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Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Federal Register

Vol. 75, No. 202

Wednesday, October 20, 2010

Presidential Documents

Title 3—

The President

Proclamation 8586 of October 15, 2010

National Character Counts Week, 2010

By the President of the United States of America

A Proclamation

America's strength, even in the most challenging of times, is found in the spirit and character of our people. During National Character Counts Week, we reflect upon the values of equality, fairness, and compassion that lie at the heart of our country. These qualities resonate in the countless humanitarian acts and deep social consciousness of our citizens. From lending a hand to those in need to caring for the sick, selfless service is a fundamental American ideal, and one we must instill in our children and grandchildren.

The strength and character of our country have always come from our ability to recognize ourselves in one another. Concern for the well-being of our fellow Americans has shaped our Nation's development and will continue to cast our future. As parents and educators, community leaders and mentors, we share the responsibility for instilling in our children this fundamental principle. By demonstrating shared values such as respect, curiosity, integrity, courage, honesty, and patriotism, we help our youth develop the strength of character that is the mark of our great Nation. In turn, our young people will serve as models of mutual regard and civility, and share in the responsibility to maintain our schools and neighborhoods as safe, supportive, and inclusive environments.

Across America, countless individuals reflect our highest ideals by offering their time and energy to help make our communities safer, more nurturing places to live. Their service results from a decision to become engaged, and it often becomes a lifelong commitment. During National Character Counts Week, let us take this opportunity to celebrate the generosity of America's character, and to fortify and inspire it in our next generation of leaders.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 17 through October 23, 2010, as National Character Counts Week. I call upon all public officials, educators, parents, students, and Americans to observe this week with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of October, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–26554
Filed 10–19–10; 8:45 am]
Billing code 3195–W1–P

Presidential Documents

Proclamation 8587 of October 15, 2010

National Forest Products Week, 2010

By the President of the United States of America

A Proclamation

Since the first communities and settlements in our Nation, forests and their products have played a vital role in our growth and economic development. Forests have also enhanced the splendor of our surroundings, served as wildlife habitats, provided places for recreational activities, and offered serene settings for contemplation. As we mark the 50th anniversary of National Forest Products Week, we recognize the enduring value of forests as sustainable, renewable, and bountiful resources, and we recommit to our stewardship and efforts to further their conservation.

Our Nation's forests provide us with clean water and air, wood, wildlife, recreation, and beauty. Forest products can be seen in myriad places in our daily lives, from the houses we live in to the paper we write on. National Forest Products Week draws attention to these invaluable resources, and to the importance of ensuring our forests remain flourishing ecosystems that will provide indispensable benefits for current and future generations. Every forested acre represents an opportunity to reduce the effects of climate change; to protect habitats and communities; to explore nature; to provide clean air and water; and to produce raw materials like timber, fiber, and biomass.

Earlier this year, I launched the America's Great Outdoors Initiative to develop a 21st-century conservation agenda that will reconnect Americans with the outdoors and protect our Nation's vast and varied natural heritage. Senior officials from my Administration have been traveling across America to learn about innovative ways that private landowners; State, local, and tribal governments; conservationists; and other concerned citizens are coming together to preserve our natural resources. They have also heard about the many benefits our forests and their products provide the Nation.

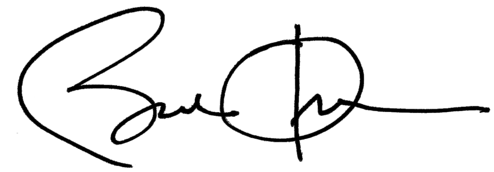
In this time of economic recovery, we must not forget the jobs created and supported by forest management and restoration, as well as the significant contributions made by the Americans who work in these sectors. They not only help bring forest products to market, but also spur innovative ways to move our country forward. Forests provide renewable and recyclable commodities, and scientific exploration can find new frontiers of growth in their application. Through new technologies, we have made progress in nanotechnology, enhanced biofuels and biochemicals; expanded our knowledge of medicinal plants; and examined more sustainable green building practices. Through careful conservation of our forests, we can ensure future generations will be able to both enjoy these national treasures and expand upon the many uses we have for their products today.

To recognize the importance of products from our forests, the Congress, by Public Law 86–753 (36 U.S.C. 123), as amended, has designated the week beginning on the third Sunday in October of each year as National Forest Products Week, and has authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim October 17 through October 23, 2010, as

National Forest Products Week. I call on all Americans to celebrate the varied uses and products of our forested lands, as well as the people who carry on the tradition of careful stewardship of these precious natural resources for generations to come.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of October, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.



[FR Doc. 2010–26578
Filed 10–19–10; 8:45 am]
Billing code 3195–W1–P

Presidential Documents

Proclamation 8588 of October 15, 2010

White Cane Safety Day, 2010

By the President of the United States of America

A Proclamation

The white cane, in addition to being a practical mobility tool, serves as a symbol of dignity, freedom, and independence for individuals who are blind or visually impaired. On White Cane Safety Day, our Nation celebrates the immeasurable contributions the Americans who use canes have made as valued members of our diverse country. We also examine our progress and recommit to full integration, equality, education, and opportunity for Americans with visual impairments.

Today, students with disabilities are reaching achievements considered unattainable just a few decades ago. Many gains have been realized throughout our educational system, but we must accomplish more so that America's technological advances and assistive tools are available for the benefit of all students. My Administration is committed to ensuring that electronic readers and other electronic equipment used by schools, including postsecondary institutions, are accessible to individuals who are blind or visually impaired. We are also providing guidance and technical assistance to help colleges and universities fully comply with the legal requirements to use emerging technology that is accessible to all students in the classroom. Blindness and visual impairments are not impediments to obtaining knowledge, and we must highlight the availability of existing tools to facilitate communication and work to improve access to them. Additionally, the Braille code opens doors of literacy and learning to countless individuals with visual impairments across our country and around the world, and we must work with advocates and leaders throughout our society to promote and improve Braille literacy among our students.

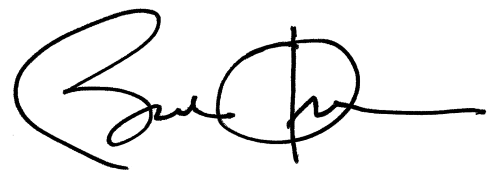
Americans with disabilities are Americans first and foremost, entitled to both full participation in our society and full opportunity in our economy. My Administration is working to increase information access so Americans who are blind or visually impaired can fully participate in our increasingly interconnected world. To expand career options for people with disabilities in the Federal Government, I signed an Executive Order directing executive departments and agencies to design strategies to increase recruitment and hiring of these valued public servants. I was also pleased to sign the Twenty-First Century Communications and Video Accessibility Act into law earlier this month to ensure that the jobs of the future are accessible to all. This legislation will make it easier for people who are deaf, blind, or live with a visual impairment to use the technology our 21st-century economy depends on, from navigating digital menus on a television to sending emails on a smart phone.

As we observe the 20th anniversary of the Americans with Disabilities Act this year, my Administration reaffirms our national commitment to creating access to employment, education, and social, political, and economic opportunities for Americans with disabilities. Together with individuals who are blind or visually impaired, service providers, educators, and employers, we will uphold our country as an inclusive, welcoming place for blind or visually impaired people to work, learn, play, and live.

By joint resolution approved on October 6, 1964 (Public Law 88–628, as amended), the Congress designated October 15 of each year as White Cane Safety Day to recognize the contributions of Americans who are blind or have low vision.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim October 15, 2010, as White Cane Safety Day. I call upon all public officials, business and community leaders, educators, librarians, and Americans to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of October, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.



[FR Doc. 2010–26646
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Rules and Regulations

Federal Register

Vol. 75, No. 202

Wednesday, October 20, 2010

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2008–BT–TP–0020]

RIN 1904–AB89

Energy Conservation Program for Consumer Products: Test Procedures for Residential Furnaces and Boilers (Standby Mode and Off Mode)

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) is amending its test procedures for residential furnaces and boilers to include provisions for measuring standby mode and off mode energy consumption, as required by the Energy Independence and Security Act of 2007 (EISA 2007). These test procedure amendments are primarily based on and incorporate by reference provisions of the International Electrotechnical Commission (IEC) Standard 62301, "Household electrical appliances—Measurement of standby power." This final rule adds new calculations to determine the annual energy consumption associated with standby mode and off mode measured power, and it modifies the existing energy consumption equations to integrate standby mode and off mode energy consumption into the calculation of overall annual energy consumption of these products. This final rule also adopts a number of definitions for key terms.

DATES: This rule is effective November 19, 2010. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register on November 19, 2010.

ADDRESSES: You may review copies of all materials related to this rulemaking at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Mr. Mohammed Khan, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–7892. E-mail: *Mohammed.Khan@ee.doe.gov.*

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585. Telephone: (202) 586–9507. E-mail: *Eric.Stas@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: This final rule incorporates by reference the following standard into part 430.

- International Electrotechnical Commission (IEC) Standard 62301 ("IEC 62301"), Household electrical appliances—Measurement of standby power (first edition, June 2005).

Copies of IEC Standard 62301 can be purchased from the American National Standards Institute, 11 West 42nd Street, New York, New York 10036, (212) 642–4936, or *http://webstore.iec.ch.*

You can also view copies of this standards at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., 6th Floor, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

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I. Background and Authority

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291 *et seq.;* EPCA or the Act) sets forth a variety of provisions designed to improve energy efficiency. Part A [1] of Title III (42 U.S.C. 6291–6309) establishes the "Energy Conservation Program for Consumer Products Other Than Automobiles," including residential furnaces and boilers (all of which are referenced below as "covered products").[2] (42 U.S.C. 6291(1)–(2) and 6292(a)(5))

Under the Act, this program consists essentially of three parts: (1) Testing; (2) labeling; and (3) establishing Federal energy conservation standards. The testing requirements consist of test procedures that manufacturers of covered products must use as the basis for certifying to DOE that their products comply with applicable energy conservation standards adopted under EPCA and for representing the efficiency of those products. Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted under EPCA. Under 42 U.S.C. 6293, EPCA sets forth criteria and procedures for DOE's adoption and amendment of such test procedures. EPCA provides that "[a]ny test procedures prescribed or amended

[1] This part was originally titled Part B. It was redesignated Part A in the United States Code for editorial reasons.

[2] All references to EPCA refer to the statute as amended through the Energy Independence and Security Act of 2007, Public Law 110–140.

under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, * * * or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary [of Energy], and shall not be unduly burdensome to conduct.” (42 U.S.C. 6293(b)(3)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them, with a comment period no less than 60 or more than 270 days. (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine “to what extent, if any, the proposed test procedure would alter the measured energy efficiency * * * of any covered product as determined under the existing test procedure.” (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

On December 19, 2007, the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140, was enacted. The EISA 2007 amendments to EPCA, in relevant part, require DOE to amend the test procedures for all covered products to include measures of standby mode and off mode energy consumption. Specifically, section 310 of EISA 2007 provides definitions of “active mode,” “standby mode,” and “off mode” (42 U.S.C. 6295(gg)(1)(A)); however, the statute permits DOE to amend these definitions in the context of a given product (42 U.S.C. 6295(gg)(1)(B)). The legislation requires integration of such energy consumption “into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product, unless the Secretary determines that—

(i) The current test procedures for a covered product already fully account and incorporate the standby and off mode energy consumption of the covered product; or

(ii) Such an integrated test procedure is technically infeasible for a particular covered product, in which case the Secretary shall prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible.” (42 U.S.C. 6295(gg)(2)(A))

Under the statutory provisions introduced by EISA 2007, any such amendment must consider the most current versions of International Electrotechnical Commission (IEC) Standard 62301, *Household electrical appliances—Measurement of standby power,* (First Edition 2005–06) and IEC Standard 62087, *Methods of measurement for the power consumption of audio, video, and related equipment* (Second Edition, 2008–09).[3] *Id.* For residential furnaces and boilers, the statute directed DOE to prescribe any such amendment to the test procedures by September 30, 2009. (42 U.S.C. 6295(gg)(2)(B)(iv))

DOE’s current test procedure for residential furnaces and boilers is found at 10 CFR part 430, subpart B, appendix N, *Uniform Test Method for Measuring the Energy Consumption of Furnaces and Boilers.* DOE established its test procedures for furnaces and boilers in a final rule published in the **Federal Register** on May 12, 1997. 62 FR 26140. This procedure establishes a means for determining annual energy efficiency and annual energy consumption of gas-fired, oil-fired, and electric furnaces and boilers. It is important to note that gas-fired and oil-fired furnaces and boilers consume both fossil fuel and electricity. Electric furnaces and boilers only consume electricity. In this test procedure, fossil-fuel energy consumption is accounted for comprehensively over a full-year cycle, thereby satisfying EISA 2007 requirements for fossil-fuel standby mode and off mode energy consumption. However, electrical energy consumption in standby mode and off mode is not accounted for in the current test procedure.

Proposed amendments to include electrical energy consumption in standby mode and off mode were published in the **Federal Register** in the July 27, 2009, notice of proposed rulemaking (NOPR). 74 FR 36959. DOE’s proposal was presented and explained at a public meeting on August 18, 2009 at DOE headquarters in Washington, DC. DOE invited written comments, data, and information on the NOPR and accepted such material through October 13, 2009.

Subsequent to the NOPR, DOE issued a Supplemental Notice of Proposed Rulemaking (SNOPR) for the purpose of adding an integrated metric that incorporates standby mode and off mode energy consumption into the statutorily-identified efficiency descriptor, Annual Fuel Utilization Efficiency (AFUE). The SNOPR was published in the **Federal Register** on April 5, 2010. 75 FR 17075. An extension of the comment period was published in the **Federal Register** on April 14, 2010. 75 FR 19296. The comment period closed on April 27, 2010.

II. Summary of the Final Rule

In this final rule, DOE is amending the current test procedure for furnaces and boilers in order to implement recent amendments to EPCA pertaining to measurement of standby mode and off mode energy consumption. As an initial matter, DOE has concluded that the existing test procedures already fully account for and incorporate the standby mode and off mode fossil-fuel energy consumption of gas-fired and oil-fired furnaces and boilers. Accordingly, for the fossil-fuel aspect of these units, no further action is required. (42 U.S.C. 6295(gg)(2)(A)(i)) However, to address electrical standby mode and off mode energy use, today’s amendments incorporate by reference into the DOE test procedures, the International Electrotechnical Commission’s (IEC) Standard 62301, *Household electrical appliances—Measurement of standby power* (First Edition 2005–06), as well as language to clarify application of this standard for measuring standby mode and off mode power consumption for furnaces and boilers.[4]

In addition, the amendments add new calculations to determine annual energy consumption associated with electrical standby mode and off mode measured power. The amendments modify existing energy consumption equations to integrate electrical standby mode and off mode energy consumption into the calculation of overall annual energy consumption of these products. Finally, the final rule also adopts definitions for a number of key terms.

Since the time of the NOPR and public hearing, DOE proposed that one additional test procedure change is needed to carry out the purposes of EISA 2007. Specifically, it was thought necessary to add an integrated metric that incorporates standby mode and off mode energy consumption into the statutorily-identified efficiency descriptor, AFUE. For the reasons discussed below, after considering public comments, DOE has determined that the proposed test procedure change

[3] IEC standards are available for purchase at: *http://www.iec.ch.*

[4] EISA 2007 directs DOE to also consider IEC Standard 62087 when amending its test procedures to include standby mode and off mode energy consumption. *See* 42 U.S.C. 6295(gg)(2)(A). However, IEC Standard 62087 addresses the methods of measuring the power consumption of audio, video, and related equipment. However, IEC Standard 62087 does not include measurement of the power consumption of appliances such as furnaces and boilers. Therefore, DOE has determined that IEC Standard 62087 is not applicable to this rulemaking.

for an integrated metric is not technically feasible.

Today's amendments are essentially as proposed in the July 27, 2009 NOPR. 74 FR 36959. DOE has provided further clarification in this final rule on how to implement the IEC Standard 62301 standard, as a result of public comments. These comments and clarifications are discussed fully below.

As provided by EPCA, amendments to the test procedure to measure standby mode and off mode energy consumption shall not be used to determine compliance with previously established standards. (42 U.S.C. 6295(gg)(2)(C)) Furthermore, EPCA requires DOE to determine whether a proposed test procedure amendment would alter the measured efficiency of a product, and require adjustment of the existing standards. (42 U.S.C. 6293(e)) However, the inclusion of standby mode and off mode test methods in this final rule will not affect a manufacturer's ability to demonstrate compliance with the current energy conservation standards for residential furnaces and boilers. The new test procedure provisions clearly state that the standby mode and off mode test need not be performed to determine compliance with the current energy conservation standards for furnaces and boilers, because the standards do not comprehensively account for all standby mode and off mode energy consumption.

Today's final rule, which include provisions for measuring standby mode and off mode, will become effective in terms of adoption into the Code of Federal Regulations (CFR), 30 days after the date of publication in the **Federal Register**. Manufacturers will be required to use this test procedure's standby mode provisions to demonstrate compliance with any future energy conservation standards for residential furnaces and boilers as of the compliance date of a final rule establishing amended energy conservation standards for furnaces and boilers that fully address standby mode and off mode energy consumption. The introductory note to 10 CFR part 430, subpart B, appendix N reads as follows: "The procedures and calculations that refer to standby mode and off mode energy consumption, (*i.e.,* sections 8.6 and 10.9 of this appendix N) need not be performed to determine compliance with energy conservation standards for furnaces and boilers at this time. However, any representation related to standby mode and off mode energy consumption of these products made after April 18, 2011 must be based upon results generated under this test procedure, consistent with the requirements of 42 U.S.C. 6293(c)(2). After July 1, 2010, any adopted energy conservation standard shall address standby mode and off mode energy consumption, and upon the compliance date for such standards, compliance with the applicable provisions of this test procedure will also be required." The quoted language will be removed in the rulemaking to amend the energy conservation standards for residential furnaces and boilers which must also address standby mode and off mode energy consumption. A statement has also been added to the introductory note to clarify that any representations pertaining to standby mode and off mode energy consumption that are made after a date 180 days after publication of the test procedure final rule in the **Federal Register** must be based upon testing under the relevant provisions of this test procedure. Although this is a statutory requirement under 42 U.S.C. 6293(c), DOE has concluded that it would be useful to explicitly state this requirement in DOE's regulations.

III. Discussion

In the July 27, 2009 NOPR and at the subsequent August 18, 2009 public meeting, DOE sought input from interested parties on the proposed amendments to the DOE test procedure for furnaces and boilers to address standby mode and off mode energy use. Three written comments were received from the Air-Conditioning, Heating and Refrigeration Institute (AHRI), the People's Republic of China (China), and Energy Kinetics, Inc. Two comments were generally supportive of the proposed amendments but asked for clarification and specific modifications on how to implement the IEC Standard 62301 in light of some possible conflicts with the existing test procedure's specifications. (AHRI, No. 08 at pp. 1–2; China, No. 09 at p. 3.) A third comment asked for consideration of a completely new test procedure for boilers (Energy Kinetics, No. 3 at pp. 1–3). This third comment is not directly related to the purpose of these amendments that are the basis for this test procedure rulemaking to address measurement of standby mode and off mode energy consumption, but it is discussed separately below.

In general, DOE has retained the approach to measurement of standby mode and off mode presented in the July 2009 NOPR with certain modifications based upon public comment input, so for further details, please consult that document. 74 FR 36959 (July 27, 2009). DOE notes that numerous comments were received on the supplemental proposal of an integrated AFUE ($AFUE_I$), the overwhelming majority of which opposed adoption of the proposed integrated metric. These comments and the overall discussion of the regulating metric for this product are discussed below. However, to summarize here, based upon a careful examination of these public comments, DOE has concluded that an integrated metric ($AFUE_I$) is not technically feasible, because the standby mode and off mode energy usage, when measured, is essentially lost in practical terms due to the fact that manufacturers' ratings of AFUE are presented to the nearest whole number. Consequently, DOE has decided to withdraw its $AFUE_I$ proposal.

A. Possible Conflicts Between IEC Standard 62301 and Existing Test Procedures

The AHRI comments recommended that the existing test procedure's provisions [5] should be used whenever there is a possible conflict with IEC Standard 62301. Specifically, AHRI suggested that because the additional proposed measurements will be taken in the course of the overall conduct of the existing test procedure, ambient temperature, test voltage and frequency, and instrument accuracy should be the same as is currently specified in the furnace and boiler test procedure. (AHRI, No. 3 at p. 1) The comment from China pointed out the same possible conflicts but only asked for clarification. (China, No. 09 at p. 3)

DOE has further analyzed the various provisions of both the existing test procedure and IEC Standard 62301 and has concluded that some of the provisions of IEC Standard 62301 could represent either a conflict or unnecessary burden. Accordingly, DOE believes some additional clarification is necessary in this final rule. The following discussion outlines, parameter by parameter, where the existing procedures are to apply and where the IEC procedures are to apply.

On the matter of ambient temperature, DOE agrees with AHRI that the existing test procedure specification should be used. Ambient temperature is an important measurement within the existing test procedure and has bearing

[5] The existing provisions are found at Title 10 part 430, subpart B, appendix N, which incorporates by reference sections of the American National Standards Institute (ANSI)/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standard 103—1993, "Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers."

on the overall efficiency determination of the appliance. Considerable effort is required to maintain a reasonably uniform ambient temperature in the testing facility during actual testing of furnaces and boilers. This is because there is considerable heat being produced by the operation of the appliance during testing. The existing provisions require a determination of average ambient temperature by taking multiple measurements at various locations around the appliance; the air for combustion and draft relief must not differ by more that 5 °F from the average ambient temperature, and the average ambient temperature must remain in a specified range during all tests (section 8.5, *Room Ambient Temperature,* of the ASHRAE 103—1993). In contrast, IEC Standard 62301 only specifies an ambient temperature requirement of (23 +/− 5) °C (section 4.2, *Test room,* of IEC Standard 62301). DOE believes this limited specification in IEC Standard 62301 is indicative that ambient temperature is not likely to have a significant effect on the measurement of standby mode and off mode wattage, provided that a reasonable range of temperature is maintained. Since an ambient temperature within a reasonable range is all that is required under IEC Standard 62301, and given that an increased testing burden may result from adoption of the slightly different IEC Standard 62301 ambient temperature provision, DOE has concluded that the existing, more detailed specification of ambient temperature is appropriate for the standby mode and off mode wattage measurements. In this final rule, DOE is explicitly clarifying the ambient temperature requirement in its regulations at 10 CFR part 430, subpart B, appendix N, sections 8.6.1 and 8.6.2.

On the matter of voltage and frequency, section 4.3, *Power supply,* of IEC Standard 62301 states that "where the IEC standard is referenced by an external standard or regulation that specifies a test voltage and frequency, the test voltage and frequency so defined shall be used for all tests." The DOE test procedures for residential furnaces and boilers would be considered such an external standard, except that the DOE test procedure only specifies voltage and not frequency. Accordingly, it is not clear that this deference to the existing test procedures should automatically apply.

IEC Standard 62301 specifies the test voltage and frequency of the country for which the measurement is being determined (*e.g.,* 115V, 60Hz for North America). IEC Standard 62301 specifies that the tested voltage and frequency should be within 1 percent of these values. As noted above, in the existing test procedure, there is no specification of frequency, but throughout the United States, 60 Hz is the frequency of the distributed electrical power. Therefore, there is no possible conflict regarding frequency, so DOE has determined that the 60Hz specification should apply. The voltage specification in the existing test procedure is expressed as "within 1% of nameplate voltage." Typically, nameplate voltage would be either 115V or 120V. Therefore, the difference in testing voltage possible is either non-existent or very small, especially considering the same specified tolerance. In view of this small possible difference in the voltage specification and the general deference given to external standards, DOE has clarified in this final rule that the existing test procedure's specification for voltage shall apply to the standby mode and off mode measurements. In this final rule, DOE is explicitly clarifying the frequency and voltage requirements in its regulations at 10 CFR part 430, subpart B, appendix N, sections 8.6.1 and 8.6.2.

On the issue of measurement accuracy, DOE continues to believe, as stated in the NOPR, that the relevant IEC Standard 62301 provisions are reasonable and appropriate for the low wattage levels expected for furnaces and boilers in standby mode and off mode and should not pose a significant burden to the furnace and boiler industry or the associated testing industry. 74 FR 36959, 36966 (July 27, 2009). It is noted that these measurement accuracy provisions discussed here only apply to the new measurement requirements for standby mode and off mode added by this final rule. This final rule does not affect the existing test procedures' accuracy provision which applies for the active mode measurements. AHRI in its comment recommended that the existing test procedure provisions on measurement accuracy should be used for all electrical measurements including the newly proposed measurements. The accuracy provision in the existing test procedure states "the error shall be no greater than 1%" (section 6.10, *Energy Flow Rate,* of ASHRAE Standard 103—1993). In contrast, IEC Standard 62301's accuracy provision states "measurements * * * shall be made with an uncertainty of less than or equal to 2% at the 95% confidence level" (section 4.5, *Power measurement accuracy,* of IEC Standard 62301). In addition, section 5 of IEC Standard 62301 outlines measurement procedures that clarify how stability is to be addressed in the testing (section 5, *Measurements,* of IEC Standard 62301). AHRI stated that the "95% confidence" provision implies repeated measurements and is not consistent with any other measurements taken in the course of conducting testing under the residential furnace and boiler test procedure. (AHRI, No. 3 at p. 1). In follow-up comments, AHRI provided detailed recommendations that maintain the instrument accuracy specification of the existing test procedure (*i.e.,* no greater than 1-percent error). Also included in the AHRI detailed recommendations is an added stability measurement procedure that involves multiple measurements similar to what is outlined in section 5 of the IEC Standard 62301 procedures (AHRI, No. 11 at pp. 3–4). AHRI did not provide any data as to the potential for increased cost, time, or other burden that might result from adopting the IEC accuracy provisions in total.

In response, DOE believes the IEC accuracy provisions, including the "95% confidence" format, are consistent with how instrument and measurement accuracy are specified in the present day, whereas the existing test procedure provision format is consistent with how instrument and measurement accuracy were specified at the time the test procedures were first developed. In addition, in this case, DOE does not believe the IEC provision is more stringent or burdensome than the existing provision. Taken together, DOE does not view the AHRI comments as providing a reason to depart from the IEC measurement accuracy provision. DOE had decided to retain its proposed approach to measurement accuracy, because the IEC accuracy provision is consistent with how present day instrument and measurement procedures are specified, should not represent a significant increase in testing burden, and will provide the additional benefit of measurement consistency across DOE product types. This latter point is of interest to DOE in the context of energy conservation standards where the analysis and consideration of regulating standby mode and off mode energy consumption would be served by a consistent measurement basis across product types.

In summary, DOE has revisited the IEC Standard 62301 provisions in order to address the comments received and has, for the reasons stated above, decided to require existing test procedure specifications to govern ambient temperature and voltage during the standby mode and off mode tests.

However, also for reasons stated above, DOE is requiring use of IEC Standard 62301 as the governing standard for standby mode and off mode instrument and measurement accuracy.

B. Alternate Test Procedure for Boilers

The comments from Energy Kinetics presented what it believes to be a myriad of shortcomings of the existing DOE test procedures as applied to boilers. The dominant point made in the comment is to suggest that an input/output method of test, in lieu of the current test procedure's flue loss method of test, would be more appropriate for boilers.[6] However, the commenter did not recommend any specific alternate test method. (Energy Kinetics, No. 3 pp. 1–3, specifically points 1.0, 2.0, 4.0, and 6.0) Although generally outside the scope of the present rulemaking to address standby mode and off mode energy use, DOE is aware of the developments and possible advantages of input/output methods and is appreciative of the efforts made by the commenter in presenting these issues from their perspective. Conceptually, DOE sees merit in a number of points made in the comments. Specifically, DOE believes any time a more complete or more comprehensive analysis is suggested, its potential for use in a test procedure should be given serious consideration. However, it is DOE's view at this time that the input/output methodology has not progressed to the point that it can be considered for addition or substitution directly into DOE regulations. Specifically, DOE is not aware of an agreed upon representative average use simulation or model, utilizing input/output method of test, which might meet the statutory requirements for a DOE test procedure. The statute requires that "*any test procedure prescribed or amended * * * shall be reasonably designed to produce test results which measure energy efficiency * * * of a covered product during a representative average use cycle or period of use * * * and shall not be unduly burdensome to conduct.*" (42 U.S.C. 6293(b)(3) (emphasis added)) The commenter has not offered such a procedure for consideration. Nonetheless, DOE acknowledges that this is an important issue, and, accordingly, DOE will monitor the efforts of ASHRAE and others in developing improved testing methods.

C. Additional Issues Raised by Energy Kinetics

Within the overall suggestion to consider a different test procedure for boilers, the Energy Kinetics comments raised issues regarding the existing DOE boiler test procedure that are not necessarily related to the test methodology issue discussed above. Although these issues may have some relevance to the test methodology issue, they are independent enough to merit separate discussion.

First, Energy Kinetics suggested in its comments that the treatment of jacket losses in the existing test procedure is inappropriate for boilers. (Energy Kinetics, No. 03 pp. 1–3, specifically points 4.4, 4.5, 5.0, and 5.1). Key to this interpretation is the commenter's belief that the heat energy from the boiler jacket should not be credited as useful heat to the home. This belief would be true for boilers installed outdoors but not true for boiler installed indoors. For uniformity purposes, the existing test procedure minimizes the number of ratings to just two; indoor ratings for boilers that are not weatherized and outdoor ratings for boilers that are weatherized. (10 CFR part 430, subpart B, appendix N, section 10.1) Indoor ratings (*i.e.,* non-weatherized) assume all jacket heat is useful heat, and outdoor ratings (*i.e.,* weatherized) assume all jacket heat is an energy loss. These existing provisions provide a uniform basis of comparison for indoor installed boilers that is reasonably representative without requiring a separate test to determine and added calculations to deduct (or partially deduct) jacket loss. Also, these existing provisions provide a uniform basis of comparison for outdoor installed boilers where a full jacket loss deduction is appropriate. It is interesting to note, a full deduction of jacket loss for indoor boilers, although inappropriate, would easily be accommodated in an input/output test methodology since, in that methodology, only the heat content of the circulating water is credited as useful heat. In effect, this limit on only crediting circulating water heat results in a full deduction of any jacket loss. This fact supports the commenter's preference for a full jacket loss deduction for all boilers.

In consideration of all of the above, DOE believes the points Energy Kinetics raised are outside of the scope of this rulemaking and does not see the need to delay this final rule for the purposes of reconsidering the existing provisions on jacket loss. DOE believes that a better path would be to consider this issue as part of a more comprehensive future rulemaking to consider updates to the residential furnaces and boilers test procedure.

The Energy Kinetics comment also identified two areas where it believes the test procedures should be expanded: (1) Use of advanced controls, and (2) the combination of water heating and space conditioning functions. (Energy Kinetics, No. 03 pp. 1–3, specifically points 2.0, 4.6, and 5.2) These are issues of which DOE is aware and which are currently under study within the test procedure support community. As with the jacket loss issue, DOE believes this issue is out of scope and does not see the need to delay this final rule for the purposes of addressing these complicated issues at this time. Again, DOE believes that a better path would be to consider these issues as part of a more comprehensive future rulemaking to consider updates to the residential furnace and boilers test procedure.

Finally, Energy Kinetics stated that a separate metric should be developed to provide information on the relative difference in energy efficiency across different distribution systems (*e.g.* ducted distribution systems vs. hydronic systems). (Energy Kinetics, No. 03 p. 2, specifically points 7.0, 7.1, and 7.2.) In response, DOE notes that the test procedure's focus is the testing and differentiation of energy performance of the manufactured product. Annual energy consumption estimates reflect a uniform application of representative values that result in an energy or monetary value of a given manufactured product's performance, all for the purposes of comparison. One could argue that the test procedure's annual energy consumption estimates are inaccurate because of this lack of distribution efficiency consideration. However, one could also argue that the test procedure provides for a means to uniformly test and compare all boilers regardless of effects of actual distribution systems. In any event, the issue is outside of the scope of this rulemaking and will not be considered further or resolved here. Once again, DOE believes that a better path would be to consider this issue as part of a more comprehensive future rulemaking to consider updates to the residential furnaces and boilers test procedure.

[6] Flue loss method of test involves measurement of the actual energy loss occurring in the exiting flue passage. Annual efficiency is determined as 100 percent minus the on-period and off-period flue losses and other appropriate losses (*e.g.,* jacket losses for outdoor units and air infiltration losses for indoor units). Input/output method of test involves direct measurement of the useful output of the unit. For hot water boilers this output would be the heat content of the circulating water. Under the input/output method of test, annual efficiency would be inferred by some combination of laboratory simulation or mathematical modeling utilizing these heat measurements.

D. Need for an Integrated Annual Fuel Utilization Efficiency (AFUE$_I$)

Subsequent to publication of the July 2009 NOPR and the related public hearing, DOE proposed one additional test procedure change that it tentatively determined is needed to carry out the purposes of EISA 2007. Specifically, DOE proposed to add an integrated metric that incorporates standby mode and off mode energy consumption into the statutorily-identified efficiency descriptor, AFUE. Key to DOE's tentative determination is the specification of AFUE as the required energy efficiency descriptor for furnaces in the statute. (42 U.S.C. 6291(22)). EISA 2007 requires, if technically feasible, integration of standby mode and off mode energy consumption into the overall energy efficiency, energy consumption, or other energy descriptor. (42 U.S.C. 6295(gg)(2)(A)) The July 2009 NOPR proposed accomplishing this integration by incorporating standby mode and off mode energy consumption into the energy consumption equations and other energy descriptors. It was thought at the time of the proposal that this extent of integration was sufficient to satisfy the requirements of EISA 2007. However, because of the specific identification of AFUE as the efficiency descriptor for furnaces in the statute, DOE interpreted EISA 2007 as requiring, if technically feasible, an integrated AFUE that reflects standby mode and off mode energy consumption for both fossil fuel and electricity. DOE reasoned that this approach would also allow for a smooth transition to the EISA 2007 requirement that all energy conservation standards adopted after July 1, 2010 must account for standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(3)(A))

As noted above, this matter was the subject of an SNOPR published in the **Federal Register** on April 5, 2010. 75 FR 17075.

Numerous comments opposed both the need for AFUE$_I$ and the possibility of regulating by AFUE$_I$. In sum, these comments suggested that DOE has misinterpreted the statute in terms of requiring the integration of standby mode and off mode energy consumption into the AFUE metric and further that regulating by AFUE$_I$ would be counter to the intent of EISA 2007, so the separate standard form of regulation, as contemplated by EISA 2007, should be pursued instead. Commenters overwhelmingly opposed DOE's proposed integrated AFUE$_I$ metric, as presented in the SNOPR.

On the first point, Lennox, AHRI, and American Council for an Energy-Efficient Economy (ACEEE) all asserted that in their reading of the EISA 2007 statute, the requirement to integrate standby mode and off mode energy consumption into the AFUE metric is not mandated. (Lennox, No. 20 at p. 3; AHRI, No. 08 at p. 2; ACEEE, No. 18 at p. 3) These commenters believe DOE is given latitude in the statute to integrate if it chooses and that there is no mandate that DOE must integrate the standby and off mode consumption into the AFUE descriptor. Other commenters pointed out the mathematical inconsistencies associated with adding consumption values within an efficiency descriptor. (Carrier No. 17 at p. 3; AHRI, No. 16 at p. 2) In support of this inconsistency argument, ACEEE stated that the proposed approach for AFUE$_I$ is counter to DOE's own position taken in its test procedure final rule for fluorescent lamp ballasts. 74 FR 54445 (Oct. 22, 2009). In the technical support document (TSD) for that rulemaking, DOE stated, "Because BEF [ballast efficiency factor] is a measure of efficiency and standby mode power is a measure of energy consumption, DOE does not believe it is feasible to incorporate a measure of standby mode energy use into the BEF metric." (ACEEE, No. 18 at p. 2) In contrast, comments from the American Gas Association (AGA) and the American Public Gas Association (APGA) were supportive of the integrating concept. However, while these entities support the proposal for AFUE$_I$, they argued that the included conversion factor transposing the point-of-use electrical energy into an expression of Btu provides only a partial picture of the total energy use of these products. AGA and APGA stated that it would be more appropriate to convert measured site energy to source energy to capture transmission losses. Accordingly, AGA and APGA recommended that the proposed integrated metric should be adjusted for a full-fuel-cycle measure of energy consumption and encouraged further integration of electricity consumption utilizing the full fuel cycle into the regulatory process. (AGA, No. 19, at pp. 1–3; APGA, No. 23 at pp. 1–2)

Further objection to AFUE$_I$ was expressed in the comments if in fact DOE uses AFUE$_I$ as the basis of regulation. Specifically, it was argued that because of the relatively small magnitude of the standby mode and off mode loss, the results for AFUE$_I$ are not materially different enough from the existing test procedure's AFUE to allow for effective differentiation and regulation, and, therefore, integration is not feasible. (ACEEE, No. 18 at p. 4) Earthjustice asserted that the rounding allowed in the test procedure and the associated sampling provisions would "swallow" the effect of standby mode and off mode. (Earthjustice, No. 21 at pp. 3–4) Trane further argued that the integrated AFUE would have the perverse effect of making larger-capacity furnaces inappropriately appear to be slightly more efficient than smaller furnaces. This is because the magnitude of standby mode and off mode energy consumption could be the same across a given manufacturer's models of different capacities. The result, in that case, is a smaller adjustment in terms of efficiency percentage for larger furnaces, even though the potential energy savings by reducing standby mode and off mode energy consumption is the same. (Trane, No. 14 at p. 3)

Key to the opposition to AFUE$_I$ as the regulating metric is the distinction made in the statute as to "technically feasible" with regard to test procedure integration, and "feasible" with regard to a single new or amended standard. (42 U.S.C. 6295(gg)(2)(A) and (3)) Specifically, objecting comments maintain that the AFUE$_I$ provides an ineffective basis for regulation, and, therefore, it makes it infeasible to carryout the intent of EISA 2007. These commenters reasoned that a separate metric such as that provided in the original NOPR, specifically E_{SO} or the measured wattage, would be a feasible basis of regulation.

In consideration of the above, DOE reexamined the applicable provisions of EPCA regarding standby mode and off mode energy consumption. Specifically, EPCA requires that the test procedures for all covered products be amended to include standby mode and off mode energy consumption by integrating such energy consumption into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product, unless the Secretary determines that: (1) The current test procedures for a covered product already fully account for and incorporate the standby mode and off mode energy consumption of the covered product; or (2) such an integrated test procedure is technically infeasible for a particular covered product, in which case, the Secretary shall prescribe a separate standby mode and off mode energy use test procedure for that covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A))

To examine the commenters' claim that an integrated AFUE metric (AFUE$_I$) is infeasible, DOE further investigated the magnitude of the standby mode and off mode electrical use for residential furnaces. DOE conducted testing of various commercially-available residential furnaces that span a range of efficiencies, input capacities, and manufacturers, and found that the standby mode and off mode electrical rate of consumption ranges from 2 to 10 watts, depending on the residential furnace's features. A typical residential furnace uses approximately 7 watts of electrical standby mode and off mode power. Some common components contributing to the electrical standby mode and off mode energy consumption include the interruptible igniter, the control board for the furnace, and any additional controls used in the furnace blower-motor assembly. When the hours that the furnace spends in standby mode and off mode are considered, standby mode and off mode power consumption of 7 watts results in a total of approximately 55 kilowatt hours of electrical use annually per furnace. The total annual fossil fuel energy use for a typical furnace with an input capacity of 80,000 Btu/h is at least 400 times greater than the electrical standby mode and off mode energy consumption, depending on the operating conditions of the furnace. Thus, when the electrical consumption in standby mode and off mode is added to the fossil fuel energy consumption in all modes of operation in the $AFUE_I$ equation, as proposed in the SNOPR, the standby mode and off mode electrical consumption would have an insignificant impact on the value of $AFUE_I$. Using the approximations described above, the standby mode and off mode electrical consumption would be 1/400th or 0.25 percent of the fossil fuel energy consumption. Currently, the Federal energy conservation standards and manufacturers' ratings of AFUE are presented to the nearest whole number. Consequently, given rounding conventions, standby mode and off mode would be likely to effect a change in the standard level for furnaces and boilers in only rare cases, if an integrated AFUE metric were adopted.

