance from communications experts and form designers is that appropriate white space between the text and the margins . . . make a more effective, readable notice").

[129] *See* Empire Justice at 4 (urging the Commission to exert oversight of the centralized source and to use a .gov domain name for the centralized source); *see also* R. Lang (noting generally that a .gov URL "would help people to know for certain that they are on the correct site").

[130] *See* 15 U.S.C. 1681j(a)(1)(B).

[131] The size of the disclosure header varies between print advertisements and Internet websites. For print advertisements, the main disclosure text can be half the size of the largest character in the advertisement; for Internet websites, the disclosure is required to be larger, in relation to other characters on the page. Because the main disclosure text on print advertisements can be smaller, the Commission is concerned that the header might not be readable if it were smaller than the main disclosure text.

[132] As in the proposed Rule, the reference to *AnnualCreditReport.com* shall be an operational hyperlink to the centralized source.

of the other disclosure text and background of the box. Second, because the disclosure will now appear with other text and eye-catching graphics on an existing web page, the Commission has determined that the best way to ensure prominence is to require that the text be at least as large as the largest character on the page. For example, if the largest character on the page is 24 point type size, then all of the characters in the disclosure must be at a minimum 24 point type size.[133]

(C) Disclosure Button

As set forth in paragraph 610.4(b)(4)(v), the third element of the disclosure shall be a distinct button below the disclosure text, which hyperlinks to *AnnualCreditReport.com*. The Commission has added this requirement, recognizing that websites may use distinctive "order" buttons to draw the viewer's eye. Because the disclosure now must appear on an existing web page, it may compete with these "order" buttons for the viewer's attention. To compete effectively, the Commission believes that including a button in the disclosure is necessary.

The final amended Rule requires that the button contain the text "Take me to the authorized source". This text, in conjunction with the disclosure text described above, will inform consumers that they can click to obtain easily the free credit report they are entitled to under federal law. The text's specific reference to "the authorized source" will also avoid the possibility of having two identical buttons on the page, which might lead a consumer to believe that clicking on either button will take him or her to the same place.

Finally, the final amended Rule includes additional requirements to strengthen prominence of the button, including requirements that: (1) the background of the button must be the same color as the hyperlink to *AnnualCreditReport.com* contained in the disclosure;[134] (2) the text "Take me to the authorized source" must be in a high degree of contrast to the background of the button; (3) the button must be centered on its own line; and (4) the text of the button must be the same size as the disclosure text (*i.e.*, at least the same size as the largest character on the web page).[135]

In sum, the Commission believes that the placement, content and size requirements of the Internet website disclosure, coupled with the general requirements for visual disclosures, will help ensure prominence.[136] Further, these requirements will make it easier for consumers to distinguish the disclosure from competing messages on a website and will enable consumers to easily access *AnnualCreditReport.com*. The Commission will monitor and evaluate the effectiveness of the disclosure required under the final amended Rule and will consider additional changes, including revisiting the separate landing page concept, as necessary to achieve the statutory purpose and minimize consumer confusion.

e. Section 610.4(b)(5): Disclosures for Internet-hosted multi-media advertising

Proposed section 610.4(b)(5) required Internet-hosted multi-media advertisements for "free credit reports" disseminated in both audio and visual formats to include the same disclosure as proposed for Internet websites. It further required that the disclosure appear simultaneously in the audio and visual part of the advertisement and that the visual disclosure be in a type at least the same size as the largest hyperlink to the company's website, display of the Uniform Resource Locator of the company's website, or display of the company's telephone number. This section was intended to address innovative forms of advertising for "free credit reports" in multi-media platforms, such as smart phone applications, YouTube.com, and comparable visual and audio mechanisms, that may not be captured by other medium-specific provisions of the Rule.

Several commenters offered suggestions regarding placement and format of disclosures for Internet-hosted multi-media. For example, NAAG suggested that the disclosure should be equally prominent and in close proximity to the triggering claim of "free" or "free credit report."[137] NCLC suggested that the visual disclosures should be displayed for the entire duration of the advertisement due to the wide variation in the duration of advertisements in this medium.[138] In addition, Schwartz & Ballen opposed the type size requirement because it is inconsistent with the requirement for television advertisements.

In response to the comments, the Commission has modified the proposal in a number of ways. Consistent with changes to the other sections, the Commission has added a requirement that the disclosure be made in close proximity to the first mention of a free credit report. In addition, the Commission notes that the strengthened requirements for prominence in section 610.4(a) of the final amended Rule address the comments offering placement, format, and timing suggestions.[139]

Further, the Commission has modified the language of the disclosure to be consistent with the changes to the print and Internet website disclosures discussed in detail above. Accordingly, the Commission has determined that the disclosure must include "THIS NOTICE IS REQUIRED BY LAW" as a header followed by: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law." Finally, the Commission notes that not all Internet-hosted multi-media ads will include text; thus, the final amended Rule clarifies that the specific size requirement for the visual disclosure applies only if there are characters on the advertisement. In other instances,

[133] A few commenters questioned the different type size requirements for print advertisements and Internet websites. *See* AOL, Microsoft, Yahoo! at 2; IAB at 4. The Commission reviewed these comments and concludes that the different nature of these media demands different type size requirements for the disclosure. Specifically, an Internet website requires a larger type size for the disclosure because it is the location from which consumers have the ability to place an order for a "free credit report." In contrast, print advertisements direct consumers to another source, such as a telephone number or Internet website, to order a "free credit report" and consumers will receive another disclosure at that time. In addition, there may be greater space limitations in some print media that do not exist on Internet websites.

The final amended Rule also clarifies that "characters" includes those in an image or graphic banner – not just characters technically coded on the Internet website as text.

[134] The final amended Rule already requires that the hyperlink to *AnnualCreditReport.com* be in a high degree of contrast to the background of the box containing the disclosure; linking the color of the button to the color of the hyperlink will ensure that both elements will appear in high contrast to the background color of the box. In addition, tying the two colors together will create a visual cue that clicking on either link will get the consumer to the authorized source. The Commission notes further that the requirement that the two links be the same color applies to the page as the consumer initially views it. For example, the Rule is not violated if the two links appear initially in the same color, a consumer clicks the hyperlink, returns to the site, and finds that the hyperlink subsequently appears in a different color.

[135] This requirement will ensure the prominence of the button because the button must be large enough to accommodate the required text in the required size.

[136] As discussed in the NPRM, Congress' use of the word "prominent" must be viewed as an expression of intent that the new disclosures be more noticeable and more effective than those currently required or used in advertising for "free credit reports."

[137] NAAG at 4-5.

[138] NCLC at 6.

[139] In response to Schwartz & Ballen's comment about the inconsistencies between the size of the television and multi-media disclosures, the Commission notes that the Internet-hosted multi-media disclosures will likely be on smaller screens; therefore, the differences in the specific type-size requirements are appropriate.

the Rule's general prominence requirement applies.[140]

The Commission will monitor and evaluate the effectiveness of this section and innovations in technology and advertising and will consider additional changes as necessary to achieve the statutory mandate.

f. Section 610.4(b)(6): Disclosures for telephone requests

Proposed section 610.4(b)(6) addressed the content and timing of the disclosures for when consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement for "free credit reports." Proposed section 610.4(b)(6) required that companies offering "free credit reports" via telephone make the disclosure at the *beginning* of the telephone call and include the introductory sentence: "You have reached [name of company or service]."[141]

One commenter opposed the timing of the disclosure, asserting that a telephone disclosure should be provided not at the beginning of the call, but at the first mention of a "free credit report," which triggers the need for the disclosure.[142] The Commission agrees. In certain circumstances consumers may be making telephone requests about advertisements for bundled products, and may want to ask about an advertised product other than the "free credit report." In this case, a disclosure about "free credit reports" at the outset of the call could be confusing. Instead, the Commission has decided to modify the proposed section to make it consistent with the approach taken throughout section 610.4 of the final amended Rule, which requires the disclosure in close proximity to the triggering claim. Thus, section 610.4(b)(6) now requires the disclosures for inbound telemarketing to be made at the first mention of a "free credit report." In addition, the final amended Rule modifies the language of the disclosure consistent with the changes for print advertisements and Internet websites, with one minor change. The required disclosure for inbound telemarketing is: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the only authorized source under federal law." The Internet website and print disclosure text begins with the header "This notice is required by law". Because the disclosure here is an audio one, it would be difficult for the consumer to understand what the "this" in "this notice" is referring to. The "following notice" language will provide a cue for the consumer that he or she is about to hear a message required by law.

g. Section 610.4(b)(7): Telemarketing solicitations

Proposed section 610.4(b)(7) also required outbound telemarketers to include the required disclosures at the beginning of their telemarketing solicitations. Similar to the modifications made to section 610.4(b)(6), the final amended Rule requires that any telemarketing call made to a consumer that offers a "free credit report" include, at the first mention of a "free credit report," the following disclosure: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the only authorized source under federal law."[143]

*D. Elimination of Obsolete "Roll-out" Provisions of the Original Rule*

As proposed in the NPRM, the final amended Rule eliminates the "roll-out" provisions contained in sections 610.2(i) and 610.3(g) of the original Rule. When the Commission promulgated the original Rule, it provided for a structured "roll-out" of the availability of free annual file disclosures, beginning in the western states on December 1, 2004, and concluding with eastern states on September 1, 2005. This original Rule provision is now obsolete and serves no useful purpose. No comments were submitted on this issue. Accordingly, the final amended Rule deletes sections 610.2(i) and 610.3(g) of the original Rule.[144]

*E. Effective Date and Interim Disclosures*

The effective date of the Rule amendments shall be April 1, 2010, except for the wording of the disclosures for television and radio advertisements in sections 610.4(b)(1)(i) and (2), which shall be September 1, 2010.

Section 205(b)(3) of the Act provides for interim disclosures for advertisements in the event that the Rule is not "finalized" before the nine-month deadline specified in the Act:

> If an advertisement subject to section 612(g) of the [FCRA], as added by this section, is made public after the 9-month deadline specified in paragraph (1), but before the rule . . . is finalized, such advertisements shall include the disclosure: "Free credit reports are available under Federal law at: 'AnnualCreditReport.com.'"

The Commission has determined that the final amended Rule is "finalized" upon its effective date. The effective date is April 1, 2010, except for the wording of the disclosures for television and radio advertisements. Prior to April 1, 2010, covered entities must make the interim disclosures required by the Act in a prominent manner, as required by the statute.

The Commission believes that a delay in the effective date for the wording of the disclosures in television and radio advertisements is warranted beyond April 2010. As one commenter noted, compliance with the required interim disclosures followed by compliance with the different final disclosures will impose additional costs for television and radio advertisers: "[I]t would require advertisers and advertising agencies to create two sets of commercials: one set to run beginning on February 22, 2010, and the second set to run when the Rule goes into effect. This would substantially and unnecessarily increase the costs to provide television and radio commercials."[145]

In order to reduce the cost burden on television and radio advertisers, the Commission believes flexibility is warranted, and has provided a later effective date for the wording of the disclosures for television and radio advertisements. Accordingly, prior to September 1, 2010, television and radio advertisers must make the interim disclosures required by the Act in a prominent manner, as required by the statute and the final amended Rule. On and after September 1, 2010, all television and radio advertisements

[140] The Commission notes that this section applies to Internet-hosted multi-media *advertising*, as opposed to Internet websites. Internet websites with audio and visual components must comply with the disclosures for Internet websites.

[141] The timing requirement drew from the Commission's Telemarketing Sales Rule, which, among other things, prohibits telemarketers from failing to disclose that the purpose of the call is to sell goods or services and the nature of the goods or services. 16 CFR 310.3.

[142] Schwartz & Ballen at 7 (asserting that consumers will likely interpret the required disclosure at the beginning of a telephone call to mean that they have dialed an incorrect telephone number and will likely terminate the telephone call).

[143] The Commission notes that the word "free" was inadvertently omitted in the proposed Rule. Indeed, the Section-by-Section discussion of the NPRM correctly defined the trigger as "the first mention of 'free credit report.'" 74 FR 52921-22. In addition, as with the language for telephone requests, the language of the disclosure required by this section has been modified consistent with the changes for print advertisements.

[144] In addition to the proposed revisions and additions discussed above, proposed section 610.2(b)(2)(iv)(D) removes an erroneous reference to "national credit reporting agencies."