After considering the comments on the SNOPR, DOE has determined that it is technically infeasible to integrate the standby mode and off mode energy use with active mode energy use for furnaces because the standby mode and off mode energy usage, when measured, is essentially lost in practical terms due to the fact that manufacturers' ratings of AFUE are presented to the nearest whole number.

In light of the comments and DOE's re-examination explained above, DOE is abandoning its supplemental proposal to integrate the standby mode and off mode electrical energy consumption into the AFUE descriptor for residential furnaces. Instead, DOE is adopting amendments to the residential furnaces and boilers test procedure to separately measure the electrical power consumption of those products in standby mode and off mode (*i.e.,* P_{SB} and P_{OFF}) as specified in its original NOPR. 74 FR 36959, 36970–71 (July 27, 2009). In addition, DOE is adopting the calculations as specified in its original NOPR, which allow the electrical power consumption to be translated into an annualized energy consumption value based on the hours the furnace spends operating in standby mode and off mode (*i.e.,* E_{SO}). *Id.* This approach would allow for the measurement of standby mode and off mode electrical consumption of different furnace and boiler products. Although the magnitude of energy savings may be small for a given unit, it could be substantial when aggregated across the full range of covered products over the 30-year analysis period. DOE plans to further address the standby mode and off mode electrical consumption of residential furnaces through the use of one of these separate energy descriptors in the current standards rulemaking. For additional information, *see http://www1.eere.energy.gov/buildings/appliance_standards/residential/furnaces_boilers.html.*

E. Other Comments Received on the Supplemental Notice of Proposed Rulemaking

Comments were received in response to the SNOPR that were not related to the subject of the SNOPR but rather were related to aspects of the original NOPR. Although these comments are outside of the narrowed focus of the SNOPR, DOE did not want to unnecessarily limit the opportunity for public comment and is addressing these comments here. These additional comments objected to the integration and accounting of standby mode and off mode energy consumption as presented in the July 2009 NOPR. Specifically, Carrier, Rheem, and AHRI argued that the annual accounting of electricity energy consumption, as expressed in the test procedure's descriptor E_{AE}, should not include the addition of standby mode and off mode energy consumption, because E_{AE} without such addition is currently being used by the industry, and to change this value now would unnecessarily burden manufacturers. (Carrier, No. 17 at p. 3: Rheem, No. 15 at pp. 8–9: AHRI, No. 16 at pp. 4–5) The E_{AE} descriptor is the annual electrical energy consumption of furnaces and boilers. This annual consumption descriptor has always been a part of the test procedures for furnaces and boilers, and it is used to obtain a representative annual operating cost for furnaces and boilers. For fossil-fueled furnaces and boilers, the annual operating cost is the sum of the annual electrical operating cost plus the annual fossil fuel cost. The July 2009 NOPR proposed to modify this descriptor by adding the additional electrical consumption represented by the newly-added standby mode and off mode energy consumption. No comments were received objecting to this addition to E_{AE} at the time of the original NOPR. However, in response to the SNOPR, these commenters now report that E_{AE} without the addition of standby mode and off mode energy consumption is being used currently to identify electrically efficient furnaces and also to identify efficient furnace fans for the purposes of tax credits. Adding standby mode and off mode energy consumption to the E_{AE} term is problematic because it would change the meaning of the existing rebate and tax credit criterion based on E_{AE}. In response, DOE does not see the need to withdraw the proposed modification of E_{AE} for the convenience of current programs using the unmodified E_{AE} descriptor. Rather, DOE believes that the modified descriptor is both consistent with the directives in EISA 2007 and also provides a more complete basis for product comparison. Accordingly, DOE is adopting the proposed modification to E_{AE} as part of this final rule.

A second objection was received regarding the proposed E_{SO} descriptor. E_{SO} is the annual sum of standby mode and off mode electrical energy consumption. Trane and Rheem objected to the accounting or hourly assignments proposed for the E_{SO} descriptor, because such accounting is inaccurate in their view. In the proposed amendments, electric standby mode is defined as the off period during the heating season, and off mode is defined as the entire non-heating season. These definitions allow for the use of the hourly assignments already in the test procedures. Taken together, these proposed assignments would provide a full year's accounting of the energy consumption. Trane argued that there is some overstatement of E_{SO} because some of the off period for one of the electrical components (*i.e.,* circulating fan) is actually in active mode because of the possible active cooling load hours utilizing this same fan. Rheem argued the opposite point, because in Rheem's view, the proposed

E_{SO} assignments understate the actual standby mode energy consumption; Rheem reasoned that some electronic losses are constant, and an annual consumption approximation of the wattage times a full year of 8760 hours would be more appropriate. As one can see, there is no perfect resolution to this accounting problem. Accordingly, DOE finds the proposed accounting in the NOPR to be reasonably accurate and appropriate for the integration necessary to implement the relevant provisions of EISA 2007. Accordingly, DOE has decided to retain the accounting methodology associated with E_{SO} for this final rule.

IV. Effect of Test Procedure Revisions on Compliance With Standards

In amending a test procedure, section 323(e) of EPCA directs DOE to determine to what extent, if any, the test procedure would alter the measured energy efficiency of the covered product. If the amended test procedure alters the measured efficiency, the Secretary must amend the applicable energy conservation standard to the extent the amended test procedure changes the energy efficiency of products that minimally comply with the existing standard. (42 U.S.C. 6293(e)) The current energy conservation standard for furnaces and boilers is based on a metric, AFUE, which is not effected by the inclusion of electrical standby mode and off mode energy consumption. As explained below, this final rule has no effect on the current energy conservation standard.

As provided by EPCA, amendments to the test procedures to include standby mode and off mode energy consumption shall not be used to determine compliance with previously established standards. (42 U.S.C. 6295(gg)(2)(C)) The inclusion of a standby mode and off mode test method in this final rule will not affect a manufacturer's ability to demonstrate compliance with the existing energy conservation standards for residential furnaces and boilers. The standby mode and off mode tests need not be performed to determine compliance with the current energy conservation standards for furnaces and boilers because the current standards do not comprehensively account for electrical standby mode and off mode energy consumption.

Today's final rule, which includes provisions for measuring standby mode and off mode energy consumption, will become effective, in terms of adoption into the Code of Federal Regulations (CFR), 30 days after the date of publication in the **Federal Register**. Manufacturers will be required to use this test procedure's standby mode and off mode provisions to demonstrate compliance with any future energy conservation standards for residential furnaces and boilers that address standby mode and off mode energy consumption. The introductory sentence to 10 CFR part 430, subpart B, appendix N, reads as follows: "The procedures and calculations that refer to standby mode and off mode energy consumption (*i.e.,* sections 8.6 and 10.9 of this appendix N) need not be performed to determine compliance with energy conservation standards for furnaces and boilers at this time." The above statement will be removed as part of a future rulemaking to amend the energy conservation standards for residential furnaces and boilers to account for standby mode and off mode energy consumption, and compliance with the applicable test procedure provisions will be required on the compliance date of those amended energy conservation standards. A statement has also been added to the introductory note to appendix N to clarify that any representations pertaining to standby mode and off mode energy consumption of these products that are made on or after a date 180 days after the date of publication of this test procedure final rule in the **Federal Register** must be based upon results generated under this test procedure, consistent with the requirements of 42 U.S.C. 6293(c)(2). Although this is a statutory requirement under 42 U.S.C. 6293(c), DOE has concluded that it would be useful to explicitly state this requirement in DOE's regulations.

V. Compliance With Other EPCA Requirements

EPCA requires that new or amended test procedures shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) For the reasons that follow, DOE has determined that the incorporation of IEC Standard 62301, along with the modifications and additional calculations described above, satisfy this requirement.

As noted above, the test procedure incorporates by reference provisions from IEC Standard 62301 for the measurement of standby mode and off mode energy consumption. IEC Standard 62301 is widely accepted and used internationally to measure electric power in standby mode and off mode. Based on its analysis of IEC Standard 62301, DOE has determined that the test methods and equipment that the amendments require for measuring standby mode and off mode power do not differ substantially from the test methods and equipment in the current DOE test procedure for furnaces and boilers. Therefore, testing of furnaces and boilers pursuant to today's final rule will not require any significant investment in test facilities or new equipment. For these reasons, DOE does not believe that the standby mode and off mode test procedure provisions will add significant costs.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

Today's regulatory action is not a "significant regulatory action" under section 3(f) of Executive Order 12866, "Regulatory Planning and Review." 58 FR 51735 (Oct. 4, 1993). Accordingly, this regulatory action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis for any rule that, by law, must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site at *http://www.gc.doe.gov.*

Today's final rule adopts test procedure provisions to measure standby mode and off mode energy consumption of residential furnaces and boilers, generally through the incorporation by reference of IEC

Standard 62301 and the modifications and additional calculations described in detail in the July 2009 NOPR. DOE reviewed today's final rule under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. For the reasons explained in the July 2009 NOPR, DOE certified that the proposed rule would not have a significant impact on a substantial number of small entities. 74 FR 36959, 36967 (July 27, 2009).

As noted above, the test procedure incorporates by reference provisions from IEC Standard 62301 for the measurement of standby mode and off mode energy consumption. IEC Standard 62301 is widely accepted and used internationally to measure electric power in standby mode and off mode. Based on its analysis of IEC Standard 62301, DOE determined that the test methods and equipment that the amendments require for measuring standby mode and off mode power do not differ substantially from the test methods and equipment in the current DOE test procedure for furnaces and boilers. Therefore, testing of furnaces and boilers pursuant to today's final rule will not require any significant investment in test facilities or new equipment. For these reasons, DOE does not believe that the standby mode and off mode test procedure provisions will add significant costs.

The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs fewer than a threshold number of workers specified in 13 CFR part 121, which relies on size standards and codes established by the North American Industry Classification System (NAICS). The threshold number for NAICS classification 333415, which applies to Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (including residential furnaces and boilers), is 750 employees.[7] DOE reviewed the Air-Conditioning, Heating, and Refrigeration Institute's Directory of Certified Product Performance for Residential Furnaces and Boilers (2009),[8] the ENERGY STAR Product Databases for Gas and Oil Furnaces (May 15, 2009),[9] the California Energy Commission's Appliance Database for Residential Furnaces and Boilers,[10] and the Consortium for Energy Efficiency's Qualifying Furnace and Boiler List (April 2, 2009).[11] From this review, DOE found that there are approximately 25 small businesses within the furnace and boiler industry. Even though there are a significant number of small businesses within the furnace and boiler industry, DOE has concluded that the test procedure amendments contained in this final rule would not represent a substantial burden to any manufacturer, including small manufacturers, as explained above.

Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis was provided to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b). DOE did not receive any comments regarding a significant economic impact on any small entities. Thus, DOE reaffirms and certifies that this rule will have no significant economic impact on a substantial number of small entities.

C. Review Under the Paperwork Reduction Act of 1995

Today's final rule imposes no new information or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

D. Review Under the National Environmental Policy Act of 1969

DOE is establishing a final rule to amend the test procedure for residential furnaces and boilers to address measurement of the standby mode and off mode energy consumption of these products. DOE has determined that this final rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (Pub. L. 91–190, codified at 42 U.S.C. 4321 *et seq.*), and DOE's implementing regulations at 10 CFR part 1021. Specifically, this final rule, which adopts an industry standard for measurement of standby mode and off mode energy consumption, amends an existing rule without changing its environmental effect, and, therefore, is covered by Categorical Exclusion A5 found in 10 CFR part 1021, subpart D, appendix A. Today's final rule would not affect the amount, quality, or distribution of energy usage, and, therefore, would not result in any environmental impacts.[12] Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. 64 FR 43255 (August 10, 1999). The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States, and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process that it will follow in developing such regulations. 65 FR 13735. DOE has examined this final rule and determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write

[7] U.S. Small Business Administration, Table of Small Business Size Standards, August 22, 2008, available at: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[8] The Air-Conditioning, Heating and Refrigeration Institute, Directory of Certified Product Performance, June 2009, available at: *http://www.ahridirectory.org/ahridirectory/pages/home.aspx.*

[9] The U.S. Environmental Protection Agency and the U.S. Department of Commerce, ENERGY STAR Furnaces—Product Databases for Gas and Oil Furnaces, May 15, 2009: *http://www.energystar.gov/index.cfm?c=furnaces.pr_furnaces.*

[10] The California Energy Commission, Appliance Database for Residential Furnaces and Boilers, 2009: *http://www.appliances.energy.ca.gov/QuickSearch.aspx.*

[11] Consortium of Energy Efficiency, Qualifying Furnace and Boiler List, April 2, 2009: *http://www.ceedirectory.org/ceedirectory/pages/cee/ceeDirectoryInfo.aspx.*

[12] Categorical Exclusion A5 provides: "Rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended."

regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4, codified at 2 U.S.C. 1501 *et seq.*) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a) and (b)) Section 204 of UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate." UMRA also requires an agency plan for giving notice and opportunity for timely input to small governments that may be potentially affected before establishing any requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at *http://www.gc.doe.gov.*) Today's final rule, which modifies the current test procedures for residential furnaces and boilers, contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's final rule to amend DOE test procedures would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 15, 1988), DOE has determined that this final rule would not result in any takings that might require compensation under the Fifth Amendment to the United States Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (Pub. L. 106–554, codified at 44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's final rule is not a significant regulatory action under Executive Order 12866 or any successor order; would not have a significant adverse effect on the supply, distribution, or use of energy; and has not been designated by the Administrator of OIRA as a significant energy action. Therefore, DOE has determined that this rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects for this rulemaking.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101 *et seq.*), DOE must comply with all laws applicable to the former Federal Energy Administration, including section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (Pub. L. 95–70). (15 U.S.C. 788) Section 32 provides that where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Federal Trade Commission (FTC) concerning the impact of commercial or industry standards on competition.

Certain of the amendments and revisions in this final rule incorporate testing methods contained in the following commercial standard, the International Electrotechnical Commission (IEC) Standard 62301, "Household electrical appliances—Measurement of standby power" (First Edition 2005–06). As stated in the July 2009 NOPR, DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the Federal Energy Administration Act (*i.e.,* that it was developed in a manner that fully provides for public participation, comment, and review). 74 FR 36959, 36968 (July 27, 2009). DOE has consulted with the Attorney General and the Chairman of the FTC concerning the impact on competition of requiring manufacturers to use the test methods contained in this standard, and neither recommended against incorporation of this standard.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule before its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on August 20, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons stated in the preamble, DOE is amending part 430 of chapter II of title 10 of the Code of Federal Regulations, to read as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.3 is amended by adding new paragraph (l)(1), and adding and reserving paragraph (l)(2), to read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(l) * * *

(1) International Electrotechnical Commission (IEC) Standard 62301 ("IEC 62301"), *Household electrical appliances—Measurement of standby power* (first edition, June 2005), IBR approved for Appendix N to Subpart B.

(2) [Reserved].

* * * * *

■ 3. Appendix N to subpart B of part 430 is amended as follows:

■ a. Adding a note after the heading.

■ b. In section 2.0 *Definitions,* by redesignating sections 2.1, 2.2, 2.3, and 2.4 as sections 2.2, 2.3, 2.9, and 2.5 respectively; and adding new sections 2.1, 2.4, 2.6, 2.7, and 2.8.

■ c. In section 8.0 *Test procedure,* by adding new sections 8.6, 8.6.1, and 8.6.2.

■ d. In section 9.0 *Nomenclature,* by adding three new text items at the end of the section.

■ e. In section 10.0 *Calculation of derived results from test measurements,* by:

■ i. Revising sections 10.2.3, 10.2.3.1, 10.2.3.2, 10.3, 10.5.2, 10.5.3; and

■ ii. Adding new section 10.9.

The additions and revisions read as follows:

Appendix N to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Furnaces and Boilers

Note: The procedures and calculations that refer to standby mode and off mode energy consumption (*i.e.,* sections 8.6 and 10.9 of this appendix N) need not be performed to determine compliance with energy conservation standards for furnaces and boilers at this time. However, any representation related to standby mode and off mode energy consumption of these products made after April 18, 2011 must be based upon results generated under this test procedure, consistent with the requirements of 42 U.S.C. 6293(c)(2). After July 1, 2010, any adopted energy conservation standard shall address standby mode and off mode energy consumption, and upon the compliance date for such standards, compliance with the applicable provisions of this test procedure will be required.

* * * * *

2.0 Definitions

2.1 *Active mode* means the condition during the heating season in which the furnace or boiler is connected to the power source, and either the burner, electric resistance elements, or any electrical auxiliaries such as blowers or pumps, are activated.

* * * * *

2.4 *IEC 62301* means the test standard published by the International Electrotechnical Commission (IEC), titled "Household electrical appliances—Measurement of standby power," Publication 62301 (First Edition 2005–06). (incorporated by reference, *see* § 430.3)

* * * * *

2.6 *Off mode* means the condition during the non-heating season in which the furnace or boiler is connected to the power source, and neither the burner, electric resistance elements, nor any electrical auxiliaries such as blowers or pumps, are activated.

2.7 *Seasonal off switch* means the switch on the furnace or boiler that, when activated, results in a measurable change in energy consumption between the standby and off modes.

2.8 *Standby mode* means the condition during the heating season in which the furnace or boiler is connected to the power source, and neither the burner, electric resistance elements, nor any electrical auxiliaries such as blowers or pumps, are activated.

* * * * *

8.0 Test Procedure

* * * * *

8.6 Measurement of electrical standby and off mode power.

8.6.1 Standby power measurement. With all electrical auxiliaries of the furnace or boiler not activated, measure the standby power (P_{SB}) in accordance with the procedures in IEC 62301 (incorporated by reference, *see* § 430.3), except that section 8.5 *Room Ambient Temperature* of ASHRAE 103—1993 (incorporated by reference, *see* § 430.3) and the voltage provision of section 8.2.1.4 *Electrical Supply* of ASHRAE 103—1993 shall apply in lieu of the corresponding provisions of IEC 62301 at section 4.2 *Test room* and the voltage specification of section 4.3 *Power supply.* Frequency shall be 60Hz. Clarifying further, IEC 62301 section 4.5 *Power measurement accuracy* and section 5 *Measurements* shall apply in lieu of section 6.10 *Energy Flow Rate* of ASHRAE 103—1993. Measure the wattage so that all possible standby mode wattage for the entire appliance is recorded, not just the standby mode wattage of a single auxiliary.

8.6.2 Off mode power measurement. If the unit is equipped with a seasonal off switch or there is an expected difference between off mode power and standby mode power, measure off mode power (P_{OFF}) in accordance with the standby power procedures in IEC 62301 (incorporated by reference, *see* § 430.3), except that section 8.5 *Room Ambient Temperature* of ASHRAE 103—1993 (incorporated by reference, *see* § 430.3) and the voltage provision of section 8.2.1.4 *Electrical Supply* of ASHRAE 103—1993 shall apply in lieu of the corresponding provisions of IEC 62301 at section 4.2 *Test room* and the voltage specification of section 4.3 *Power supply.* Frequency shall be 60Hz. Clarifying further, IEC 62301 section 4.5

Power measurement accuracy and section 5 *Measurements* shall apply for this measurement in lieu of section 6.10 *Energy Flow Rate* of ASHRAE 103—1993. Measure the wattage so that all possible off mode wattage for the entire appliance is recorded, not just the off mode wattage of a single auxiliary. If there is no expected difference in off mode power and standby mode power, let $P_{OFF} = P_{SB}$, in which case no separate measurement of off mode power is necessary.

9.0 Nomenclature

* * * * *

E_{SO} = Average annual electric standby mode and off mode energy consumption, in kilowatt-hours
P_{OFF} = Furnace or boiler off mode power, in watts
P_{SB} = Furnace or boiler standby mode power, in watts

10.0 Calculation of Derived Results From Test Measurements

* * * * *

10.2.3 Average annual auxiliary electrical energy consumption for gas or oil-fueled furnaces or boilers. For furnaces and boilers equipped with single-stage controls, the average annual auxiliary electrical consumption (E_{AE}) is expressed in kilowatt-hours and defined as:

$$E_{AE} = BOH_{SS}(y_P PE + y_{IG}PE_{IG} + yBE) + E_{SO}$$

Where:

BOH_{SS} = as defined in 10.2.1 of this appendix
PE = as defined in 10.2.1 of this appendix
y_P = as defined in 10.2.1 of this appendix
y_{IG} = as defined in 10.2.1 of this appendix
PE_{IG} = as defined in 10.2.1 of this appendix
y = as defined in 10.2.1 of this appendix
BE = as defined in 10.2.1 of this appendix
E_{SO} = as defined in 10.9 of this appendix.

10.2.3.1 For furnaces or boilers equipped with two-stage controls, E_{AE} is defined as:

$$E_{AE} = BOH_R (y_P PE_R + y_{IG}PE_{IG} + yBE_R) + BOH_H (y_P PE_H + y_{IG}PE_{IG} + y\,BE_H) + E_{SO}$$

Where:

BOH_R = as defined in 10.2.1.2 of this appendix
y_P = as defined in 10.2.1 of this appendix
PE_R = as defined in 9.1.2.2 and measured at the reduced fuel input rate of ANSI/ASHRAE Standard 103—1993, (incorporated by reference, *see* § 430.3)
y_{IG} = as defined in 10.2.1 of this appendix
PE_{IG} = as defined in 10.2.1 of this appendix
y = as defined in 10.2.1 of this appendix
BE_R = as defined in 9.1.2.2 of ANSI/ASHRAE Standard 103—1993, (incorporated by reference, *see* § 430.3) measured at the reduced fuel input rate
BOH_H = as defined in 10.2.1.3 of this appendix
PE_H = as defined in 9.1.2.2 of ANSI/ASHRAE Standard 103—1993, (incorporated by reference, *see* § 430.3) measured at the maximum fuel input rate
BE_H = as defined in 9.1.2.2 of ANSI/ASHRAE Standard 103—1993, (incorporated by reference, *see* § 430.3) measured at the maximum fuel input rate
E_{SO} = as defined in 10.9 of this appendix.

10.2.3.2 For furnaces or boilers equipped with step-modulating controls, E_{AE} is defined as:

$$E_{AE} = BOH_R (y_P PE_R + y_{IG}PE_{IG} + yBE_R) + BOH_M (y_P PE_H + y_{IG}PE_{IG} + y\,BE_H) + E_{SO}$$

Where:

BOH_R = as defined in 10.2.1.2 of this appendix
y_P = as defined in 10.2.1 of this appendix
PE_R = as defined in 9.1.2.2 of ANSI/ASHRAE Standard 103—1993, (incorporated by reference, *see* § 430.3), measured at the reduced fuel input rate
y_{IG} = as defined in 10.2.1 of this appendix
PE_{IG} = as defined in 10.2.1 of this appendix
y = as defined in 10.2.1. of this appendix
BE_R = as defined in 9.1.2.2 of ANSI/ASHRAE Standard 103—1993, (incorporated by reference, *see* § 430.3) measured at the reduced fuel input rate
BOH_M = as defined in 10.2.1.4 of this appendix
PE_H = as defined in 9.1.2.2 of ANSI/ASHRAE Standard 103—1993, (incorporated by reference, *see* § 430.3) measured at the maximum fuel input rate
BE_H = as defined in 9.1.2.2 of ANSI/ASHRAE Standard 103—1993, (incorporated by reference, *see* § 430.3) measured at the maximum fuel input rate
E_{SO} = as defined in 10.9 of this appendix.

10.3 Average annual electric energy consumption for electric furnaces or boilers.

$$E_E = 100(2{,}080)(0.77)DHR/(3.412\ AFUE) + E_{SO}$$

Where:

100 = to express a percent as a decimal
2,080 = as specified in 10.2.1 of this appendix
0.77 = as specified in 10.2.1 of this appendix
DHR = as defined in 10.2.1 of this appendix
3.412 = conversion to express energy in terms of watt-hours instead of Btu
AFUE = as defined in 11.1 of ANSI/ASHRAE Standard 103—1993 (incorporated by reference, *see* § 430.3), in percent, and calculated on the basis of: ICS installation, for non-weatherized warm air furnaces; indoor installation, for non-weatherized boilers; or outdoor installation, for furnaces and boilers that are weatherized.
E_{SO} = as defined in 10.9 of this appendix.

* * * * *

10.5.2 Average annual auxiliary electrical energy consumption for gas or oil-fueled furnaces and boilers located in a different geographic region of the United States and in buildings with different design heating requirements. For gas or oil-fueled furnaces and boilers, the average annual auxiliary electrical energy consumption for a specific geographic region and a specific typical design heating requirement (E_{AER}) is expressed in kilowatt-hours and defined as:

$$E_{AER} = (E_{AE} - E_{SO})\ (HLH/2080) + E_{SOR}$$

Where:

E_{AE} = as defined in 10.2.3 of this appendix
E_{SO} = as defined in 10.9 of this appendix
HLH = as defined in 10.5.1 of this appendix
2,080 = as specified in 10.2.1 of this appendix
E_{SOR} = as specified in 10.5.3 of this appendix.

10.5.3 Average annual electric energy consumption for electric furnaces and boilers located in a different geographic region of the United States and in buildings with different design heating requirements. For electric furnaces and boilers, the average annual electric energy consumption for a specific geographic region and a specific typical design heating requirement (E_{ER}) is expressed in kilowatt-hours and defined as:

$$E_{ER} = 100(0.77)\ DHR\ HLH/(3.412\ AFUE) + E_{SOR}$$

Where:

100 = as specified in 10.3 of this appendix
0.77 = as specified in 10.2.1 of this appendix
DHR = as defined in 10.2.1 of this appendix
HLH = as defined in 10.5.1 of this appendix
3.412 = as specified in 10.3 of this appendix
AFUE = as defined in 10.3 of this appendix
E_{SOR} = E_{SO} as defined in 10.9 of this appendix, except that in the equation for E_{SO}, the term BOH is multiplied by the expression (HLH/2080) to get the appropriate regional accounting of standby mode and off mode loss.

* * * * *

10.9 Average annual electrical standby mode and off mode energy consumption. Calculate the annual electrical standby mode and off mode energy consumption (E_{SO}) in kilowatt-hours, defined as:

$$E_{SO} = ((P_{SB} * (4160 - BOH)) + (P_{OFF} * 4600)) * K$$

Where:

P_{SB} = furnace or boiler standby mode power, in watts, as measured in Section 8.6
4,160 = average heating season hours per year
P_{OFF} = furnace or boiler off mode power, in watts, as measured in Section 8.6
4,600 = average non-heating season hours per year
K = 0.001 kWh/Wh, conversion factor for watt-hours to kilowatt-hours
BOH = total burner operating hours as calculated in section 10.2 for gas or oil-fueled furnaces or boilers. Where for gas or oil-fueled furnaces and boilers equipped with single-stage controls, BOH = BOH_{SS}; for gas or oil-fueled furnaces and boilers equipped with two-stage controls, BOH = ($BOH_R + BOH_H$); and for gas or oil-fueled furnaces and boilers equipped with step-modulating controls, BOH = ($BOH_R + BOH_M$). For

electric furnaces and boilers, BOH = 100(2080)(0.77)DHR/(E_{in} 3.412)(AFUE))

Where:

100 = to express a percent as a decimal
2,080 = as specified in 10.2.1 of this appendix
0.77 = as specified in 10.2.1 of this appendix
DHR = as defined in 10.2.1 of this appendix
3.412 = conversion to express energy in terms of KBtu instead of kilowatt-hours
AFUE = as defined in 11.1 of ANSI/ASHRAE Standard 103—1993 (incorporated by reference, *see* § 430.3) in percent
E_{in} = Steady-state electric rated power, in kilowatts, from section 9.3 of ANSI/ASHRAE Standard 103—1993 (incorporated by reference, *see* § 430.3).

[FR Doc. 2010–26369 Filed 10–19–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1036; Directorate Identifier 2009–NM–247–AD; Amendment 39–16480; AD 2010–22–01]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 767–200, –300, and –300F Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding an existing airworthiness directive (AD) for the products listed above. That AD currently requires repetitive inspections for fatigue cracking and corrosion of the upper link fuse pin of the nacelle struts, and related investigative and corrective actions if necessary. The existing AD also provides terminating action for the repetitive inspections. This AD revises certain criteria for the terminating action. This AD was prompted by two reports of cracked upper link fuse pins. We are issuing this AD to prevent fatigue cracking or corrosion of the upper link fuse pin, which could result in failure of the fuse pin and consequent reduced structural integrity of the nacelle strut and possible separation of the strut and engine from the airplane during flight.

DATES: This AD is effective November 4, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of November 4, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of November 5, 2009 (74 FR 50692, October 1, 2009).

We must receive comments on this AD by December 6, 2010.

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

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

For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6577; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

On September 18, 2009, we issued AD 2009–20–09, Amendment 39–16032 (74 FR 50692, October 1, 2009), for certain Model 767–200, –300, and –300F series airplanes. That AD requires repetitive inspections for fatigue cracking and corrosion of the upper link fuse pin of the nacelle struts, and related investigative and corrective actions if necessary. That AD also provides terminating action for the repetitive inspections. That AD resulted from two reports of cracked upper link fuse pins. We issued that AD to prevent fatigue cracking or corrosion of the upper link fuse pin, which could result in failure of the fuse pin and consequent reduced structural integrity of the nacelle strut and possible separation of the strut and engine from the airplane during flight.

Actions Since Existing AD Was Issued

We have learned that paragraph (h) of AD 2009–20–09 incorrectly identifies the pin replacement as acceptable for compliance with the optional strut modification specified in paragraph (g) of that AD. Rather, replacing the pin terminates only the repetitive inspections of the pins as required by paragraph (g) of this AD; replacing the pin does not terminate the requirement for the strut modification. We have removed credit for replacement of the fuse pins with new fuse pins from paragraph (h) of the existing AD (specified as paragraph (i) in this AD) because it is not a terminating action. We have added new paragraph (j) in this AD to specify that replacement of the fuse pins terminates the repetitive inspection requirements of paragraph (g) of this AD, and the strut modification is still required.

We have also revised paragraph (b) of this AD to clarify that certain requirements of this AD terminate certain requirements of AD 2000–19–09, Amendment 39–11910 (65 FR 58641, October 2, 2000), and AD 2004–16–12, Amendment 39–13768 (69 FR 51002, August 17, 2004).

Explanation of Additional Paragraph in the AD

We have added a new paragraph (d) to this AD to provide the Air Transport Association (ATA) of America subject code 54: Nacelles/Pylons. This code is added to make this AD parallel with other new AD actions. We have reidentified subsequent paragraphs accordingly.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs.

AD Requirements

This AD requires repetitive inspections for fatigue cracking and corrosion of the upper link fuse pin of the nacelle struts, and related investigative and corrective actions if necessary. This AD also provides terminating action for the repetitive inspections.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because this AD shortens the time for the repetitive intervals. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1036; Directorate Identifier 2009–NM–247–AD;" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD affects 354 airplanes of U.S. registry. This new AD adds no new costs to affected operators. The current costs for this AD are repeated for the convenience of affected operators, as follows:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of fuse pins (requirement of AD 2009–20–09).	4 work-hours × $85 per hour = $340 per inspection cycle.	$0	$340 per inspection cycle	$120,360 per inspection cycle.

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

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 that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

(4) 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.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, 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]

■ The FAA amends § 39.13 by removing airworthiness directive (AD) 2009–20–09, Amendment 39–16032 (74 FR 50692, October 1, 2009), and adding the following new AD:

2010–22–01 The Boeing Company: Amendment 39–16480; Docket No. FAA–2010–1036; Directorate Identifier 2009–NM–247–AD.

Effective Date

(a) This AD is effective November 4, 2010.

Affected ADs

(b) This AD supersedes AD 2009–20–09, Amendment 39–16032. Certain requirements of this AD terminate certain requirements of AD 2000–19–09, Amendment 39–11910, and AD 2004–16–12, Amendment 39–13768.

Applicability

(c) This AD applies to The Boeing Company Model 767–200, –300, and –300F series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 767–54A0074, Revision 1, dated April 24, 2008.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 54: Nacelles/Pylons.

Unsafe Condition

(e) This AD was prompted by two reports of cracked upper link fuse pins. We are issuing this AD to prevent fatigue cracking or corrosion of the upper link fuse pin, which could result in failure of the fuse pin and consequent reduced structural integrity of the nacelle strut and possible separation of the strut and engine from the airplane during flight.

Compliance

(f) Comply with this AD within the compliance times specified, unless already done.

Restatement of Requirements of AD 2009–20–09, With Revised Credit Provisions in Paragraph (I) of This AD

Initial and Repetitive Inspections/ Investigative and Corrective Actions

(g) Inspect the upper link fuse pin of the nacelle struts for fatigue cracking and corrosion at the applicable time specified in Table 1 of this AD. Do the applicable inspection by doing all the applicable actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin 767–54A0074, Revision 1, dated April 24, 2008; and do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspection at intervals not to exceed 3,000 flight cycles or 24 months, whichever is first, until the requirements of paragraph (h) of this AD have been done.

TABLE 1—COMPLIANCE TIMES

Engine type	At the later of:	
	Initial inspection threshold	Grace period
JT9D	14,000 total flight cycles	Within 3,000 flight cycles or 18 months after November 5, 2009 (the effective date of AD 2009-20–09), whichever is first.
CF6–80A	24,000 total flight cycles	Within 3,000 flight cycles or 18 months after November 5, 2009, whichever is first.
PW4000	8,000 total flight cycles	Within 3,000 flight cycles or 18 months after November 5, 2009, whichever is first.
CF6–80C2	10,000 total flight cycles	Within 3,000 flight cycles or 18 months after November 5, 2009, whichever is first.
RB211	24,000 total flight cycles	Within 3,000 flight cycles or 18 months after November 5, 2009, whichever is first.

Note 1: The upper link inspections can be done with the pylon and/or engine in any position.

Note 2: In paragraph 3.B, Steps 4.b.(1)(a) and 4.b.(2)(b)(2){a} of the Accomplishment Instructions of Boeing Alert Service Bulletin 767–54A0074, Revision 1, dated April 24, 2008, the procedures specify to apply two layers of Boeing Material Specification (BMS) 10–11 primer to the inside surface of the fuse pin if no crack indication is found. However, two layers of primer are only necessary to touch up bare areas on the fuse pin if no crack indication is found.

Terminating Action in AD 2000–19–09, Amendment 39–11910, and AD 2004–16–12, Amendment 39–13768

(h) Accomplishment of the modification specified in paragraph (h)(1) or (h)(2) of this AD, as applicable, terminates the inspections required by paragraph (g) of this AD.

(1) For Model 767 series airplanes powered by Rolls-Royce RB211 series engines, as identified in AD 2000–19–09: Modification of the nacelle strut and wing structure, as required by paragraphs (a) and (b) of AD 2000–19–09.

(2) For Model 767–200, –300, and –300F series airplanes powered by Pratt & Whitney and General Electric engines, as identified in AD 2004–16–12: Modification of the nacelle strut and wing structure, as required by paragraphs (a), (b), (d), and (e) of AD 2004–16–12.

Credit for Inspection Done Using Previous Service Information

(i) Inspection of the fuse pins before November 5, 2009, in accordance with Boeing Service Bulletin 767–54–0074, dated March 27, 1997, is acceptable for compliance with the inspections required by paragraph (g) of this AD, except that operator's equivalent procedures are not allowed.

New Requirements of This AD

Optional Terminating Action for Inspections

(j) Replacement of the fuse pins with new fuse pins (not serviceable fuse pins), in accordance with Boeing Service Bulletin 767–54–0074, dated March 27, 1997; or Boeing Alert Service Bulletin 767–54A0074, Revision 1, dated April 24, 2008; terminates the repetitive inspections of the fuse pins required by paragraph (g) of this AD.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD. AMOCs that specified using new pins (not serviceable pins) approved previously in accordance with AD 2009–20–09, Amendment 39–16032, are approved as AMOCs for the corresponding provisions of paragraph (h) of this AD.

Related Information

(l) For more information about this AD, contact Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6577; fax (425) 917–6590.

Material Incorporated by Reference

(m) You must use Boeing Alert Service Bulletin 767–54A0074, Revision 1, dated April 24, 2008, to do the actions required by this AD, unless the AD specifies otherwise. If you accomplish the optional terminating actions specified in this AD, you must use Boeing Alert Service Bulletin 767–54A0074, Revision 1, dated April 24, 2008; or Boeing Service Bulletin 767–54–0074, dated March 27, 1997; to perform those actions, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of Boeing Service Bulletin 767–54–0074, dated March 27, 1997, under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The Director of the Federal Register previously approved the incorporation by reference of Boeing Alert Service Bulletin 767–54A0074, Revision 1, dated April 24, 2008, on November 5, 2009 (74 FR 50692, October 1, 2009).

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(4) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on October 6, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–26224 Filed 10–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1037; Directorate Identifier 2010–NM–202–AD; Amendment 39–16481; AD 2010–22–02]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Seven cases of on-ground hydraulic accumulator screw cap/end cap failure have been experienced on CL–600–2B19 aeroplanes, resulting in the loss of the associated hydraulic system and high-energy impact damage to adjacent systems and structure. * * *

* * * * *

A detailed analysis of the calculated line of trajectory of a failed screw cap/end cap for each of the accumulators has been conducted, resulting in the identification of several areas where systems and/or structural components could potentially be damaged. Although all of the failures to date have occurred on the ground, an in-flight failure affecting such components could potentially have an adverse effect on the controllability of the aeroplane.

* * * * *

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective November 4, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of November 4, 2010.

We must receive comments on this AD by December 6, 2010.

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

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

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 in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Christopher Alfano, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7340; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2010–24, dated August 3, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

Seven cases of on-ground hydraulic accumulator screw cap/end cap failure have been experienced on CL–600–2B19 aeroplanes, resulting in the loss of the associated hydraulic system and high-energy impact damage to adjacent systems and structure. The lowest number of flight cycles accumulated at the time of failure, to date, has been 6,991 flight cycles.

The part numbers (P/N) of the accumulators currently installed on CL–600–2B19 aeroplanes are 601R75138–1 (08–60163–001 or 08–60163–002) [Hydraulic System No. 1, Hydraulic System No. 2, Inboard Brake and Outboard Brake accumulators] and 601R75138–3 (08–60164–001 or 08–60164–002) [Hydraulic System No. 3 accumulator].

A detailed analysis of the calculated line of trajectory of a failed screw cap/end cap for each of the accumulators has been conducted, resulting in the identification of several areas where systems and/or structural components could potentially be damaged. Although all of the failures to date have occurred on the ground, an in-flight failure affecting such components could potentially have an adverse effect on the controllability of the aeroplane.

This directive gives instructions to amend the Airplane Flight Manual (AFM), remove two accumulators (Hydraulic System No. 2 and No. 3) from the aeroplane and conduct repetitive ultrasonic inspections [for cracks] of the Hydraulic System No. 1, Inboard Brake and Outboard Brake accumulators that are not identified by the letter "T" after the serial number (S/N) on the identification plate for cracks until they are replaced by new accumulators P/N 601R75139–1 (11093–4).

Required actions also include deactivating the hydraulic system No. 3 accumulator. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Canadair Regional Jet Temporary Revision (TR) RJ/186–1, dated August 24, 2010, to the Limitations section, Normal Procedures section, and Abnormal Procedures section of the Canadair Regional Jet Airplane Flight Manual (AFM), CSP A–012. Canadair Regional Jet TR RJ/186–1, dated August 24, 2010, advises the flightcrew that for certain airplanes the hydraulic 3B pump is selected "on" instead of "auto" for all phases of flight.

Bombardier has issued the service information in the following table:

BOMBARDIER SERVICE BULLETINS

Document	Revision	Date
Bombardier Alert Service Bulletin A601R–29–029, including Appendix A, dated October 18, 2007.	B	May 11, 2010.
Bombardier Alert Service Bulletin A601R–29–031	A	March 26, 2009.

BOMBARDIER SERVICE BULLETINS—Continued

Document	Revision	Date
Bombardier Alert Service Bulletin A601R–32–103, including Appendix A, Revision A, dated October 18, 2007.	D	May 11, 2010.
Bombardier Service Bulletin 601R–29–032	A	January 26, 2010.
Bombardier Service Bulletin 601R–29–033, including Appendix A, dated May 5, 2009	A	May 11, 2010.
Bombardier Service Bulletin 601R–29–035	Original	May 11, 2010.
Bombardier Service Bulletin 601R–32–106, including Appendix A	A	May 11, 2010.
Bombardier Service Bulletin 601R–32–107	A	June 17, 2010.

The actions described in this service information as outlined in the "Discussion" section above, are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between the AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the AD.

Explanation of Affected Accumulators

The actions specified in the MCAI apply only to Tactair accumulators. Certain actions in this AD apply to all accumulators. This is a result of the unsafe condition, which is due to the location of the accumulators and potential damage resulting from the release of the accumulator screw cap/end cap. This is the reason for the deactivation of the hydraulic system No. 3 accumulator and removal of the hydraulic system No. 2 accumulator.

Interim Action

This AD does not require the removal of the hydraulic system No. 3 accumulator, or replacement of the hydraulic system No. 1, inboard brake, and outboard brake accumulators, in Part IV and Part VII of the Canadian Airworthiness Directive CF–2010–24, dated August 3, 2010. The planned compliance time for the removal of the hydraulic system No. 3 accumulator, or replacement of the hydraulic system No. 1, inboard brake, and outboard brake accumulators, in Part IV and Part VII of the Canadian Airworthiness Directive CF–2010–24, dated August 3, 2010, would allow enough time to provide notice and opportunity for prior public comment on the merits of those actions. Therefore, we are considering further rulemaking to address this issue.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because seven cases of on-ground hydraulic accumulator screw cap/end cap failure have been experienced on Model CL–600–2B19 airplanes, resulting in the loss of the associated hydraulic system and high-energy impact damage to adjacent systems and structure. The lowest number of flight cycles accumulated at the time of failure, to date, has been 6,991 flight cycles.

A detailed analysis of the calculated line of trajectory of a failed screw cap/end cap for each of the accumulators has been conducted, resulting in the identification of several areas where systems and/or structural components could potentially be damaged, fuel lines and wires included. Although all of the failures to date have occurred on the ground, an in-flight failure affecting such components could consequently reduce the controllability of the airplane. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1037; Directorate Identifier 2010–NM–202–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

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.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, 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:

2010–22–02 Bombardier, Inc.: Amendment 39–16481. Docket No. FAA–2010–1037; Directorate Identifier 2010–NM–202–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective November 4, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, serial numbers 7003 and subsequent.

Subject

(d) Air Transport Association (ATA) of America Code 29 and 32: Hydraulic Power and Landing Gear, respectively.

Reason

(e) The mandatory continued airworthiness information (MCAI) states:

Seven cases of on-ground hydraulic accumulator screw cap/end cap failure have been experienced on CL–600–2B19 aeroplanes, resulting in the loss of the associated hydraulic system and high-energy impact damage to adjacent systems and structure. * * *

* * * * *

A detailed analysis of the calculated line of trajectory of a failed screw cap/end cap for each of the accumulators has been conducted, resulting in the identification of several areas where systems and/or structural components could potentially be damaged. Although all of the failures to date have occurred on the ground, an in-flight failure affecting such components could potentially have an adverse effect on the controllability of the aeroplane.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Airplane Flight Manual (AFM) Revision

(g) Within 30 days after the effective date of this AD, revise the Limitations section, Normal Procedures section, and Abnormal Procedures section of the AFM by incorporating Canadair Regional Jet Temporary Revision (TR) RJ/186–1, dated August 24, 2010, into the applicable section of Canadair Regional Jet AFM, CSP A–012. Thereafter, except as provided by paragraph(s) of this AD, no alternative actions specified in Canadair Regional Jet TR RJ/186–1, dated August 24, 2010, may be approved.

Note 1: The actions required by paragraph (g) of this AD may be done by inserting a copy of Canadair Regional Jet TR RJ/186–1, dated August 24, 2010, into the applicable section of the Canadair Regional Jet AFM, CSP A–012. When the TR has been included in the general revisions of the AFM, the general revisions may be inserted into the AFM, and the TR removed, provided that the relevant information in the general revision is identical to that in Canadair Regional Jet TR RJ/186–1, dated August 24, 2010.

Deactivation of the Hydraulic System No. 3 Accumulator

(h) Within 250 flight cycles after the effective date of this AD, deactivate the hydraulic system No. 3 accumulator, in accordance with Part A of the Accomplishment Instructions of Bombardier Alert Service Bulletin A601R–29–031, Revision A, dated March 26, 2009. Doing the removal of the hydraulic system No. 3 accumulator in paragraph (j) of this AD is an alternate method of compliance with the requirements of this paragraph. The actions in this paragraph apply to all accumulators in hydraulic system No. 3.

Removal of the Hydraulic System No. 2 Accumulator

(i) Within 500 flight cycles after the effective date of this AD, remove the hydraulic system No. 2 accumulator, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–29–032, Revision A, dated January 26, 2010. The actions in this paragraph apply to all accumulators in hydraulic system No. 2.

Optional Removal of the Hydraulic System No. 3 Accumulator

(j) Removal of the hydraulic system No. 3 accumulator, in accordance with Part B of the Accomplishment Instructions of Bombardier Alert Service Bulletin A601R–29–031, Revision A, dated March 26, 2009, is an alternate method of compliance with the requirements of paragraph (h) of this AD.

Initial and Repetitive Ultrasonic Inspection of Hydraulic System No. 1, Inboard Brake, and Outboard Brake Accumulators

(k) For hydraulic system No. 1, inboard brake, and outboard brake accumulators having P/N 601R75138–1 (08–60163–001 or 08–60163–002): At the applicable compliance times specified in paragraph (l) of this AD, do the inspections required by paragraphs (k)(1) and (k)(2) of this AD. Repeat the inspections for each accumulator having P/N 601R75138–1 (08–60163–001 or 08–60163–002) thereafter at intervals not to exceed 500 flight cycles until the replacement specified in this paragraph is done or the replacement specified in paragraph (m) of this AD is done. If any crack is found, before further flight, replace the accumulator with a new accumulator having part number (P/N) 601R75138–1 (08–60163–001 or 08–60163–002) and having the letter "T" after the serial number on the identification plate, in accordance with the Accomplishment Instructions of the applicable service bulletin identified in Table 1 or Table 2 of this AD.

(1) Do an ultrasonic inspection for cracks on each accumulator, in accordance with Part B of the Accomplishment Instructions of the applicable service bulletin identified in Table 1 of this AD.

TABLE 1—BOMBARDIER SERVICE INFORMATION FOR ACCUMULATOR INSPECTION

Accumulator	Document	Revision	Date
Hydraulic System No. 1	Bombardier Alert Service Bulletin A601R–29–029, including Appendix A, dated October 18, 2007.	B	May 11, 2010.
Inboard and Outboard Brake	Bombardier Alert Service Bulletin A601R–32–103, including Appendix A, Revision A, dated October 18, 2007.	D	May 11, 2010.

(2) Do an ultrasonic inspection for cracks on the screw cap, in accordance with the Accomplishment Instructions of the applicable service bulletin identified in Table 2 of this AD.

TABLE 2—BOMBARDIER SERVICE INFORMATION FOR SCREW CAP INSPECTION

Accumulator	Document	Revision	Date
Hydraulic System No. 1	Bombardier Service Bulletin 601R–29–033, including Appendix A, dated May 5, 2009.	A	May 11, 2010.
Inboard and Outboard Brake	Bombardier Service Bulletin 601R–32–106, including Appendix A.	A	May 11, 2010.

(l) For hydraulic system No. 1, inboard brake, and outboard brake accumulators having P/N 601R75138–1 (08–60163–001 or 08–60163–002): Do the inspections specified in paragraph (k) of this AD at the applicable time in paragraph (l)(1), (l)(2), and (l)(3) of this AD.

(1) For any accumulator not having the letter "T" after the serial number on the identification plate and with more than 4,500 flight cycles on the accumulator as of the effective date of this AD: Inspect within 500 flight cycles after the effective date of this AD.

(2) For any accumulator not having the letter "T" after the serial number on the identification plate and with 4,500 flight cycles or less on the accumulator as of the effective date of this AD: Inspect prior to the accumulation of 5,000 flight cycles on the accumulator.

(3) If it is not possible to determine the flight cycles accumulated for any accumulator not having the letter "T" after the serial number on the identification plate: Inspect within 500 flight cycles after the effective date of this AD.

Note 2: For any accumulator having P/N 601R75138–1 (08–60163–001 or 08–60163–002) and the letter "T" after the serial number on the identification plate, or if the accumulator P/N is not listed in paragraph (k) of this AD, the inspection specified in paragraph (k) of this AD is not required.

Optional Replacement of the Hydraulic System No. 1, Inboard Brake, and Outboard Brake Accumulators

(m) Replacing any hydraulic system No. 1, inboard brake, or outboard brake accumulator having P/N 601R75138–1 (08–60163–001 or 08–60163–002), with a new accumulator having P/N 601R75139–1 (11093–4), in accordance with the Accomplishment Instructions of the applicable service bulletin identified in Table 3 of this AD, is a terminating action for the inspections in paragraph (k) of this AD for that accumulator.

TABLE 3—BOMBARDIER SERVICE INFORMATION FOR ACCUMULATOR REPLACEMENT

Accumulator	Document	Revision	Date
Hydraulic System No. 1	Bombardier Service Bulletin 601R–29–035	Original	May 11, 2010.
Inboard and Outboard Brake	Bombardier Service Bulletin 601R–32–107	A	June 17, 2010.

Credit for Actions Accomplished in Accordance With Previous Service Information

(n) Deactivating the hydraulic system No. 3 accumulator before the effective date of this AD in accordance with Part A of the Accomplishment Instructions of Bombardier Alert Service Bulletin A601R–29–031, dated December 23, 2008, is acceptable for compliance with the requirements of paragraph (h) of this AD.

(o) Removing the hydraulic system No. 2 accumulator in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–29–032, dated November 12, 2009, before the effective date of this AD is acceptable for compliance with the requirements of paragraph (i) of this AD.

(p) Removing the hydraulic system No. 3 accumulator in accordance with Part B of the Accomplishment Instructions of Bombardier Service Bulletin A601R–29–031, dated December 23, 2008, before the effective date of this AD is acceptable for compliance with the requirements of paragraph (j) of this AD.

(q) An ultrasonic inspection for cracks done before the effective date of this AD in accordance with Part B of the Accomplishment Instructions of the applicable service bulletin identified in Table 4 of this AD, or the Accomplishment Instructions of the applicable service bulletin identified in Table 5 of this AD, is acceptable for compliance with the corresponding ultrasonic inspection required by paragraph (k) of this AD.

TABLE 4—BOMBARDIER CREDIT SERVICE INFORMATION FOR ACCUMULATOR INSPECTION

Document	Revision	Date
Bombardier Alert Service Bulletin A601R–29–029	Original	October 18, 2007.
Bombardier Alert Service Bulletin A601R–29–029	A	November 12, 2009.
Bombardier Alert Service Bulletin A601R–32–103	Original	November 21, 2006.
Bombardier Alert Service Bulletin A601R–32–103	A	March 7, 2007.
Bombardier Alert Service Bulletin A601R–32–103	B	October 18, 2007.
Bombardier Alert Service Bulletin A601R–32–103	C	February 26, 2009.

TABLE 5—BOMBARDIER CREDIT SERVICE INFORMATION FOR SCREW CAP INSPECTION

Document	Revision	Date
Bombardier Service Bulletin 601R–29–033	Original	May 5, 2009.
Bombardier Service Bulletin 601R–32–106	Original	May 5, 2009.

(r) Replacing any hydraulic system No. 1, inboard brake, or outboard brake accumulator before the effective date of this AD in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–32–107, dated May 11, 2010, is acceptable for compliance with the corresponding requirements of paragraph (m) of this AD.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows:

(1) This AD does not require the removal of the hydraulic system No. 3 accumulator, or replacement of the hydraulic system No. 1, inboard brake, and outboard brake accumulators, in Part IV and Part VII of the Canadian Airworthiness Directive CF–2010–24, dated August 3, 2010.

(2) The actions specified in Canadian Airworthiness Directive CF–2010–24, dated August 3, 2010, apply only to Tactair accumulators. The actions required by paragraphs (h) and (i) of this AD apply to all accumulators in the positions specified in paragraphs (h) and (i) of this AD.

Other FAA AD Provisions

(s) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York, 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(t) Refer to MCAI Canadian Airworthiness Directive CF–2010–24, dated August 3, 2010; Canadair Regional Jet Temporary Revision RJ/186–1, dated August 24, 2010; and the service bulletins listed in Table 6 of this AD; for related information.

TABLE 6—BOMBARDIER SERVICE INFORMATION

Document	Revision	Date
Bombardier Alert Service Bulletin A601R–29–029	B	May 11, 2010.
Bombardier Alert Service Bulletin A601R–29–031	A	March 26, 2009.
Bombardier Alert Service Bulletin A601R–32–103	D	May 11, 2010.
Bombardier Service Bulletin 601R–29–032	A	January 26, 2010.
Bombardier Service Bulletin 601R–29–033	A	May 11, 2010.
Bombardier Service Bulletin 601R–29–035	Original	May 11, 2010.
Bombardier Service Bulletin 601R–32–106	A	May 11, 2010.
Bombardier Service Bulletin 601R–32–107	A	June 17, 2010.

Material Incorporated by Reference

(u) You must use Canadair Regional Jet Temporary Revision RJ/186–1, dated August 24, 2010, to the Canadair Regional Jet Airplane Flight Manual, CSP A–012, and the service information identified in Table 7 of this AD to do the actions required by this AD, unless the AD specifies otherwise. If you accomplish the optional terminating actions specified in this AD, you must use the service information identified in Table 8 of this AD to perform those actions, unless the AD specifies otherwise.

TABLE 7—MATERIAL INCORPORATED BY REFERENCE FOR ACTIONS REQUIRED IN THIS AD

Document	Revision	Date
Bombardier Alert Service Bulletin A601R–29–029, including Appendix A, dated October 18, 2007.*.	B	May 11, 2010.
Bombardier Alert Service Bulletin A601R–29–031	A	March 26, 2009.
Bombardier Alert Service Bulletin A601R–32–103, including Appendix A, Revision A, dated October 18, 2007.*	D	May 11, 2010.
Bombardier Service Bulletin 601R–29–032	A	January 26, 2010.
Bombardier Service Bulletin 601R–29–033, including Appendix A, dated May 5, 2009.*	A	May 11, 2010.
Bombardier Service Bulletin 601R–32–106, including Appendix A.*	A	May 11, 2010.

(* In Appendix A to these documents, the document number is shown only on page A1 of these appendices.)

TABLE 8—MATERIAL INCORPORATED BY REFERENCE FOR THE OPTIONAL ACTIONS IN THIS AD

Document	Revision	Date
Bombardier Alert Service Bulletin A601R–29–031	A	March 26, 2009.
Bombardier Service Bulletin 601R–29–035	Original	May 11, 2010.
Bombardier Service Bulletin 601R–32–107	A	June 17, 2010.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on October 7, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–26225 Filed 10–19–10; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 232, 240, and 249

[Release Nos. 33–9151; 34–63109; IC–29462; File No. S7–10–09]

RIN 3235–AK27

Facilitating Shareholder Director Nominations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; notice of stay of effective and compliance dates.

SUMMARY: By order dated October 4, 2010 (Release No. 33–9149, 34–63031), the Securities and Exchange Commission ("Commission") stayed from November 15, 2010 until the resolution of the petition for review in *Business Roundtable, et al.* v. *SEC,* No. 10–1305 (D.C. Cir., filed Sept. 29, 2010) ("*Business Roundtable*"), the effective and compliance dates of amendments to the federal proxy and related rules that the Commission adopted to facilitate the effective exercise of shareholders' traditional state law rights to nominate and elect directors to company boards of directors. We are publishing this release in the **Federal Register** to provide additional notice regarding the change in effective and compliance dates of the amendments.

DATES: *Effective Date:* The effective and compliance dates of the final rules published on September 16, 2010 (75 FR 56668) amending 17 CFR parts 200, 232, 240 and 249, which were to become effective on November 15, 2010, are delayed until further notice. The Commission will publish a document in the **Federal Register** announcing the effective and compliance dates of the final rules following the resolution of the petition for review in *Business Roundtable.* This document does not affect any rules in the above-referenced parts currently in effect.

SUPPLEMENTARY INFORMATION: On September 16, 2010, the Commission published final rules [1] in the **Federal Register** (75 FR 56668) with the effective date of November 15, 2010, and a compliance date of November 15, 2010, except that companies that qualify as "smaller reporting companies" (as defined in 17 CFR 240.12b–2) as of the effective date of the final rules will not be subject to Rule 14a–11 until three years after the effective date. The Commission entered an order on October 4, 2010, staying the effective and compliance dates of the final rules until the resolution of the petition for review in *Business Roundtable.*

FOR FURTHER INFORMATION CONTACT: Lillian Brown, Tamara Brightwell, or Ted Yu, Division of Corporation Finance, at (202) 551–3200, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

As discussed in the preamble above, pursuant to the October 4, 2010 order, which was issued under the authority in Section 25(c)(2) of the Securities Exchange Act of 1934, as amended, and Section 705 of the Administrative Procedure Act, the effective and compliance dates for the final rules published on September 16, 2010 (75 FR 56668) amending Title 17, Chapter II of the Code of Federal Regulations, are delayed until further notice.

[1] The final rules include Exchange Act Rule 14a–11 and associated amendments, such as Schedule 14N, Exchange Act Rule 14a–18, and amendments to Exchange Act Rule 14a–2, as well as amendments to Exchange Act Rule 14a–8.

Dated: October 14, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–26348 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–9152; File No. S7–14–08]

RIN 3235–AK16

Indexed Annuities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; withdrawal; request for comment on Paperwork Reduction Act burden estimate.

SUMMARY: We are withdrawing rule 151A under the Securities Act of 1933, which defines the terms "annuity contract" and "optional annuity contract" under the Act. On July 12, 2010, the United States Court of Appeals for the District of Columbia Circuit issued an order vacating the rule.

DATES: 17 CFR 230.151A (Rule 151A), published at 74 FR 3175 (January 16, 2009) and effective on January 12, 2011, is withdrawn as of October 20, 2010.

FOR FURTHER INFORMATION CONTACT: Michael L. Kosoff, Senior Counsel, Office of Insurance Products, Division of Investment Management, at (202) 551–6795, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8629.

SUPPLEMENTARY INFORMATION: On January 8, 2009, the Commission issued a release adopting rule 151A under the Securities Act of 1933.[1] Rule 151A defines the terms "annuity contract" and "optional annuity contract" under the Securities Act. The rule was intended to clarify the status under the Federal securities laws of indexed annuities, under which payments to the purchaser are dependent on the performance of a securities index. On July 12, 2010, the United States Court of Appeals for the District of Columbia Circuit issued an order vacating rule 151A in *American Equity Investment Life Insurance Company, et al.* v. *Securities and Exchange Commission,* No. 09–1021 (D.C. Cir.). Accordingly, the Commission hereby withdraws rule 151A, which was published at 74 FR 3175 (Jan. 16, 2009).

[1] 15 U.S.C. 77a *et seq.;* Securities Act Release No. 8996 (Jan. 8, 2009) [74 FR 3138 (Jan. 16, 2009)].

Paperwork Reduction Act

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995,[2] the Commission is soliciting comment on changes to a collection of information necessitated by the Court order vacating rule 151A. The Commission is submitting this existing collection of information to the Office of Management and Budget for change and approval.

The burdens associated with rule 151A are currently approved under the "collection of information" requirements for Form S–1 under the Securities Act of 1933 ("Form S–1" (OMB Control No. 3235–0065)). This form sets forth the disclosure requirements for registration statements that are prepared by eligible issuers. The Commission previously estimated that there would be an annual increase of 400 responses on Form S–1. In connection with this increase in expected responses, the Commission increased the estimated burden for Form S–1 by 60,000 hours of internal staff time and $72 million of external professional costs.

Since the Commission's adoption of rule 151A, the Commission has adopted changes to the information required by Form S–1, which have further increased the total hours and cost burden associated with the 400 additional responses that we estimated would result from the adoption of rule 151A by approximately 1,600 hours and $1,920,000.[3]

As a result of the Court order, the Commission no longer expects that there will be an annual increase of 400 responses on Form S–1, and believes that the estimate of the corresponding burdens for Form S–1 should be decreased by the amount of the burden associated with those 400 responses. Accordingly, the Commission estimates that the Court order will have the effect of decreasing the estimated burden for Form S–1 by 61,600 hours of internal staff time (60,000 plus 1,600) and $73,920,000 for external professional costs ($72,000,000 plus $1,920,000).

The information collection requirements related to Form S–1 are mandatory. There is no mandatory retention period for the information disclosed, and the information disclosed is made publicly available on the EDGAR filing system. 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.

We request comment on the accuracy of the Commission's estimate of the change in the burden for Form S–1. Persons wishing to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–14–08. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–14–08, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication.

Procedural and Other Matters

Section 553 of the Administrative Procedure Act provides that when an agency for good cause finds that notice and public comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment.[4] The Commission has determined that there is good cause for making today's withdrawal of rule 151A final without prior proposal and

[2] 44 U.S.C. 3501 *et seq.*

[3] These changes in the burden estimates are the result of the adoption of rules enhancing information provided in connection with proxy solicitations and in other reports filed with the Commission. Securities Act Release No. 9089 (Dec. 16, 2009) [74 FR 68334 (Dec. 23, 2009)]. That rulemaking assigned an incremental burden increase of 16 hours per response on Form S–1. We estimated that 25% of that burden would be carried by the company internally and that 75% of the burden would by carried by outside professionals retained by the company at an average cost of $400 per hour. Accordingly, we estimated an incremental internal burden increase of 4 (25% of 16) hours and an incremental external cost increase of $4800 (75% of 16 = 12 and 12 × $400 = $4800) for each response, including the 400 additional responses that we had expected as a result of rule 151A. Thus, the rulemaking assigned an additional burden for the 400 responses of 1600 (400 × 4) hours and $1,920,000 (400 × $4800). In addition, another rulemaking following the adoption of rule 151A also resulted in a change in the burden estimate for Form S–1. Securities Release No. 33–8995 (Dec. 31, 2008) [74 FR 2158 (Jan. 14, 2009)]. However, that rulemaking modified reporting requirements for oil and gas companies and did not affect the estimated burden for the additional 400 filers under rule 151A.

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

opportunity for comment. Because of the Court order vacating rule 151A, the Commission's action to withdraw the rule is ministerial in nature. Accordingly, the Commission for good cause finds that a notice and comment period is unnecessary.[5]

The Administrative Procedure Act also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.[6] This requirement, however, does not apply if the agency finds good cause for making this action to withdraw rule 151A effective sooner. For the reason discussed above, the Commission finds that there is good cause to make withdrawal of the rule effective immediately.

The Commission considers the costs and benefits of its rules and regulations. As discussed above, rule 151A was vacated by the Court and the action the Commission takes today merely implements the Court's decision. Our action to withdraw the rule is ministerial and therefore will have no separate economic effect.

Conclusion

Therefore, for the reasons set out in the preamble, 17 CFR 230.151A (rule 151A), published at 74 FR 3175 (January 16, 2009) and effective on January 12, 2011, is withdrawn.

By the Commission.

Dated: October 14, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–26347 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–63094; File No. S7–28–10]

RIN 3235–AK73

Reporting of Security-Based Swap Transaction Data

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; request for comments.

SUMMARY: Section 766 of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") requires the Securities and Exchange Commission ("Commission") to adopt an interim final rule for the reporting of security-based swaps entered into before July 21, 2010, the terms of which had not expired as of that date ("pre-enactment security-based swap transactions"), within 90 days of the enactment of the Dodd-Frank Act. Pursuant to this requirement, the Commission today is adopting an interim final temporary rule that requires specified counterparties to pre-enactment security-based swap transactions to report certain information relating to pre-enactment security-based swaps to a registered security-based swap data repository or to the Commission by the compliance date established in the security-based swap reporting rules required under Sections 3C(e) and 13A(a) of the Securities Exchange Act of 1934 ("Exchange Act"),[1] or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first and report information relating to pre-enactment security-based swaps to the Commission upon request. The Commission also is issuing an Interpretive Note to the rule that states that counterparties that may be required to report to the Commission will need to preserve information pertaining to the terms of these pre-enactment security-based swaps.

DATES: *Effective Date:* § 240.13Aa–2T is effective October 20, 2010 and will remain in effect until January 12, 2012. If the Commission publishes permanent recordkeeping and reporting rules for security-based swap transactions before January 12, 2012, that rule will terminate the effectiveness of § 240.13Aa–2T.

Comment Date: Comments on the interim final temporary rule should be received on or before December 20, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/final.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–28–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–28–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/interim-final-temp.shtml*). Comments are also 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. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: David Michehl, Senior Special Counsel, at (202) 551–5627, Sarah Albertson, Special Counsel, at (202) 551–5647, Natasha Cowen, Special Counsel, at (202) 551–5652, Yvonne Fraticelli, Special Counsel, at (202) 551–5654, Geoffrey Pemble, Special Counsel, at (202) 551–5628, Brian Trackman, Special Counsel, at (202) 551–5616, Mia Zur, Special Counsel, at (202) 551–5638, Kathleen Gray, Attorney, at (202) 551–5305, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is adopting Rule 13Aa–2T under the Exchange Act as an interim final temporary rule. We are soliciting comments on all aspects of this interim final temporary rule. We will carefully consider the comments that we receive and will address them, if applicable, in connection with the permanent reporting rules the Commission is required to adopt under the Dodd-Frank Act.

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[5] This finding also satisfies the requirements of 5 U.S.C. 808(2) (if a Federal agency finds that notice and public comment are "impracticable, unnecessary or contrary to the public interest," a rule "shall take effect at such time as the Federal agency promulgating the rule determines"), allowing the withdrawal to become effective notwithstanding the requirement of 5 U.S.C. 801. No analysis is required under the Regulatory Flexibility Act. *See* 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analysis, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking).

[6] *See* 5 U.S.C. 553(d).

[1] All references to the Exchange Act contained in this release refer to the Securities Exchange Act of 1934, as amended by the Dodd-Frank Act.

I. Introduction

On July 21, 2010, the President signed into law the Dodd-Frank Act.[2] An important element of the Dodd-Frank Act is Title VII, the Wall Street Transparency and Accountability Act of 2010, which directly addresses regulation of over-the-counter derivatives ("OTC derivatives"). Title VII of the Dodd-Frank Act establishes a regulatory framework for OTC derivatives, and makes a number of statutory revisions to the Commodity Exchange Act and the Exchange Act ("Title VII Amendments"). The Title VII Amendments broadly categorize covered products as either swaps, regulated primarily by the Commodity Futures Trading Commission ("CFTC"), security-based swaps, regulated primarily by the Commission, or mixed swaps, jointly regulated by the Commission and the CFTC.

Pursuant to Section 761 of the Dodd-Frank Act, new Section 3(a)(68) of the Exchange Act defines a security-based swap to include a swap, as defined in Section 1a of the Commodity Exchange Act,[3] that is based on a narrow-based security index, or a single security or loan, or any interest therein or on the value thereof, or the occurrence or non-occurrence of an event relating to an issuer of a security or the issuers of securities in a narrow-based index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.[4] Section 761 of the Dodd-Frank Act also adds new definitions in Section 3(a) of the Exchange Act [5] for entities involved in the security-based swaps markets, including, among others, security-based swap dealer,[6] major security-based swap participant,[7] security-based swap data repository,[8] and security-based swap execution facility.[9] The Commission has issued an advance notice of proposed rulemaking seeking comment on the definitions of key terms relating to the regulation of swaps and security-based swaps.[10]

The Dodd-Frank Act requires, among other things, that security-based swaps be reported to a registered security-based swap data repository or the Commission.[11] In particular, the Dodd-Frank Act added Section 13A(a)(2)(A) of the Exchange Act, which requires that pre-enactment security-based swaps be reported to a registered security-based swap data repository or the Commission by a date that is not later than: (i) 30 days after issuance of the interim final rule; or (ii) such other period as the Commission determines to be appropriate.[12] Section 13A(a)(2)(B) of the Exchange Act [13] requires the Commission to promulgate an interim final rule providing for the reporting of these pre-enactment security-based swaps within 90 days of the enactment of the Dodd-Frank Act.[14] Consistent

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[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 11–203, H.R. 4173).

[3] 7 U.S.C. 1a. Section 721(b) of the Dodd-Frank Act amends Section 1(a) of the Commodity Exchange Act to add paragraph (47) defining swap, subject to enumerated exceptions, as any agreement, contract, or transaction: (i) That is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind; (ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence; (iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as (I) an interest rate swap; (II) a rate floor; (III) a rate cap; (IV) a rate collar; (V) a cross-currency rate swap; (VI) a basis swap; (VII) a currency swap; (VIII) a foreign exchange swap; (IX) a total return swap; (X) an equity index swap; (XI) an equity swap; (XII) a debt index swap; (XIII) a debt swap; (XIV) a credit spread; (XV) a credit default swap; (XVI) a credit swap; (XVII) a weather swap; (XVIII) an energy swap; (XIX) a metal swap; (XX) an agricultural swap; (XXI) an emissions swap; and (XXII) a commodity swap; (iv) that is an agreement, contract, or transaction that is, or in the future becomes commonly known to the trade as a swap; (v) including any security-based swap agreement which meets the definition of 'swap agreement' as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein; or (vi) that is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v).

[4] *See* 15 U.S.C. 78c(a)(68).

[5] 15 U.S.C. 78c(a).

[6] Security-based swap dealer is defined in Section 3(a)(71)(A) of the Exchange Act, 15 U.S.C. 78c(a)(71)(A), to mean any person who: (i) Holds themself out as a dealer in security-based swaps; (ii) makes a market in security-based swaps; (iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps. The term security-based swap dealer does not include a person that enters into security-based swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business. 15 U.S.C. 78c(a)(71)(C). In addition, the Commission shall exempt from designation as a security-based swap dealer an entity that engages in a *de minimis* quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. 15 U.S.C. 78c(a)(71)(D).

[7] Major security-based swap participant is defined in Section 3(a)(67)(A) of the Exchange Act, 15 U.S.C. 78c(a)(67)(A), as any person: (i) Who is not a security-based swap dealer; and (ii)(I) who maintains a substantial position in security-based swaps for any of the major security-based swap categories, as such categories are determined by the Commission, excluding both positions held for hedging or mitigating commercial risk and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan; (II) whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or (III) that is a financial entity that (aa) is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking regulator; and (bb) maintains a substantial position in outstanding security-based swaps in any major security-based swap category, as such categories are determined by the Commission. For purposes of subparagraph (A), the Commission shall define, by rule or regulation, the term 'substantial position' at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. 15 U.S.C. 78c(a)(67)(B).

[8] Security-based swap data repository is defined in Section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75), as any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps.

[9] Security-based swap execution facility is defined in Section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(a)(77), as a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that (A) facilitates the execution of security-based swaps between persons; and (B) is not a national securities exchange.

The new definitions in Section 3(a) parallel amendments to Section 1(a) of the Commodity Exchange Act pursuant to Section 721 of the Title VII Amendments.

[10] *See* Securities Exchange Act Release No. 62717 (August 13, 2010), 75 FR 51429 (August 20, 2010).

[11] 15 U.S.C. 78m–1(a)(2)(A).

[12] *See id.*

[13] 15 U.S.C. 78m–1(a)(2)(B).

[14] The Commission notes that Section 3C of the Exchange Act, added by Section 763(a) of the Dodd-Frank Act, also requires the Commission to adopt rules that provide for the reporting of data for security-based swaps entered into before the date of enactment of the Dodd-Frank Act to a registered security-based data repository or to the Commission no later than 180 days after the effective date of the Dodd-Frank Act (thus, by January 12, 2012). *See* 15 U.S.C. 78c–3(e). Section 3C is not effective until 360 days after enactment of the Dodd-Frank Act. The

with its responsibilities under Section 13A(a)(2) of the Exchange Act, the Commission is today adopting Rule 13Aa–2T, an interim final temporary rule governing reporting of pre-enactment security-based swaps.

II. Interim Final Temporary Exchange Act Rule 13Aa–2T

The Commission is adopting Rule 13Aa–2T under the Exchange Act to specify the reporting requirements applicable to pre-enactment security-based swaps. Rule 13Aa–2T requires specified counterparties to a pre-enactment security-based swap transaction to: (1) Report certain information relating to pre-enactment security-based swaps to a registered security-based swap data repository or to the Commission by the compliance date established in the security-based swap reporting rules required by Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first; and (2) report information relating to pre-enactment security-based swaps to the Commission upon request during an interim period. In addition, the Commission is issuing an Interpretive Note to Rule 13Aa2–T that reflects what information the Commission believes reporting parties should retain in order to meet the reporting obligation contained in the rule. Specifically, the Commission believes that counterparties will need to preserve information pertaining to the terms of such pre-enactment security-based swaps, to the extent and in such form as it currently exists.

We have included several requests for comment in this release. We will carefully consider the comments that we receive and will address them, if applicable, in connection with the permanent reporting rules, which will be published for notice and comment.

As explained above, the Dodd-Frank Act revises Section 3(a) of the Exchange Act to define key terms related to the new regulatory framework for security-based swaps.[15] Rule 13Aa–2T(a) incorporates the definitions of "major security-based swap participant," "security-based swap," "security-based swap dealer," and "security-based swap data repository" from the Dodd-Frank Act. The statutory language reserves to the Commission authority to further define these terms,[16] which the Commission expects to do as rules are developed relating to the regulation of security-based swaps and in response to input from market participants. In addition, the Commission notes that rules governing the registration of security-based swap data repositories will be the subject of another Commission rulemaking. As a result, there currently are no registered security-based swap data repositories able to accept security-based swap data as required under the Dodd-Frank Act.

A. Reporting Obligations

Rule 13Aa–2T(b)(1) requires that a counterparty to a pre-enactment security-based swap transaction shall report, with respect to a pre-enactment security-based swap transaction, to a registered security-based swap data repository or to the Commission: (1) A copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no electronic copy; and (2) the time, if available, the transaction was executed.[17] Rule 13Aa–2T(b)(1) also establishes the compliance deadline for reporting pre-enactment security-based swap transactions. Pursuant to Rule 13Aa-2T(b)(1), a reporting party shall report the pre-enactment security-based swap transaction by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act[18] or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first.[19] The Commission believes it is appropriate to delay the reporting of such transaction information until the time detailed above because, until the registration rule is adopted and implemented, there will not be a registered security-based swap data repository able to accept security-based swap data as required under the Dodd-Frank Act. Rule 13Aa–2T(a)(4) defines a pre-enactment security-based swap transaction as a security-based swap that was entered into prior to, and that had not expired as of, July 21, 2010.[20]

In addition, pursuant to Rule 13Aa–2T(b)(2), a counterparty to a pre-enactment security-based swap transaction is required to report to the Commission upon request any information relating to these pre-enactment security-based swap transactions during the time that the interim final temporary rule is in effect.[21] The information that the Commission would request to be reported may vary depending upon the needs of the Commission, and may include actual trade data as well as summary trade data. Such summary data may include a description of the types of a security-based swap dealer's counterparties or types of reference entities, or the total number of pre-enactment security-based swap transactions entered into by the dealer and some measure of the frequency and duration of those contracts.[22]

The Commission anticipates that Rule 13Aa–2T(b) will facilitate the Commission's ability to understand and evaluate the current market for security-based swaps, and may inform the Commission's analysis of the other required rulemakings under the Dodd-Frank Act. In addition, information requested by the Commission may be used to facilitate other activities of the Commission, such as examinations.

B. Reporting Party

Section 13A(a)(3) to the Exchange Act[23] specifies the party obligated to report a security-based swap—either a security-based swap dealer, a major security-based swap participant, or a counterparty to the swap. These provisions apply for purposes of reporting pursuant to the interim final temporary rule.[24] Specifically, Section 13A(a)(3) of the Exchange Act provides that with respect to a security-based swap in which only one counterparty is a security-based swap dealer or major security-based swap participant, the security-based swap dealer or major security-based swap participant shall report the security-based swap; with respect to a security-based swap in which one counterparty is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based

Commission believes that its action today is consistent with both Section 13A and Section 3C of the Exchange Act.

[15] *See supra* Section I.

[16] The Title VII Amendments enable the Commission to further define certain terms jointly with the CFTC, in consultation with the Board of Governors of the Federal Reserve System. *See* Section 712(d) of the Dodd-Frank Act.

[17] *See* Rule 13Aa–2T(b)(1). *See infra* Section II.B for a discussion of which counterparty has the reporting obligation.

[18] The Commission notes that Section 3C(e) of the Exchange Act requires that security-based swaps entered into before the date of enactment shall be reported no later than 180 days after the effective date of the section, *i.e.*, January 12, 2012.

[19] *See* Rule 13Aa–2T(b)(1). The Commission notes that rulemaking regarding registered security-based swap repositories must be completed within 360 days after the date of enactment of the Dodd-Frank Act.

[20] *See* Rule 13Aa–2T(a)(4).

[21] *See infra* Section II.B for a discussion of which counterparty has the reporting obligation.

[22] *See infra* Section II.D for a discussion of the treatment of post-enactment security-based swaps.

[23] 15 U.S.C. 78m–1(a)(3).

[24] *See id.*

swap dealer shall report the security-based swap; and with respect to any other security-based swap, the counterparties to the security-based swap shall select a counterparty to report the security-based swap.[25]

Rule 13Aa–2T(c) incorporates these provisions. Specifically, Rule 13Aa–2T(c) provides that where only one counterparty to a security-based swap transaction is a security-based swap dealer or a major security-based swap participant, the security-based swap dealer or major security-based swap participant shall report the transaction; where one counterparty to a security-based swap transaction is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based swap dealer shall report the transaction; and where neither counterparty to a security-based swap transaction is security-based swap dealer or a major security-based swap participant, the counterparties to the transaction shall select the counterparty who will report the transaction.[26]

C. Interpretive Note on Record Retention

Pre-enactment security-based swaps that must be reported pursuant to Section 13A(a)(2) of the Exchange Act [27] and new interim final temporary Rule 13Aa–2T thereunder have already occurred prior to enactment of the Dodd-Frank Act.[28] Thus, to support the reporting requirements in Rule 13Aa–2T(b), a Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T requires each counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to retain information and documents relating to the terms of the transaction.[29] Specifically, the Note requires a counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to retain in its existing format all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of the security-based swap transaction, including but not limited to: Any information necessary to identify and value the transaction; the date and time of execution of the transaction; all information from which the price of the transaction was derived; whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization, and, if so, the identity of such clearing agency or derivatives clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction. The Commission believes that it is necessary for a counterparty that may be required to report such transaction to retain all information relating to the terms of pre-enactment security-based swaps in order for that counterparty to be able to comply with the reporting requirements of Rule 13Aa–2T. The specific information identified in the Note, as outlined above, is designed to encompass material information about pre-enactment security-based swap transactions that may be the subject of a request by the Commission to report pursuant to Rule 13Aa–2T(b)(2), as well as the information required to be reported pursuant to Rule 13Aa–2T(b)(1). The Commission believes that the information identified above will provide the Commission with access to relevant information to help the Commission perform its oversight functions under the Federal securities laws.

The time of execution of a security-based swap transaction is the point at which the parties become irrevocably bound under applicable law.[30] For example, in the context of security-based swaps, an oral agreement over the phone will create an enforceable contract, and the time of execution will be when the parties to the telephone call agree to the material terms.[31] The Commission also understands that the "price" of a security-based swap may be expressed differently for different asset classes.

The Commission envisions that documentation retained pursuant to the need to preserve all information from which the price of the transaction was derived should reflect all information necessary to determine the price including, among other things, the quoting convention (for example, the economic spread, which is variously referred to as the traded spread, quote spread or composite spread, expressed as a number of basis points per annum, for CDS transactions,[32] or the LIBOR-based Floating Rate Payment, expressed as a floating rate plus a fixed number of basis points multiplied by the notional amount, for equity or loan total return swaps).