[145] Manatt, Phelps & Phillips at 4-5.

must include only the disclosures set forth in section 610.4(b)(1) and (2) of the final amended Rule. The Commission notes, however, that because the other provisions of the final amended Rule take effect on April 1, 2010, television and radio advertisers must comply with those provisions as of that date.[146]

## IV. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 ("RFA")[147] requires the Commission to provide an Initial Regulatory Flexibility Analysis ("IRFA") with a proposed rule, and a Final Regulatory Flexibility Analysis ("FRFA") with a final rule, unless the Commission certifies that the rule will have no significant economic impact on a substantial number of small entities.[148]

The Commission anticipates that the final amended Rule will have no significant economic impact on a substantial number of small entities. As discussed above, section 610.2 of the amended final Rule will apply exclusively to the nationwide CRAs that currently operate and maintain the centralized source pursuant to section 612(a) of the FCRA, 15 U.S.C. 1681j(a). None of the three nationwide CRAs is a small entity. Further, section 610.4 of the final amended Rule sets forth disclosures concerning the advertising or marketing of "free credit reports," pursuant to section 205 of the Act. The Commission believes that the universe of entities offering "free credit reports" is likely to be small, comprised mostly of the three nationwide CRAs and their subsidiaries and affiliates. As explained more fully below, the Commission believes the number of small entities offering "free credit reports" is likely to be insubstantial and, therefore, the overall economic impact of the final amended Rule is not likely to have a significant impact on a substantial number of small entities. Accordingly, the Commission certifies that the final amended Rule will have no significant impact on a substantial number of small entities. Nonetheless, to ensure that no such impact, if any, has been overlooked, the Commission had conducted the following FRFA, as follows.

### *A. Need for and objectives of the final amended Rule*

The final amended Rule implements section 205 of the Act, which mandates that advertisements offering "free credit reports" contain prominent disclosures informing consumers that federally mandated free annual file disclosures are available at *AnnualCreditReport.com*. Further, the Free Reports Rule requires, among other things, a centralized source through which consumers may request a free annual file disclosure from each nationwide CRA. Amendments to the Rule eliminate practices that interfere with consumers' ability to obtain free annual file disclosures through the centralized source, in violation of section 610.2(g) of the original Rule. Finally, the final amended Rule eliminates obsolete provisions from the original Rule that no longer serve any purpose.

### *B. Significant issues raised by public comment, summary of agency's assessment of these issues, and changes, if any, made in response to such comments*

The Commission received over 1,080 comments in response to the NPRM, mostly from consumers who either supported the proposed Rule, or urged the Commission to take additional action to stem the deceptive and confusing marketing of "free credit reports." In particular, many consumers and consumer advocates supported the proposed delay in advertising of "free credit reports" on the centralized source until after consumers received their free annual file disclosures. Although the Commission considered the view of business interests opposing a delay in advertising on the centralized source, the Commission has adopted this proposal in the final amended Rule because the record reveals that consumers seeking their free credit report are confused by such advertising. The Commission, however, did not ban advertising in connection with the dissemination of free annual file disclosures, a position advocated by some consumers and consumer advocates. As explained in the Statement of Basis and Purpose, delaying advertising is a less restrictive means of addressing consumer confusion. Accordingly, the Commission believes that the delay in advertising on the centralized source strikes the appropriate balance between ensuring consumers' unfettered right to receive free annual file disclosures and the desire on the part of business to advertise other useful products and services (such as credit scores) to consumers.

The Commission also received comments both supporting and opposing the proposal that disclosures in connection with Internet advertisements appear on a separate landing page. The arguments for and against such a requirement are discussed in depth above in the Section-by-Section discussion. After considering these comments, the Commission agreed with many of the commenters that the "separate landing page" requirement may be confusing to consumers, some of whom may believe the unexpected appearance of such a page means it is a scam, such as an unauthorized pop-up or, worse, a "phishing" website – one that mimics a true website in order to capture consumers' information. The Commission has decided that the "separate landing page" requirement is unnecessary to accomplish the goal of reducing deceptive marketing of "free credit reports;" rather, for Internet websites, disclosures on each page on which the triggering claims for "free credit reports" appear, as well as on each page of the ordering process, are sufficient to accomplish that goal.

The Commission also received comments on the scope of the proposed definition of "free credit report," as well as the language of the specific proposed required disclosures. The Commission has revised both the definition of "free credit report" and the required disclosures in light of these comments. Specifically, the definition of "free credit report" in the final amended Rule makes clear that it pertains only to file disclosures obtained directly or indirectly from a nationwide CRA (as opposed to a specialty CRA, for example) and that the definition covers free credit reports bundled with trial offers of other products. Further, as discussed at length in the Section-by-Section discussion above, the language of the required disclosures has been clarified in several instances, adding greater consistency and precision and tracking more closely Commission precedent in this field.

### *C. Description and estimate of the number of small entities subject to the final amended Rule or explanation why no estimate is available*

As noted above, section 610.2 of the final amended Rule limits advertising through the centralized source and prohibits other conduct in connection with the provision of annual file disclosures to consumers. By its terms, amended section 610.2 will apply exclusively to the nationwide CRAs that currently operate and maintain the

[146] Manatt, Phelps & Phillips urged the Commission to make clear that only the section 610.4(b)(1) and (2) disclosures – drawn from section 205(a)(2) of the Act – should apply during the interim period. The statute, however, sets forth the disclosures required during the interim period. Further, the Commission believes that the delayed effective date will ensure that television and radio advertisers have ample time to come into compliance with the final amended Rule, thus reducing compliance costs.

[147] 5 U.S.C. 601-612.

[148] 5 U.S.C. 603-605.

centralized source pursuant to section 612(a) of the FCRA, 15 U.S.C. 1681j(a). None of the three nationwide CRAs is a small entity.[149]

In addition, section 610.4 of the final amended Rule sets forth disclosures concerning the advertising or marketing of "free credit reports," pursuant to section 205 of the Act. The universe of entities offering "free credit reports" is small, comprised mostly of the three nationwide CRAs and their subsidiaries and affiliates. Based upon its knowledge of industry practices and members, Commission staff estimates that there may also be a small number of independently operating CRAs or resellers of consumer reports that, in theory, might offer "free credit reports" subject to the final amended Rule. For example, when the original Rule was first implemented, several resellers of reports appeared, using imposter websites, such as those misspelling AnnualCreditReport.com, or using sound-alike websites names that did not link to AnnualCreditReport.com. In 2005, the Commission staff sent warning letters to the known operators of those suspect sites, totaling 29 operators. This suggests that the total number of independent resellers of reports may be small and that the number of small entities offering "free credit reports" is likely to be insubstantial.