The interpretation to retain information does not require any counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to create new records with respect to transactions that occurred in the past. By allowing such records to be retained in their existing format, the interpretation is designed to assure that important information relating to the terms of pre-enactment security-based swap transactions is preserved without unnecessary burden on the counterparties. Likewise, to the extent that any information required to be retained pursuant to the Note and reported pursuant to Rule 13Aa–2T(b)(1) or (b)(2) is not information that the counterparty already has prior to the effective date of this proposal, such as the time of execution, the Commission understands that such information could not be retained pursuant to the Note or reported pursuant to Rule 13Aa–2T(b)(1) or (b)(2).

D. Post-Enactment Security-Based Swaps

As noted above, Rule 13Aa–2T applies solely to security-based swap transactions entered into before July 21, 2010, the terms of which had not expired as of that date, and thus does not cover security-based swap transactions entered into on or after July 21, 2010. The Dodd-Frank Act, however, also requires the Commission to adopt reporting rules covering such post-enactment security-based swaps.

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[25] *See id.*

[26] *See* Rule 13Aa–2T(c).

[27] 15 U.S.C. 78m–1(a)(2).

[28] Pre-enactment security-based swaps are those security-based swaps that were entered into before July 21, 2010, the terms of which had not expired as of that date. *See* Section 13A(a)(2)(A).

[29] *See* Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T.

[30] The Commission understands that time of execution is not a data element that is consistently captured with respect to security-based swap transactions.

[31] On the effective date of the Dodd-Frank Act, security-based swaps will be securities and the execution of the transaction will be the sale for Federal securities law purposes. For an explanation of when a sale occurs under the Securities Act of 1933 *see* Securities Act Release No. 8591 and Securities Exchange Act Release No. 52056 (July 19, 2005), 70 FR 44722 (August 3, 2005), notes 391 and 394.

[32] Dealers quote prices for entering into credit default swaps as a fixed number of basis points per annum they require to be paid (if they are quoting to sell protection) or that they are willing to pay (if they are quoting to buy protection). This number is variously referred to as the "running spread," "quoted spread" or "traded spread." It will be higher to sell protection than to buy protection, allowing the dealer to earn a profit on offsetting transactions for the same reference entity—*e.g.,* 510 basis points bid, 530 basis points asked.

On execution, the running spread is converted, using a standard, publicly available, industry-accepted formula, into an upfront payment plus a standardized coupon—generally 100 basis points for investment grade reference entities, and 500 basis points for high yield reference entities. This conversion does not affect the market value or economics of the transaction, and is done simply to make CDS more fungible, which makes them easier to clear, among other benefits. Because of this conversion, the running spread itself does not appear in the terms of the contract, but is replaced by its economic equivalent.

Specifically, Section 3C(e)(2) of the Exchange Act requires the reporting of security-based swaps entered into on or after such date of enactment to a registered security-based swap data repository or the Commission no later than the later of: (A) 90 days after such effective date; or (B) such other time after entering into the security-based swap as the Commission may prescribe by rule or regulation.[33] In addition, Section 13A(a)(1) of the Exchange Act requires that each security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be reported to: (A) A security-based swap data repository described in Section 13(n) of the Exchange Act; or (B) in the case in which there is no security-based swap data repository that would accept the security-based swap, to the Commission within such time period as the Commission may by rule or regulation prescribe.[34] The Commission is directed to adopt rules under Sections 3C(e) and 13A(a) within 360 days of the enactment of the Dodd-Frank Act.[35] Parties to security-based swaps could be required under those rules, if adopted, to report information relating to such transactions. In that regard, counterparties could be expected to have access to similar information in order to report post-enactment security-based swaps.

E. Effective Date

Rule 13Aa–2T will be effective as of October 20, 2010 and will remain in effect until the operative date of the permanent recordkeeping and reporting rules for security-based swap transactions to be adopted by the Commission or January 12, 2012, whichever occurs first.[36] The Commission believes it is appropriate to make the rule effective upon publication in the **Federal Register** since the rule applies to information parties to pre-enactment security-based swaps would already have in their possession. In addition, this would provide the Commission the ability to request information on such pre-enactment security-based swaps immediately. Further, the Commission believes the proposed sunset date is appropriate because it will allow the rule to remain in effect until a permanent rule relating to the reporting of pre-enactment security-based swaps has become effective and operative, or until the date by which Section 3C of the Exchange Act requires security-based swaps entered into before the date of enactment of the Dodd-Frank Act to be reported to a registered security-based data repository or the Commission.[37]

III. Request for Comment

We are requesting comments from all members of the public. We will carefully consider the comments that we receive. We seek comment generally on all aspects of the interim final temporary rule. In addition, we seek comment on the following:

1. Should the Commission clarify or modify any of the definitions included in Rule 13Aa–2T? If so, which definitions and what specific modifications are appropriate or necessary?

2. The Commission seeks public comment on what specific information is necessary to derive the "price" of a security-based swap transaction. In other words, what specific information is needed for a third party to value the transaction? How do these data elements vary depending on the type or class of security-based swap? Do current quoting conventions across classes and types of securities-based swaps provide sufficient information from which to derive transaction prices?

3. Is there an industry standard format for information and records regarding security-based swaps? Are there different standard formats depending on the type or class of security-based swap? Please answer with specificity.

4. Rule 13Aa–2T(c) details which counterparty to a security-based swap transaction has the reporting obligation. In cases where counterparties must select which counterparty will report the transaction, is additional Commission guidance necessary or desirable? Is there a mechanism to allocate the reporting obligation that the Commission should implement in such cases?

5. The Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T provides that counterparties shall retain, in their existing format, all information and documents relating to the terms of a pre-enactment security-based swap transaction, including but not limited to certain specified data elements. What documents and data typically are kept by security-based swap market participants to memorialize their transactions? What documents and data typically are kept to memorialize post-trade events such as novations, assignments, terminations and other events? In what format? How long are such records currently maintained by market participants? How often do market participants record the time of execution of a security-based swap?

6. The Commission requests comment on its interpretation of the types of documents and data needed to be retained in order to satisfy reporting required by the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T. What additional information, if any, should be retained and what burdens or costs would the retention of such information entail? What information and documents, if any, are not needed to be retained while still providing for an understanding of the material terms of a security-based swap?

7. What are the technological or administrative burdens of maintaining the information specified in the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T?

8. The Commission requests comment on the information that is required to be reported pursuant to Rule 13Aa–2T(b)(1). What additional information, if any, should be reported?

9. Rule 13Aa–2T is a temporary rule and is set to expire no later than January 12, 2012. Should we remove the expiration provision of the rule and make the rule permanent? Should we extend the expiration date of the rule? If so, for how long? Should we allow the rule to expire?

Title VII of the Dodd-Frank Act requires that the Commission consult and coordinate to the extent possible with the CFTC for the purposes of assuring regulatory consistency and comparability, to the extent possible,[38] and states that in adopting rules, the CFTC and Commission shall treat functionally or economically similar products or entities in a similar manner.[39]

The CFTC has adopted rules related to the reporting of swaps entered into before July 21, 2010, the terms of which had not expired as of that date ("pre-enactment swaps") as required under Section 729 of the Dodd-Frank Act. Understanding that the Commission and the CFTC regulate different products and markets, and as such, appropriately may be proposing alternative regulatory requirements, we request comments on the impact of any differences between the Commission and CFTC approaches to the regulation of pre-enactment security-based swaps and pre-enactment

[33] *See* 15 U.S.C. 78c–3(e)(2). Section 3(C)(e)(1) also states that security-based swaps entered into before the date of the enactment of this section shall be reported to a registered security-based swap data repository or the Commission no later than 180 days after the effective date of that section.

[34] *See* 15 U.S.C. 78m–1(a)(1).

[35] *See* Sections 763(a) and 766(a) of the Dodd-Frank Act.

[36] *See* Rule 13Aa–2T(d).

[37] *See* 15 U.S.C. 78c–3(e).

[38] Section 712(a)(2) of the Dodd-Frank Act.

[39] Section 712(a)(7) of the Dodd-Frank Act.

swaps. Specifically, do the regulatory approaches under the Commission's proposed rulemaking pursuant to Section 766 of the Dodd-Frank Act and the CFTC's proposed rulemaking pursuant to Section 729 of the Dodd-Frank Act result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe the approaches proposed by the Commission and the CFTC to regulate pre-enactment security-based swaps and pre-enactment swaps are comparable? If not, why? Do commenters believe there are approaches that would make the regulation of pre-enactment security-based swaps and pre-enactment swaps more comparable? If so,what? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? If so, which one? We request commenters to provide data, to the extent possible, supporting any such suggested approaches.

IV. Other Matters

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**.[40] This requirement does not apply, however, if the agency "for good cause finds * * * that notice and public procedure are impracticable, unnecessary, or contrary to the public interest." [41] Further, the Administrative Procedure Act also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.[42] This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[43] The Commission, for good cause, finds that notice and solicitation of comment before the effective date of Rule 13Aa–2T is impracticable, unnecessary, or contrary to the public interest.[44] Section 766 of the Dodd-Frank Act amended the Exchange Act to add a new Section 13A. Section 13A(a)(2)(B) requires the Commission to adopt, within 90 days of enactment of the Dodd-Frank Act, an interim final rule providing for the reporting of each security-based swap entered into before the date of enactment of the Dodd-Frank Act the terms of which were not expired as of that date.[45] The Commission is adopting Rule 13Aa–2T to fulfill this requirement.

V. Paperwork Reduction Act

Certain provisions of Rule 13Aa–2T contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[46] The Commission has submitted the information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. 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 title of this collection is "Rule 13Aa–2T—Reporting of Pre-Enactment Security-Based Swap Transactions." We are applying for a new OMB Control Number for this collection in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13.

1. Summary of Collection of Information

As required under Section 13A of the Exchange Act, as provided by Section 766 of the Dodd-Frank Act, the Commission is adopting new Rule 13Aa–2T governing the reporting requirements applicable to security-based swap transactions entered into before July 21, 2010, the terms of which have not expired as of that date, *i.e.,* pre-enactment security-based swap transactions. Rule 13Aa–2T, by its terms, mandates three separate data collections for entities covered by the rule. The Commission believes that new Rule 13Aa–2T will impact more than 10 entities and thus meets the definition of a collection of information under the PRA.

First, pursuant to Rule 13Aa–2T(b)(1), pre-enactment security-based swap transactions must be reported to a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first.[47] The rule specifies that the transaction report shall include a copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no electronic copy, and the time, if available, the transaction was executed.[48]

Second, Rule 13Aa–2T(b)(2) requires reporting to the Commission upon request of any information relating to pre-enactment security-based swap-transactions.[49] Finally, the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T requires each counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to retain, in its existing format, all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of pre-enactment security-based swap transactions.[50] The rule specifies that such information shall include, without limitation: Any information needed to identify and value the transaction; the time, if available, of execution of the transaction; all information from which the price of the transaction was derived; whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization, and, if so, the identity of such clearing agency or derivatives clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.[51]

2. Proposed Use of Information

The rule makes information available to the Commission that can provide insight into the size and operation of the OTC derivatives market.[52] The information will provide a starting benchmark against which to assess the development of the security-based swap market over time. The information collected pursuant to Rule 13Aa–2T also will provide the Commission information to assist with its analysis of the permanent reporting and other rules required by the Dodd-Frank Act. Information related to pre-enactment security-based swap transactions may also be used by the Commission to assess activities and risks in the security-based swap markets or securities markets more generally. Requiring such information be reported

[40] *See* 5 U.S.C. 553(b).

[41] *Id.*

[42] *See* 5 U.S.C. 553(d).

[43] *Id.*

[44] This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a Federal agency finds that notice and public comment are "impractical, unnecessary or contrary to the public interest," a rule "shall take effect at such time as the Federal agency promulgating the rule determines.").

[45] 15 U.S.C. 78m–1(a)(2)(B).

[46] 44 U.S.C. 3501 *et seq.*

[47] *See* Rule 13Aa–2T(b)(1).

[48] *Id.*

[49] *See* Rule 13Aa–2T(b)(2).

[50] *See* Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T.

[51] *Id.*

[52] For example, the information collected could provide the Commission with insight as to the size (in notional value), number of transactions, and number and type of participants of the security-based swap market.

also should facilitate general market oversight.

3. Respondents

Rule 13Aa–2T requires reporting of all security-based swaps entered into prior to July 21, 2010, the terms of which have not expired as of that date. The rule thus will cover security-based swap dealers, major security-based swap participants, each defined in Section 3(a) of the Exchange Act, and other counterparties when there is no security-based swap dealer or major security-based swap participant involved in the pre-enactment security-based swap transaction.[53]

The Commission does not know the exact number of security-based swap market participants. Based on the information currently available to the Commission, there are roughly 1,000 entities regularly engaged in the CDS marketplace, consisting primarily of banks, hedge funds, and asset managers. The Commission believes that most of these same entities would likely also participate in other security-based swap markets and that few, if any, other entities engage in security-based swaps that are not CDSs. Accordingly, the Commission preliminarily believes that it is reasonable to use the figure of 1,000 potential respondents covered by Rule 13Aa–2T for purposes of estimating collection of information burdens under the PRA.

The Commission seeks comment on what entities may be subject to Rule 13Aa–2T, whether specific classes of entities may be impacted, how many entities may be impacted, and whether any such entity or class of entities may be impacted differently than others under the rule. The Commission seeks comment on the accuracy of its estimates as to the number of participants in the security-based swap market that will be required to report information pursuant to Rule 13Aa–2T.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

As described above, pursuant to Rule 13Aa–2T(b)(1), pre-enactment security-based swap transactions must be reported to a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first. Additionally, Rule 13Aa–2T(b)(2) requires reporting to the Commission upon request of any information relating to pre-enactment security-based swap-transactions. Finally, the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T requires each counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to retain, in its existing format, all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of pre-enactment security-based swap transactions.

Although a new obligation, the Commission does not believe that Rule 13Aa–2T will require covered entities to materially change their current practices or operations with respect to recordkeeping for pre-enactment security-based swap transactions. The Commission believes that any counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction, as part of its regular business operations, would already maintain records of any such transactions, and that such records likely include the minimum information set out in the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T. Nonetheless, our interpretation that counterparties must retain information relating to the terms of pre-enactment security-based swaps in order to be able to satisfy their reporting obligation is a new burden. Entities subject to the rule may have to implement new document retention and reporting policies.[54]

Based on publicly available information and consultation with industry sources, the Commission estimates there were approximately 2 million CDS contracts outstanding on the date of enactment.[55] The Commission believes that CDS transactions represent the majority of security-based swap transactions. The Commission preliminarily estimates that CDS transactions represent approximately 85 percent of all security-based swap transactions open on the date of enactment of the Dodd-Frank Act.[56] Accordingly, the total number of security-based swap transactions subject to Rule 13Aa–2T would be approximately 2,400,000.

The Commission preliminarily estimates that the requirement to retain information and documents pursuant to the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T would impose a burden on each respondent of approximately 38 burden hours for an aggregate burden of approximately 38,000 hours, which includes an estimate of the number of potential burden hours required to amend internal procedures, reprogram systems, and implement compliance processes to ensure that pre-enactment security-based swap transaction data is preserved.[57]

Rule 13Aa–2T(b)(1) requires reporting entities to report pre-enactment security-based swap transactions to a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first. Reporting entities may have initial costs to establish connectivity with and report the pre-enactment security-based swaps to a registered security-based swap data repository or the Commission. The Commission preliminarily estimates that the cost to establish connectivity to a security-based swap data repository to facilitate the reporting required by Rule 13Aa–2T(b)(1) would impose a burden on each respondent of approximately $25,000, for an aggregate burden of approximately $25,000,000.[58] In

[53] *See* 15 U.S.C. 78c(a)(68) and (71).

[54] The Commission expects to issue permanent rules regarding the retention and reporting of information about the terms of security-based swaps within the next year in compliance with the Dodd-Frank Act. Any PRA burden contained in those rules will be taken into account in those rulemakings.

[55] *See, e.g., http://www.dtcc.com/products/derivserv/data_table_i.php* (data as of July 23, 2010).

[56] The Commission's estimate is based on internal analysis of available security-based swap market data. The Commission is seeking comment about the overall size of the security-based swap market, and as discussed in this release, believes that Rule 13Aa–2T will, among other things, provide insight about the number of pre-enactment security-based swaps and the overall size of the security-based swap market.

[57] This figure is based on discussions with various market participants. It is based on the following: [((Sr. Programmer at 2 hours) + (Sr. Systems Analyst at 4 hours) + (Compliance Manager at 5 hours) + (Compliance Clerk at 20 hours) + (Director of Compliance at 2 hours) + (Compliance Attorney at 5 hours)) × (1,000 reporting entities)] = 38,000 burden hours, which is 38 hours per reporting entity. As noted, the Commission preliminarily believes that, given the current nature of the records to be retained, information on security-based swap transactions is currently being retained by market participants in the ordinary course of business, and as a practical matter should not result in any significant new burdens. Because the Commission expects to adopt permanent reporting rules within one year, the Commission does not believe that Rule 13Aa–2T will generate any ongoing burdens beyond the first 12 months. Accordingly, our estimates do not distinguish initial and ongoing burdens.

[58] This estimate is based on discussions of Commission staff with various market participants,

Continued

addition, the Commission preliminarily estimates that complying with Rule 13Aa–2T(b)(1) would impose a burden on each respondent of approximately 480 hours, for an aggregate burden of approximately 480,000 burden hours.[59]

Rule 13Aa–2T(b)(2) requires reporting entities to report to the Commission upon request any information relating to pre-enactment security-based swap transactions. Because the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T(d) requires reporting entities to retain their documents and information relating to the terms of pre-enactment security-based swap transactions, the Commission preliminarily believes that responding to a Commission request for such information should not impose a significant additional burden on reporting entities. A reporting entity would need to review the request and gather responsive transaction data and documents. Assuming the Commission requested one report from each reporting entity,[60] the Commission preliminarily estimates that responding to Commission requests for information and documents pursuant to Rule 13Aa–2T(b)(2) would impose a burden on each respondent of approximately 34 hours, for an aggregate burden of approximately 34,000 burden hours.[61]

The Commission seeks comment on the recordkeeping and reporting collection of information burdens associated with Rule 13Aa–2T. In particular, what burdens, if any, will respondents incur with respect to system design, programming, expanding systems capacity, and establishing compliance programs to comply with Rule 13Aa–2T? Will there be different or additional burdens associated with the collection of information under Rule 13Aa–2T that a covered entity does not currently undertake in the ordinary course of business that we have not identified?

5. Retention Period of Recordkeeping Requirements

A covered entity will be required by Rule 13Aa–2T to retain records and information only until such information has been reported to a registered security-based swap data repository or the Commission.[62] Rule 13Aa–2T(b)(1) provides that the reporting shall occur by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first.

6. Collection of Information Is Mandatory

Any collection of information pursuant to Rule 13Aa–2T will be a mandatory collection of information to permit the Commission to collect accurate information about security-based swap transactions entered into prior to, and not expired as of, the date of enactment of the Dodd-Frank Act.

7. Responses to Collection of Information May Not Be Confidential

Other than information for which a reporting entity requests confidential treatment and that may be withheld from the public in accordance with the provisions of 5 U.S.C. 522 (The Freedom of Information Act ("FOIA")), the collection of information pursuant to Rule 13Aa–2T will not be kept confidential and will be publicly available. Among other things, FOIA recognizes the confidentiality of commercial information under two exemptions. First, FOIA Exemption 4 provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[63] Second, FOIA Exemption 8 provides an exemption for matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[64] The Commission will carefully consider any requests for confidential treatment under either of these exemptions or under other exemptions contained in 5 U.S.C. 522.

8. Request for Comment

Pursuant to 44 U.S.C. 3505(c)(2)(B), the Commission solicits comment to:

1. Evaluate whether the proposed collection of information is necessary for the performance of the functions of the agency, including whether the information shall have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

VI. Cost-Benefit Analysis

Earlier this year, Congress passed the Dodd-Frank Act. The far-reaching legislation was a response to the recent financial crisis. Among other things, it is designed to strengthen oversight, improve consumer protections, and reduce systemic risks throughout the financial system.[65] Title VII of the Dodd-Frank Act specifically addresses the OTC derivatives markets, including the market for security-based swaps. The swap markets have been described as being opaque.[66] Transaction-level

as well as the Commission's experience regarding connectivity between securities market participants, including alternative trading systems and self-regulatory organizations for data reporting purposes. The Commission derived the total estimated expense from the following: ($25,000 relating to hardware- and software-related expenses) × (1,000 reporting entities) = $25,000,000. It is the Commission's understanding that many reporting entities already have established linkages to entities that may register as security-based swap data repositories, which may impact the out-of-pocket costs associated with Rule 13Aa–2T(b)(1).

[59] This figure is based on discussions of Commission staff with various market participants, as well as the Commissions experience regarding connectivity between securities market participants, including alternative trading systems and self-regulatory organizations for data reporting purposes. The Commission derived the total estimated one-time burden from the following: [(2,400,000 estimated total pre-enactment securities-based swap transactions) × (75 percent automated, electronic reporting) × (0.1 hours/transaction)] + [2,400,000 estimated total pre-enactment securities-based swap transactions) × (25 percent manual, electronic reporting) × (Compliance Clerk 0.5 hours/transaction)] = 480,000 burden hours, which is 480 burden hours per respondent. Because the Commission expects to adopt permanent reporting rules within one year, the Commission does not believe that Rule 13Aa–2T will generate any ongoing burdens beyond the first 12 months. Accordingly, our estimates do not distinguish initial and ongoing burdens.

[60] The Commission preliminarily believes it would not request reports from every reporting entity. However, for purposes of estimating the burden, the Commission is assuming it would request one report from each reporting entity.

[61] This figure is based on discussions with various market participants. It is based on the following: [(Compliance Manager at 5 hours) + (Compliance Attorney at 5 hours) + (Programmer Analyst at 1 hour) + (Compliance Clerk at 15 hours) + (Director of Compliance at 3 hours) + (Sr. Database Administrator at 5 hours)] × (1,000 reporting entities) = 34,000 burden hours, which is 34 hours per reporting entity.

[62] The Commission notes that a respondent may well be subject to additional record retention burdens for pre-enactment security-based swaps pursuant to rules to be adopted by the Commission pursuant to Section 3C(e) of the Exchange Act.

[63] *See* 5 U.S.C. 552(b)(4).

[64] *See* 5 U.S.C. 552(b)(8).

[65] *See* H.R. Rep. No. 111–517, at 865 (2010). *See, e.g.,* 156 Cong. Rec. S5878 (July 15, 2010) and 156 Cong. Rec. S5882 (July 15, 2010).

[66] With respect to CDS, for example, the Government Accountability Office found that "comprehensive and consistent data on the overall market have not been readily available," that "authoritative information about the actual size of the CDS market is generally not available," and that regulators currently are unable "to monitor activities across the market." Government Accountability Office, "Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps," GAO–09–397T (March 2009), at 2, 5, 27. *See* Robert E. Litan, "The Derivatives Dealers' Club and Derivatives Market

data is not publicly available. A major source of information is the semi-annual survey conducted by the Bank of International Settlements ("BIS") on the volume of swaps transaction by major categories of swaps.[67] One of the purposes of the Dodd-Frank Act is to improve the transparency of the OTC derivatives market.[68]

Title VII requires the Commission to undertake a large number of rulemakings to implement the regulatory framework for security-based swaps that is set forth in the Dodd-Frank Act, including the reporting of security-based swap transactions. The interim final temporary rule being issued today is the first step in that process and is designed to provide for reporting of pre-enactment security-based swaps in the framework set up by the Dodd-Frank Act. The rule will provide the Commission the ability to obtain data on pre-enactment security-based swaps. Rule 13Aa–2T also will provide for the preservation of data on pre-enactment security-based swaps until the Commission issues permanent recordkeeping and reporting rules for all security-based swaps. By making records available to the Commission, Rule 13Aa–2T will enable the Commission to begin its review of the size and scope of the security-based swap marketplace. Today's action is designed to ultimately lead to a more robust, transparent environment for the market for security-based swaps.

The Commission is sensitive to the costs and benefits associated with Rule 13Aa–2T. The Commission requests comment on the costs and benefits associated with the rule, and its cost-benefit analysis, including identification and assessments of any costs and benefits not discussed in this analysis. The Commission also seeks comments on the accuracy of any of the benefits identified and also welcomes comments on the accuracy of any of the cost estimates. Finally, the Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits.

A. Benefits

Rule 13Aa–2T, which is being adopted as required by the Dodd-Frank Act, will provide a means for the Commission to gain a better understanding of the security-based swap markets, including the size and scope of that market, by making available transaction data on pre-enactment security-based swaps. In addition, having such data available should help Commission staff to analyze the security-based swap market as a whole and identify risks. In this way, Rule 13Aa–2T will support the Commission's supervisory function over the security-based swap markets as required by Congress in the Dodd-Frank Act. Further, the rule should make available information to the Commission that could inform its decision-making with respect to the rules that it is required to implement under the Dodd-Frank Act. Rule 13Aa–2T also could facilitate the reports the Commission is required to provide to Congress on security-based swaps and the security-based swaps marketplace.[69]

Further, Rule 13Aa–2T will require market participants to inventory their positions in swaps to determine what information needs to be retained and reported. Potentially, this may encourage management review of internal procedures and controls by those market participants.

The Commission's rules on reporting pre-enactment security-based swap transaction data also may have benefits to the OTC derivatives market. For example, the introduction of the Trade Reporting and Compliance Engine (TRACE) system helped substantially increase the transparency of, and decrease transaction costs in, the bond market.[70] This interim final temporary rule represents a first step toward a more transparent market for security-based swaps. Market participants also will be able to begin planning how security-based swap data can be maintained, consolidated, and reported in anticipation of permanent rules to be issued by the Commission pursuant to the requirements set forth in the Dodd-Frank Act. The initial experience in the context of Rule 13Aa–2T may help market participants and the Commission assess alternatives for permanent security-based swap transaction reporting requirements.

B. Costs

The Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T requires the retention of records relating to security-based swap transactions entered into before July 21, 2010, the terms of which had not expired as of that date. Although there are recordkeeping costs associated with the retention of existing pre-enactment security-based swap transaction information, the Commission preliminarily does not believe that they will be significant. The information that is required to be reported pursuant to Rule 13Aa–2T(b)(1)(i)—a copy of the transaction confirmation—should be information that respondents already keep in their normal course of business. In addition, that information can be reported in the form in which it is kept, either electronic or written form. Further, respondents must report the time of execution pursuant to Rule 13Aa–2T(b)(1)(ii) only to the extent that the information is available.

The Commission preliminarily estimates that the interim final temporary rule could affect more than 1,000 market participants and cover approximately 2.4 million security-based swap transactions, although identification of the exact number of respondents and covered transactions is impossible to determine at this time.[71] As stated above, however, the Commission preliminarily believes that information about open security-based swap transactions should already be maintained by covered entities as part of their day-to-day operations. Further, the rule does not require market participants to modify the data that they have for retention purposes. Rule 13Aa–2T requires only that parties retain records of the terms of the transactions in the form and to the extent that they already exist; parties are not required retroactively to supplement or otherwise alter transaction information.

The Commission recognizes that the permanent reporting rules that it is required to adopt under Section 3C(e) of the Exchange Act also will apply to pre-enactment security-based swaps. Therefore, in adopting Rule 13Aa–2T, the Commission sought to limit the burden on potential respondents by not imposing substantial and potentially conflicting affirmative reporting requirements that would require respondents to make system and other changes that may be different from the

Reform," Brookings Institution (April 7, 2010) at 15–20. *See also* Michael Mackenzie, June 25, 2010, *Era of an opaque swaps market ends,* Fin. Times, June 25, 2010.

[67] The BIS semi-annual report on the swap markets summarizes developments in the OTC derivatives markets during the relevant period. The report breaks down trading volumes and other statistics for various classes of derivatives, including credit default swaps, interest rate and foreign exchange derivatives, and equity and commodity derivatives. The report covers derivatives trading within the G10 countries. The most recent report, available at *http://www.bis.org/statistics/derstats.htm,* covers the period through the last quarter of 2009.

[68] *See, e.g.,* 156 Cong. Rec. S5879 (July 15, 2010) and 156 Cong. Rec. H5252 (June 30, 2010).

[69] *See* Section 719 of the Dodd-Frank Act.

[70] Michael, Goldstein, Edith Hotchkiss and Erik Sirri, *Transparency and Liquidity: A Controlled Experiment on Corporate Bonds,* Review of Financial Standards (2007); Amy Edwards, Lawrence Harris and Michael Piwowar, *Corporate Bond Market Transaction Costs and Transparency,* J. of Fin. (2007).

[71] *See supra* Section V.

changes they will need to make pursuant to the permanent reporting rules.[72]

The Commission preliminarily estimates that amending internal procedures, reprogramming systems, and implementing compliance processes to ensure that pre-enactment security-based swap transaction data is preserved pursuant to the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T could result in a cost to each respondent of approximately $6,236 and an aggregate cost of approximately $6,236,000.[73] The Commission preliminarily does not believe that there will be additional costs attributable to the record retention requirements of Rule 13Aa–2T beyond the initial cost of ensuring that such records are maintained.

The Commission preliminarily estimates that the requirement to report the transaction confirmation and time, if available, of execution pursuant to Rule 13Aa–2T(b)(1) could result in a cost to each reporting entity of approximately $43,900 and an aggregate cost of approximately $43,900,000.[74] This cost figure includes two main components. These are, first, an estimate of the cost to establish connectivity to a security-based swap data repository; and second, an estimate of the cost to complete the reporting process.

As stated above, the Commission estimates that it may make one request from each reporting entity pursuant to Rule 13Aa–2T(b)(2). The Commission preliminarily estimates that responding to Commission requests for information and documents could result in a cost to each reporting entity of approximately $6,352 and an aggregate cost of approximately $6,352,000.[75]

C. Request for Comment

The Commission requests comment on the costs and benefits of Rule 13Aa–2T discussed above, as well as any costs and benefits not already described that could result. The Commission also requests data to quantify any potential costs or benefits.

• How can the Commission accurately estimate the costs and benefits?

• What are the costs currently borne by entities covered by this rule with respect to the retention of records on security-based swap transactions?

• How many entities will be affected by the rule? How many transactions will be subject to the rule?

• Are there additional costs involved in complying with the rule that have not been identified? What are the types, and amounts, of the costs?

• Are there additional benefits from the rule that have not been identified?

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 3(f) of the Exchange Act[76] requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act[77] requires the Commission, when making rules under the Exchange Act, to consider the impact of such rules on competition. Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

As discussed above, Rule 13Aa–2T will require counterparties to a pre-enactment security-based swap transaction to report: (1) To a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first, a copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no electronic copy, and the time, if available, the transaction was executed; and (2) to the Commission upon request any information relating to the security-based swap transactions.[78] In addition, pursuant to the Note to paragraphs (b)(1) and (2) of Rule 13Aa–2T, any counterparty to a pre-enactment security-based swap transaction shall retain, in its existing format, all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of a pre-enactment security-based swap transaction.[79]

Although the Commission is required to promulgate rules governing the

[72] The Commission believes that it is practical to require this reporting after rules for registration of security-based data repositories are in place, to allow the choice of reporting to an entity that has experience receiving this type of information. The Commission will have access to the data it determines is most useful for understanding and analyzing the market for security-based swaps as it develops final reporting and other rules required under the Dodd-Frank Act by being able to require information to be reported upon request to the Commission under Rule 13Aa–2T(b)(2).

[73] This figure is based on discussions with various market participants. The Commission derived the total estimated initial annualized expense from the following: ((Sr. Programmer (2 hours) at $292 per hour + (Sr. Systems Analyst (4 hours) at $244 per hour) + (Compliance Manager (5 hours) at $258 per hour) + (Compliance Clerk (20 hours) at $63 per hour) + (Director of Compliance (2 hours) at $388 per hour) + (Compliance Attorney (5 hours) at $270 per hour)) × (1000 reporting entities) = $6,236,000, which is $6,236 per reporting entity. Hourly figures cited in this release are from SIFMA's *Management & Professional Earnings in the Securities Industry 2008* and SIFMA's *Office Salaries in the Securities Industry 2008,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 or 2.93, as appropriate, to account for bonuses, firm size, employee benefits, and overhead. Because the Commission expects to adopt permanent reporting rules within one year, the Commission does not believe that Rule 13Aa–2T will generate any ongoing costs beyond the first 12 months. Accordingly, our estimates do not distinguish initial and ongoing costs.

[74] This figure is based on discussions of Commission staff with various market participants, as well as the Commission's experience regarding connectivity between securities market participants, including alternative trading systems and self-regulatory organizations for data reporting purposes. The Commission derived the total estimated one-time burdens from the following: [($25,000/reporting entity to establish connectivity) × (1000 reporting entities)] + [2,400,000 estimated total pre-enactment securities-based swap transactions) × (25 percent manual, electronic reporting) × (Compliance Clerk (0.5 hours/transaction) at $63 per hour)] = $43,900,000, which is $43,900 per reporting entity. This estimate is intended to include the costs of system development that will facilitate reporting the majority (estimated 75 percent) of security-based swap transactions. Because the Commission expects to adopt permanent reporting rules within one year, the Commission does not believe that Rule 13Aa–2T will generate any ongoing costs beyond the first 12 months. Accordingly, our estimates do not distinguish initial and ongoing costs.

[75] This figure is based on the following: [((Compliance Manager (5 hours) at $258 per hour) + (Compliance Attorney (5 hours) at $271 per hour) + (Programmer Analyst (1 hour) at $193) + (Compliance Clerk (15 hours) at $63 per hour) + (Director of Compliance (3 hours) at $388 per hour) + (Sr. Database Administrator (5 hours) at $281 per hour)) x (1 Commission request per reporting entity) x (1000 reporting entities)] = $6,352,000, which is $6,352 per reporting entity. Hourly figures are from SIFMA's *Management & Professional Earnings in the Securities Industry 2008* and SIFMA's *Office Salaries in the Securities Industry 2008,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 or 2.93, as appropriate, to account for bonuses, firm size, employee benefits, and overhead.

[76] 15 U.S.C. 78c(f).

[77] 15 U.S.C. 78w(a)(2).

[78] *See supra* Section II.B for a discussion of which counterparty has the reporting obligation.

[79] This information will include, but is not limited to: Any information needed to identify and value the transaction; the date and time of execution of the transaction; all information from which the price of the transaction was derived; whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization and, if so, the identity of such clearing agency or derivatives clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.

reporting of pre-enactment security-based swap transactions, the Commission believes that by requiring the reporting of information about pre-enactment security-based swap transactions, this rule is an important first step in providing increased transparency to the market for security-based swaps, both to the participants or potential participants in the market and to regulators charged with overseeing a segment of the market that was previously not regulated. This increased transparency ultimately should provide the opportunity for increased competition among market participants and thus contribute to a more efficient market. This added visibility also should aid the Commission in carrying out its regulatory responsibilities by providing information that can be used to better understand and analyze the market. Further, a well-regulated security-based swap market may increase the confidence of market participants in the soundness of the market, potentially drawing additional participants into the market, increasing efficiency. The Commission also notes that all similarly situated respondents will be subject to the same requirements under the rule, and thus no participant should be at an unfair competitive advantage compared to others.

The Commission requests comment on all aspects of this analysis and, in particular, on whether Rule 13Aa–2T will place a burden on competition, as well as the effect of the proposal on efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views, if possible.

VIII. Regulatory Flexibility Certification

The Commission hereby certifies that pursuant to 5 U.S.C. 605(b) that the interim final temporary rules contained in this release will not have a significant economic impact on a substantial number of small entities. The interim final temporary rules apply only to counterparties that may engage in security-based swap transactions. Prior to the effective date of the Dodd-Frank Act, only an eligible contract participant (as defined in Section 1(a)(12) of the Commodity Exchange Act) may enter into security-based swap transactions. For this reason, the interim final temporary rule should not have a significant economic impact on a substantial number of small entities.

IX. Statutory Basis and Text of Amendments

The Commission is adopting Rule 13Aa–2T pursuant to Section13A of the Exchange Act, as amended.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Securities and Exchange Commission is amending Title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for Part 240 is amended by adding authorities for § 240.13Aa–2T to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 240.13Aa–2T is also issued under sec. 943, Public Law 111–203, 124 Stat. 1376.

* * * * *

■ 2. Section 240.13Aa–2T is added to read as follows:

§ 240.13Aa–2T Interim rule for reporting pre-enactment security-based swap transactions.

(a) *Definitions.* For purposes of this rule, the following definitions shall apply:

(1) *Clearing agency* shall have the same meaning as set forth in Section 3(a)(23) of the Exchange Act;

(2) *Exchange Act* shall mean the Securities Exchange Act of 1934, as amended;

(3) *Major security-based swap participant* shall have the meaning provided in Section 3(a)(67) of the Exchange Act and any rules or regulations thereunder;

(4) *Pre-enactment security-based swap transaction* shall mean a security-based swap that was entered into prior to, and that had not expired as of, July 21, 2010;

(5) *Security-based swap* shall have the meaning provided in Section 3(a)(68) of the Exchange Act and any rules or regulations thereunder;

(6) *Security-based swap dealer* shall have the meaning provided in Section 3(a)(71) of the Exchange Act and any rules or regulations thereunder; and

(7) *Security-based swap data repository* shall have the meaning provided in Section 3(a)(75) of the Exchange Act and any rules or regulations thereunder.

(b) *Reporting of pre-enactment security-based swap transactions.* A counterparty to a pre-enactment security-based swap transaction as provided in paragraph (c) of this section shall:

(1) Report to a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13 A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swap, whichever occurs first, the following information with respect to the pre-enactment security-based swap transaction:

(i) A copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no electronic copy; and

(ii) The time, if available, the transaction was executed; and

(2) Report to the Commission, in a form and manner as prescribed by the Commission, upon request any information relating to the security-based swap transaction.

Note to paragraphs (b)(1) and (2): In order to comply with the above reporting requirements, each counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction shall retain, in its existing format, all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of a pre-enactment security-based swap transaction, including but not limited to: any information necessary to identify and value the transaction; the date and time of execution of the transaction; all information from which the price of the transaction was derived; whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization and, if so, the identity of such clearing agency or derivatives clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.

(c) *Reporting party.* The counterparties to a pre-enactment security-based swap transaction shall report the information required under paragraph (b) of this section as follows:

(1) Where only one counterparty to a pre-enactment security-based swap transaction is a security-based swap dealer or a major security-based swap

participant, the security-based swap dealer or major security-based swap participant shall report the transaction;

(2) Where one counterparty to a pre-enactment security-based swap transaction is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based swap dealer shall report the transaction; and

(3) Where neither counterparty to a pre-enactment security-based swap transaction is security-based swap dealer or a major security-based swap participant, the counterparties to the transaction shall select the counterparty who will report the transaction.

(d) *Effective Date.* This section shall be effective beginning October 20, 2010 until January 12, 2012. If the Commission publishes permanent recordkeeping and reporting rules for security-based transactions before January 12, 2012, that rule will terminate the effectiveness of this section.

Dated: October 13, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–26217 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 12

[CBP Dec. 10–32]

RIN 1515–AD70

Extension of Import Restrictions Imposed on Certain Categories of Archaeological Material From the Pre-Hispanic Cultures of the Republic of Nicaragua

AGENCY: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends Customs and Border Protection (CBP) regulations to reflect the extension of import restrictions on certain categories of archaeological material from the Pre-Hispanic cultures of the Republic of Nicaragua. The restrictions, which were originally imposed by Treasury Decision (T.D.) 00–75 and extended by CBP Decision (Dec.) 05–33, are due to expire on October 20, 2010. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has determined that factors continue to warrant the imposition of import restrictions. Accordingly, these import restrictions will remain in effect for an additional 5 years, and the CBP regulations are being amended to reflect this extension until October 20, 2015. These restrictions are being extended pursuant to determinations of the United States Department of State made under the terms of the Convention on Cultural Property Implementation Act that implemented the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. T.D. 00–75 contains the Designated List of archaeological material representing Pre-Hispanic cultures of Nicaragua to which the restrictions apply.

DATES: *Effective Date:* October 20, 2010.

FOR FURTHER INFORMATION CONTACT: For legal aspects, Charles Steuart, Chief, Intellectual Property Rights and Restricted Merchandise Branch, Regulations and Rulings, Office of International Trade, (202) 325–0020. For operational aspects, Michael Craig, Chief, Interagency Requirements Branch, Trade Policy and Programs, Office of International Trade, (202) 863–6558.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the provisions of the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention, implemented by the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*), the United States entered into a bilateral agreement with the Republic of Nicaragua concerning the imposition of import restrictions on certain categories of archaeological material from the Pre-Hispanic cultures of the Republic of Nicaragua on June 16, 1999, and following completion by the Government of Nicaragua of all internal legal requirements, the agreement entered into force on October 20, 2000. On October 26, 2000, the former U.S. Customs Service (now U.S. Customs and Border Protection (CBP)), published T.D. 00–75 in the **Federal Register** (65 FR 64140), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions and included a list designating the types of articles covered by the restrictions.

Import restrictions listed in 19 CFR 12.104g(a) are "effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period can be extended for additional periods not to exceed five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists" (19 CFR 12.104g(a)). On October 20, 2005, CBP published CBP Dec. 05–33 in the **Federal Register** (70 FR 61031) which amended 19 CFR 12.104g(a) to reflect the extension for an additional period of 5 years.

On February 23, 2010, the Department of State received a request by the Government of the Republic of Nicaragua to extend the Agreement, and after the Department of State proposed to extend the Agreement and reviewed the findings and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that the cultural heritage of Nicaragua continues to be in jeopardy from pillage of Pre-Hispanic archaeological resources and made the necessary determinations to extend the import restrictions for an additional five years. Diplomatic notes have been exchanged on October 15, 2010, reflecting the extension of those restrictions for an additional five year period. Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect this extension of the import restrictions.

The Designated List of Pre-Hispanic Archaeological Material from Nicaragua covered by these import restrictions is set forth in T.D. 00–75. The Designated List and accompanying image database may also be found at the following Internet Web site address: *http://exchanges.state.gov/heritage/culprop/nifact.html.*

The restrictions on the importation of these archaeological materials from the Republic of Nicaragua are to continue in effect until October 20, 2015. Importation of such material continues to be restricted unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure (5 U.S.C. 553(a)(1)). In addition, CBP has determined that such notice or public procedure would be impracticable and contrary to the public interest because the action being taken is essential to avoid interruption of the application of the existing import restrictions (5 U.S.C. 553(b)(B)). For the same reasons, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

Because this rule involves a foreign affairs function of the United States, it is not subject to Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1).

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise.

Amendment to CBP Regulations

■ For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

§ 12.104g [Amended]

■ 2. In § 12.104g, paragraph (a), the table is amended in the entry for Nicaragua by removing the reference to "CBP Dec. 05—33" and adding in its place "CBP Dec. 10—32".

Alan Bersin,

Commissioner, U.S. Customs and Border Protection.

Approved: October 15, 2010.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 2010–26383 Filed 10–19–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

30 CFR Chapter III and 43 CFR Parts 4 and 10

RIN 1094–AA53

Interior Board of Land Appeals and Other Appeals Procedures

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: The Office of the Secretary is amending several existing procedural regulations governing appeals to the Interior Board of Land Appeals (IBLA); adopting new regulations governing consolidation, extensions of time, intervention, and motions in IBLA appeals; removing regulations relating to the former Interior Board of Surface Mining and Reclamation Appeals and Interior Board of Contract Appeals, which no longer exist; and correcting the address of the Office of Hearings and Appeals.

DATES: This rule is effective November 19, 2010.

FOR FURTHER INFORMATION CONTACT: Robert S. More, Director, Office of Hearings and Appeals, U.S. Department of the Interior, Phone 703–235–3810. Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Office of the Secretary published a proposed rule on March 8, 2007, to update regulations of the Office of Hearings and Appeals (OHA) governing appeals to IBLA under 43 CFR part 4, subparts E and L. 72 FR 10454–10466. Subpart E contains regulations governing public land hearings and appeals, while subpart L contains regulations governing surface coal mining hearings and appeals. We proposed to amend the existing regulations governing service of documents, reconsideration, statements of reasons for appeal, answers, and requests for hearings; and we proposed to add regulations governing motions for consolidation, extensions of time, and intervention, and for serving and responding to other motions.

We received comments on the proposed rule from the State of Alaska Department of Law; Carl J.D. Bauman, Esq.; Biodiversity Conservation Alliance; Chevron North America Exploration and Production Company; Earthjustice; Kentucky Resources Council; Mary A. Nordale, Esq.; Oil & Gas Accountability Project; J. P. Tangen, Esq.; Western Resource Advocates; and Wyoming Outdoor Council. We are grateful for the suggestions from these commenters and have made a number of changes in the proposed rule in response to the comments, as explained in the section-by-section analysis below.

This final rule makes changes to a number of other provisions that were not included in the proposed rule. These changes, also explained in the section-by-section analysis, are minor technical and conforming amendments that do not require notice and comment under the Administrative Procedure Act.

II. Section-by-Section Analysis

A. 30 CFR Chapter III—Board of Surface Mining and Reclamation Appeals

This chapter in Title 30 consists of a single part, 301, entitled "Procedures under the Surface Mining Control and Reclamation Act of 1977." Part 301, in turn, consists of a single section, 301.1, entitled "Cross reference," which refers readers to 43 CFR part 4, subpart L, for procedures relating to appeals to the Interior Board of Surface Mining and Reclamation Appeals (IBSMA). IBSMA was abolished by Secretarial Order dated April 26, 1983, and its functions were transferred to IBLA. 48 FR 22370 (May 18, 1983). However, 30 CFR Chapter III was never updated to reflect this change.

The fact that the outdated provisions of 30 CFR Chapter III have been overlooked for the last 27 years suggests that few if any readers were even aware of the cross-reference in § 301.1. During the same period, parties have had no apparent difficulty filing surface mining appeals with IBLA under 43 CFR part 4, subpart L. Since 30 CFR Chapter III appears unnecessary as well as outdated, this rule removes it from the CFR.

B. 43 CFR Part 4, Subpart A—General; Office of Hearings and Appeals

This rule revises 43 CFR 4.1, entitled "Scope of authority; applicable regulations," to reflect changes to OHA's organization and delegations since the last revision in 1996. In March 2005, the Hearings Division referred to in § 4.1(a) was divided into three separate components: The Departmental Cases Hearings Division, the Probate Hearings Division, and the White Earth Reservation Land Settlements Act (WELSA) Hearings Division. This change was effected by a revision to OHA's organization chapter in the Departmental Manual, 112 DM 13

(2005). No change to the regulations was made at that time.

Effective January 6, 2007, Congress abolished the Interior Board of Contract Appeals (IBCA) referred to in § 4.1(b)(1) and transferred its functions to a new Civilian Board of Contract Appeals (CBCA) within the General Services Administration. Public Law 109–163, sec. 847, 119 Stat. 3391 (2006); see 71 FR 65825 (Nov. 9, 2006).

For the last several years, OHA's delegation chapter in the Departmental Manual has contained limits on OHA's authority. For example, OHA may not overrule or modify a final legal interpretation (M–Opinion) of the Solicitor, or review the merits of a biological opinion issued by the Fish and Wildlife Service. 212 DM 13 (2009). However, the introductory text to § 4.1 is silent with respect to any limitations on OHA's authority.

This rule therefore updates the description of the Hearings Divisions in § 4.1(a) and deletes the description of the IBCA in § 4.1(b)(1); the remaining paragraphs of § 4.1(b) are renumbered. The rule revises 43 CFR 4.1 to clarify that OHA's authority to hear, consider, and decide matters "as fully and finally as might the Secretary" is subject to any limitations imposed by the Secretary. And the rule updates redesignated § 4.1(b)(1)(ii) to include a reference to Indian probate judges, whose decisions—like those of administrative law judges—are appealable to the Interior Board of Indian Appeals.

C. 43 CFR Part 4, Subpart B—General Rules Relating to Procedure and Practice

The final rule makes minor formatting changes to § 4.21(b). And it revises § 4.22(a) to clarify that a document received after regular business hours at the office where it must be filed is considered filed on the next business day.

D. 43 CFR Part 4, Subpart C—Special Rules of Practice Before the Interior Board of Contract Appeals

Subpart C, consisting of §§ 4.100 through 4.128, sets forth procedures for appeals to IBCA. With the abolition of IBCA and transfer of its functions to CBCA, those procedures are no longer needed. CBCA has published its own procedures at 48 CFR part 6101. This rule therefore removes the regulations in subpart C from 43 CFR part 4.

E. 43 CFR Part 4, Subpart E—Special Rules Applicable to Public Land Hearings and Appeals

This rule finalizes the changes to subpart E set forth in the March 8, 2007, proposed rule, with a number of revisions reflecting the comments we received. The preamble to the proposed rule at 72 FR 10454–10460 should be consulted for additional explanation of the changes as proposed.

Section 4.400 Definitions.

We proposed to add definitions for "BLM," "last address of record," and "party" and to revise definitions for "Board," "Bureau," and "office" or "officer." No comments were received on the proposed definitions, and they are generally adopted as proposed. The one exception is the definition of "Bureau," which has been revised.

The existing regulations define "Bureau" to mean simply the Bureau of Land Management (BLM). In the proposed rule, we proposed to revise the definition of "Bureau" to include the Minerals Management Service (MMS), "because IBLA reviews some decisions of the Minerals Management Service under subpart E, *e.g.,* decisions concerning offshore minerals management and royalty management. See 30 CFR Sections 290.2, 290.8, 290.108." 72 FR 10454. It was subsequently pointed out that IBLA also reviews royalty management decisions of the Bureau of Indian Affairs (BIA) under 30 CFR 290.108, and that BIA should also be included in the definition of "Bureau." More recent developments affected our proposal to add MMS to the definition.

Effective June 18, 2010, Secretarial Order 3302 renamed MMS the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE). Under paragraph 4(b) of that Order, all references to MMS in the Department's regulations, *e.g.,* 30 CFR part 290, are being changed to BOEMRE. Under Secretarial Order 3299 (May 19, 2010), BOEMRE is being reorganized into three separate organizations over the next year. The first phase of the reorganization took effect October 1, 2010, when the Minerals Revenue Management function moved from BOEMRE and became the Office of Natural Resources Revenue (ONRR) within the Office of the Assistant Secretary—Policy, Management and Budget (PMB), reporting to the Deputy Assistant Secretary—Natural Resources Revenue. Both the Director of ONRR and the Deputy Assistant Secretary—Natural Resources Revenue may render decisions appealable to IBLA.

At some point in 2011, two other organizations will be created from the remaining BOEMRE functions, the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE). We expect that some decisions from these two bureaus will also be appealable to IBLA.

In light of these developments, the final rule uses an expanded term, "Bureau or Office" in place of "Bureau," and it defines the new term to mean BIA, BLM, BOEMRE, ONRR, the Deputy Assistant Secretary—Natural Resources Revenue, or any successor organization. The phrase "or any successor organization" will cover BOEM and BSEE when they come into existence.

Section 4.401 Documents

Section 4.401 governs the filing and service of documents in an appeal. *Filing* refers to submitting the original of a document to the appropriate decisionmaking authority (as specified in the regulations), while *service* refers to delivering a copy of the document to every other person who is participating in the appeal. A document is filed when it is duly received in the office of the appropriate decisionmaking authority (*see* 43 CFR 4.22(a)). A document is served when delivery is made or attempted as specified in this rule.

We proposed to revise § 4.401(c) to allow service of a document, other than a notice of appeal that initiates a proceeding, by first-class mail to a person's last address of record or by delivery service to a person's last address of record if it is not a post office box. Under the existing regulation, service is limited to personal delivery or registered or certified mail. "Last address of record" was defined in proposed § 4.400 as the address provided in a person's most recent filing in an appeal or, if there has not been any filing, the person's address as provided in the Bureau or Office decision under appeal.

Commenters supported liberalizing the service requirements, but some thought the proposed rule did not go far enough. Their suggestions included (a) allowing service by electronic mail or facsimile; (b) specifying that service on a party represented by counsel should be made on the representative; (c) requiring service at a party's current address, if known to be different from the last address of record; (d) not requiring service of documents on all parties named in the decision under appeal; and (e) increasing the number of days after which delivery is presumed to occur.

In response to the comments, the final rule provides that service of any document other than a notice of appeal can be made by personal delivery, mail, delivery service, or electronic means. Mail includes Express Mail, Priority Mail, or First-Class Mail (including

Registered Mail, Certified Mail, or First-Class Mail without such additional services). Delivery service includes package or envelope delivery by companies such as DHL, FedEx, and United Parcel Service. Electronic means includes electronic mail or facsimile.

Electronic means can be used if the party to be served has previously consented to that means in writing. Service by such means is effective when the document is transmitted, unless the serving party learns that the document did not reach the party to be served. In the latter case, the attempted service by electronic means is not effective, and the document must be served by another method. These provisions are modeled on the 2007 revisions to Rule 5 of the Federal Rules of Civil Procedure.

Under the final rule, a party must serve a notice of appeal and statement of reasons on all other persons (individuals and entities) named in the decision under appeal, so that those persons can decide whether they want to participate in the appeal. But subsequent documents have to be served only on the parties to the appeal, including the initiating and responding parties and any persons granted intervenor status. Thus, persons named in the decision under appeal who wish to participate in the appeal must file a notice of appeal under § 4.411, an answer under § 4.414, or a motion to intervene under § 4.406. Persons named in the decision under appeal who do not participate in the appeal do not have to be served with documents other than the notice of appeal and statement of reasons.

The final rule provides that service on a party known to be represented by counsel or other designated representative must be made on the representative. Service must be made at the last address of record of the party (if unrepresented) or the representative, unless the party or representative has notified the serving party of a subsequent change of address. This provision is intended to avoid disputes over whether the serving party sent a document to the most recent address known to the serving party. A party should be able to rely on a person's address of record in the Bureau or Office or a subsequent change of address notice. However, if a document sent to that address comes back undelivered or unclaimed, the serving party must make other reasonable efforts to complete service. For example, if a document sent by certified mail is returned unclaimed, the serving party should at least re-send the document by regular mail. *See Jones* v. *Flowers,* 547 U.S. 220, 234–35 (2006).

Also in response to comments, the rule provides that service by mail or a delivery service—in the absence of evidence to the contrary—will be deemed to take place 5 business days (typically 7 calendar days) after the document was sent, rather than 3 days as stated in the proposed rule. A sentence has been added stating that a document is considered sent when it is given to the U.S. Postal Service (or deposited in one of its mailboxes), properly addressed and with proper postage affixed, or when it is given to a delivery service (or deposited in one of its receptacles), properly addressed and with the delivery cost prepaid.

Corresponding revisions have been made to proposed § 4.422(c).

The final rule also adds a new § 4.401(d) specifying the format of documents filed in a case. Sections 4.412 and 4.414 in the proposed rule had included general formatting guidance for briefs filed with IBLA ("double-spaced, using standard margins and font size"); but we decided to include more specific guidance in § 4.401, where it would be applicable to all cases filed under subpart E. The language adopted is based on 43 CFR 45.11(a), 45.12(d).

Section 4.403 Finality of Decision; Reconsideration

The proposed rule revised the language in § 4.403 to clarify the standard for a motion for reconsideration, to specify that parties can file a response to such a motion, and to list circumstances that may warrant IBLA's granting a motion in its discretion. No comments were received on the proposed changes, and they are adopted as proposed.

Section 4.404 Consolidation

We proposed to add a regulation providing that the Board may consolidate appeals on its own initiative or on motion of a party, if the facts or legal issues involved are the same or similar. The rule would codify existing practice. One comment was received supporting the proposed regulation, and it is adopted as proposed.

Section 4.405 Requests for Extension of Time

We proposed to add a regulation governing motions requesting an extension of time to file a document with the Board. As proposed, the rule would require a party to file such a motion no later than the day before the document is due and to show good cause for the extension. It would allow any other party to file an objection within 2 business days after service of the motion. And it would provide that, if the Board does not act on a motion before the document is due, the document must be filed no later than 15 days after the original due date, unless the Board subsequently shortens or lengthens the time by order. We received several comments on this proposal.

One commenter suggested that the party requesting an extension be required to indicate in the motion whether the other parties (or their counsel) oppose the motion; and the commenter expressed concern that a 2-day period for objecting to an extension is too short. The final rule adopts the commenter's suggestion with respect to requiring the moving party to ascertain whether other parties oppose the motion, and eliminates the 2-day period for objecting to an extension. Under § 4.401(c)(6), service is normally deemed to take place 5 business days after the document was sent. Five business days is the equivalent of 7 calendar days (or 8, if the period includes a holiday). Thus, under the rule as proposed, the Board would have to wait to rule on the motion for at least 7 calendar days after a motion for extension of time is filed for service to occur, plus an additional 2 days to allow for a response from the other parties (or more, if the commenter's suggestion of a longer response period were adopted). Meanwhile, the party seeking the extension does not know how long it will have to file its document. Most motions for extension of time are unopposed, and the Board is fully capable of deciding such motions without a written response from another party.

Another commenter suggested that, if the Board denies a motion for extension of time, the moving party should have an automatic 15-day extension, to run from receipt of the Board's order denying the motion. This suggestion was not adopted, since it would grant an extension of time in cases where the Board has already determined that good cause has not been shown. The same commenter suggested that an exception to the filing deadline for a motion for extension of time be provided for compelling circumstances; the commenter pointed out that such an exception was stated in the preamble to the proposed rule, but not in the regulation. This suggestion has been adopted.

A third commenter stated that the regulations should provide that extensions of reasonable duration will be freely granted. The commenter found it "ironic that the OHA can be proposing curtailed opportunities to present pleadings when the IBLA takes three years to produce a decision on appeal." We disagree that setting a "good cause" standard for extensions of time, as we have in § 4.405(d), will curtail opportunities for the parties to present their pleadings. Neither the proposed nor final rule reduces the time allowed for the parties to file their pleadings, and extensions of time will continue to be available upon a proper showing. It is also worth noting that the average age of IBLA's pending cases has been falling steadily over the last few years, from 20 months at the start of FY 2004 to less than 5 months currently. In fact, one of the principal reasons for this rulemaking is to further improve the efficiency of IBLA's adjudicatory process.

A final commenter suggested that "good cause" be defined in the regulations to include "difficulty in obtaining the administrative record or the need to fully review a lengthy record or an appeal involving complicated legal or factual issues." We believe it would be impossible to adequately capture the wide array of personal, professional, substantive, and procedural reasons that could constitute "good cause" under appropriate circumstances, although the proposed rule preamble did note that conducting settlement negotiations in good faith would justify a reasonable extension of time.

For reasons explained below in connection with § 4.414, the final rule adds a paragraph (f) to this section, allowing for an automatic extension, not to exceed 30 days, of the deadline for filing an answer.

Section 4.406 Intervention; Amicus Curiae

We proposed to add a regulation governing intervention in appeals before IBLA and appearance as an amicus curiae. Under the proposed rule, if the person seeking to intervene would be adversely affected if the decision under appeal were reversed, vacated, set aside, or modified by the Board, a motion to intervene would be due within 30 days after the person knew or should have known that the decision had been appealed. However, if the person seeking to intervene would have an independent right to appeal the decision under § 4.410, a motion to intervene would be due within 30 days after the person was served with the decision or, if not served, knew or should have known of the decision. The preamble cited *Independent Petroleum Association of Mountain States,* 136 IBLA 279, 281 (1996), for the proposition that the Board will deny a motion to intervene where granting it would circumvent the requirement in § 4.411(a) that an appeal be filed within 30 days after service of a decision.

One commenter objected to the proposal because, for a party having a right to appeal, the time for filing a motion to intervene could expire before the party even learns that another party has filed an appeal. According to the commenter, a party having a right to appeal may choose not to do so in the first instance, but may want to intervene if another party files an appeal, especially if the parties' interests are not aligned. The commenter recommended that, in all cases, the deadline for filing a motion to intervene should be 30 days after the person knew or should have known that the decision has been appealed to the Board.

The final rule adopts the commenter's recommended approach. It further requires the party seeking to intervene to set forth the basis for the proposed intervention in the motion, including (1) whether the person had a right to appeal the decision under § 4.410 or would be adversely affected if the decision under appeal were reversed, vacated, set aside, or modified by the Board, and (2) how and when the person learned of the appeal. The Board could then take that information into account in deciding whether to grant the motion.

The final rule adds a paragraph (e) specifying that a person granted full or limited intervenor status is a party to the appeal, while an amicus curiae is not. Thus, other parties are required to serve documents on an intervenor under § 4.401, though not on an amicus curiae. However, an amicus curiae is required to serve its brief on the parties to the appeal.

Section 4.407 Motions

We proposed to add a regulation governing motions filed with the Board, requiring that the motion provide a concise statement of the reasons supporting the motion, giving any other party 15 days to respond, and stating that the Board would rule on any motion as expeditiously as possible. The 15-day response deadline would apply unless another regulation or the Board by order provides otherwise.

Two commenters objected to the proposal. One argued that there is no need for a regulation on motions and that the Board should maintain its current practice. However, as explained in the proposed rule, the absence of a regulation leads to uncertainty among practitioners, e.g., as to the length of time they have to respond to a motion. The rule will help standardize practice and facilitate prompt rulings on motions.

The other commenter objected to the 15-day response period as being insufficient in most cases and likely to result in motions for extension of time. The commenter recommended that 30 days be allowed for responding to a motion.

The Board's experience is that most motions are routine in nature and are often unopposed or generate only a brief response. For those motions, a short response period facilitates disposition. Other motions are more substantive and justify a longer response period. Fifteen days is already a week longer than the 8 days allowed for responses to substantive motions in Rule 27 of the Federal Rules of Appellate Procedure. The final rule therefore retains the response deadline of 15 days after service of the motion. If additional time is needed for a particularly substantive motion, the responding party can request an extension of time under § 4.405.

Section 4.410 Who May Appeal

As explained above, the proposed rule included a revised definition of "Bureau" in § 4.400 as including MMS along with BLM. But it did not include any proposed changes to § 4.410, which mentions appeals only from decisions of BLM or an administrative law judge. The final rule revises § 4.410 to substitute the more inclusive term "Bureau or Office" for "BLM" in paragraphs (a) and (c). As explained above, the definition of "Bureau or Office" in § 4.400 has been further revised in the final rule to include BIA, BLM, BOEMRE, ONRR, the Deputy Assistant Secretary—Natural Resources Revenue, and any successor organization.

Section 4.411 Appeal; How Taken, Mandatory Time Limit

We proposed to add a provision to § 4.411(a) specifying that transmitting a notice of appeal by facsimile to the office of the officer who made the decision would not constitute filing. This proposal was intended to avoid the problem observed in cases in which an appellant attempted to transmit a notice of appeal by facsimile, but the relevant office did not receive it on time or at all. *See Underwood Livestock, Inc.,* 165 IBLA 128, 130–31 (2005); *National Wildlife Federation,* 162 IBLA 263, 264–66 (2004).

Two commenters objected to the proposal and argued that timely electronic transmission of a notice of appeal should be accepted. One of the commenters suggested that the regulations include an express statement that the risk of delay or nondelivery of the notice of appeal is on the sender. BLM supported the proposed rule, expressing a concern that the volume of paper involved could overwhelm the facilities in some offices. They noted that one appellant had recently filed 17 appeals totaling about 1,200 pages.

Based on the Board's recent experience, it appears that some BLM offices already accept electronic filing of notices of appeal, while others may not. Rather than adopt a uniform rule for BLM, we have decided to delete proposed § 4.411(a)(4) for now, leaving it up to BLM whether to accept notices of appeal by facsimile or e-mail. We plan to revisit the issue of electronic filing in a future rulemaking.

We also proposed to add a provision to § 4.411(b) specifying that a person representing more than one appellant must state that he or she is authorized to do so. *See, e.g., The Friends and Residents of Log Creek,* 150 IBLA 44, 48 (1999) ("Proper application of the Department's rules of practice requires an affirmative showing that a representative of a named appellant is qualified and authorized to represent any other purported appellant or appellants, if single representation for multiple parties is intended").

One commenter objected that this requirement is unnecessary and would "create a trap for the unwary." The commenter pointed out that 43 CFR 1.5(a) already provides that the signature of a party's representative on a document constitutes a certificate that he or she is authorized and qualified to represent the party. The commenter argued that it would be "far simpler and more efficient" for the Board to issue an order to show cause, requiring a person to verify his or her authority to represent a party, in cases where the Board has a question about such authority.

We disagree with the commenter in part. If inclusion of a single statement in a notice of appeal avoids a potential issue about a representative's authority, that action would be "far simpler and more efficient" than the Board's issuance of an order to show cause, followed by responses from the parties—a process that would take at least a few weeks. Nevertheless, we share the commenter's concern about the new requirement creating a "trap for the unwary." Moreover, it may well be that, in many cases where this issue arises, a mere statement by the representative that other appellants have authorized him or her to represent them will not be sufficient to resolve the issue. If so, the Board will still have to use an order to show cause to satisfy itself that the requirements of 43 CFR part 1 have been met. On balance, therefore, we have decided to omit the proposed requirement from the final rule.

The final rule amends § 4.411 to add an introductory phrase, "[e]xcept as otherwise provided by law," to paragraph (a)(2), since a statute or regulation may provide a longer or shorter period for filing an appeal than the normal 30 days. For example, under 30 U.S.C. 1724(d)(4)(B)(ii)(V), an order to perform a restructured accounting for oil and gas royalties must "provide the lessee or its designee 60 days within which to file an administrative appeal of the order to perform a restructured accounting."

The final rule also adds a new § 4.411(d), specifying what the office of the officer who made the decision must do after receiving a notice of appeal. The office must forward to the Board the notice of appeal and any accompanying documents, as well as the complete administrative record.

Section 4.412 Statement of Reasons; Statement of Standing; Reply Briefs

We proposed to revise § 4.412(a) to require a single statement of reasons to be filed within 30 days after the notice of appeal is filed, rather than allowing two or more statements of reasons as in the current regulations. No comments were received on this change, and it is adopted. We have modified the language of paragraph (a) slightly, to say that the statement of reasons must be filed "no later than 30 days after the notice of appeal was filed," rather than "within 30 days after the notice of appeal was filed." An appellant does not have to wait until "after the notice of appeal was filed" to file a statement of reasons; the two documents can be filed at the same time.

We also proposed to limit the statement of reasons to 30 pages (excluding exhibits, declarations, or other attachments), unless the appellant obtains leave of the Board to file a longer statement by showing good cause. And we proposed that an appellant would also have to show good cause for leave to file any additional pleading, *e.g.,* a reply to an answer.

One commenter objected to the page limitation in the proposed rule, saying that it was arbitrary and inadequately justified in the proposed rule. Thirty pages is the limit for a principal brief under Rule 32(a)(7) of the Federal Rules of Appellate Procedure; and in the Board's experience, it should be sufficient in all but the most complicated cases. This proposed change is adopted as proposed.

The same commenter and several others objected to the requirement that an appellant obtain leave of the Board to file a reply brief. The current regulations make no provision for a reply brief, and most appellants who wish to file a reply seek leave of the Board to do so. Thus the proposed rule is consistent with the prevailing practice. However, it is also true that the Board routinely grants leave to file a reply when requested, and appellants file replies in fewer than 10 percent of the cases. Thus, allowing a limited time for appellants to file a reply brief appears unlikely to delay proceedings unduly.

In light of the Board's experience and the comments received, the final rule expressly allows an appellant who feels the need to do so to file a reply brief within 15 days after service of an answer under § 4.414. This is comparable to the 14 days allowed for a reply brief in Rule 31 of the Federal Rules of Appellate Procedure. The reply brief is limited to the issues raised in the answer and to 20 pages, unless the appellant obtains leave of the Board to file a longer brief by showing good cause. No further briefing by any party is permitted, unless requested by the Board.

Section 4.413 Service of Notice of Appeal

The proposed rule included updated addresses for the Office of the Solicitor on which a copy of a notice of appeal and statement of reasons must be served. The Office of the Solicitor has informed us a handful of other changes, and the final rule revises the information in § 4.413(c)(1), (d)(5), and (d)(9) to reflect those changes. No public comments were received on the proposed changes, and they are adopted as proposed, with minor editorial changes.

Section 4.414 Answers

We proposed to require each party that wishes to participate in an appeal, including the Bureau, to file a single answer (or motion, if appropriate, e.g., a motion to dismiss) within 60 days of service of the statement of reasons for appeal. This is twice the length of time generally provided for filing an answer under the existing regulations and would equal the total length of time that an appellant has to file a statement of reasons from the date of service of the decision being appealed (30 days under § 4.411(a) plus 30 days under § 4.412(a)). No comments were received on the proposed change. On further consideration, however, we have decided to leave the period for filing an answer in § 4.414(a) at 30 days, but to revise § 4.405 to provide for an automatic extension of time upon request, not to exceed 30 days.

In many cases currently, no party files an answer, which means that the case is ripe for adjudication 30 days after service of the notice of appeal or statement of reasons. Enlarging the period for filing an answer to 60 days in all cases would mean that the Board would have to wait an additional 30 days in every case to see whether a party filed an answer.

Under the final rule, if a person wants to file an answer but needs additional time to do so, the person can get up to the full 60 days contemplated in the proposed rule simply by filing a request for an extension of time before the end of the initial 30-day deadline. But if no one files an answer or a request for an extension of time within the initial 30-day period, the Board can proceed to consider the appeal, without having to wait an additional 30 days.

For the reasons discussed above in connection with § 4.411, the final rule omits the proposed requirement that, if a person is representing more than one party, the answer must state that the person is authorized to do so.

Section 4.415 Motion for a Hearing on an Appeal Involving Questions of Fact

We proposed several changes to existing § 4.415: (1) Deleting the requirement that a request for a hearing on issues of material fact be filed within 30 days after an answer is due; (2) requiring a party that requests a hearing to specify in its motion what the issues of material fact are, what evidence must be presented, what witnesses need to be examined, and what documentary evidence needs to be explained, if any; (3) including the standards used by the Board in deciding whether to refer a case for a hearing; (4) giving the Board the authority to refer a matter for a hearing by an administrative law judge (ALJ), who would issue (a) proposed findings of fact on specified issues, (b) a recommended decision, or (c) a decision that will be final in the absence of an appeal; and (5) authorizing the Board to suspend the effectiveness of the decision under review pending a final decision on the appeal if it finds good cause to do so.

One commenter objected to the proposed requirement that a party requesting a hearing specify what evidence must be presented, what witnesses need to be examined, and what documentary evidence needs to be explained, if any. The commenter argued that discovery may be necessary before a party can make these determinations, and discovery may not be available until the case is referred to an ALJ for a hearing. The commenter recommended that the rule require a party to identify only the issues of material fact on which a hearing is necessary or, at the least, clarify that a party will not be limited to its specifications of evidence, witnesses, and documents in the request for a hearing.

We have decided to retain the requirement that the party specify, not only the issues of material fact to be heard, but also the evidence, witnesses, and documents to be presented or cross-examined. This information is needed for the Board to evaluate the hearing request and determine, for example, whether evidence could be presented in documentary form, rather than by oral testimony, thereby saving the parties and the ALJ the time and expense of a hearing. However, language has been added to § 4.415(e) clarifying that, unless the Board orders otherwise, the ALJ may consider other relevant issues and evidence identified after referral of the case for a hearing.

The same commenter also recommended that the proposed rule be amended to include procedures for discovery in cases handled by the Departmental Cases Hearings Division. While this recommendation is outside the scope of the current rulemaking, which focuses on procedures for IBLA, we agree that discovery procedures for cases before the Departmental Cases Hearings Division should be established. We will propose such procedures in a separate rulemaking.

No other comments were received on the proposed changes to § 4.415, and they are adopted as proposed.

Section 4.421 Definitions

We proposed to remove from this section a handful of terms that are also defined in § 4.400, to alphabetize the remaining definitions, and to revise them to reflect revisions to the definitions in § 4.400. No comments were received on the proposed changes, and they are adopted as proposed.

In addition, in response to a comment from BLM, we have substituted a definition of "manager" for the definition of "district manager" in the current regulation. BLM pointed out that subpart E never actually uses "district manager," except to define it in this section as the supervising BLM officer of the grazing district. By contrast, subpart E uses "manager" in several regulations. Since BLM manages grazing both within grazing districts and on the public lands outside grazing districts, the final regulation defines the term "manager" more broadly as "the BLM official with direct supervision over the public lands that are pertinent to the decision or contest."

Section 4.422 Documents

The proposed rule included changes to the service requirements in § 4.422(c) corresponding to those proposed for § 4.401(c). The final rule adopts the same changes to § 4.422(c) as are adopted for § 4.401(c), discussed above. In addition, language has been included in § 4.422(c)(4) and (6) to reflect service of a complaint in a contest proceeding by publication, as provided in § 4.450–5.

Section 4.433 Authority of the Administrative Law Judge

Consistent with one of the proposed changes to § 4.415 mentioned above, we proposed to revise § 4.433 to provide authority to an ALJ to issue either a recommended decision or a decision that would be final for the Department absent an appeal to the Board, in addition to proposed findings of fact on the issues presented at the hearing. No comments were received on the proposed change, and it is adopted as proposed.

Section 4.434 Conduct of Hearing

We proposed to revise this regulation to substitute "administrative law judge" for "examiner" and to substitute "Bureau," as defined in § 4.400, for "Bureau of Land Management." No comments were received on the proposed changes, and they are adopted as proposed, except that the expanded term "Bureau or Office" is used in the final rule.

Section 4.437 Copies of Transcript

This regulation refers to the parties' stipulating to a summary of the evidence, a procedure that has not been used for many years and is unnecessary, since all hearings are transcribed. The final rule removes this reference in § 4.437.

Section 4.438 Summary of Evidence

We proposed to remove this regulation as unnecessary, for the reasons explained above in connection with § 4.437. No comments were received on the proposed change, and it is adopted as proposed. Existing § 4.439 is redesignated § 4.438.

Section 4.438 Action by Administrative Law Judge

Consistent with the proposed changes to §§ 4.415 and 4.433 mentioned above, we proposed to revise this regulation to authorize an ALJ to issue (a) proposed findings of fact on the issues presented at the hearing, (b) a recommended decision that includes findings of fact and conclusions of law, or (c) a decision that would be final for the Department absent an appeal to the Board. No comments were received on this proposed change, and it is adopted as proposed.

Section 4.452–8 Findings and Conclusions; Decision by Administrative Law Judge

Paragraphs (a) and (b) of this section provide that, following a hearing in a contest proceeding, the parties may submit proposed findings of fact and conclusions of law, and the ALJ will consider them and issue his or her decision, including findings, conclusions, and the reasons for them. Paragraph (c) provides that "[t]he Board may require, in any designated case, that the [ALJ] make only a recommended decision and that the decision and the record be submitted to the Board for consideration."

As far as we are aware, the authority in paragraph (c) has never been used, and we are unaware of any reason to depart from the consistent current practice of having the ALJ render an initial decision that is then reviewable by the Board on appeal. The final rule, therefore, deletes paragraph (c).

Section 4.476 Conduct of Hearing; Reporter's Fees; Transcripts

Like § 4.437 discussed above, § 4.476(d) refers to the parties' stipulating to a summary of the evidence, a procedure that has not been used for many years and is unnecessary, since all hearings are transcribed. The final rule removes this reference in § 4.476.

Section 4.477 Findings and Conclusions; Decision by Administrative Law Judge

Paragraph (a) of this section provides that, following a hearing in a grazing proceeding and the time allowed for the parties to submit proposed findings of fact and conclusions of law, the ALJ will consider them and issue his or her decision, including findings, conclusions, and the reasons for them. Paragraph (b) provides that the Board "may require, in any designated case, that the [ALJ] make only a recommended decision and that such decision and the record be submitted to the Board for consideration." We are not aware of the Board's ever having used the authority in paragraph (b), and we have deleted paragraph (b) from the final rule.

Section 4.478 Appeals to the Board of Land Appeals; Judicial Review

As noted in the proposed rule, in 2003, OHA amended its regulations to authorize an ALJ to issue an order granting or denying a petition for stay of a BLM grazing decision. 43 CFR 4.474(c), 68 FR 68765, 68771 (Dec. 10, 2003). The amendments also provided for an appeal to IBLA from such an order in § 4.478(a), but did not specify a time or place for filing the appeal. We proposed to amend § 4.478(a) to provide that an appeal may be filed with the ALJ in accordance with § 4.411(a). No comments were received on the proposed change, and it is adopted as proposed.

F. 43 CFR Part 4, Subpart L—Special Rules Applicable to Surface Coal Mining Hearings and Appeals

Section 4.1108 Form of Documents

The final rule adds a new § 4.1108(g) providing that documents filed under subpart L must conform to the document formatting requirements of § 4.401(d). This provision takes the place of the more general formatting guidance ("double-spaced, using standard margins and font size") included in proposed § s 4.1392(a)(2), (e)(2).

Section 4.1109 Service

The Solicitor's Office has informed us that, in 2009, the Knoxville Field Solicitor's Office moved to a new location. We have revised § 4.1109(a)(2)(ii) to update the office address.

Section 4.1117 Reconsideration

We proposed to add § 4.1117 to treat motions for reconsideration under subpart L in a manner consistent with those under subpart E. See § 4.403, discussed above. No comments were received on the proposed addition, and it is adopted as proposed.

Section 4.1270 Petition for Discretionary Review of a Proposed Civil Penalty

We proposed to correct the reference in § 4.1270(f) from § 4.1277 (which does not exist) to § 4.1275. No comments were received on the proposed change, and it is adopted as proposed.

Section 4.1276 Reconsideration

We proposed to remove this regulation because of the addition of § 4.1117, discussed above. No comments were received on the proposed change, and it is adopted as proposed.

Section 4.1286 Motion for a Hearing

We proposed to revise § 4.1286 to treat requests for a hearing under subpart L in a manner consistent with those under subpart E. See § 4.415, discussed above. No comments were received on the proposed changes, and they are adopted as proposed.

Section 4.1287 Action by Administrative Law Judge

The final rule adds a new § 4.1287 to require action by the ALJ, following referral of a case for a hearing under subpart L, in a manner consistent with that under subpart E. See redesignated § 4.438, discussed above.

Section 4.1392 Contents of Request; Amendment of Requests; Responses

Section 4.1392 governs the filing of requests for review, and responses to such requests, in cases involving a determination by the Office of Surface Mining Reclamation and Enforcement that a person does or does not have valid existing rights under 30 CFR 761.16. One commenter requested that the final regulations clarify a requester's right to file a supplemental brief, which could serve to narrow the issues in contention. Consistent with the change to § 4.412 concerning reply briefs, discussed above, the final rule adds a § 4.1392(e), giving a requester who wishes to file a reply a limited opportunity to do so. The final rule also revises § 4.1392(d) to clarify the requirements for filing a response.

G. 43 CFR Part 10—Native American Graves Protection and Repatriation Regulations

In January 2002, OHA moved its headquarters offices to a new building and revised these regulations to update its address. 67 FR 4367, 4368 (Jan. 30, 2002). In April 2003, however, the National Park Service revised 43 CFR 10.12 and inadvertently republished OHA's former address. 68 FR 16354, 16363–64 (Apr. 3, 2003). This final rule therefore revises § 10.12(j) and (k) to substitute OHA's current address.

III. Review Under Procedural Statutes and Executive Orders

A. *Decision To Issue Final Rule Without Prior Notice and Comment on Some Provisions.* While prior notice and opportunity for comment were provided for most of the provisions of this final rule, the Office of the Secretary has included additional provisions that were not part of the March 8, 2007, proposed rule. These provisions are 30 CFR Chapter III and 43 CFR part 4, subpart C, which are removed; 43 CFR 4.1, 4.21, 4.22, 4.410, 4.437, 4.452–8, 4.476, 4.477, 4.1108, 4.1392, and 10.12, which are revised; and 43 CFR 4.401(d), 4.411(d), and 4.1287, which are added. As is clear from the section-by-section analysis above, the changes to these regulations are minor technical amendments or changes needed to conform to other statutory or regulatory actions.