Nonetheless, the Commission specifically sought comment in the NPRM "on the number of entities likely to be affected by the proposed section 610.4 to the Rule and the number of those, if any, that are small entities."[150] The Commission received no responsive comments. The lack of additional evidence on both the number of small entities offering "free credit reports" and how the proposed Rule might impact small entities, tends to support the Commission staff's initial assessment that few, if any, independently operating sellers or resellers of credit reports are likely to be small entities.

*D. Description of the projected reporting, recordkeeping, and other compliance requirements of the final amended Rule, including an estimate of the classes of small entities that will be subject to the final amended Rule and the type of professional skills that will be necessary to comply*

Section 610.2 of the final amended Rule limits advertising by the CRAs on the centralized source until after consumers have obtained their free annual file disclosures, and prohibits practices that interfere with consumers' ability to obtain free annual file disclosures through the centralized source. As discussed more fully below in connection with the Paperwork Reduction Act, these amendments to the Rule will impose no more than a *de minimis*, one-time burden of 12 hours to be completed by professional technical personnel and/or management personnel.

Further, section 610.4 of the final amended Rule sets forth statutorily-mandated advertising disclosures for offering of "free credit reports" in television and radio advertisements, as well as other media, including print and Internet advertising. The amendments to the original Rule pertain to all advertisements for "free credit reports": the Act does not distinguish between large and small entities that advertise for "free credit reports," nor does the Act contemplate any exemptions to the disclosure requirements. Most likely, these disclosures will be prepared by professional and management personnel. At the same time, section 610.4 imposes no reporting or recordkeeping obligations.

*E. Steps the agency has taken to minimize any significant economic impact on small entities, consistent with the stated objectives of the applicable statutes, including the factual, policy, and legal reason(s) for selecting alternative(s) finally adopted, and why each of the significant alternatives, if any, was rejected.*

The Commission believes that the Rule amendments are likely to have an insignificant impact on small entities. Nonetheless, the Commission solicited comment on alternatives that would minimize compliance costs. The Commission received no information or suggestions in response to those questions. As explained in the statement of basis and purpose above, however, the Commission has made certain changes to the amended Rule that will reduce costs for all covered entities, including any small entities that may be subject to the final amended Rule. These include elimination of the proposed separate landing page requirement for advertisements for free annual file disclosures on Internet websites.

## VI. Paperwork Reduction Act

In conjunction with the NPRM, the Commission submitted the proposed amended Rule and a Supporting Statement for Information Collection Provisions to the Office of Management and Budget ("OMB") for review under the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501-3521. The OMB has approved the Rule's information collection requirements through November 30, 2012 (OMB Control No. 3084-0128).

In the NPRM, the Commission invited comments to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will serve a useful purpose; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques, or other forms of information technology. While commenters questioned the appropriateness of various proposals in the NPRM, no commenters specifically sought to answer the data collection questions posed above.

*A. Original Rule*

The original Rule required nationwide CRAs and nationwide specialty CRAs to disclose information to third parties by requiring those consumer reporting agencies to provide to consumers, upon request, one free annual file disclosure. It also required the nationwide CRAs to provide consumers with the ability to request this disclosure through a centralized Internet website, a toll-free telephone number, and a postal address. In addition, the original Rule required the nationwide CRAs to establish a standardized form for Internet and mail requests, and it provided a model standardized form that may be used to comply with that requirement.

[149] Covered entities are classified as small businesses if they satisfy the Small Business Administration's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System ("NAICS"). The closest NAICS size standard relevant to the final amended Rule is for "credit bureaus," which is $7 million maximum in annual receipts. *See* (*http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*). *See also* 69 FR 34568, at 35494-95 (June 24, 2004) ("[T]he Commission is aware of three entities that meet the rule definition . . . . of a 'nationwide consumer reporting agency.' The Commission has concluded that none of these is a small entity."). In the original Notice of Proposed Rulemaking for the Free Reports Rule, the Commission specifically asked several questions related to the existence, number and nature of small business entities covered by the proposed Free Reports Rule. The Commission received no comments responsive to those questions. 69 FR 35495. No additional data has been provided in response to the NPRM.

[150] 74 FR at 52923-24.

*B. Section 610.4 of the Final Amended Rule*

Section 610.4 of the final amended Rule requires all advertisements for "free credit reports" to contain certain prescribed disclosures tailored to the medium used. As such, these disclosures do not constitute a collection of information, as defined by OMB's regulations that implement the PRA.[151] Accordingly, implementation of section 205 of the Act presents no associated PRA collection of information burden.

*C. Amended Section 610.2 of the Final Amended Rule*

Section 610.2 of the final amended Rule is designed to prevent interference with consumers' ability to obtain their free annual file disclosures through the centralized source, as permitted by law. Amended section 610.2 does not modify the nationwide CRAs' original obligation to provide consumers with free annual file disclosures upon request. Nor is amended section 610.2 likely to increase or decrease the estimated number of annual file disclosures made available to consumers, whether through the Internet, telephone, or mail. Rather, the amendments are intended to make it easier for consumers to obtain their free annual file disclosures from the centralized source without distracting advertising, including advertising leading consumers to commercial websites.

Moreover, amended section 610.2 is unlikely to increase significantly the administrative burden on the nationwide CRAs providing consumers with annual file disclosures through the centralized source. As discussed above, amended section 610.2 requires the nationwide CRAs to remove links on the initial page of the centralized source website to their commercial or proprietary websites. Finally, if a nationwide CRA chooses to advertise products and services – such as credit scores or credit monitoring – through the centralized source, it can do so only after the consumer has obtained his or her free annual file disclosure. Accordingly, in order to advertise through the centralized source, the nationwide CRAs must establish a mechanism to verify that consumers have completed their transaction.

[151] *See* 5 CFR 1320.3(c)(2) (excluding from the definition of "collection of information" the "public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public").

1. Estimated Hours Burden and Associated Labor Cost

The above-noted administrative amendments to section 610.2 will impose no more than a de minimis, one-time burden, as the three nationwide CRAs reconfigure the centralized source and their own proprietary websites. Commission staff estimates that these steps will take approximately 12 hours to complete per CRA.[152]

Commission staff estimates labor costs by applying appropriate estimated hourly cost figures to the burden hours described above. It is difficult to calculate with precision the labor costs associated with the final amended Rule, because they entail varying compensation levels of management (*e.g.*, administrative services, computer and information systems, systems analysts, and network and computer system administrators). Commission staff assumes that professional technical personnel and/or management personnel will implement the amendments, at an hourly rate of $39.42.[153]

Based upon the above estimates and assumptions, the total labor cost for each of the three nationwide CRAs to comply with the amendments to the Rule is $473.00 (12 hours x $39.42) or, cumulatively, $1,419.