The Department has determined that the public notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(b), do not apply to these additional provisions because the changes being made relate solely to matters of agency organization, procedure, and practice. They therefore satisfy the exemption from notice and comment rulemaking in 5 U.S.C. 553(b)(A).

B. *Regulatory Planning and Review (E.O. 12866).* In accordance with the criteria in Executive Order 12866, we have determined that this document is not a significant regulatory action. The Office of Management and Budget has not reviewed this rule under Executive Order 12866.

1. This rule will not have an annual economic effect of $100 million or more or adversely affect in a material way an economic sector, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. A cost-benefit and economic analysis is not required. These regulations will have virtually no effect on the economy because they only revise existing procedural regulations governing appeals and add new regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention.

2. This rule will not create inconsistencies with or interfere with other agencies' actions because only the Department of the Interior provides regulations that govern procedures for appeals of decisions concerning the use and disposition of public lands and their resources and concerning surface coal mining.

3. This rule will not materially alter the budgetary effects of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. These regulations deal only with procedures governing appeals, not with entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

4. This rule does not raise novel legal or policy issues. The regulations would merely revise existing procedures and add regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention, which are all familiar administrative procedures.

C. *Regulatory Flexibility Act.* The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Over the past 5 years, IBLA has received between 285 and 335 appeals per year, and appeals this year are running at an even lower rate. Not all appellants are small entities; but even if they were, 285–335 is not a substantial number, for purposes of the Act. Moreover, the minor procedural changes in this rule will not have a significant economic effect on those appellants who are small entities. A Small Entity Compliance Guide is not required.

D. *Small Business Regulatory Enforcement Fairness Act.* This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act:

1. It will not have an annual effect on the economy of $100 million or more. The rule only revises procedural regulations governing appeals and adds regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention. The rule should have no effect on the economy.

2. It will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Revising OHA's procedural regulations governing appeals and adding regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention will not affect costs or prices for citizens, individual industries, government agencies, or geographic regions.

3. It will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Revising OHA's procedural regulations governing appeals and adding regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention should have no effects, adverse or beneficial, on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

E. *Unfunded Mandates Reform Act.* In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we find that:

1. This rule will not have a significant or unique effect on small governments or significantly affect State, local, or tribal governments or the private sector. Revising OHA's procedural regulations governing appeals and adding regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention will neither uniquely nor significantly affect these governments.

2. This rule will not produce an unfunded Federal mandate of $100 million or more on State, local, or tribal governments in the aggregate or the private sector in any year, *i.e.,* it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. A statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1532, is not required.

F. *Takings (E.O. 12630).* In accordance with Executive Order 12630, we find that the rule will not have significant takings implications. A takings implication assessment is not required. Revising OHA's procedural regulations governing appeals and adding regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention should have no effect on property rights.

G. *Federalism (E.O. 13132).* In accordance with Executive Order 13132, we find that the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. There is no foreseeable effect on states from revising OHA's procedural regulations governing appeals and adding regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention. A federalism summary impact statement is not required.

H. *Civil Justice Reform (E.O. 12988).* In accordance with Executive Order 12988, the Department has determined that this rule will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. Because these regulations will improve OHA's procedural regulations governing appeals and add regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention, they will not burden either administrative or judicial tribunals.

I. *Consultation with Indian Tribes (E.O. 13175).* Under the criteria in Executive Order 13175, we have evaluated this rule and determined that it has no potential effects on federally recognized Indian tribes. These regulations would not have substantial direct effects 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. They would only revise OHA's procedural regulations governing appeals and add regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention.

J. *Paperwork Reduction Act.* This rule is exempt from the requirements of the Paperwork Reduction Act, since it applies to the conduct of agency administrative proceedings involving specific individuals and entities. 44 U.S.C. 3518(c); 5 CFR 1320.4(a)(2). An OMB form 83–I is not required.

K. *National Environmental Policy Act.* The Department has determined that this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.,* Council on Environmental Quality (CEQ) regulations, 40 CFR 1508.4, and the Department of the Interior's regulations at 43 CFR 46.210(i). CEQ regulations, at 40 CFR 1508.4, define a "categorical exclusion" as a category of actions that do not individually or cumulatively have a significant effect on the human environment. The regulations further direct each department to adopt NEPA procedures, including categorical exclusions. 40 CFR 1507.3.

The Department has determined that this rule is categorically excluded from further environmental analysis under NEPA in accordance with 43 CFR 46.210(i), which categorically excludes "[p]olicies, directives, regulations and guidelines: that are of an administrative, financial, legal, technical, or procedural nature * * *" In addition, the Department has determined that none of the extraordinary circumstances listed in 43 CFR 46.215 applies to this rule.

The rule is an administrative and procedural rule that revises OHA's procedural regulations governing appeals and adds regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention. Therefore, given the categorical exclusion, neither an environmental assessment nor an environmental impact statement under NEPA is required.

L. *Information Quality Act.* In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act, Pub. Law 106–554.

M. *Effects on the Energy Supply (E.O. 13211).* This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required. Revising OHA's procedural regulations governing appeals and adding regulations governing consolidation of appeals, requests for extensions of time, motions, and intervention are not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

30 CFR Part 301

Administrative practice and procedure, Mines, Surface mining.

43 CFR Part 4

Administrative practice and procedure, Mines, Public lands, Surface mining.

43 CFR Part 10

Administrative practice and procedure, Hawaiian Natives, Historic preservation, Indians—Claims, Museums, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Office of the Secretary amends 30 CFR Chapter III and 43 CFR parts 4 and 10 as set forth below:

Title 30—Mineral Resources

Chapter III—[REMOVED]

■ Under the authority of 30 U.S.C. 1211, 30 CFR Chapter III, consisting of part 301, is removed.

Title 43—Public Lands: Interior

43 CFR Subtitle A—Office of the Secretary of the Interior

PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES

■ 2. The authority citation for part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 43 U.S.C. 1201.

Subpart A—General; Office of Hearings and Appeals

■ 3. In § 4.1, revise the introductory text and paragraph (a), remove paragraph (b)(1), redesignate paragraphs (b)(2) through (b)(4) as paragraphs (b)(1) through (b)(3), and revise the first sentence of newly redesignated paragraph (b)(1)(ii) to read as follows:

§ 4.1 Scope of authority; applicable regulations.

The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary. The Office may hear, consider, and decide those matters as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary. Principal components of the Office include:

(a) One or more Hearings Divisions consisting of administrative law judges who are authorized to conduct hearings in cases required by law to be conducted under 5 U.S.C. 554, and other deciding officials who are authorized to conduct hearings in cases arising under statutes and regulations of the Department; and

(b) * * *

(1) * * *

(ii) Decisions and orders of administrative law judges and Indian probate judges in Indian probate matters, other than those involving estates of the Five Civilized Tribes of Indians. * * *

* * * * *

§ 4.21 [Amended]

■ 4. In § 4.21, amend paragraph (b)(3) by adding the word "and" after the semicolon at the end of the paragraph and amend paragraph (b)(4) by removing the semicolon at the end of the paragraph and adding a period in its place.

Subpart B—General Rules Relating to Practice and Procedure

■ 5. Revise § 4.22(a) to read as follows:

§ 4.22 Documents.

(a) *Filing of documents.* A document is filed in the office where the filing is required only when the document is received in that office during its regular business hours and by a person authorized to receive it. A document received after the office's regular business hours is considered filed on the next business day.

* * * * *

Subpart C—[Removed and Reserved]

■ 6. Subpart C, consisting of §§ 4.100 through 4.128 and Appendix I, is removed and reserved.

Subpart E—Special Rules Applicable to Public Land Hearings and Appeals

■ 7. Revise the authority citation for part 4, subpart E, to read as follows:

Authority: Sections 4.470 to 4.480 are also issued under authority of 43 U.S.C. 315a.

■ 8. Revise § 4.400 to read as follows:

§ 4.400 Definitions.

As used in this subpart:

Administrative law judge means an administrative law judge in the Office of Hearings and Appeals, appointed under 5 U.S.C. 3105.

BIA means the Bureau of Indian Affairs.

BLM means the Bureau of Land Management.

Board means the Interior Board of Land Appeals in the Office of Hearings and Appeals. The address of the Board is 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203. The telephone number is 703–235–3750, and the facsimile number is 703–235–8349.

BOEMRE means the Bureau of Ocean Energy Management, Regulation and Enforcement.

Bureau or Office means BIA, BLM, BOEMRE, ONRR, the Deputy Assistant Secretary—Natural Resources Revenue, or any successor organization, as appropriate.

Last address of record means the address in a person's most recent filing in an appeal or, if there has not been any filing, the person's address as provided in the Bureau decision under appeal.

ONRR means the Office of Natural Resources Revenue.

Office or *officer* includes "administrative law judge" or "Board" where the context so requires.

Party includes a party's representative(s) where the context so requires.

Secretary means the Secretary of the Interior or an authorized representative.

■ 9. In § 4.401, revise paragraph (c) and add paragraph (d) to read as follows:

§ 4.401 Documents.

* * * * *

(c) *Service of documents.* (1) A party that files any document under this subpart must serve a copy of it concurrently as follows:

(i) On the appropriate official of the Office of the Solicitor under § 4.413(c) and (d);

(ii) For a notice of appeal and statement of reasons, on each person named in the decision under appeal; and

(iii) For all other documents, on each party to the appeal (including intervenors).

(2) Service on a person or party known to be represented by counsel or other designated representative must be made on the representative.

(3) Service must be made at the last address of record of the person or party (if unrepresented) or the representative, unless the person, party, or representative has notified the serving party of a subsequent change of address.

(4) Service may be made as shown in the following table:

If the document is * * *	Service may be made by * * *
(i) A notice of appeal	(A) Personal delivery; (B) Registered or certified mail, return receipt requested; (C) Delivery service, delivery receipt requested, if the last address of record is not a post office box; or (D) Electronic means, such as electronic mail or facsimile, if the person to be served has previously consented to that means in writing.
(ii) Not a notice of appeal	(A) Personal delivery; (B) Mail; (C) Delivery service, if the last address of record is not a post office box; or (D) Electronic means, such as electronic mail or facsimile, if the person to be served has previously consented to that means in writing.

(5) At the conclusion of any document that a party must serve under the regulations in this subpart, the party must sign a written statement that:

(i) Certifies that service has been or will be made in accordance with the applicable rules; and

(ii) Specifies the date and manner of service.

(6) Service that complies with paragraphs (c)(2) through (4) of this section is complete as shown in the following table:

If service is made by * * *	Service is complete when the document is * * *
(i) Personal delivery	Delivered to the party.
(ii) Mail or delivery service	Delivered to the party.
(iii) Electronic means	Transmitted to the party, unless the serving party learns that it did not reach the party to be served.

(7) In the absence of evidence to the contrary, delivery under paragraph (c)(6)(ii) of this section is deemed to take place 5 business days after the document was sent. A document is considered sent when it is given to the U.S. Postal Service (or deposited in one of its mailboxes), properly addressed and with proper postage affixed, or when it is given to a delivery service (or deposited in one of its receptacles), properly addressed and with the delivery cost prepaid.

(d) *Document format.* (1) The format requirements in paragraph (d)(2) of this section apply to any pleading, motion, brief, or other document filed in a case under this subpart, other than an exhibit or attachment or the administrative record.

(i) An exhibit or attachment must be 8½ by 11 inches in size or, if larger, folded to 8½ by 11 inches and attached to the document.

(ii) Any document that does not comply with the requirements in this paragraph (d) may be rejected.

(2) A document filed in a case must:

(i) Be 8½ by 11 inches in size;

(ii) Be printed on just one side of the page;

(iii) Be clearly typewritten, printed, or otherwise reproduced by a process that yields legible and permanent copies;

(iv) Use 11 point font size or larger;

(v) Be double-spaced except for the case caption, argument headings, long quotations, and footnotes, which may be single-spaced;

(vi) Have margins of at least 1 inch;

(vii) Be numbered sequentially, starting on the second page; and

(vii) Be stapled in the upper left-hand corner, if stapled, or bound on the left side, if bound.

■ 10. Revise § 4.403 to read as follows:

§ 4.403 Finality of decision; reconsideration.

(a) The Board's decision is final agency action and is effective on the date it is issued, unless the decision itself provides otherwise.

(b) The Board may reconsider its decision in extraordinary circumstances.

(1) A party that wishes to request reconsideration of a Board decision must file a motion for reconsideration with the Board within 60 days after the date of the decision.

(2) The motion may include a request that the Board stay the effectiveness of its decision.

(3) Any other party to the original appeal may file a response to a motion for reconsideration with the Board within 21 days after service of the motion, unless the Board orders otherwise.

(4) A motion for reconsideration will not stay the effectiveness or affect the finality of the Board's decision unless so ordered by the Board for good cause.

(5) A party does not need to file a motion for reconsideration in order to exhaust its administrative remedies.

(c) A motion for reconsideration must:

(1) Specifically describe the extraordinary circumstances that warrant reconsideration; and

(2) Include all arguments and supporting documents.

(d) Extraordinary circumstances that may warrant granting reconsideration include, but are not limited to:

(1) Error in the Board's interpretation of material facts;

(2) Recent judicial development;

(3) Change in Departmental policy; or

(4) Evidence that was not before the Board at the time the Board's decision was issued and that demonstrates error in the decision.

(e) If the motion cites extraordinary circumstances under paragraph (d)(4) of this section, it must explain why the evidence was not provided to the Board during the course of the original appeal.

(f) The Board will not grant a motion for reconsideration that:

(1) Merely repeats arguments made in the original appeal, except in cases of demonstrable error; or

(2) Seeks relief from the legally binding consequences of a statute or regulation.

■ 11. Add §§ 4.404 through 4.407 to read as follows:

§ 4.404 Consolidation.

If the facts or legal issues in two or more appeals pending before the Board are the same or similar, the Board may consolidate the appeals, either on motion by a party or at the initiative of the Board.

§ 4.405 Extensions of time.

(a) If a document other than a notice of appeal is required to be filed or served within a definite time, a party may seek additional time by filing with the Board a motion requesting an extension of time.

(b) A motion requesting an extension must be filed no later than the day before the date the document is due, absent compelling circumstances. The motion may be filed and served by facsimile. Section 4.401(a) does not apply to a motion requesting an extension of time.

(c) Except as provided in paragraph (f) of this section, before filing a motion requesting an extension of time, the moving party must make reasonable efforts to contact each other party to determine whether the party opposes the motion. The moving party must state in its motion:

(1) Whether any party it reached opposes the motion; and

(2) What steps it took to contact any party it was unable to reach.

(d) Except as provided in paragraph (f) of this section, the party must support its motion requesting an extension of time by showing there is good cause to grant it.

(e) A Board order granting or denying a motion requesting an extension will state when the document must be filed. Except as provided in paragraph (f) of this section, if the Board does not act on a motion before the document is due, the document must be filed no later than 15 days after the original due date, unless the Board orders otherwise.

(f) A party seeking additional time to file an answer may have one automatic extension, not to exceed 30 days, of the deadline in § 4.414(a) by filing a motion for such extension under paragraphs (a) and (b) of this section.

§ 4.406 Intervention; amicus curiae.

(a) A person who wishes to intervene in an appeal must file a motion to intervene within 30 days after the person knew or should have known that the decision had been appealed to the Board.

(b) A motion to intervene must set forth the basis for the proposed intervention, including:

(1) Whether the person had a right to appeal the decision under § 4.410 or would be adversely affected if the Board reversed, vacated, set aside, or modified the decision; and

(2) How and when the person learned of the appeal.

(c) The Board may:

(1) Grant the motion to intervene;

(2) Deny the motion to intervene for good cause, e.g., where granting it would disadvantage the rights of the existing parties or unduly delay adjudication of the appeal; or

(3) Grant the motion to intervene but limit the person's participation in the appeal.

(d) A person may file a motion at any time to file a brief as an amicus curiae.

(1) The motion must state the person's interest in the appeal and how its brief will be relevant to the issues involved.

(2) The Board may grant or deny the motion in its discretion. The Board may also allow a person to file a brief as amicus curiae if it denies the person's motion to intervene.

(e) A person granted full or limited intervenor status is a party to the appeal, while an amicus curiae is not. A person granted amicus curiae status must serve its brief on the parties to the appeal.

§ 4.407 Motions.

(a) Any motion filed with the Board must provide a concise statement of the reasons supporting the motion.

(b) When a person or party files a motion, other than a motion for an extension of time under § 4.405, any party has 15 days after service of the motion to file a written response, unless a provision of this subpart or the Board by order provides otherwise.

(c) The Board will rule on any motion as expeditiously as possible.

(d) The requirements of § 4.401(d) apply to a motion.

■ 12. In § 4.410, revise paragraphs (a) introductory text and (c) introductory text to read as follows:

§ 4.410 Who may appeal.

(a) Any party to a case who is adversely affected by a decision of the Bureau or Office or an administrative law judge has the right to appeal to the Board, except:

* * * * *

(c) Where the Bureau or Office provided an opportunity for participation in its decisionmaking process, a party to the case, as set forth in paragraph (a) of this section, may raise on appeal only those issues:

* * * * *

■ 13. In § 4.411, revise paragraphs (a) and (b) and add paragraph (d) to read as follows:

§ 4.411 Appeal; how taken, mandatory time limit.

(a) A person who wishes to appeal to the Board must file a notice that the person wishes to appeal.

(1) The notice of appeal must be filed in the office of the officer who made the decision (not the Board).

(2) Except as otherwise provided by law:

(i) A person served with the decision being appealed must transmit the notice of appeal in time for it to be received in the appropriate office no later than 30 days after the date of service of the decision; and

(ii) If a decision is published in the **Federal Register**, a person not served with the decision must transmit the notice of appeal in time for it to be received in the appropriate office no later than 30 days after the date of publication.

(b) The notice of appeal must give the serial number or other identification of the case. The notice of appeal may include a statement of reasons for the appeal, and a statement of standing if required by § 4.412(b).

* * * * *

(d) After receiving a timely notice of appeal, the office of the officer who made the decision must promptly forward to the Board:

(1) The notice of appeal;

(2) Any statement of reasons, statement of standing, and other documents included with the notice of appeal; and

(3) The complete administrative record compiled during the officer's consideration of the matter leading to the decision being appealed.

■ 14. In § 4.412, revise the section heading and paragraph (a) and add paragraphs (d) and (e) to read as follows:

§ 4.412 Statement of reasons; statement of standing; reply briefs.

(a) An appellant must file a statement of reasons for appeal with the Board no later than 30 days after the notice of appeal was filed. Unless the Board orders otherwise upon motion for good cause shown, the text of a statement of reasons may not exceed 30 pages, excluding exhibits, declarations, or other attachments.

* * * * *

(d) The filing of a reply brief is discouraged. However, an appellant who wishes to file a reply brief may do so within 15 days after service of an answer under § 4.414.

(1) The reply brief is limited to the issues raised in the answer.

(2) Unless the Board orders otherwise upon motion for good cause shown, the text of a reply brief may not exceed 20 pages, excluding exhibits, declarations, or other attachments.

(e) The requirements of § 4.401(d) apply to a statement of reasons and a reply brief.

■ 15. Revise §§ 4.413 through 4.415 to read as follows:

§ 4.413 Service of notice of appeal.

(a) The appellant must serve a copy of the notice of appeal on each person named in the decision from which the appeal is taken and on the Office of the Solicitor as identified in paragraphs (c) and (d) of this section. Service must be accomplished and certified as prescribed in § 4.401(c).

(b) Failure to serve a notice of appeal will subject the appeal to summary dismissal as provided in § 4.402.

(c) The appellant must serve a copy of the notice of appeal on the Office of the Solicitor as shown in the following table.

If the appeal is taken from a decision of * * *	Then the appellant must serve the notice on * * *
(1) ONRR, the Deputy Assistant Secretary—Natural Resources Revenue, or BIA concerning royalties.	Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215.
(2) BOEMRE	Associate Solicitor, Division of Mineral Resources, U.S. Department of the Interior, Washington, DC 20240.
(3) The Director, BLM	(i) If the decision concerns use and disposition of public lands, including land selections under the Alaska Native Claims Settlement Act, as amended: Associate Solicitor, Division of Land and Water Resources, U.S. Department of the Interior, Washington, DC 20240; or (ii) If the decision concerns use and disposition of mineral resources: Associate Solicitor, Division of Mineral Resources, U.S. Department of the Interior, Washington, DC 20240.
(4) A BLM State Office (including all District, Field, and Area Offices within that State Office's jurisdiction).	The appropriate office identified in paragraph (d) of this section.
(5) An Administrative Law Judge	The persons identified in paragraph (e) of this section.

(d) This paragraph applies to any appeal taken from a decision of a BLM State Office, including all District, Field, and Area Offices within that State Office's jurisdiction. The appellant must serve documents on the Office of the Solicitor in accordance with the following table, unless the decision identifies a different official:

BLM state office	Mailing address
(1) Alaska	Regional Solicitor, Alaska Region, U.S. Department of the Interior, 4230 University Drive, Suite 300, Anchorage, AK 99508–4626.
(2) Arizona	Field Solicitor, U.S. Department of the Interior, U.S. Courthouse, Suite 404, 401 W. Washington St. SPC 44, Phoenix, AZ 85003.
(3) California	Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, 2800 Cottage Way, Room E–1712, Sacramento, CA 95825–1890.
(4) Colorado	Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215.
(5) Eastern States	(i) For decisions involving Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, or Wisconsin: Regional Solicitor, Northeast Region, U.S. Department of the Interior, One Gateway Center, Suite 612, Newton, MA 02458. (ii) For decisions involving Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, or Tennessee: Regional Solicitor, Southeast Region, U.S. Department of the Interior, 75 Spring Street, SW., Suite 304, Atlanta, Georgia 30303.
(6) Idaho	Field Solicitor, U.S. Department of the Interior, University Plaza, 960 Broadway Avenue, Suite 400, Boise, ID 83706.

BLM state office	Mailing address
(7) Montana (covers the states of Montana, North Dakota, and South Dakota).	(i) Deliveries by U.S. Mail: Field Solicitor, U.S. Department of the Interior, P.O. Box 31394, Billings, MT 59107–1394. (ii) All other deliveries: Field Solicitor, U.S. Department of the Interior, 316 North 26th Street, Room 3005, Billings, MT 59101.
(8) Nevada	Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, 2800 Cottage Way, Room E–1712, Sacramento, CA 95825–1890.
(9) New Mexico (covers the states of New Mexico, Kansas, Oklahoma, and Texas).	Regional Solicitor, Southwest Region, U.S. Department of the Interior, 505 Marquette Ave., NW., Suite 1800, Albuquerque, NM 87102.
(10) Oregon (covers the states of Oregon and Washington).	Regional Solicitor, Pacific Northwest Region, U.S. Department of the Interior, 805 SW. Broadway, Suite 600, Portland, OR 97205.
(11) Utah	Regional Solicitor, Intermountain Region, U.S. Department of the Interior, 6201 Federal Building, 125 South State Street, Salt Lake City, UT 84138–1180.
(12) Wyoming (covers the states of Wyoming and Nebraska).	Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215.

(e) This paragraph applies to any appeal taken from a decision of an administrative law judge.

(1) Except as provided in paragraph (e)(2) of this section, the appellant must serve either:

(i) The attorney from the Office of the Solicitor who represented the Bureau or Office at the hearing; or

(ii) If there was no hearing, the attorney who was served with a copy of the decision by the administrative law judge.

(2) If the decision involved a mining claim on national forest land, the appellant must serve either:

(i) The attorney from the Office of General Counsel, U.S. Department of Agriculture, who represented the U.S. Forest Service at the hearing; or

(ii) If there was no hearing, the attorney who was served with a copy of the decision by the administrative law judge.

(f) Parties must serve the Office of the Solicitor as required by this section until a particular attorney of the Office of the Solicitor files and serves a Notice of Appearance or Substitution of Counsel. Thereafter, parties must serve the Office of the Solicitor as indicated by the Notice of Appearance or Substitution of Counsel.

(g) The appellant must certify service as provided in § 4.401(c)(5).

§ 4.414 Answers.

(a) Any person served with a notice of appeal who wishes to participate in the appeal must file an answer or appropriate motion with the Board within 30 days after service of the statement of reasons for appeal. The answer must respond to the statement of reasons for appeal.

(b) Unless the Board orders otherwise upon motion for good cause shown:

(1) The text of the answer or motion may not exceed 30 pages, excluding exhibits, declarations, or other attachments; and

(2) The party may not file any further pleading.

(c) Failure to file an answer or motion will not result in a default. If an answer or motion is filed or served after the time required, the Board may disregard it in deciding the appeal, unless the delay in filing is waived as provided in § 4.401(a).

(d) The requirements of § 4.401(d) apply to an answer or motion.

§ 4.415 Motion for a hearing on an appeal involving questions of fact.

(a) Any party may file a motion that the Board refer a case to an administrative law judge for a hearing. The motion must state:

(1) What specific issues of material fact require a hearing;

(2) What evidence concerning these issues must be presented by oral testimony, or be subject to cross-examination;

(3) What witnesses need to be examined; and

(4) What documentary evidence requires explanation, if any.

(b) In response to a motion under paragraph (a) of this section or on its own initiative, the Board may order a hearing if there are:

(1) Any issues of material fact which, if proved, would alter the disposition of the appeal; or

(2) Significant factual or legal issues remaining to be decided, and the record without a hearing would be insufficient for resolving them.

(c) If the Board orders a hearing, it must:

(1) Specify the issues of fact upon which the hearing is to be held; and

(2) Request the administrative law judge to issue:

(i) Proposed findings of fact on the issues presented at the hearing;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(d) If the Board orders a hearing, it may do one or more of the following:

(1) Suspend the effectiveness of the decision under review pending a final Departmental decision on the appeal if it finds good cause to do so;

(2) Authorize the administrative law judge to specify additional issues; or

(3) Authorize the parties to agree to additional issues that are material, with the approval of the administrative law judge.

(e) The hearing will be conducted under §§ 4.430 to 4.438 and the general rules in subpart B of this part. Unless the Board orders otherwise, the administrative law judge may consider other relevant issues and evidence identified after referral of the case for a hearing.

■ 16. Revise § 4.421 to read as follows:

§ 4.421 Definitions.

In addition to the definitions in § 4.400, as used in this subpart:

Director means the Director of BLM or a BLM Deputy Director or Assistant Director.

Manager means the BLM official with direct jurisdiction over the public lands that are pertinent to the decision or contest.

Person named in the decision means any of the following persons identified in a final BLM grazing decision: An affected applicant, permittee, lessee, or agent or lienholder of record, or an interested public as defined in § 4100.0–5 of this title.

State Director means the supervising BLM officer for the State in which a particular range lies, or an authorized representative.

■ 17. In § 4.422, revise paragraphs (c) and (d) to read as follows:

§ 4.422 Documents.

* * * * *

(c) *Service of documents.* (1) A party that files any document under this subpart must serve a copy of it concurrently as follows:

(i) On the appropriate official of the Office of the Solicitor under § 4.413(c) and (d);

(ii) For a notice of appeal and statement of reasons, on each person named in the decision under appeal; and

(iii) For all other documents, on each party to the appeal.

(2) Service on a party known to be represented by counsel or other designated representative must be made on the representative.

(3) Service must be made at the last address of record of the party (if unrepresented) or the representative, unless the party or representative has notified the serving party of a subsequent change of address.

(4) Service may be made as shown in the following table:

If the document is * * *	Service may be made by * * *
(i) An appeal under § 4.470	(A) Personal delivery; (B) Registered or certified mail, return receipt requested; (C) Delivery service, delivery receipt requested, if the last address of record is not a post office box; or (D) Electronic means, such as electronic mail or facsimile, if the person to be served has previously consented to that means of service in writing.
(ii) A complaint under § 4.450–4 or 4.451–2	(A) Any of the methods specified in paragraph (c)(4)(i) of this paragraph; or (B) Publication as specified in § 4.450–5.
(iii) Neither an appeal nor a complaint	(A) Personal delivery; (B) Mail; (C) Delivery service, if the last address of record is not a post office box; or (D) Electronic means, such as electronic mail or facsimile, if the person to be served has consented to that means in writing.

(5) At the conclusion of any document that a party must serve under the regulations in this subpart, the party must sign a written statement that:

(i) Certifies that service has been or will be made in accordance with the applicable rules; and

(ii) Specifies the date and manner of service.

(6) Service that complies with paragraphs (c)(2) through (4) of this section is complete as shown in the following table:

If service is made by * * *	Service is complete when * * *
(i) Personal delivery	The document is delivered to the party.
(ii) Mail or delivery service	The document is delivered to the party.
(iii) Electronic means	The document is transmitted to the party, unless the serving party learns that it did not reach the party to be served.
(iv) Publication	The final notice is published under § 4.450–5(b)(3).

(7) In the absence of evidence to the contrary, delivery under paragraph (c)(6)(ii) of this section is deemed to take place 5 business days after the document was sent.

(d) The manager or administrative law judge, as the case may be, may extend the time for filing or serving any document in a contest, other than a notice of appeal under § 4.452–9.

§§ 4.430 through 4.432 [Amended]

■ 18. In §§ 4.430 through 4.432 and 4.436, remove the reference "Bureau" and add in its place the reference "Bureau or Office" wherever it appears.

■ 19. Revise §§ 4.433 and 4.434 to read as follows:

§ 4.433 Authority of the administrative law judge.

(a) The administrative law judge has general authority to conduct the hearing in an orderly and judicial manner, including authority to:

(1) Administer oaths;

(2) Call and question witnesses;

(3) Subpoena witnesses as specified in paragraph (b) of this section;

(4) Issue findings and decisions as specified in paragraph (c) of this section; and

(5) Take any other actions that the Board may prescribe in referring the case for hearing.

(b) The administrative law judge has authority to subpoena witnesses and to take and cause depositions to be taken for the purpose of taking testimony but not for discovery. This authority must be exercised in accordance with the Act of January 31, 1903 (32 Stat. 790; 43 U.S.C. 102 through 106).

(c) The administrative law judge has authority to issue any of the following, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411 within 30 days of receipt of the decision.

(d) The issuance of subpoenas, the attendance of witnesses, and the taking of depositions are governed by §§ 4.423 and 4.26.

§ 4.434 Conduct of hearing.

(a) The administrative law judge may seek to obtain stipulations as to material facts.

(b) Unless the administrative law judge directs otherwise:

(1) The appellant will first present its evidence on the facts at issue; and

(2) The other parties and the Bureau or Office will then present their evidence on such issues.

§ 4.436 [Amended]

■ 20. In § 4.436, remove the reference "Bureau" and add in its place the reference "Bureau or Office" wherever it appears.

■ 21. Revise § 4.437 to read as follows:

§ 4.437 Copies of transcript.

Each party must pay for any copies of the transcript that the party requests.

The Bureau or Office will file the original transcript with the case record.

§ 4.438 [Removed]

■ 22. Remove § 4.438.

§ 4.439 [Redesignated as § 4.438]

■ 23. Redesignate § 4.439 as § 4.438 and revise it to read as follows:

§ 4.438 Action by administrative law judge.

(a) Upon completion of the hearing and the incorporation of the transcript in the record, the administrative law judge will issue and serve on the parties, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law and that advises the parties of their right to file exceptions under paragraph (c) of this section; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(b) The administrative law judge will promptly send to the Board the record and:

(1) The proposed findings;

(2) The recommended decision; or

(3) The final decision if a timely notice of appeal is filed.

(c) The parties will have 30 days from service of proposed findings or a recommended decision to file exceptions with the Board.

■ 24. In § 4.452–8, revise the section heading and remove paragraph (c).

The revision reads as follows:

§ 4.452–8 Findings and conclusions; decision by administrative law judge.

* * * * *

■ 25. Revise § 4.476(d) to read as follows:

§ 4.476 Conduct of hearings; reporter's fees; transcript.

* * * * *

(d) The reporter's fees will be borne by the Government. Each party must pay for any copies of the transcript that the party requests. The Government will file the original transcript with the case record.

■ 26. Revise § 4.477 to read as follows:

§ 4.477 Findings and conclusions; decision by administrative law judge.

As promptly as possible after the time allowed for presenting proposed findings and conclusions, the administrative law judge will make findings of fact and conclusions of law, unless waiver has been stipulated, and will render a decision upon all issues of material fact and law presented on the record. In doing so, he or she may adopt the findings of fact and conclusions of law proposed by one or more of the parties if they are correct. The reasons for the findings, conclusions, and decision made will be stated, and along with the findings, conclusions, and decision, will become a part of the record in any further appeal. A copy of the decision must be sent by certified mail to all the parties.

■ 27. Revise § 4.478(a) to read as follows:

§ 4.478 Appeals to the Board of Land Appeals; judicial review.

(a) Any person who has a right of appeal under § 4.410 or other applicable regulation may appeal to the Board from an order of an administrative law judge granting or denying a petition for a stay in accordance with § 4.411.

* * * * *

■ 28. The authority citation for part 4, subpart L, continues to read as follows:

Authority: 30 U.S.C. 1256, 1260, 1261, 1264, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.

■ 29. Add § 4.1108(g) to read as follows:

§ 4.1108 Form of documents.

* * * * *

(g) Documents filed under this subpart must conform to the requirements of § 4.401(d).

■ 30. Revise § 4.1109(a)(2)(i) to read as follows:

§ 4.1109 Service.

(a) * * *

(2) * * *

(i) For mining operations in Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Texas, and Virginia: Field Solicitor, U.S. Department of the Interior, 800 S. Gay Street, Suite 800, Knoxville, Tennessee 37929; Telephone: (865) 545–4294; FAX: (865) 545–4314.

* * * * *

■ 31. Add § 4.1117 to read as follows:

§ 4.1117 Reconsideration.

A party may file a motion for reconsideration of any decision of the Board under this subpart within 60 days after the date of the decision. The provisions of § 4.403 apply to a motion filed under this paragraph.

■ 32. Revise § 4.1270(f) to read as follows:

§ 4.1270 Petition for discretionary review of a proposed civil penalty.

* * * * *

(f) If the petition is granted, the rules in §§ 4.1273 through 4.1275 are applicable, and the Board must use the point system and conversion table contained in 30 CFR part 723 or 845 in recalculating assessments. However, the Board has the same authority to waive the civil penalty formula as that granted to administrative law judges in § 4.1157(b)(1). If the petition is denied, the decision of the administrative law judge is final for the Department, subject to § 4.5.

§ 4.1276 [Removed]

■ 33. Remove § 4.1276.

■ 34. Revise § 4.1286 to read as follows:

§ 4.1286 Motion for a hearing on an appeal involving issues of fact.

(a) Any party may file a motion that the Board refer a case to an administrative law judge for a hearing. The motion must state:

(1) What specific issues of material fact require a hearing;

(2) What evidence concerning these issues must be presented by oral testimony, or be subject to cross-examination;

(3) What witnesses need to be examined; and

(4) What documentary evidence requires explanation, if any.

(b) In response to a motion under paragraph (a) of this section or on its own initiative, the Board may order a hearing if there are:

(1) Any issues of material fact which, if proved, would alter the disposition of the appeal; or

(2) Significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them.

(c) If the Board orders a hearing, it must:

(1) Specify the issues of fact upon which the hearing is to be held; and

(2) Request the administrative law judge to issue:

(i) Proposed findings of fact on the issues presented at the hearing;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(d) If the Board orders a hearing, it may do one or more of the following:

(1) Suspend the effectiveness of the decision under review pending a final Departmental decision on the appeal if it finds good cause to do so;

(2) Authorize the administrative law judge to specify additional issues; or

(3) Authorize the parties to agree to additional issues that are material, with the approval of the administrative law judge.

(e) The hearing will be conducted under §§ 4.1100, 4.1102 through 4.1115, 4.1121 through 4.1127, and 4.1130 through 4.1141. Unless the Board orders otherwise, the administrative law judge may consider other relevant issues and evidence identified after referral of the case for a hearing.

■ 35. Add § 4.1287 to read as follows:

§ 4.1287 Action by administrative law judge.

(a) Upon completion of the hearing and the incorporation of the transcript in the record, the administrative law judge will issue and serve on the parties, as specified by the Board under § 4.415(c)(2):

(1) Proposed findings of fact on the issues presented at the hearing;

(2) A recommended decision that includes findings of fact and conclusions of law and that advises the parties of their right to file exceptions under paragraph (c) of this section; or

(3) A decision that will be final for the Department unless a notice of appeal is filed in accordance with § 4.411.

(b) The administrative law judge will promptly send to the Board the record and:

(1) The proposed findings;

(2) The recommended decision; or

(3) The final decision if a timely notice of appeal is filed.

(c) The parties will have 30 days from service of the recommended decision to file exceptions with the Board.

■ 36. In § 4.1392, revise paragraphs (a) and (d) and add paragraph (e) to read as follows:

§ 4.1392 Contents of request; amendment of requests; responses.

(a) The request for review:

(1) Must include:

(i) A clear statement of the reasons for appeal;

(ii) A request for specific relief;

(iii) A copy of the decision appealed from; and

(iv) Any other relevant information; and

(2) May not exceed 30 pages, excluding exhibits, declarations, and other attachments, unless the Board orders otherwise upon motion for good cause shown.

* * * * *

(d) An interested party may file an answer, motion, or statement as described in paragraph (b) of this section in response to an amended request for review as follows:

(1) If the request for review is amended as a matter of right, the answer, motion, or statement must be filed within the longer of the following periods:

(i) The time remaining for response to the original request for review; or

(ii) Ten days after receipt of the amended request for review; and

(2) If the Board grants a motion to amend a request for review, the answer, motion, or statement must be filed within the time set by the Board in its order granting the motion.

(e) The filing of a reply is discouraged. However, a person who filed a request for review may file a reply that:

(1) Is limited to the issues raised in an answer or motion;

(2) Does not exceed 20 pages, excluding exhibits, declarations, and other attachments, unless the Board orders otherwise upon motion for good cause shown; and

(3) Is filed within:

(i) Fifteen days after service of the answer or motion under paragraph (b) or (d)(1) of this section; or

(ii) The time set by the Board in its order under paragraph (d)(2) of this section.

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

■ 37. The authority citation for part 10 is revised to read as follows:

Authority: 16 U.S.C. 470dd; 25 U.S.C. 9, 3001 *et seq.*

Subpart C—Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony in Museums and Federal Collections

§ 10.12 [Amended]

■ 38. In § 10.12:

■ a. In paragraph (j) introductory text, remove the address "4015 Wilson Boulevard, Arlington, VA 22203–1923" and add in its place the address "801 North Quincy Street, Arlington, VA 22203"; and

■ b. In paragraphs (k)(1) and (3), remove the address "4015 Wilson Boulevard, Arlington, VA 22203–1954" and add in its place the address "801 North Quincy Street, Arlington, VA 22203".

Dated: October 4, 2010.

Rhea S. Suh,

Assistant Secretary—Policy, Management and Budget.

[FR Doc. 2010–26200 Filed 10–19–10; 8:45 am]

BILLING CODE 4310–79–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0927]

RIN 1625–AA00

Safety Zones; Temporary Change of Date for Recurring Fireworks Display Within the Fifth Coast Guard District, Wrightsville Beach, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily changing the enforcement period of safety zone regulations for a recurring fireworks display within the Fifth Coast Guard District. These regulations apply to only one recurring fireworks display event that takes place at Wrightsville Beach, NC. Safety zone regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in a portion of Motts Channel and Banks Channel near Wrightsville Beach, NC, during the event.

DATES: In § 165.506, Table to § 165.506, entry (d)14 is effective from 5:30 p.m. to 8:30 p.m. on November 27, 2010. In § 165.506, Table to § 165.506, entry (d)10 is suspended effective from November 20, 2010 through November 27, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0927 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0927 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Chief Warrant Officer Joseph Edge, Prevention Department, Coast Guard Sector North Carolina, Atlantic Beach, NC; telephone 252–247–4525, e-mail *Joseph.M.Edge@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because publishing an NPRM is impracticable and contrary to public interest since immediate action is needed to minimize potential danger to the public during the event. The Coast Guard did not receive notification of the change in the date of the event in sufficient time to issue an NPRM and hold a comment period for this rulemaking. The potential dangers posed by fallout from pyrotechnic fireworks displays to vessel traffic transiting the waterway makes this safety zone necessary to provide for the safety of spectator craft and other vessels transiting the event area. For the safety concerns noted, it is in the public interest to have these regulations in effect during the event. The Coast Guard will issue broadcast notice to mariners to advise vessel operators of navigational restrictions. On scene Coast Guard and local law enforcement vessels will also provide actual notice to mariners.

Under 5 U.S.C. 553(d)(3), and for the same reasons, the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure the safety of the event participants, spectator craft and other vessels transiting the event area.

Background and Purpose

Fireworks display events are frequently held on or adjacent to navigable waters within the boundary of the Fifth Coast Guard District. For a description of the geographical area of each Coast Guard Sector—Captain of the Port Zone, please see 33 CFR 3.25.

This regulation temporarily changes the enforcement period of the safety zone for one recurring marine event, described at (d)(10) of the Table to 33 CFR 165.506, that is normally scheduled to occur each year on the fourth Monday in November.

On November 27, 2010, the North Carolina Holiday Flotilla at Wrightsville Beach, NC will sponsor the "2010 NC Holiday Flotilla boat parade and fireworks". The event will take place near Wrightsville Beach, NC on the waters of Motts Channel and Banks Channel. The regulation at 33 CFR 165.506 is enforced annually for this event. The event will consist of approximately 40 sailboats and powerboats participating in a parade in the vicinity of Wrightsville Beach, North Carolina and conclude with a fireworks display. Also, a fleet of spectator vessels is expected to gather near the event site to view the parade and fireworks. To provide for the safety of participants, spectators, and transiting vessels, the Coast Guard will temporarily restrict vessel traffic in the event area from 5:30 p.m. to 8:30 p.m. on November 27, 2010. The regulation at 33 CFR 165.506 will be enforced for the duration of the event. Vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander.

Discussion of Rule

The Coast Guard is temporarily suspending the regulations at 33 CFR 165.506 by changing the date of enforcement in the table to § 165.506. The Coast Guard is temporarily changing the enforcement period of the safety zone for this recurring event within the Fifth Coast Guard District. This regulation applies to only one marine event listed at (d)10 in the Table to § 165.506.

The Table to § 165.506, event (d)10 establishes the enforcement date for the "North Carolina Holiday Flotilla". This regulation temporarily changes the enforcement date from the fourth Monday in November to Saturday, November 27, 2010. The temporary safety zone will be enforced from 5:30 p.m. to 8:30 p.m. on November 27, 2010, and will restrict general navigation in the regulated area during the event. The North Carolina Holiday Flotilla, which is the sponsor for this event, holds this event annually; however, they have changed the date of the event for 2010 so that it is outside the scope of the existing enforcement period. Except for participants and vessels authorized by the Coast Guard Patrol Commander, no person or vessel will be allowed to enter or remain in the regulated area. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

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. Although this rule prevents traffic from transiting a portion of Motts Channel and Banks Channel during the specified event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts, local radio stations and area newspapers so mariners can adjust their plans accordingly. Additionally, this rulemaking does not change the permanent regulated areas that have been published in 33 CFR 165.506, Table to § 165.506. In some cases vessel traffic may be able to transit the regulated area when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in Motts Channel or Banks Channel where this event is being held. This regulation will not have a significant impact on a substantial number of small entities because it will be enforced only during the event that will be patrolled by the Coast Guard patrol commander. The Captain of the Port will ensure that small entities are able to operate in the areas where events are occurring when it is safe to do so. In some cases, vessels will be able to safely transit around the regulated area at various times, and, with the permission of the Patrol Commander, vessels may transit through the regulated area. Before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

§ 165.506 [Amended]

■ 2. From November 20, 2010 through November 27, 2010 in § 165.506, Table to § 165.506, suspend entry (d)10.

■ 3. From 5:30 p.m. to 8:30 p.m. on November 27, 2010, in § 165.506, Table to § 165.506, add entry (d)14 to read as follows:

Number	Date	Event	Sponsor	Location
(d) Coast Guard Sector North Carolina—COTP Zone				
*	*	*	*	* * *
14	November 27, 2010	2010 North Carolina Holiday Flotilla boat parade and fireworks.	NC Holiday Flotilla at Wrightsville Beach, NC.	All waters of Motts Channel within a 300 yard radius of the fireworks barge in approximate position latitude 34°12′29″ N, longitude 077°48′27″ W, approximately 560 yards south of Sea Path Marina, Wrightsville Beach, NC.

Dated: September 28, 2010.

Anthony Popiel,

Captain, U.S. Coast Guard, Captain of the Port North Carolina.

[FR Doc. 2010–26378 Filed 10–19–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0824]

Safety Zone, Brandon Road Lock and, Dam to Lake Michigan Including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, and Calumet-Saganashkee Channel, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a segment of the Safety Zone, Brandon Road Lock and Dam to Lake Michigan including Des Plaines River, Chicago Ship and Sanitary Canal, Chicago River, Calumet-Saganashkee Channel on all waters of the Chicago Sanitary and Ship Canal from Mile Marker 296.1 to Mile Marker 296.7 from 6 a.m. on October 4, 2010 through 6 p.m. on October 11, 2010 and from 6 a.m. on November 3, 2010 through 6 p.m. on November 5, 2010. This action is necessary to protect the waterways, waterway users and vessels from hazards associated with the U.S. Army Corps of Engineers' installation of parasitic structures which will help control the spread of aquatic nuisance species that might devastate the waters in the Chicago Sanitary and Ship Canal.

During the enforcement period, entry into, transiting, mooring, laying-up or anchoring within the enforced area of this safety zone by any person or vessel is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

DATES: The regulations in 33 CFR 165.T09–0166 will be enforced daily from 6 a.m. to 6 p.m. on October 4, 2010 to October 11, 2010 and daily from 6 a.m. to 6 p.m. on November 3, 2010 to November 5, 2010. This rule is effective with actual notice for purposes of enforcement at 6 a.m. on October 4, 2010.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail CDR Tim Cummins, Deputy Prevention Division, Ninth Coast Guard District, telephone 216–902–6045, e-mail address *Timothy.M.Cummins@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce Safety Zone, Brandon Road Lock and Dam to Lake Michigan including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, Calumet-Saganashkee Channel, Chicago, IL listed in 33 CFR 165.T09–0166(a)(2), on all waters of the Chicago Sanitary and Ship Canal from Mile Marker 296.1 to Mile Marker 296.7 daily from 6 a.m. to 6 p.m. on October 4, 2010 to October 11, 2010 and daily from 6 a.m. to 6 p.m. on November 3, 2010 to November 5, 2010.

This enforcement action is necessary because the Captain of the Port, Sector Lake Michigan has determined that the U.S. Army Corps of Engineers' installation operation poses risks to life and property. Specifically, there will be congested waterways and construction operations requiring the use of divers taking place in the vicinity of the U.S. Army Corps of Engineers' electric dispersal barrier. The combination of vessel traffic, divers, and electric current in the water makes the control of vessels through the impacted portion of the Chicago Sanitary and Ship Canal necessary to prevent injury and property loss.

In accordance with the general regulations in § 165.23 of this part, entry into, transiting, mooring, laying up, or anchoring within the enforced area of this safety zone by any person or vessel is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

This notice is issued under authority of 33 CFR 165.T09–0166 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Captain of the Port, Sector Lake Michigan, will also provide notice through other means, which may include but are not limited to Broadcast Notice to Mariners, Local Notice to Mariners, local news media, distribution in leaflet form, and on-scene oral notice. Additionally, the Captain of the Port, Sector Lake Michigan, may notify representatives from the maritime industry through telephonic and e-mail notifications.

Dated: September 24, 2010.

L. Barndt,

Captain, U.S. Coast Guard, Captain of the Port, Sector Lake Michigan.

[FR Doc. 2010–26379 Filed 10–19–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0124; FRL–9211–5]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Limiting Emissions of Volatile Organic Compounds From Consumer Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Delaware. The revision amends existing Section 2.0—Consumer Products to Delaware's Regulation 1141 (formerly SIP Regulation No. 41)—Limiting Emissions of Volatile Organic Compounds from

Consumer and Commercial Products. This action is being taken under the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on November 19, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2010–0124. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, *i.e.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19901.

FOR FURTHER INFORMATION CONTACT: Gregory Becoat, (215) 814–2036, or by e-mail at *becoat.gregory@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 18, 2010 (75 FR 34671), EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. The NPR proposed approval of the Delaware SIP revision that amends Regulation 1141/SIP Regulation No. 41— Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products. The SIP revision amends existing Section 2.0—Consumer Products by adding the sale, distribution, and manufacturing of 23 new categories of consumer products and product types to the list of products already regulated by this rule. These categories include personal hygiene and grooming, home cleaning, and cleaning of electrical and electronic equipment. EPA received no comments on the NPR to approve Delaware's SIP revision. The formal SIP revision was submitted by the State of Delaware on June 22, 2009.

II. Summary of SIP Revision

Regulation 1141 (formerly SIP Regulation No. 41), Section 2.0 establishes applicability to any person who sells, supplies, offers for sale, uses or applies, or manufactures for sale consumer products in the State of Delaware. The rule does not apply to a retailer who sells, supplies, or offers for sale in the State of Delaware a particular consumer product that does not comply with the Volatile Organic Compounds (VOC) standards, provided that retailer demonstrates that the manufacturer or distributor of that product mislead that retailer into believing that the product did comply with the VOC standards. The rule sets compliance dates for specific VOC content limits in percent VOCs by weight for consumer products and lists exemptions from the VOC content limits. The rule also contains requirements for the following consumer products: (1) Products requiring dilution, (2) ozone depleting compounds, (3) aerosols adhesives, (4) antiperspirants or deodorants, (5) charcoal lighter materials, and (6) floor wax strippers. Regulation 1141 provides alternative control plans (ACP) by allowing responsible parties the option to voluntarily enter into separate ACP agreements for the consumer products mentioned above. In addition, the rule contains the following: (1) Criteria for innovative products exemptions and requirements for waiver requests, (2) administrative requirements for labeling and reporting, and (3) test methods for demonstrating compliance. Further details of Delaware's regulation revisions can be found in a Technical Support Document prepared for the June 18, 2010 proposed rulemaking action.

III. Final Action

EPA is approving the Delaware SIP revision that amends existing Section 2.0—Consumer Products to Delaware's Regulation 1141 (formerly SIP Regulation No. 41)—Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 20, 2010. Filing a petition for reconsideration by the Administrator of this final rule pertaining to Delaware's amendment to Section 2.0—Consumer Products of Delaware's Regulation No. 1141 (formerly SIP Regulation No. 41), does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 17, 2010.

W.C. Early,

Acting Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart I—Delaware

■ 2. In § 52.420, the table in paragraph (c) is amended by revising Regulation 1141, Section 2.0 to read as follows:

§ 52.420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP

State regulation (7 DNREC 1100)	Title/subject	State effective date	EPA approval date	Additional explanation
*	*	*	*	*
1141	**Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products**			
*	*	*	*	*
Section 2.0	Specific Emission Control Requirements.	4/11/09	10/20/10 [Insert page number where the document begins].	Adds the sale, distribution, and manufacturing of 23 categories of consumer products and product types.
*	*	*	*	*

* * * * *

[FR Doc. 2010–25314 Filed 10–19–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R06–OAR–2008–0932; FRL–9214–9]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Texas; Beaumont/Port Arthur Ozone Nonattainment Area: Redesignation to Attainment for the 1997 8-Hour Ozone Standard and Determination of Attainment for the 1-Hour Ozone Standard; Clarification of EPA's Approval of the El Paso Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve a request from the State of Texas to redesignate the Beaumont/Port Arthur (BPA) Texas ozone nonattainment area to attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). EPA is making a final determination that the BPA nonattainment area has attained the 1997 8-hour ozone NAAQS, based on complete, quality-assured, and certified ambient air quality monitoring data for 2006–2008. Preliminary data available for 2009 and 2010 show that the area continues to attain the 1997 8-hour ozone NAAQS.

In finalizing its approval of the redesignation request, EPA also approves, as a revision to the BPA State Implementation Plan (SIP), a 1997 8-hour ozone maintenance plan that includes a 2021 Motor Vehicle Emissions Budget (MVEB). EPA is also approving the BPA area's 2002 base year emissions inventory as part of the BPA SIP. EPA also is approving as part of the BPA SIP, the Texas Clean-Fuel Vehicle (CFV) Program Equivalency Demonstration. EPA finds that with final approval of these revisions, the area has a fully approved SIP that meets all of the 1997 8-hour ozone requirements and 1-hour ozone anti-backsliding requirements under section 110 and Part D of the Federal Clean Air Act (CAA or Act) that are applicable for purposes of redesignation. EPA is also approving a determination that the BPA area is meeting the 1-hour ozone standard based upon three years of complete, quality-assured, and certified ambient air quality monitoring data for 2006–2008. Preliminary data available for 2009 and 2010 show that the area continues to attain the standard.

Additionally, EPA is taking final action to approve the post-1996 Rate of Progress (ROP) plan's contingency measures, the substitute control measures for the failure-to-attain contingency measures, and the removal from the Texas SIP of a 1-hour ozone failure-to-attain contingency measure, a volatile organic compound (VOC) SIP rule for marine vessel loading, as meeting the requirements of section 110(l) and part D of the Act.

EPA also is providing clarification of an earlier separate EPA rulemaking action approving the Section 110(a)(1) Maintenance Plan for the 1997 8-hour ozone standard for the El Paso 1997 8-hour attainment area.

DATES: *Effective Date:* This rule will be effective November 19, 2010.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R06–OAR–2008–0932. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information 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 Air Planning Section, Air Planning Branch, Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Ellen Belk, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–2164; fax number 214–665–7263; e-mail address *belk.ellen@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What is the background for this rule?

The background for today's actions is discussed in detail in EPA's May 17, 2010, proposal to approve Texas' redesignation request (75 FR 27514). In that proposed action, we noted that, under EPA regulations at 40 CFR part 50, the 1997 8-hour ozone standard is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations is less than or equal to 0.08 parts per million (ppm) (see 69 FR 23858, April 30, 2004, for more information). Under the CAA, EPA may redesignate a nonattainment area to attainment if sufficient complete, quality-assured data are available to determine that the area has attained the standard and if it meets the other CAA redesignation requirements in section 107(d)(3)(E).

The TCEQ, on December 16, 2008, submitted a complete request to redesignate the BPA area to attainment for the 1997 8-hour ozone standard. The redesignation request included three years of complete, quality-assured data for the period of 2005 through 2007, indicating the 8-hour NAAQS for ozone, as promulgated in 1997, had been attained for the BPA area. Complete, quality-assured monitoring data for 2006–2008 also show that the area continues to attain the 1997 8-hour ozone standard. Preliminary data available for the 2009 and 2010 ozone seasons indicate that the area continues to be in attainment.

The request also included a maintenance plan with associated MVEBs, the 2002 base year emission inventory, and the sole outstanding 1-hour ozone anti-backsliding requirement for the BPA area, the Texas CFV Program Equivalency Demonstration. The submitted MVEB for nitrogen oxides (NO_X) and VOC for the BPA area is defined in the table below:

BEAUMONT/PORT ARTHUR NO_X AND VOC MVEB

[Summer season tons per day]

Pollutant	2021
NO_X	* 7.24
VOC	4.77

* Includes an allocation of 1 tpd from the available NO_X safety margin.

The submittal met the adequacy criteria in 40 CFR 93.118(e)(4), and on April 1, 2010 (75 FR 16456), EPA published a **Federal Register** notice deeming the 2021 MVEB for Beaumont/Port Arthur, Texas adequate for transportation conformity purposes.

Apart from the redesignation request, the TCEQ also submitted and EPA proposed to approve the 1-hour ozone Post-1996 ROP Plan's contingency measures, backfill failure-to-attain contingency measures, and removal from the Texas SIP under section 110(l) of a VOC marine vessel loading contingency measure.

The May 17, 2010 proposed rule and Technical Support Document provide a detailed discussion of how Texas met the redesignation requirements and other CAA requirements.

II. What comments did we receive on the proposed rule?

EPA provided a 30-day review and comment period, which closed on June 16, 2010. EPA received 25 comment letters in response to the proposed rulemaking, each of which expressed support for approving the request from the State of Texas to redesignate the BPA ozone nonattainment area to attainment for the 1997 8-hour ozone standard. The comment letters are available for review in the docket for this rulemaking. EPA received letters expressing support for the BPA redesignation approval from the following: Texas Commission on Environmental Quality, Austin; Executive Director, Southeast Texas Regional Planning Commission (SETRPC), Beaumont; Director, Transportation and Environmental Resources, SETRPC, Beaumont; Mayor, City of Beaumont; President, Greater Beaumont Chamber of Commerce; Executive Port Director, Port of Beaumont; Mayor, City of Bridge City; Mayor, City of Port Neches; Mayor, City of West Orange; Director of Public Works, City of West Orange; Mayor, City of Lumberton; Mayor, City of Nederland; County Judge, Orange County; Jefferson County Commissioners Court; County Judge, Hardin County; Texas State Representative, District 21, Texas House of Representatives; President, Caliber Solutions, Beaumont; Entergy Texas Inc., Beaumont; Goodyear Tire & Rubber Company, Beaumont; Oiltaking Beaumont Partners, L.P.; Chairman, Southeast Texas Plant Managers Forum, Nederland; Plant Manager, Solvay Solexis, Inc., Orange; Huntsman Petrochemical LLC, Port Neches; Sabine-Neches Navigation District, Nederland; and the Greater El Paso Chamber of Commerce. EPA also received additional comments submitted by the Greater El Paso Chamber of Commerce. We received no adverse comments on the proposed rule.

Comment: The Greater El Paso Chamber of Commerce requested that EPA take immediate action to make a determination that the El Paso County one-hour nonattainment area has attained the revoked one-hour ozone National Ambient Air Quality Standard (NAAQS).

Response: This rulemaking finalizes EPA's approval of Texas's request to redesignate the BPA area to attainment for the 1997 8-hour ozone standard and for a determination that the BPA area attained the 1-hour ozone standard. The commenter's request for a rulemaking determining attainment of the 1-hour standard for El Paso is outside the scope of our proposed action. EPA notes that we have previously approved the section 110(a)(1) maintenance plan for the El Paso 1997 8-hour ozone attainment area 74 FR 2387 (January 15, 2009).

Comment: The Greater El Paso Chamber of Commerce requested that EPA take immediate action to find that the Prevention of Significant Deterioration (PSD) program requirements are immediately effective in El Paso County.

Response: As noted in the previous response to comment, EPA's rulemaking is not focused on the El Paso 1997 8-hour maintenance area, but on the redesignation of the BPA area for the 1997 8-hour ozone standard and a determination of attainment for that area for the 1-hour ozone standard. There is one respect, however, in which EPA wishes to respond in order to harmonize and assure consistency of treatment for areas with approved 1997 8-hour maintenance plans, whether they are initially designated attainment (like El Paso) or redesignated to attainment (like BPA) for that standard. EPA thus wishes to clarify a statement it previously made in approving the El Paso section 110(a)(1) maintenance plan for the 1997 8-hour standard 74 FR 2387 (January 15, 2009). In that notice, EPA stated that a separate analysis under section 110(l) would be required to transition from a nonattainment New Source Review (NSR) permitting program to a PSD permitting program. Since that time, EPA has had further opportunity to consider the applicable statutory and regulatory provisions and the decision in *South Coast Air Quality Management Dist.* v. *EPA,* 472 F.3d 882 (DC Cir. 2006). As a result, we no longer believe that the Clean Air Act requires a separate 110(l) analysis to replace 1-hour nonattainment NSR with PSD once an area has been redesignated to attainment for the 1997 8-hour standard, or has an approved 110(a)(1) maintenance plan for that standard. In sum, we believe that the approach to the nonattainment NSR/PSD transition that we are adopting here with respect to BPA should also be extended to El Paso. Thus, as long as the Texas NSR SIP is clear that the PSD SIP requirements apply to an area such as El Paso, then that is all that is required by EPA.

III. What action is EPA taking?

EPA is taking final action to approve several related actions under the Act for the BPA ozone nonattainment area, consisting of Hardin, Jefferson, and Orange counties. Consistent with the Act, EPA is taking final action to determine that the BPA area has attained the 1997 8-hour ozone NAAQS and to approve a request from the State of Texas to redesignate the BPA area to attainment of the 1997 8-hour ozone standard. This determination is based on complete, quality-assured, and certified ambient air quality monitoring data for the 2006–2008 ozone seasons that show that the 1997 8-hour ozone NAAQS has been attained in the area. Preliminary data available for 2009 and 2010 indicate that the area continues to attain the 1997 8-hour ozone NAAQS. EPA is also finalizing a determination that the BPA area is meeting the 1-hour ozone standard. This determination is based on complete, quality-assured, and certified ambient air quality monitoring data for the 2006–2008 ozone seasons, as well as preliminary data available for 2009 and 2010 that indicate the area continues to attain the 1-hour ozone NAAQS.

EPA is taking final action to approve the 2002 base year emissions inventory as meeting the 1997 8-hour ozone requirement for the BPA 8-hour ozone nonattainment area. We are approving the State's CFV program equivalency demonstration as meeting the sole outstanding antibacksliding 1-hour ozone requirement for the BPA serious 1-hour ozone nonattainment area. We are finding that the BPA area, based upon this final approval of this emissions inventory and the CFV program equivalency determination, meets all the applicable CAA requirements under section 110 and Part D for purposes of redesignation for the 1997 8-hour ozone NAAQS including all the applicable antibacksliding CAA requirements for a serious 1-hour ozone nonattainment area. Further, EPA is taking final action to approve into the SIP, as meeting section 175A and 107(d)(3)(E)(iv) of the Act, Texas' maintenance plan for the BPA area for the 1997 8-hour ozone NAAQS. The maintenance plan shows maintenance of the standard through 2021. Additionally, EPA is approving the 2021 MVEB for NO_X and VOCs shown in the table in section I above, which was submitted by Texas for the BPA area in conjunction with its redesignation request and maintenance plan.

Consequently, EPA is taking final action to approve the State's request to redesignate the area from nonattainment to attainment for the 1997 8-hour ozone NAAQS. After evaluating Texas' redesignation request, EPA has determined that with this final approval of the above-identified SIP elements and the maintenance plan, the area meets the redesignation criteria set forth in section 107(d)(3)(E) and section 175A of the Act. The final approval of this redesignation request changes the official designation in 40 CFR part 81 for the BPA area from nonattainment to attainment for the 1997 8-hour ozone standard. EPA also notes that with this final redesignation to attainment for the 1997 8-hour ozone NAAQS and this final determination of attainment for the 1-hour ozone NAAQS, the 1-hour anti-backsliding obligations to submit planning SIPs to meet the attainment demonstration and reasonably available control measures (RACM) requirements, and the ROP and contingency measures requirements, cease to apply. Finalizing the 1-hour ozone attainment determination suspends for the BPA area the foregoing obligations, and they cease to apply upon EPA's final action redesignating the BPA area to attainment for the 1997 8-hour ozone standard. In addition, after final redesignation to attainment for the 1997–8-hour ozone standard, EPA does not require the continued application of 1-hour anti-backsliding nonattainment NSR, if Texas interprets its SIP as applying PSD to BPA in these circumstances.

EPA also is taking final action to approve the Post-1996 ROP Plan's contingency measures and backfill failure-to-attain contingency measures, and the removal from the Texas SIP under section 110(l) of a VOC marine vessel loading contingency measure.

Additionally, EPA is clarifying statements made and the approach it took with respect to the 1-hour ozone nonattainment NSR/PSD transition in its approval of the El Paso 110(a)(1) maintenance plan.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by State law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the Clean Air Act for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, these actions merely do not impose additional requirements beyond those imposed by State law and the Clean Air Act. For that reason, these actions:

• Are not "significant regulatory actions" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Are not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 20, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Environmental protection, Air pollution control.

Dated: September 30, 2010.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

■ 40 CFR parts 52 and 81 are amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS—Texas

■ 2. Section 52.2270 is amended as follows:

■ a. The table in paragraph (c) entitled, "EPA Approved Regulations in the Texas SIP" is amended under Chapter 115 (Reg 5), Subchapter C, Division 1, by revising the entry for Section 115.219.

■ b. The second table in paragraph (e) entitled, "EPA-Approved Non-Regulatory Provisions and Quasi Regulatory Measures in the Texas SIP" is amended by adding eight new entries at the end.

The revision and additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
* * *	* *	*	*	*
Chapter 115 (Regt 5)—Control of Air Pollution from Volatile Organic Compounds				
* * *	* *	*	*	*
Subchapter C—Volatile Organic Compound Transfer Operations				
Division 1: Loading and Unloading of Volatile Organic Compounds				
* * *	* *	*	*	*
Section 115.219	Counties and Compliance	11/15/2006	10/20/2010 [Insert citation of publication in Federal Register].	

EPA APPROVED REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
* * * * * * *				

(e) * * *

* * * * *

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/effective date	EPA approval date	Comments
* * * * * * *				
Redesignation Request for the 1997 8-hour Ozone NAAQS (Hardin, Jefferson, and Orange Counties).	Beaumont/Port Arthur, TX	12/10/2008	10/20/2010 [Insert citation of publication in Federal Register].	
Determination of Attainment for the 1-hour Ozone NAAQS (Hardin, Jefferson, and Orange Counties).	Beaumont/Port Arthur, TX	12/10/2008	10/20/2010 [Insert citation of publication in Federal Register].	
2002 Base Year Emissions Inventory. (1997 8-hour Ozone NAAQS)	Beaumont/Port Arthur, TX	12/10/2008	10/20/2010 [Insert citation of publication in Federal Register].	
Texas Clean-Fuel Vehicle Program Equivalency Demonstration (1-hour Ozone NAAQS).	Beaumont/Port Arthur, TX	12/10/2008	10/20/2010 [Insert citation of publication in Federal Register].	
Substitute Control Measures for the SIP-Approved Failure-to-attain Contingency Measures (1-hour Ozone NAAQS).	Beaumont/Port Arthur, TX	12/10/2008	10/20/2010 [Insert citation of publication in Federal Register].	
Post 1996 Rate of Progress Plan Contingency Measures (1-hour Ozone NAAQS).	Beaumont/Port Arthur, TX	11/16/2004	10/20/2010 [Insert citation of publication in Federal Register].	
Maintenance Plan (1997 8-hour Ozone NAAQS, CAA Section 175A).	Beaumont/Port Arthur, TX	12/10/2008	10/20/2010 [Insert citation of publication in Federal Register].	
2021 Motor Vehicle Emissions Budget (1997 8-hour Ozone NAAQS).	Beaumont/Port Arthur, TX	12/10/2008	10/20/2010 [Insert citation of publication in Federal Register].	

■ 3. Section 52.2275 is amended by adding paragraph (h) to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(h) *Determination of attainment for the 1-hour ozone standard and redesignation for the 1997 8-hour ozone standard.* Effective November 19, 2010, EPA has determined that the Beaumont/Port Arthur ozone nonattainment area has attained the 1-hour ozone National Ambient Air Quality Standard (NAAQS) and has redesignated the area to attainment for the 1997 8-hour ozone standard. With this final redesignation to attainment for the 1997 8-hour ozone NAAQS and this final determination of attainment for the 1-hour ozone NAAQS, the 1-hour anti-backsliding obligations to submit planning SIPs to meet the attainment demonstration and reasonably available control measures (RACM) requirements, and the ROP and contingency measures requirements, cease to apply.

PART 81—[AMENDED]

■ 4. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 5. In § 81.344, the table entitled, "Texas-Ozone (8-Hour Standard)" is amended by: revising the entries for Beaumont/Port Arthur TX; Revising footnote 3; and adding a new footnote 4 at the end of the table.

The revisions and addition read as follows:

§ 81.344 Texas.

* * * * *

TEXAS-OZONE (8-HOUR STANDARD)

Designated area	Designation [a]		Category/ Classification	
	Date [1]	Type	Date [1]	Type
* * * * * * *				
Beaumont/Port Arthur TX:				
Hardin County	(3)	Attainment	(3)	
Jefferson County	(3)	Attainment	(3)	
Orange County	(3)	Attainment	(3)	
* * * * * * *				

[3] Effective November 19, 2010.
[4] Effective October 31, 2008.

* * * * *

[FR Doc. 2010–26261 Filed 10–19–10; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register

Vol. 75, No. 202

Wednesday, October 20, 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 983

[Doc. No. AMS–FV–10–0077; FV10–983–3 CR]

Pistachios Grown in California, Arizona, and New Mexico; Continuance Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Referendum order.

SUMMARY: This document directs that a referendum be conducted among eligible California, Arizona, and New Mexico pistachio producers to determine whether they favor continuance of the marketing order regulating the handling of pistachios grown in California, Arizona, and New Mexico.

DATES: The referendum will be conducted from November 1 through November 20, 2010. To vote in this referendum, producers must have produced pistachios in California, Arizona, or New Mexico during the period September 1, 2009, through August 31, 2010.

ADDRESSES: Copies of the marketing order may be obtained from the California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, U.S. Department of Agriculture, 2202 Monterey Street, Suite 102B, Fresno, California, 93721–3129, or the Office of the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237.

FOR FURTHER INFORMATION CONTACT: Andrea Ricci, 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: *Andrea.Ricci@ams.usda.gov* or *Kurt.Kimmel@ams.usda.gov,* respectively.

SUPPLEMENTARY INFORMATION: Pursuant to Marketing Order No. 983 (7 CFR part 983), hereinafter referred to as the "order," and the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act," it is hereby directed that a referendum be conducted to ascertain whether continuance of the order is favored by producers. The referendum shall be conducted from November 1 through November 20, 2010, among eligible California, Arizona, and New Mexico pistachio producers. Only producers that were engaged in the production of pistachios in California, Arizona, or New Mexico during the period of September 1, 2009, through August 31, 2010, may participate in the continuance referendum.

USDA has determined that continuance referenda are an effective means for determining whether producers favor the continuation of marketing order programs. USDA would consider termination of the order if less than two-thirds of the producers voting in the referendum or producers of less than two-thirds of the volume of California, Arizona, and New Mexico pistachios represented in the referendum favor continuance of their program. In evaluating the merits of continuance versus termination, USDA will consider the results of the continuance referendum and other relevant information regarding operation of the order. USDA will evaluate the order's relative benefits and disadvantages to producers, handlers, and consumers to determine whether continuing the order would tend to effectuate the declared policy of the Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the ballot materials used in the referendum herein ordered have been approved by the Office of Management and Budget (OMB), under OMB No. 0581–0215, Pistachios Grown in California, Arizona and New Mexico. It has been estimated that it will take an average of 20 minutes for each of the approximately 840 producers of California, Arizona, and New Mexico pistachios to cast a ballot. Participation is voluntary. Ballots postmarked after November 20, 2010, will not be included in the vote tabulation.

Andrea Ricci and Kurt J. Kimmel of the California Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, are hereby designated as the referendum agents of the Secretary of Agriculture to conduct this referendum. The procedure applicable to the referendum shall be the "Procedure for the Conduct of Referenda in Connection With Marketing Orders for Fruits, Vegetables, and Nuts Pursuant to the Agricultural Marketing Agreement Act of 1937, as Amended" (7 CFR 900.400–900.407).

Ballots will be mailed to all producers of record and may also be obtained from the referendum agents or from their appointees.

List of Subjects in 7 CFR Part 983

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

Authority: 7 U.S.C. 601–674.

Dated: October 14, 2010.

David R. Shipman,

Acting Administrator.

[FR Doc. 2010–26333 Filed 10–19–10; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0998; Directorate Identifier 2010–NE–29–AD]

RIN 2120–AA64

Airworthiness Directives; General Electric Company (GE) CF6–45 Series and CF6–50 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for GE CF6–45 and CF6–50 series turbofan engines. This proposed AD would require performing a fluorescent penetrant inspection (FPI) of the stage 3 low-pressure turbine (LPT) rotor at every shop visit at which the LPT module is separated from the engine. This proposed AD results from seven

reports of uncontained failures of LPT stage 3 disks and eight reports of cracked LPT stage 3 disks found during shop visit inspections. We are proposing this AD to prevent LPT rotor separation, which could result in an uncontained engine failure and damage to the airplane.

DATES: We must receive any comments on this proposed AD by December 20, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

FOR FURTHER INFORMATION CONTACT: Christopher J. Richards, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.j.richards@faa.gov;* phone: (781) 238–7133; fax: (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA–2010–0998; Directorate Identifier 2010–NE–29–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Examining the AD Docket

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

Discussion

Since July 2008, we have received seven reports of uncontained failures of LPT stage 3 rotor disks and eight reports of cracked LPT rotor stage 3 disks found during shop visit inspections. Our investigation revealed that certain part number LPT stage 3 rotor disks might fail due to circumferential cracking of the forward cone body (forward spacer arm) of the LPT stage 3 disk when exposed to core engine (N2) vibrations. On June 4, 2010, we issued AD 2010–12–10 that requires a separate set of corrective actions. Those actions, along with this proposed AD, reduce the likelihood of further uncontained engine failures. This condition, if not corrected, could result in critical life-limited rotating engine part failure, which could result in an uncontained engine failure and damage to the airplane.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require performing a fluorescent penetrant inspection at every shop visit when the LPT module is separated from the engine.

Interim Action

These actions are interim actions and we may take further rulemaking actions in the future.

Costs of Compliance

We estimate that this proposed AD would affect 387 engines installed on airplanes of U.S. registry. We also estimate that it would take about 7 work-hours per engine to perform the proposed actions, and that the average labor rate is $85 per work-hour. No parts would be required. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $230,265.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed 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. Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Under the authority delegated to me by the Administrator, the Federal

Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive:

General Electric Company: Docket No. FAA–2010–0998; Directorate Identifier 2010–NE–29–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by December 20, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to General Electric Company (GE) CF6–45A, CF6–45A2, CF6–50A, CF6–50C, CF6–50CA, CF6–50C1, CF6–50C2, CF6–50C2B, CF6–50C2D, CF6–50C2–F, CF6–50C2–R, CF6–50E, CF6–50E1, and CF6–50E2 series turbofan engines, with a low-pressure turbine (LPT) rotor stage 3 disk that has a part number (P/N) listed in Table 1 of this AD installed:

TABLE 1—LPT ROTOR STAGE 3 DISK P/NS

1473M90P01	1473M90P02	1473M90P03	1473M90P04
1479M75P01	1479M75P02	1479M75P03	1479M75P04
1479M75P05	1479M75P06	1479M75P07	1479M75P08
1479M75P09	1479M75P11	1479M75P13	1479M75P14
9061M23P06	9061M23P07	9061M23P08	9061M23P09
9061M23P10	9061M23P12	9061M23P14	9061M23P15
9061M23P16	9224M75P01		

These engines are installed on, but not limited to, Boeing 747–200B series, –200C series, and –200F series, 747–300 series airplanes; McDonnell Douglas DC–10–15, –30, and –30F, MD–10–30, KC–10A, and KDC–10 airplanes; and Airbus A300 series airplanes.

Unsafe Condition

(d) This AD results from seven reports of uncontained failures of LPT stage 3 disks and eight reports of cracked LPT stage 3 disks found during shop visit inspections. We are issuing this AD to prevent LPT rotor separation, which could result in an uncontained engine failure and damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed at each shop visit after the effective date of this AD, at which the LPT module is separated from the engine.

Cleaning the LPT Stage 3 Disk

(f) Clean the LPT stage 3 disk, using a wet-abrasive blast to eliminate residual or background fluorescence. You can find guidance on cleaning the disk in the cleaning procedure of CF6–50 Engine Manual, GEK 50481 72–57–02.

Inspecting the LPT Stage 3 Disk

(g) Perform a fluorescent penetrant inspection (FPI) of the inner diameter of the forward cone body (forward spacer arm) of the LPT stage 3 disk. You can find guidance on performing the FPI in the CF6–50 Engine Manual, GEK 50481 72–57–02.

(h) If a crack or a band of fluorescence is present, remove the disk from service.

Alternative Methods of Compliance

(i) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(j) Contact Christopher J. Richards, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.j.richards@faa.gov;* phone: (781) 238–7133; fax: (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on October 8, 2010.

Peter A. White,

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

[FR Doc. 2010–26312 Filed 10–19–10; 8:45 am]

BILLING CODE 4910–13–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4062 and 4063

RIN 1212–AB20

Liability for Termination of Single-Employer Plans; Treatment of Substantial Cessation of Operations

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule; extension of comment period.

SUMMARY: PBGC is extending to November 12, 2010, the comment period on its proposed rule to provide guidance on the applicability and enforcement of ERISA section 4062(e), which provides for reporting of and liability for certain substantial cessations of operations by employers that maintain single-employer plans.

DATES: Comments must be submitted on or before November 12, 2010.

ADDRESSES: Comments, identified by Regulation Identifier Number (RIN) 1212–AB20, may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *E-mail: reg.comments@pbgc.gov.*
- *Fax:* 202–326–4224.
- *Mail or hand delivery:* Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026.

All submissions must include the Regulation Identifier Number for this rulemaking (RIN 1212–AB20). Comments received, including personal information provided, will be posted to *http://www.pbgc.gov.* Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, or Deborah C. Murphy, Attorney, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026; 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: On August 10, 2010 (at 75 FR 48283), Pension Benefit Guaranty Corporation (PBGC) published a proposed rule that would provide guidance on the applicability and enforcement of ERISA section 4062(e), which provides for reporting of and liability for certain substantial cessations of operations by employers that maintain single-employer plans. PBGC is extending the comment period until November 12, 2010, in order to give the public additional time to review and comment on the proposed rule.

Issued in Washington, DC, this 15th day of October 2010.

Vincent K. Snowbarger,

Deputy Director for Operations, Pension Benefit Guaranty Corporation.

[FR Doc. 2010–26371 Filed 10–19–10; 8:45 am]

BILLING CODE 7709–01–P

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9903

Cost Accounting Standards: Elimination of the Exemption From Cost Accounting Standards for Contracts Executed and Performed Entirely Outside the United States, Its Territories, and Possessions

AGENCY: Office of Management and Budget (OMB), Office of Federal Procurement Policy, Cost Accounting Standards Board.

ACTION: Notice of proposed rule.

SUMMARY: The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board (Board), invites public comments concerning a Notice of Proposed Rule (NPR) to eliminate an exemption from the Cost Accounting Standards for contracts executed and performed entirely outside the United States, its territories, and possessions.

DATES: Comments must be in writing and must be received by December 20, 2010.

ADDRESSES: All comments to this NPR must be in writing. Electronic comments may be submitted in any one of three ways:

1. *Federal eRulemaking Portal:* Comments may be directly sent via *http://www.regulations.gov*—a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type "(b)(14) Overseas Exemption NPR" (without quotation marks) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments;

2. *E-mail:* Comments may be included in an e-mail message sent to *casb2@omb.eop.gov.* The comments may be submitted in the text of the e-mail message or as an attachment;

3. *Facsimile:* Comments may also be submitted via facsimile to (202) 395–5105; or

4. *Mail:* If you choose to submit your responses via regular mail, please mail them to: Office of Federal Procurement Policy, 725 17th Street, NW., Room 9013, Washington, DC 20503, ATTN: Raymond J.M. Wong. Due to delays caused by the screening and processing of mail, respondents are strongly encouraged to submit responses electronically.

Be sure to include your name, title, organization, postal address, telephone number, and e-mail address in the text of your public comment and reference "(b)(14) Overseas Exemption NPR" in the subject line irrespective of how you submit your comments. Comments received by the date specified above will be included as part of the official record. Comments delayed due to use of regular mail may not be considered.

Please note that all public comments received will be available in their entirety at *http://www.whitehouse.gov/omb/casb_index_public_comments/* and *http://www.regulations.gov* after the close of the comment period. Do not include any information whose disclosure you would object to.

FOR FURTHER INFORMATION CONTACT: Raymond J.M. Wong, Director, Cost Accounting Standards Board (telephone: 202–395–6805; e-mail: *Raymond_wong@omb.eop.gov*).