2. Estimated Capital/Other Non-Labor Cost Burden

Commission staff believes that the Rule amendments will not impose any capital or other non-labor costs. Commission staff assumes that the nationwide CRAs will continue their current practice of using third-party contractors (instead of their own employees) to fulfill consumer requests for annual file disclosures, pursuant to the Rule. Because of the way these contracts are typically established, these costs will likely be incurred on a continuing basis, and will be calculated based on the number of annual file disclosures requested by consumers. As discussed above, Commission staff believes that the amendments, while making it easier for consumers to obtain their free annual file disclosures from the centralized source, will not increase the burden on industry to supply such file disclosures, nor affect the overall number of file disclosures provided to consumers annually, because consumers will likely be redirected from websites that require consumers to pay for their "free credit report" to the centralized source.

[152] This figure derives from consultation with FTC staff experienced in web design and operations.

[153] *See* (*http://www.bls.gov/ncs/ncswage2008.htm#Wage_Tables*) (National Compensation Survey: Occupational Earnings in the United States 2008, US Department of Labor released August 2009, Bulletin 2720, Table 3) ("Full-time civilian workers," mean and median hourly wages). The above amount is an average of the mean hourly wages of administrative services managers, computer and information systems managers, computer systems analysts, and network and computer systems administrators.

## Appendix A

*List of Non-Consumer NPRM Commenters*

American Express Company ("American Express")

AOL, Microsoft, Yahoo! ("AOL, Microsoft, Yahoo!")

Association of National Advertisers ("ANA")
Representative John Boozman ("Representative Boozman")
Chamber of Commerce of the United States of America ("U.S. Chamber of Commerce")
Consumer Data Industry Association ("CDIA")

Council of Better Business Bureaus ("BBB")
Direct Marketing Association ("DMA")
Empire Justice Center ("Empire Justice")
Evergreen Credit Reporting, Inc. ("Evergreen")

Experian Information Solutions, Inc. ("Experian")

Bill McCollum, Attorney General, State of Florida ("State of Florida")
Professor David A. Friedman ("Friedman")
Interactive Advertising Bureau ("IAB")
Intersections Inc. ("Intersections")
Senator Carl Levin ("Senator Levin")
Lori Swanson, Attorney General, State of Minnesota ("State of Minnesota")
Mannatt, Phelps & Phillips ("Mannatt, Phelps & Phillips")
National Association of Attorneys General ("NAAG")

National Business Coalition for E-Commerce and Privacy ("E-Commerce")
National Consumer Law Center ("NCLC")
Mindy A. Bockstein, Chairperson and Executive Director, State of New York, Consumer Protection Board ("NYCPB")
Representative Mike Ross ("Representative Ross")

Senator Charles Schumer ("Senator Schumer")

Schwartz & Ballen LLP ("Schwartz & Ballen")
TransUnion ("TransUnion")

**FINAL RULE**

### List of Subjects in 16 CFR Part 610

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Trade practices.

### Authority and Issuance

■ For the reasons discussed in the statement of basis and purpose, the Federal Trade Commission amends title

16, Chapter I, Subchapter F, of the Code of Federal Regulations, part 610, as follows:

## PART 610—FREE ANNUAL FILE DISCLOSURES

■ 1. The authority citation for part 610 is revised to read as follows:

**Authority:** 15 U.S.C. 1681a, g, and h; sec. 211(a) and (d), Pub. L. 108-159, 117 Stat. 1968 and 1972 (15 U.S.C. 1681j); Pub. L. 111-24.

■ 2. Revise § 610.2 to read as follows:

### § 610.2 Centralized source for requesting annual file disclosures from nationwide consumer reporting agencies.

(a) *Purpose*. The purpose of the centralized source is to enable consumers to make a single request to obtain annual file disclosures from all nationwide consumer reporting agencies, as required under section 612(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681j(a).

(b) *Establishment and operation*. All nationwide consumer reporting agencies shall jointly design, fund, implement, maintain, and operate a centralized source for the purpose described in paragraph (a) of this section. The centralized source required by this part shall:

(1) Enable consumers to request annual file disclosures by any of the following request methods, at the consumers' option:

(i) A single, dedicated Internet website,

(ii) A single, dedicated toll-free telephone number; and

(iii) Mail directed to a single address;

(2) Be designed, funded, implemented, maintained, and operated in a manner that:

(i) Has adequate capacity to accept requests from the reasonably anticipated volume of consumers contacting the centralized source through each request method, as determined in accordance with paragraph (c) of this section;

(ii) Collects only as much personally identifiable information as is reasonably necessary to properly identify the consumer as required under the Fair Credit Reporting Act, section 610(a)(1), 15 U.S.C. 1681h(a)(1), and other applicable laws and regulations, and to process the transaction(s) requested by the consumer;

(iii) Provides information through the centralized source website and telephone number regarding how to make a request by all request methods required under § 610.2(b)(1) of this part; and

(iv) Provides clear and easily understandable information and instructions to consumers, including, but not necessarily limited to:

(A) Providing information on the progress of the consumer's request while the consumer is engaged in the process of requesting a file disclosure;

(B) For a website request method, providing access to a "help" or "frequently asked questions" screen, which includes specific information that consumers might reasonably need to request file disclosures, the answers to questions that consumers might reasonably ask, and instructions whereby a consumer may file a complaint with the centralized source and with the Federal Trade Commission;

(C) In the event that a consumer requesting a file disclosure through the centralized source cannot be properly identified in accordance with the Fair Credit Reporting Act, section 610(a)(1), 15 U.S.C. 1681h(a)(1), and other applicable laws and regulations, providing a statement that the consumers' identity cannot be verified; and directions on how to complete the request, including what additional information or documentation will be required to complete the request, and how to submit such information; and

(D) A statement indicating that the consumer has reached the website or telephone number for ordering free annual credit reports as required by federal law; and

(3) Make available to consumers a standardized form established jointly by the nationwide consumer reporting agencies, which consumers may use to make a request for an annual file disclosure, either by mail or on the Internet website required under § 610.2(b)(1) of this part, from the centralized source required by this part. The form provided at 16 CFR Part 698, Appendix D, may be used to comply with this section.

(c) *Requirement to anticipate.* The nationwide consumer reporting agencies shall implement reasonable procedures to anticipate, and to respond to, the volume of consumers who will contact the centralized source through each request method, to request, or attempt to request, a file disclosure, including developing and implementing contingency plans to address circumstances that are reasonably likely to occur and that may materially and adversely impact the operation of the nationwide consumer reporting agency, a centralized source request method, or the centralized source.

(1) The contingency plans required by this section shall include reasonable measures to minimize the impact of such circumstances on the operation of the centralized source and on consumers contacting, or attempting to contact, the centralized source.

(i) Such reasonable measures to minimize impact shall include, but are not necessarily limited to:

(A) The extent reasonably practicable under the circumstances, providing information to consumers on how to use another available request method;

(B) The extent reasonably practicable under the circumstances, communicating, to a consumer who attempts but is unable to make a request, the fact that a condition exists that has precluded the centralized source from accepting all requests, and the period of time after which the centralized source is reasonably anticipated to be able to accept the consumers' request for an annual file disclosure; and

(C) Taking all reasonable steps to restore the centralized source to normal operating status as quickly as reasonably practicable under the circumstances.

(ii) Reasonable measures to minimize impact may also include, as appropriate, collecting request information but declining to accept the request for processing until a reasonable later time, provided that the consumer is clearly and prominently informed, to the extent reasonably practicable under the circumstances, of when the request will be accepted for processing.

(2) A nationwide consumer reporting agency shall not be deemed in violation of § 610.2(b)(2)(i) of this part if a centralized source request method is unavailable to accept requests for a reasonable period of time for purposes of conducting maintenance on the request method, provided that the other required request methods remain available during such time.

(d) *Disclosures required*. If a nationwide consumer reporting agency has the ability to provide a consumer report to a third party relating to a consumer, regardless of whether the consumer report is owned by that nationwide consumer reporting agency or by an associated consumer reporting agency, that nationwide consumer reporting agency shall, upon proper identification in compliance with section 610(a)(1) of the Fair Credit Reporting Act, 15 U.S.C. 1681h(a)(1), provide an annual file disclosure to such consumer if the consumer makes a request through the centralized source.

(e) *High request volume and extraordinary request volume* – (1) *High request volume*. Provided that a nationwide consumer reporting agency has implemented reasonable procedures developed in accordance with paragraph (c) of this section, entitled

"requirement to anticipate," the nationwide consumer reporting agency shall not be deemed in violation of paragraph (b)(2)(i) of this section for any period of time in which a centralized source request method, the centralized source, or the nationwide consumer reporting agency experiences high request volume, if the nationwide consumer reporting agency:

(i) Collects all consumer request information and delays accepting the request for processing until a reasonable later time; and

(ii) Clearly and prominently informs the consumer of when the request will be accepted for processing.

(2) *Extraordinary request volume*. Provided that the nationwide consumer reporting agency has implemented reasonable procedures developed in compliance with paragraph (c) of this section, entitled "requirement to anticipate," the nationwide consumer reporting agency shall not be deemed in violation of paragraph (b)(2)(i) of this section for any period of time during which a particular centralized source request method, the centralized source, or the nationwide consumer reporting agency experiences extraordinary request volume.

(f) *Information use and disclosure*. Any personally identifiable information collected from consumers as a result of a request for annual file disclosure, or other disclosure required by the Fair Credit Reporting Act, made through the centralized source, may be used or disclosed by the centralized source or a nationwide consumer reporting agency only:

(1) To provide the annual file disclosure or other disclosure required under the FCRA requested by the consumer;

(2) To process a transaction requested by the consumer at the same time as a request for annual file disclosure or other disclosure;

(3) To comply with applicable legal requirements, including those imposed by the Fair Credit Reporting Act and this part; and

(4) To update personally identifiable information already maintained by the nationwide consumer reporting agency for the purpose of providing consumer reports, provided that the nationwide consumer reporting agency uses and discloses the updated personally identifiable information subject to the same restrictions that would apply, under any applicable provision of law or regulation, to the information updated or replaced.

(g) *Communications provided through centralized source*.

(1) Any advertising or marketing for products or services, any communications or instructions that advertise or market any products or services, or any request to establish an account through the centralized source must be delayed until after the consumer has obtained his or her annual file disclosure.

(i) In the case of requests made by mail or telephone, the consumer "has obtained his or her annual file disclosure" when the file disclosure is mailed, and the nationwide consumer reporting agency may include advertising for other products or services with the file disclosure.

(ii) In the case of requests made through the centralized source Internet website, the consumer "has obtained his or her annual file disclosure" when the file disclosure is delivered to the consumer through the Internet, and the nationwide consumer reporting agency may include advertising for other products or services with the file disclosure.

(2) Any communications, instructions, or permitted advertising or marketing shall not interfere with, detract from, contradict, or otherwise undermine the purpose of the centralized source stated in paragraph (a) of this section.

(3) Examples of interfering, detracting, inconsistent, and/or undermining communications include:

(i) Centralized source materials that represent, expressly or by implication, that a consumer must purchase a paid product or service in order to receive or to understand the annual file disclosure;

(ii) Centralized source materials that represent, expressly or by implication, that annual file disclosures are not free, or that obtaining an annual file disclosure will have a negative impact on the consumers' credit standing; and

(iii) Centralized source materials that falsely represent, expressly or by implication, that a product or service offered ancillary to receipt of a file disclosure, such as a credit score or credit monitoring service, is free, or fail to clearly and prominently disclose that consumers must cancel a service, advertised as free for an initial period of time, to avoid being charged, if such is the case.

(h) *Other practices prohibited through the centralized source*. The centralized source shall not:

(1) Contain hyperlinks to commercial or proprietary websites until after the consumer has obtained his or her annual file disclosure, except for technical transfers to a web page on which consumers can request their free annual file disclosure; provided, however, that no hyperlinks to commercial websites shall appear on the initial page of the centralized source.

(2) Require consumers to set up an account in connection with obtaining an annual file disclosure; or

(3) Ask or require consumers to agree to terms or conditions in connection with obtaining an annual file disclosure.

**§ 610.3 [Amended]**

■ 3. In § 610.3, remove paragraph (g).

■ 4. Add § 610.4 to read as follows:

**§ 610.4 Prevention of deceptive marketing of free credit reports.**

(a) For purposes of this section:

(1) *AnnualCreditReport.com and 877-322-8228* means the Uniform Resource Locator address "AnnualCreditReport.com" and toll-free telephone number, 877-322-8228. These are the locator address and toll-free telephone number currently used by the centralized source. If the locator address or toll-free telephone number changes in the future, the new address or telephone number shall be substituted within a reasonable time.

(2) *Free credit report* means a file disclosure prepared by or obtained from, directly or indirectly, a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act), that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.

(3) *General requirements for disclosures*. The disclosures covered by paragraph (b) of this section shall contain only the prescribed content and comply with the following requirements:

(i) All disclosures shall be prominent;

(ii) All disclosures shall be made in the same language as that principally used in the advertisement;

(iii) Visual disclosures shall be easily readable; in a high degree of contrast from the immediate background on which it appears; in a format so that the disclosure is distinct from other text, such as inside a border; in a distinct type style, such as bold; and parallel to the base of the advertisement or screen;

(iv) Audio disclosures shall be delivered in a slow and deliberate manner and in a reasonably understandable volume and pitch;

(v) Program-length television, radio, or Internet-hosted multi-media advertisement disclosures shall be made at the beginning, near the middle, and at the end of the advertisement; and

(vi) Nothing contrary to, inconsistent with, or that undermines the required disclosures shall be used in any advertisement in any medium, nor shall any audio, visual, or print technique be used that is likely to detract significantly from the communication of any disclosure.

(b) *Medium-specific disclosures.* All offers of free credit reports shall prominently include the disclosures required by this section.

(1) *Television advertisements.*

(i) All advertisements for free credit reports broadcast on television shall include the following disclosure in close proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

(ii) The disclosure shall appear at the same time in the audio and visual part of the advertisement. The visual disclosure shall be at least four percent of the vertical picture height and appear for a minimum of four seconds.

(2) *Radio advertisements.* All advertisements for free credit reports broadcast on radio shall include the following disclosure in close proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

(3) *Print advertisements.* All advertisements for free credit reports in print shall include the following disclosure in the form specified below and in close proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW". Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law." Each letter of the disclosure text shall be, at minimum, one-half the size of the largest character used in the advertisement.

(4) *Internet websites.* Any website offering free credit reports must display the disclosure set forth in paragraphs 610.4(b)(4)(i), (ii), and (v) of this section on each page that mentions a free credit report and on each page of the ordering process. This disclosure shall be visible across the top of each page where the disclosure is required to appear; shall appear inside a box; and shall appear in the form specified below:

(i) The first element of the disclosure shall be a header that is centered and shall consist of the following text: "THIS NOTICE IS REQUIRED BY LAW. Read more at *FTC.GOV*". Each letter of the header shall be one-half the size of the largest character of the disclosure text required by 610.4(b)(4)(ii). The reference to *FTC.GOV* shall be an operational hyperlink to (*www.ftc.gov/freereports*), underlined, and in a color that is a high degree of contrast from the color of the other disclosure text and background color of the box;

(ii) The second element of the disclosure shall appear below the header required by paragraph 610.4(b)(4)(i) and shall consist of the following text: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law." The reference to *AnnualCreditReport.com* shall be an operational hyperlink to the centralized source, underlined, and in the same color as the hyperlink to *FTC.GOV* required in paragraph 610.4(b)(4)(i);

(iii) The color of the text required by paragraphs 610.4(b)(4)(i) and (ii) shall be in a high degree of contrast with the background color of the box;

(iv) The background of the box shall be a solid color in a high degree of contrast from the background of the page and the color shall not appear elsewhere on the page;

(v) The third element of the disclosure shall appear below the text required by paragraph 610.4(b)(4)(ii) and shall be an operational hyperlink to *AnnualCreditReport.com* that appears as a centered button containing the following language: "Take me to the authorized source". The background of this button shall be the same color as the hyperlinks required by paragraphs 610.4(b)(4)(i) and (ii) and the text shall be in a high degree of contrast to the background of the button;

(vi) Each character of the text in paragraphs 610.4(b)(4)(ii) and (v) shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner;

(vii) Each character of the disclosure shall be displayed as plain text and in a sans serif font, such as Arial; and

(viii) The space between each element of the disclosure required in paragraphs 610.4(b)(i), (ii), and (v) shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner. The space between the boundaries of the box and the text or button required in paragraphs 610.4(b)(i), (ii), and (v) shall be, at minimum, twice the size of the vertical height of the largest character on the page, including characters in an image or graphic banner.

(5) *Internet-hosted multi-media advertising.* All advertisements for free credit reports disseminated through Internet-hosted multi-media in both audio and visual formats shall include the following disclosure in the form specified below and in close proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW.". Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law." The disclosure shall appear at the same time in the audio and visual part of the advertisement. If the advertisement contains characters, the visual disclosure shall be, at minimum, the same size as the largest character on the advertisement.

(6) *Telephone requests.* When consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement that represents free credit reports are available at the number, consumers must receive the following audio disclosure at the first mention of a free credit report: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the only authorized source under federal law."

(7) *Telemarketing solicitations.* When telemarketing sales calls are made that include offers of free credit reports, the call must include at the first mention of a free credit report the following disclosure: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the only authorized source under federal law."

(c) *Effective date.* This section is effective April 2, 2010, except for the wording of the disclosures for television and radio advertisements (paragraphs 610.4(b)(1)(i) and (2)), which are effective on September 1, 2010.

By direction of the Commission.

**Donald S. Clark**

*Secretary*

[FR Doc. 2010–4273 Filed 3–2–10: 8:45 am]

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Federal Register

Wednesday,
March 3, 2010

# Part V

# The President

## Executive Order 13532—Promoting Excellence, Innovation, and Sustainability at Historically Black Colleges and Universities

Federal Register
Vol. 75, No. 41
Wednesday, March 3, 2010

# Presidential Documents

**Title 3—**

## The President

**Executive Order 13532 of February 26, 2010**

## Promoting Excellence, Innovation, and Sustainability at Historically Black Colleges and Universities

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to advance the development of the Nation's full human potential and to advance equal opportunity in higher education, strengthen the capacity of historically black colleges and universities to provide the highest quality education, increase opportunities for these institutions to participate in and benefit from Federal programs, and ensure that our Nation has the highest proportion of college graduates in the world by the year 2020, it is hereby ordered as follows:

**Section 1.** *Policy.* Historically black colleges and universities (HBCUs) have made historic and ongoing contributions to the general welfare and prosperity of our country. Established by visionary leaders, America's HBCUs, for over 150 years, have produced many of the Nation's leaders in business, government, academia, and the military and have provided generations of American men and women with hope and educational opportunity. The Nation's 105 HBCUs are located in 20 States, the District of Columbia, and the U.S. Virgin Islands and serve more than 300,000 undergraduate and graduate students. These institutions continue to be important engines of economic growth and community service, and they are proven ladders of intergenerational advancement for men and women of all ethnic, racial, and economic backgrounds, especially African Americans. These institutions also produce a high number of baccalaureate recipients who go on to assume leadership and service roles in their communities and who successfully complete graduate and professional degree programs.

**Sec. 2.** *White House Initiative on HBCUs.*

(a) *Establishment.* There is established the White House Initiative on Historically Black Colleges and Universities (Initiative), to be housed in the Department of Education (Department).

(b) **Mission and Functions.** The Initiative shall work with executive departments, agencies, and offices, the private sector, educational associations, philanthropic organizations, and other partners to increase the capacity of HBCUs to provide the highest-quality education to a greater number of students, and to take advantage of these institutions' capabilities in serving the Nation's needs through five core tasks:

(i) strengthening the capacity of HBCUs to participate in Federal programs;

(ii) fostering enduring private-sector initiatives and public-private partnerships while promoting specific areas and centers of academic research and programmatic excellence throughout all HBCUs;

(iii) improving the availability, dissemination, and quality of information concerning HBCUs to inform public policy and practice;

(iv) sharing administrative and programmatic practices within the HBCU community for the benefit of all; and

(v) exploring new ways of improving the relationship between the Federal Government and HBCUs.

(c) *Administration.* There shall be an Executive Director of the Initiative. The Department shall provide the staff, resources, and assistance for the Initiative, and shall assist the Initiative in fulfilling its mission and responsibilities under this order.

(d) *Federal Agency Plans.* (1) Each executive department and agency designated by the Secretary of Education (Secretary) shall prepare an annual plan (agency plan) of its efforts to strengthen the capacity of HBCUs through increased participation in appropriate Federal programs and initiatives. Where appropriate, each agency plan shall address, among other things, the agency's proposed efforts to:

(i) establish how the department or agency intends to increase the capacity of HBCUs to compete effectively for grants, contracts, or cooperative agreements and to encourage HBCUs to participate in Federal programs;

(ii) identify Federal programs and initiatives in which HBCUs may be either underserved or underused as national resources, and improve HBCUs' participation therein; and

(iii) encourage public-sector, private-sector, and community involvement in improving the overall capacity of HBCUs.

(2) Each department and agency, in its agency plan, shall provide appropriate measurable objectives and, after the first year, shall annually assess that department's or agency's performance on the goals set in the previous year's agency plan.

(3) The Secretary shall establish a date by which agency plans shall be submitted to the Secretary. The Secretary and the Executive Director shall review the agency plans in consultation with the President's Board of Advisors on HBCUs, established in section 3 of this order, and shall submit to the President an annual plan to strengthen the overall capacity of HBCUs.

(4) To help fulfill the objectives of these plans, the head of each department and agency identified by the Secretary shall provide, as appropriate, technical assistance and information to the Executive Director for purposes of communicating with HBCUs concerning program activities of the department or agency and the preparation of applications or proposals for grants, contracts, or cooperative agreements.

(5) To help fulfill the goals of this order, each executive department and agency identified by the Secretary shall appoint a senior official to report directly to the department or agency head with respect to that department's or agency's activities under this order, and to serve as liaison to the President's Board of Advisors on HBCUs and to the Initiative.

(e) *Interagency Working Group.* There is established the Interagency Working Group, which shall be convened by the Executive Director and that shall consist of representatives from agencies designated by the Secretary, to help advance and coordinate the work of Federal agencies pursuant to this order, where appropriate.

**Sec. 3.** *President's Board of Advisors on HBCUs.*

(a) *Establishment.* There is established in the Department the President's Board of Advisors on Historically Black Colleges and Universities (the Board). The Board shall consist of not more than 25 members appointed by the President. The President shall designate one member of the Board to serve as Chair, who shall coordinate with the Executive Director to convene meetings and help direct the work of the Board. The Board shall include representatives of a variety of sectors, including philanthropy, education, business, finance, entrepreneurship, innovation, and private foundations, as well as sitting HBCU presidents.

(b) *Mission and Functions.* Through the Initiative, the Board shall advise the President and the Secretary on all matters pertaining to strengthening the educational capacity of HBCUs. In particular, the Board shall advise the President and the Secretary in the following areas:

(i) improving the identity, visibility, and distinctive capabilities and overall competitiveness of HBCUs;

(ii) engaging the philanthropic, business, government, military, homeland-security, and education communities in a national dialogue regarding new HBCU programs and initiatives;

(iii) improving the ability of HBCUs to remain fiscally secure institutions that can assist the Nation in reaching its goal of having the highest proportion of college graduates by 2020;

(iv) elevating the public awareness of HBCUs; and

(v) encouraging public-private investments in HBCUs.

(c) *Administration.* The Executive Director of the Initiative shall also serve as the Executive Director of the Board. The Department shall provide funding and administrative support for the Board to the extent permitted by law and within existing appropriations. Members of the Board shall serve without compensation, but shall be reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized by law. Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.), may apply to the Board, any functions of the President under that Act, except for those of reporting to the Congress, shall be performed by the Secretary, in accordance with guidelines issued by the Administrator of General Services.

(d) *Report.* As part of the annual report of the Initiative, the Board shall report to the President and the Secretary on their progress in carrying out its duties under this section.

**Sec. 4.** *General Provisions.* (a) For the purposes of this order, "historically black colleges and universities" shall mean those institutions listed in 34 C.F.R. 602.8.

(b) This order shall apply to executive departments and agencies designated by the Secretary. Those departments and agencies shall provide timely reports and such information as is required to effectively carry out the objectives of this order.

(c) The heads of executive departments and agencies shall assist and provide information through the White House Initiative to the Board, consistent with applicable law, as may be necessary to carry out the functions of the Board. Each executive department and agency shall bear its own expenses of participating in the Initiative.

(d) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(e) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(f) 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.

(g) Executive Order 13256 of February 12, 2002, is hereby revoked.

THE WHITE HOUSE,
*February 26, 2010.*

[FR Doc. 2010–4593
Filed 3–2–10; 8:45 am]
Billing code 3195–W0–P

# Reader Aids

**Federal Register**

Vol. 75, No. 41

Wednesday, March 3, 2010

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To extend expiring provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Intelligence Reform and Terrorism Prevention Act of 2004 until February 28, 2011. (Feb. 27, 2010; 124 Stat. 37)

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