SUPPLEMENTARY INFORMATION

A. Regulatory Process

Rules, Regulations and Standards issued by the Cost Accounting Standards Board (Board) are codified at 48 CFR Chapter 99. The Office of Federal Procurement Policy (OFPP) Act, at 41 U.S.C. 422(g), requires that the Board, prior to the establishment of any new or revised Cost Accounting Standard (CAS or Standard), complete a prescribed rulemaking process. The process generally consists of the following four steps:

1. Consult with interested persons concerning the advantages, disadvantages and improvements anticipated in the pricing and administration of Government contracts as a result of the adoption of a proposed Standard.

2. Promulgate an Advance Notice of Proposed Rulemaking (ANPRM).

3. Promulgate a Notice of Proposed Rulemaking (NPRM).

4. Promulgate a Final Rule.

The Board notes that the (b)(14) overseas exemption from CAS at 48 CFR 9903.201–1(b)(14) is not subject to the four-step process required by 41 U.S.C. 422(g)(1) because it is not a Cost Accounting Standard. The Board elects to follow those requirements in the OFPP Act, at 41 U.S.C. 422(g)(1), to consult with interested persons concerning the advantages, disadvantages, and improvements anticipated in the pricing and administration of Government contracts as a result of the adoption of any new or revised rule, prior to its promulgation.

B. Background and Summary

The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards Board (Board), is today releasing a Notice of Proposed Rule (NPR) on a proposal to eliminate the exemption from the Cost Accounting Standards (CAS) for contracts executed and performed entirely outside the United States, its territories, and possessions as codified at 48 CFR 9903.201–1(b)(14), the "(b)(14) overseas exemption." The purpose of this NPR is to obtain input on whether the (b)(14) overseas exemption at 48 CFR 9903.201–1(b)(14) should be retained, eliminated, or revised.

Statutory Requirement

Section 823(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA FY 2009) requires the Board to: "(1) Review the inapplicability of the cost accounting standards, in accordance with existing exemptions, to any contract and subcontract that is executed and performed outside the United States when such a contract or subcontract is performed by a contractor that, but for the fact that the contract or subcontract is being executed and performed entirely outside the United Sates, would be required to comply with such standards; and (2) determine whether the application of the standards to such a contract and subcontract (or any category of such contracts and subcontracts) would benefit the Government." A report must be provided to the appropriate committees of Congress containing: (1) Any revision to the cost accounting standards proposed as a result of the review required by section 823(a) and a copy of any proposed rulemaking implementing the revision; or (2) if no revision and rulemaking are proposed, a detailed justification for such decision.

History of the (b)(14) Overseas Exemption at 48 CFR 9903.201–1(b)(14)

The subject of this NPR is the (b)(14) overseas exemption at 48 CFR 9903.201–1(b)(14) which exempts from CAS "contracts and subcontracts to be executed and performed entirely outside the United States, its territories, and possessions." This exemption was first promulgated in 1973. The Armed Services Procurement Regulation (ASPR), a predecessor regulation to the Federal Acquisition Regulation (FAR), provided that the CAS clause in ASPR 7–104.83 shall not be inserted in "contracts which are executed and performed in their entirety outside the United States, its territories and possessions [(the (b)(14) overseas exemption)]." See ASPR 3–1204, as amended by Defense Procurement Circular No. 115 (dated September 24, 1973). The basis for the (b)(14) overseas exemption is connected to the scope of the law that originally created the Board.

The original Board was established by Section 2168 of the Defense Production Act (DPA). Section 2163, Territorial application of Act, of the DPA provided that sections 2061 through 2171 (which included the authority for the Board) "shall be applicable to the United States, its Territories and possessions, and the District of Columbia." The (b)(14) overseas exemption reflects this same limitation of applicability on contracts executed and performed overseas. In 1980, the Board ceased to exist under the DPA. Congress reestablished the Board in 1988 under section 22 of the OFPP Act, 41 U.S.C. 422. Unlike the DPA, the OFPP Act is not limited in applicability to the United States. Additional historical background is provided at 70 FR 53977 (September 13, 2005).

In 1991, the re-established Board reviewed the rules and regulations applicable to the administration of CAS. FAR 30.201–1(14), the exemption from CAS for contracts and subcontracts executed and performed entirely outside the United States, its territories and possessions, was part of that review. The Board retained the exemption and incorporated it into its current re-codified rules and regulations at 48 CFR 9903.201–1(b)(14), the "(b)(14) overseas exemption," on April 17, 1992 (57 FR 14148.) No specific explanation was provided for retaining the exemption.

On September 13, 2005, the Board published a Staff Discussion Paper (SDP) discussing the (b)(14) overseas exemption and sought comments on its continued appropriateness (70 FR 53977). The three public comments received in response to the SDP offered arguments for retaining the exemption; none of the comments supported any revision to, or an elimination of, the (b)(14) overseas exemption. After reviewing and discussing the public comments, the Board decided to retain the exemption. (73 FR 8259, February 13, 2008.) While the Board did not agree with all of the views expressed, it did agree with the conclusion not to delete or revise the (b)(14) overseas exemption.

Conclusions

After considering the comments from the public and Government agencies (discussed in section C. Public Comments to the Notice of Request for Information), the Board has proposed to eliminate the (b)(14) overseas exemption at 48 CFR 9903.201–1(b)(14) for the following reasons:

(1) The statutory basis that was used to justify the (b)(14) overseas exemption when it was first promulgated no longer exists. The (b)(14) overseas exemption was initially established because the Defense Production Act (DPA), the statute that originally created the Board, was limited in applicability to the United States, its territories and possessions, and the District of Columbia. Unlike the DPA, the current statute from which the Board derives its authority, the OFPP Act, does not restrict the applicability of CAS to the United States.

(2) There is no accounting basis for the (b)(14) overseas exemption. The place of contract execution and performance—the trigger for the (b)(14) overseas exemption—is not germane to the fundamental principles and methods used to account for the costs of contract performance. The exemption does not help to achieve consistency and uniformity in the cost accounting practices used by Government contractors in the measurement, assignment and allocation of costs to Government contracts, the primary objective of the CAS.

(3) Based on the data submitted in response to its request for information, the Board projects the volume of affected contractors and subcontractors to be relatively small. Some respondents expressed concern that elimination of the (b)(14) overseas exemption could negatively affect contracting, such as through deceased competition, increased prices, difficulty of enforcement overseas, and potential retaliation by foreign governments, but did not offer evidence to support these assertions. The Board has concluded that these concerns are too speculative to address. Additionally, the Board has concluded that some of the same principles, that would be applicable due to the imposition of CAS because of the elimination of the (b)(14) overseas exemption, are already applicable under the cost principles found in Part 31 of the Federal Acquisition Regulation.

C. Public Comments to the Notice of Request for Information

On April 23, 2009, as required by section 823(b) of the NDAA FY 2009, the Board published a Notice of Request for Information (74 FR 18491). It solicited public comments and information with respect to the Board's review of whether the (b)(14) overseas exemption at 48 CFR 9903.201–1(b)(14) should be retained, eliminated, or revised. The Notice posed a series of questions, the purpose of which was to elicit information and comments for the Board's consideration. The Board also solicited comments directly from three Federal Government organizations with a significant volume of contracts performed outside the United States—the Department of Defense (DOD), the Department of State (DOS), and the United States Agency for International Development (USAID). The Board received seven public comments as well as comments from these three Government organizations. The comments, which were considered by the Board in its deliberations, provide a variety of views. The full text of the public comments to the Notice of Request for Information is available at: *http://www.whitehouse.gov/omb/casb_index_public_comments/* and *http://www.regulations.gov.* They are summarized and addressed in this section, grouped by the questions posed by the Board in its Notice of Request for Information, and by common themes when the comments were not responsive to the questions posed.

1. What is your experience with the [(b)(14)] overseas exemption?

a. As a procuring entity (*e.g.,* procurement office, higher tier contractor) awarding contracts/subcontracts; or

b. As the contractor/subcontractor claiming the applicability of the [(b)(14)] overseas exemption?

Comments: Some of the responses from Federal agencies reflected their experiences with the (b)(14) overseas exemption. DOS indicated that there are few major contracts both executed and performed overseas that are subject to CAS. USAID had only two recent actions involving the (b)(14) overseas exemption. DOD reported very little activity with the (b)(14) overseas exemption at the prime contractor level, and that much of the activity is at the subcontractor level where the data is not readily available. See the Board's responses to question 2 for additional details.

Individual contractors did not respond to the Notice of Request for Information, and comments from other respondents, including trade and industry associations, did not address this question directly. A public interest group respondent took issue with the narrow set of questions posed by the Board as it felt the questions were posed to contractors and contracting officers that were unlikely to support increased CAS coverage. It noted that the questions appeared to be aimed solely at contractors and contracting offices of the Federal government. A consulting firm noted that, for foreign companies and foreign owned subsidiaries of U.S. companies, the (b)(14) overseas exemption appears to be useful; the firm stated that the (b)(14) overseas exemption made it easier to obtain bids from companies willing to bid on US Government subcontracts, but acknowledged that, in absence of the applicability of CAS, the cost measurement and allocation rules under FAR Part 31 would apply.

Responses: The Board notes that this question was directed to procuring entities (*i.e.,* Government, contractor and subcontractor) and affected contractors and subcontractors because the Board was seeking information on how the (b)(14) overseas exemption directly and specifically impacted the affected entities. While some questions were addressed to entities directly affected by the (b)(14) overseas exemption, the public was not precluded from providing comments on the substance of those questions. Other questions were not so narrowly targeted. The Board takes note of the Government's experiences with the (b)(14) overseas exemption. The Board agrees that, in the absence of the applicability of CAS, FAR Part 31, including its cost measurement, assignment, and allocation rules, would still apply. The Board sees no benefit to a CAS exemption when FAR Part 31 applies. The Board does not agree that the CAS (b)(14) overseas exemption relieves the "burden" on foreign companies from complying with the CAS rules on the measurement, assignment, and allocation of cost to Federal contracts, since the cost measurement, assignment, and allocations rules in FAR Part 31 would generally apply in the absence of CAS.

2. How often (number of actions, dollar amounts, by fiscal year) has the [(b)(14)] overseas exemption been claimed?

Comments: DOS did not provide the number of actions or dollars of obligations subject to the (b)(14) overseas exemption, but stated that eliminating the exemption would have minimal impact on State, as DOS had few major contracts that are both executed and performed overseas that are subject to CAS. USAID indicated only two recent actions: $23.5 million and $1.4 billion for 2006 and 2007, respectively. (The $1.4 billion is 34% of FY 2007 obligations for USAID.) DOD reported very little activity with the (b)(14) overseas exemption at the prime contractor level. The Navy reported that no (b)(14) overseas exemptions have been granted. The Air Force (AF) reported seventeen (b)(14) overseas exemptions with prime contractors in the past three years representing only a small percentage of its obligations. The AF expects the number of (b)(14) overseas exemptions to increase in the future because of its contingency contracting efforts, but cannot predict the amount as a percentage of total obligations, which may remain very small. DOD reported that the Army appeared to have the largest number and dollar volume of contracts claiming the (b)(14) overseas exemption, but did not compile any data. DOD's preliminary finding is that most of the activity with the (b)(14) overseas exemptions is at the subcontractor level where data is not readily available. DOD reported that its contract administrator, the Defense Contract Management Agency (DCMA), is not staffed currently to administer CAS overseas. DOD stated that the Military Services were compiling data and would forward the data on specific experiences and the number of exemptions granted based on the (b)(14) overseas exemption. During the preparation of the NPR, the Board staff contacted DOD on the status of the additional information. DOD responded that it had no additional information to provide and could not develop the information to support the use of the (b)(14) overseas exemption.

Responses: Based on the comments with usage data received from the three Federal Government agencies with the highest volume of contracts in foreign countries, it appears that the (b)(14) overseas exemption has been rarely used at the prime contractor level. No respondents provided usage data at the subcontractor level. Consequently, eliminating the (b)(14) overseas exemption based on available data would not appear to be detrimental to the performance of Government contracts.

3. If the [(b)(14)] overseas exemption is eliminated, what problems will that cause you?

a. As a procuring entity (*e.g.,* procurement office, higher tier contractor) awarding contracts/subcontracts?

Comments: Responses were mixed. Both DOS and USAID indicated that the elimination of the (b)(14) overseas exemption would have minimal to no impact on their operations. By contrast, DOD anticipates that some host governments may object to the imposition of CAS on the accounting practices of foreign concerns as an infringement of their sovereignty. There is also concern that some foreign entities may elect not to perform work for the U.S. Government, causing a reduction in the number of entities willing to perform work overseas for an unknown period of time. DOD anticipates an increase in the requests for CAS waivers from entities that are now using the (b)(14) overseas exemption, which could slow the contract award process. There may also be an increase in proposed prices from entities previously exempted by the (b)(14) overseas exemption for the costs associated with changing accounting systems, and to account for the additional risks due to the potential cost impacts for CAS non-compliances. The Defense Contract Audit Agency (DCAA) believes that the elimination of the (b)(14) overseas exemption will have little or no impact on U.S. firms. It believes that those firms most affected by the elimination of the (b)(14) overseas exemption will be foreign concerns that are subcontractors to U.S. prime contractors. DCAA commented that the cost of administering CAS requirements to certain foreign subcontractors that are currently CAS exempt under the (b)(14) overseas exemption might outweigh the benefit to be derived from making CAS applicable to them.

Two industry association respondents echoed the comments made by DOD. One industry group respondent noted that the Government benefits from sales to foreign governments, many of which require some form of foreign company participation. "Currently, foreign companies are covered by the [(b)(14) overseas] exemption in CAS for contracts executed and performed entirely outside the U.S. Were the [(b)(14) overseas] exemption eliminated, the opportunities provided through these industrial participation programs would be significantly reduced, which would reduce beneficial foreign military sales." The situation would be the same, even if industrial participation programs were not involved, where the U.S. Government and local foreign government share common foreign vendors. The respondent noted that "[g]iven the global economy, the effects of international reciprocity should be considered in avoiding unintended consequences. If the U.S. applies CAS to foreign contractors, other countries may extend their rules to U.S. contractors, effectively eliminating U.S. contractors from competing globally for foreign military sales." Another industry group respondent predicts reduced competition by foreign concerns if CAS is extended to foreign contractors; the imposition of CAS would discourage foreign participation as contractors and subcontractors, especially where the industrial base is commercial. This industry group respondent believes that USAID would be adversely impacted by the elimination of the (b)(14) overseas exemption. Local foreign vendors may elect to cease doing business with the U.S. Government rather than incur the costs of complying with CAS. This industry group respondent notes the increased administrative burden and costs of compliance for both the Government and the contracting community resulting in longer procurement lead times. The lack of local foreign vendors would be especially critical in remote locations and war zones. Generally, a foreign trade association respondent, which represents several British trade groups, made similar comments.

Responses: The three Federal government organizations with the largest dollar volume of contracts performed outside the U.S. did not provide data demonstrating that eliminating the (b)(14) overseas exemption would be detrimental to their contracting. The Board does not agree with comments about the acquisition of commercial items from foreign companies, as acquisitions of commercial items are generally exempt under 48 CFR 9903.201–1(b)(6). The Board notes that while one respondent believes that USAID would be adversely affected by the elimination of the (b)(14) overseas exemption, USAID itself does not believe the elimination of the exemption would be problematic.

Many of the comments and concerns appear to reflect the mistaken impression that the elimination of the (b)(14) overseas exemption would impose full CAS upon foreign concerns. That may not be true in light of the availability of another CAS exemption, at 48 CFR 9903.201–1(b)(4), which has two distinct parts: The (b)(4) foreign government exemption and the (b)(4) foreign concern exemption. The (b)(4) foreign government exemption provides for a complete exemption to CAS for "contracts and subcontracts with foreign governments or their agents or instrumentalities," while the (b)(4) foreign concern exemption provides an exemption to CAS, other than CAS 401 and 402, for any "any contract or subcontract awarded to a foreign concern." Even if no other CAS exemptions were applicable, many of the contracts with foreign concerns would continue to be subject to the cost principles in FAR Part 31 with its measurement, assignment, and allocation rules, as the FAR does not have an exemption or deviation for foreign concerns.

b. As the contractor/subcontractor claiming the applicability of the [(b)(14)] overseas exemption?

Comments: Three industry group respondents, including a foreign trade association respondent, expressed concerns that the ability to utilize foreign subcontractors would be curtailed. They stated that many foreign concerns will not be able to comply with CAS because of a lack of resources, the lack of knowledgeable personnel, as well as the costs of implementation. Another respondent stated that U.S. firms would be at a competitive disadvantage with foreign firms exempted from all CAS, other than CAS 401 and 402, if the foreign concern qualifies for the (b)(4) foreign concern exemption at 48 CFR 9903.201–1(b)(4).

Responses: See the Board's responses in question 3.a. The Board does not believe that U.S. concerns will necessarily be at a competitive disadvantage with foreign concerns exempted from all CAS, other than CAS 401 and 402, especially since most, if not all, of the contracts and subcontracts would continue to be subject to the cost principles in FAR Part 31, including its cost measurement, assignment, and allocation rules. The principles of consistency articulated by CAS 401 and 402 are incorporated into FAR Part 31.

The Board acknowledges that the (b)(4) foreign concern exemption, unlike the (b)(14) overseas exemption, is not an exemption from all of the Standards in CAS. Concerns which qualify for the (b)(4) foreign concern exemption are subject to CAS 401 and 402. Thus, they may be required to file a CAS disclosure statement. As the (b)(14) overseas exemption exempts all of CAS, there is not a requirement to file a CAS disclosure statement for entities covered by the exemption. There will be costs associated with filing and administering disclosure statements for foreign concerns claiming the (b)(4) foreign concern exemption for the various affected parties, including the Government, contractor and subcontractor, as applicable. The costs for the contractor or subcontractor filing the disclosure statement should be minimal as the disclosure statement merely documents and reports the existing established cost accounting practices and procedures of the filing entity.

4. How does the [(b)14)] overseas exemption help, or not help, to implement the Board's mandate "to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States?"

Comments: DCAA voiced a comment echoed by several Government respondents. "The primary objective of the Cost Accounting Standards is to achieve increased consistency and uniformity in the cost accounting practices used by Government contractors. Exempting contracts from the CAS solely based on the fact that they are executed and performed outside the United States does not achieve that primary objective." USAID is concerned that the (b)(14) overseas exemption provides a mechanism for contractors to circumvent the consistency principle of accounting. It opined that "whether the contract is CAS covered or not the contractors' established practices should result in an equitable assignment, measurement, and allocation of costs on all cost objectives regardless of the place of performance. * * * that contracts, regardless of the place of performance, receive its equitable share of direct and indirect costs." The DOD Inspector General (DODIG) noted that "[c]ontractors * * * may use the [(b)(14)] overseas exemption to hide potential fraudulent activities."

DOD observed that "[t]he more firms covered by the CASB rules, the more uniform and consistent the costs applied to US Government contracts will be." At the same time, DOD noted that all CAS exemptions are based on a cost benefits analysis of the costs of implementation versus the benefits of the consistent cost treatment. "As a class, there may be a good case to continue to exempt foreign firms performing overseas due to the administrative costs to both the U.S. Government and the contractor [/subcontractor] to enforce the rules, problems with host governments, and contractors[/subcontractors] who may choose not to bid on U.S. Government work."

In a contrary viewpoint, one non-government respondent stated that "[a]pplying full CAS to overseas contracts would not necessarily enhance measurement, assignment or allocation of costs to federal government contracts. This is because only U.S. firms would be subject to full CAS. Being less competitive may mean that foreign organization would get the work and would only have to comply with CAS 401 and 402. Applying CAS 401 and 402 may enhance the consistency in the assignment and allocation of costs to contracts. * * * CAS is also not a substitute for sound financial accounting practices and internal controls. Consistency will be better served by all companies adopting the financial reporting standards." A foreign trade association respondent offered that the FAR requires compliance with comparable standards. "[I]n many instances the organization will be covered by International Accounting Standards, which in recent years has seen a significant increase in scale and coverage."

Finally, one industry group respondent offered that with some contracts (those that are transitory, *e.g.,* DOD contingency operations, or cooperative, *e.g.,* coproduction) the expressed objectives of CAS are irrelevant "because CAS cannot be reasonable expected to yield the intended benefits."

Responses: The Board agrees that the (b)(14) overseas exemption does not help to implement consistency and uniformity in the cost accounting standards governing the measurement, assignment, and allocation of costs to contracts with the United States. The Board agrees that applying CAS 401 and 402 to foreign entities may enhance consistency and will enhance transparency with the filing of the required disclosure statements.

The Board does not agree that complying only with CAS 401 and 402 necessarily gives foreign based entities a competitive advantage over U.S. based entities which must comply with full CAS, as discussed in the Board's responses to questions 3.a. and 3.b..

5. What are the arguments for, and against, the requirement in the [(b)(14)] overseas exemption to require execution of the contract overseas?

Comments: One industry group resondent noted that the distinguishing feature of the (b)(14) overseas exemption is the phrase "executed and performed exclusively outside the United States. * * * [W]hen the U.S. Government extends itself beyond its sovereign borders and executes contracts to be performed *outside* the U.S., prospective foreign concern contractors should not be expected to adopt U.S. Government cost accounting rules where future utility and benefit cannot be reasonable foreseen beyond the immediate contract."

DOD expressed the general consensus of the respondents that in an environment of global operations, electronic commerce, and contractor mobility, the place of execution of the contract has little to do with contract operation. A public interest group respondent noted "that the term 'executed' no longer has much meaning in the context of electronic commerce and other modern forms of communication. Gone are the days when a contract was physically executed by parties and the location of the parties at the time of 'execution' was easily defined. Today, contracts are executed by parties who are often remote from one another and even in different countries or continents at the time of 'execution.' " A foreign trade association respondent agreed with those sentiments stating that the "[e]xecution of the contract overseas does not seem to be material to the contractual obligations and the application of the exemption. The nature of a contract does not change merely because it is executed overseas." USAID observed that "in some instances, the contractors' expend funds to transport [their] representatives outside of the United States to execute (sign) the contracts in order to adhere to this requirement." DCAA opined "that from the pure accounting perspective, the place of contract execution and performance should not have any bearing on the fundamental principles and methods used to account for costs of contract performance."

A public interest group respondent questioned "why should a contract that is executed and performed entirely overseas involving the U.S. Government and a U.S. company or subsidiary thereof enjoy an exemption from CAS coverage?" However, a consulting firm respondent noted that "[t]he execution of the contracts for a U.S. firms for work overseas is often done in the U.S. and therefore it is not eligible for the [(b)(14)] overseas exemption. The [place of] execution of the contract should not be sufficient enough to prevent the [(b)(14)] overseas exemption from being claimed. This places many U.S. firms at a disadvantage in competing with foreign firms for U.S. government projects."

DOD observed that a better indicator of the need for the (b)(14) overseas exemption is the location of the company headquarters and/or the location of the normal accounting operations.

Responses: The Board agrees with the sentiments expressed by the majority of respondents, that the requirement for execution overseas has no bearing in the context of contract cost accounting, and consequently, believes that the (b)(14) overseas exemption should be eliminated. In a global economy with electronic commerce, the adherence to the place of execution of a contract has little relevance to the underlying contractual obligations. The Board agrees that it makes little sense for an entity subject to U.S. jurisdiction to be exempted from CAS merely because its contract is executed overseas. Fundamentally, the requirement has very little to do with contract performance.

6. What are the arguments for, and against, the requirement in the [(b)(14)] overseas exemption to require performance of the contract overseas?

Comments: A foreign trade association respondent observed that there is no argument to support the requirement for performance overseas in the (b)(14) overseas exemption. DCAA would agree with that sentiment from the pure accounting perspective. "[T]he place of contract execution and performance should not have any bearing on the fundamental principles and methods used to account for costs of contract performance."

To the contrary, a consulting firm respondent observed that the "exemption for work overseas makes logical sense to promote competition and to allow U.S. companies to compete for such work." The respondent argued that U.S. entities working overseas must comply with the laws and regulations of the country of contract performance. To comply with CAS also would increase the costs of contract performance overseas for U.S. entities and limit competition.

USAID opined that the (b)(14) overseas exemption "should continue to require that contracts and subcontracts be performed entirely overseas." A foreign trade association respondent further opined that "[t]he current wording of 'performed entirely outside' is problematic and too restrictive," and should be changed to "substantially performed outside." USAID agreed with the assessment that the wording is problematic. However, it viewed the problem not as restrictive, but as lacking in clarity, stating that "[t]he language in this exemption should clearly state that 'performance' includes both direct and indirect costs up to and including General and Administrative expenses when incurred within the United States, its territories, and its possessions * * * [because] the Executive Management that oversees the performance or the company is located in the U.S. along with support functions and backstop positions." DOD agreed with USAID's assessment. DCAA offered "that the current [(b)(14)] overseas exemption at 48 CFR 9903.201–1(b)(14) would not exempt the vast majority of U.S. firms from the CAS due to the fact that some costs would be incurred within the United States, thereby failing to meet the [(b)(14) overseas] exemption criterion."

DOD went further, stating that the performance overseas is not as important as other factors such as the ownership and control of the company, and whether the contractor's accounting activities already encompassed CAS covered work performed elsewhere.

Responses: The Board agrees that the place of performance has no bearing on the fundamental principles and methods used to account for the costs of contract performance. The adherence to the principles and standards of financial and managerial accounting applied consistently is the foundation for financial reporting and managerial decisions.

The Board believes that there is competition overseas. The Board does not believe that the imposition of full CAS, or the exemption from it, is necessarily a major factor in a U.S. based entity's decision to do business overseas with the U.S. Government. It is only one factor among many in the decision to do business outside of the U.S. Smaller entities are already exempted from CAS under 48 CFR 9903–201–1(b)(3). Full CAS is only initially imposed either upon the award of a CAS-covered contract of at least $50 million, or upon the award of a CAS-covered contract if a contractor has received $50 million or more in net CAS-covered contracts during its preceding cost accounting period. Modified CAS may be imposed on a covered contract of less than $50 million awarded to a contractor that received less than $50 million in net CAS-covered awards in the immediately preceding cost accounting period.

7. Other Comments

The following additional comments were offered in response to the Notice of Request for Information:

a. Fraud, Waste and Abuse

Comment: One industry group respondent observed that "CAS compliance does not prevent wasteful practices, bribery, or fraudulent activities." Other respondents agreed with those sentiments.

Response: The Board agrees that CAS compliance, by itself, does not prevent wasteful practices or fraudulent activities. However, CAS provides a framework for the measurement, assignment, and allocation of costs to government contracts in a systematically structured and consistent manner, which promotes uniformity and consistency in estimating, accumulating, and reporting costs in connection with the pricing and administration of Government contracts.

b. Prime Contractors' Responsibility Related to CAS 401 and 402 for Foreign Subcontractors

Comment: DCAA commented that the prime contractor will need to give greater attention to foreign concerns that are performing as subcontractors to U.S. contractors and will no longer be covered by the (b)(14) overseas exemption. DCAA observed that if the (b)(14) overseas exemption is eliminated, the foreign subcontractors would be subject to the (b)(4) foreign concern exemption and must comply with CAS 401 and 402. DCAA noted "that these foreign subcontractors' accounting practices are not always adequately defined and that the prime contractor's oversight responsibility for ensuring its foreign subcontractors' CAS compliance is not clearly understood and properly executed." DCAA recommended that the prime contractor be required to evaluate the CAS compliance of its subcontractor, and to submit the CAS evaluation report on the subcontractor to its Contracting Officer (CO). DCAA also recommended that the Government be provided the right to examine the subcontractor's records for CAS compliance when the prime contractor does not submit the CAS evaluation report on a subcontractor's compliance with CAS to the CO. To mitigate these concerns, DCAA recommends that the Board strengthen the CAS contract clause to "* * * clearly require the prime contractor to enforce CAS compliance by its foreign subcontractor."

Response: The Board does not see a need to amend the CAS contract clauses because the Board believes it is already clear that the prime contractor is responsible for assessing the CAS compliance of its subcontractors. However, the Board is inviting comments on the issue. (*See* **F. Public Comments to the Notice of Proposed Rulemaking,** herein.)

The FAR contract provisions and the CAS clauses already state that the prime contractor and higher tier subcontractor are responsible for their subcontractors. The CAS clauses at 48 CFR 9903.201–4 require the CAS-covered contractor and higher tier subcontractor (who shall be required to do so by the contractor) to insert the appropriate CAS clauses into all their negotiated subcontracts unless they are exempted. 48 CFR 9903.202–8(a) states the contractor or higher tier subcontractor is responsible for administering the CAS requirements in their subcontracts. These requirements are applicable whether the contracts and subcontracts are performed in the U.S. or overseas.

c. [(b)(14) Overseas Exemption Inconsistent With the Application of FAR Part 31

Comment: A public interest group respondent argues that there must be some type of accounting system in foreign entities to ensure that billings under cost based contracts are reasonable, allowable and allocable. "If the argument is that CAS cannot be used for this purpose because foreign contractors and subcontractors will not have adequate systems in place, then how is it that these firms are eligible to receive cost-type contracts? * * * [C]ontractors cannot have it both ways by claiming that a CAS exemption should apply to contracts and subcontracts executed and performed entirely outside the U.S. while still being permitted to accept cost-type contracts and applying the FAR Part 31 cost principles to these contracts. * * * [Claiming the (b)(14) overseas exemption] while asserting that all costs submitted in billings to the government are reasonable, allowable, and allocable is an exercise in false logic."

Response: The Board agrees with the public interest group respondent's comments and has proposed to eliminate the (b)(14) overseas exemption.

D. Paperwork Reduction Act

The Paperwork Reduction Act, Public Law 96–511, does not apply to this proposed rule because this rule imposes no additional paperwork burden on offerors, affected contractors and subcontractors, or members of the public which requires the approval of OMB under 44 U.S.C. 3501, *et seq.* The records required by this proposed rule are those normally maintained by contractors and subcontractors who claim reimbursement of costs under government contracts.

E. Executive Order 12866 and the Regulatory Flexibility Act

Because the affected contractors and subcontractors are those who are already subject to CAS but for the (b)(14) overseas exemption, and those who are subject to only CAS 401 and 402 under the (b)(4) foreign concern exemption, the economic impact of this proposed rule on contractors and subcontractors is expected to be minor. As a result, the Board has determined that this proposed rule will not result in the promulgation of an "economically significant rule" under the provisions of Executive Order 12866, and that a regulatory impact analysis will not be required. Furthermore, this proposed rule does not have a significant effect on a substantial number of small entities because small businesses are exempt from the application of the Cost Accounting Standards. Therefore, this proposed rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980.

F. Public Comments to the Notice of Proposed Rulemaking

Interested persons are invited to provide input to this notice of a proposed rule to eliminate the (b)(14) overseas exemption from CAS at 48 CFR 9903.201–1(b)(14). Respondents are encouraged to identify, comment and provide information on any issues that they believe are important to the subject. This might include comment on whether there is a need to strengthen the CAS clauses to address the prime contractor's oversight responsibility for ensuring its subcontractors are compliant with CAS where it is applicable. All comments must be in writing, and submitted via facsimile, by e-mail, or by any other means as instructed in the **ADDRESSES** section.

To comply with the Congressional mandate in Section 823 of the NDAA FY 2009, the Board must consider the applicability of CAS to contracts and subcontracts which would be subject to CAS but for the (b)(14) overseas exemption. As always, the public is invited to submit comments on other issues regarding CAS exemptions that respondents believe the Board should consider. Those comments that are unrelated to the (b)(14) overseas exemption and its directly related issues will be separately considered by the Board. The staff continues to be especially appreciative of comments and suggestions that bring forth the concerns of all parties for consideration in the rulemaking process.

List of Subjects in 48 CFR 9903

Government procurement, Cost Accounting Standards.

Daniel I. Gordon,

Chair, Cost Accounting Standards Board.

For the reasons set forth in this preamble, Chapter 99 of Title 48 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 9903—CONTRACT COVERAGE

1. The authority citation for Part 9903 continues to read as follows:

Authority: Public Law 100–679, 102 Stat. 4056, 41 U.S.C. 422.

2. In section 9903.201–1, remove and reserve paragraph (b)(14) to read as follows:

9903.201–1 CAS applicability.

* * * * *

(b) * * *

(14) [Reserved]

* * * * *

[FR Doc. 2010–26228 Filed 10–19–10; 8:45 am]

BILLING CODE 3110–01–P

Notices

Federal Register

Vol. 75, No. 202

Wednesday, October 20, 2010

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

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Land Between The Lakes (LBL) Communication Effectiveness Study

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the new information collection, Land Between The Lakes (LBL) Communication Effectiveness Study.

DATES: Comments must be received in writing on or before December 20, 2010 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Greg Barnes, USDA Forest Service, Land Between The Lakes, 100 Van Morgan Drive, Golden Pond, KY 42211. Comments also may be submitted via e-mail to: *gmbarnes@fs.fed.us.*

The public may inspect comments received at Land Between The Lakes Administrative Office, 100 Van Morgan Drive, Golden Pond, KY 42211 during normal business hours. Visitors are encouraged to call ahead to 270–924–2000 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Greg Barnes, Land Between The Lakes, 270–924–2089. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title: Land Between The Lakes (LBL) Communication Effectiveness Study.

OMB Number: 0596—NEW.

Type of Request: NEW.

Abstract: Land Between The Lakes (hereafter referred to as LBL) is a public-use facility operated by the USDA Forest Service. Current and potential users of LBL receive information about the facility through sources such as co-op advertising and tourism promotions, as well as LBL's own Web site. The Forest Service is proposing a study designed to assess the impact of communication avenues such as promotions and other information sources on current and potential visitors to the LBL. The study will be conducted and led by LBL's own Social Science and Market Research Specialists.

The goals of the collection are to determine if LBL's communication efforts are in line with its mission and to assess how LBL is affecting the regional tourism industry. To accomplish these goals, LBL will utilize a voluntary survey provided to individuals who have previously requested information from LBL. Participants will have the option of completing the survey either in paper form to be mailed or completing an online version of the survey. The surveys received from the collection will assist in measuring the effectiveness of LBL's communication effort; in developing a positioning strategy for LBL in the recreation market; and to measure the public's opinions of LBL's promotional materials.

Estimate of Annual Burden: 10 minutes.

Type of Respondents: Individuals.

Estimated Annual Number of Respondents: 500.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 83.3 hours.

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the 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 respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Dated: October 12, 2010.

James M. Pena,

Associate Deputy Chief.

[FR Doc. 2010–26341 Filed 10–19–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

North Central Idaho Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The North Central Idaho RAC will meet in Potlatch, Idaho. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose of the meeting is to discuss potential projects for the new fiscal year.

DATES: The meeting will be held November 4, 2010, at 10 a.m. (PST).

ADDRESSES: The meeting will be held at the Potlatch Public Library, 1010 Onaway Road, Potlatch, Idaho. Written comments should be sent to Laura Smith at 104 Airport Road in Grangeville, Idaho 83530. Comments may also be sent via e-mail to *lasmith@fs.fed.us* or via facsimile to Laura at 208–983–4099.

FOR FURTHER INFORMATION CONTACT: Laura Smith, Designated Forest Official at 208–983–5143.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. A public forum will begin on November 4th at 3:15 p.m. (PST). The following business will be conducted: Comments and questions from the public to the committee. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: October 13, 2010.

Rick Brazell,

Forest Supervisor.

[FR Doc. 2010–26366 Filed 10–19–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Daniel Boone National Forest Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Daniel Boone National Forest Resource Advisory Committee will meet in London, Kentucky. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is to hold the first meeting of the newly formed committee.

DATES: The meeting will be held on November 9, 2010 beginning at 6 p.m., EST.

ADDRESSES: The meeting will be held at the Cumberland Valley Area Development District, 342 Old Whitley Road, London, KY 40744 in a meeting room on the basement floor. Written comments should be sent to Kimberly Morgan, Daniel Boone National Forest, 1700 Bypass Road, Winchester, KY 40391. Comments may also be sent via email to *kmorgan@fs.fed.us* or via facsimile to 859–744–1568. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect received comments at Daniel Boone National Forest, 1700 Bypass Road, Winchester, KY 40391. Visitors are encouraged to call ahead at 859–745–3100 to arrange an appointment.

FOR FURTHER INFORMATION CONTACT: Kimberly Morgan, RAC coordinator, USDA, Daniel Boone National Forest, 1700 Bypass Road, Winchester, KY 40391; (859) 745–3100; E-mail *kmorgan@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Introductions of all committee members, replacement members and Forest Service personnel. (2) Selection of a chairperson by the committee members. (3) Receive materials explaining the process for considering and recommending Title II projects. (4) Review of submitted project proposals for recommendation; and (5) Public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: October 13, 2010.

William R. Lorenz,

Deputy Forest Supervisor.

[FR Doc. 2010–26385 Filed 10–19–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

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

Agency: National Telecommunications and Information Administration (NTIA).

Title: State Broadband Data and Development (SDBB) Grant Program Progress Report.

OMB Control Number: 0660–0034.

Form Number(s): None.

Type of Request: Regular submission (extension of a currently approved information collection).

Number of Respondents: 56.

Average Hours per Response: 4 hours.

Burden Hours: 896.

Needs and Uses: The American Recovery and Reinvestment Act of 2009 (Recovery Act), requires the Assistant Secretary of Commerce for Information and Communications (Assistant Secretary) to develop and maintain a comprehensive, interactive, and searchable nationwide inventory map of existing broadband service capability and availability in the U.S. that depicts the geographic extent to which broadband service capability is deployed and available from a commercial or public provider throughout each state. The statute further provides that the Assistant Secretary will make the national broadband map accessible by the public on a National Telecommunications and Information Administration (NTIA) Web site no later than February 17, 2011.

NTIA developed a competitive, merit-based matching grant program funding projects that collect comprehensive and accurate State-level broadband mapping data, develop State-level broadband maps, aid in the development and maintenance of a national broadband map, and fund statewide initiatives directed at broadband planning.

NTIA requires quarterly performance reports in order to gauge the progress of grant awardees in meeting their project goals.

Affected Public: Business or other for-profit organizations.

Frequency: Quarterly.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Nicholas Fraser, (202) 395–5887.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Nicholas Fraser, OMB Desk Officer, FAX number (202) 395–7285, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov.*

Dated: October 15, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–26402 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Green Technology Pilot Program

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the revision of a currently approved collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before December 20, 2010.

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

• *E-mail: InformationCollection@uspto.gov.* Include "0651–0062 Green Technology Pilot Program comment" in the subject line of the message.

• *Fax:* 571–273–0112, marked to the attention of Susan K. Fawcett.

• *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

• *Federal Rulemaking Portal: http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Raul Tamayo, Legal Advisor, Office of Patent Legal Administration, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–7728; or by e-mail to *Raul.Tamayo@uspto.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The United States Patent and Trademark Office (USPTO) implemented a pilot program on December 8, 2009, that permits patent applications pertaining to green technologies, including greenhouse gas reduction, to be advanced out of turn for examination and reviewed earlier (accorded special status). The program is designed to promote the development of green technologies. Participation was previously limited to applications filed before December 8, 2009. The USPTO is expanding the eligibility for the pilot program to include applications filed on or after December 8, 2009. The program is also being extended until December 31, 2011. These changes will permit more applications to qualify for the program, thereby allowing more inventions related to green technologies to be advanced out of turn for examination and reviewed earlier. Applicants may participate in the green technology pilot program without meeting the current requirements of the accelerated examination program. The accelerated examination program is covered under OMB Control Number 0651–0031.

This pilot will support national and international green technology initiatives.

II. Method of Collection

Electronically using the USPTO online filing system EFS–Web.

III. Data

OMB Number: 0651–0062.

Form Number(s): PTO/SB/420.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households; businesses or other for-profits; and not-for-profit institutions.

Estimated Number of Respondents: 2,225 responses per year.

Estimated Time Per Response: The USPTO estimates that it will take the public between 1 hour and 10 hours to gather the necessary information, prepare the appropriate form or other documents, and submit the information to the USPTO.

Estimated Total Annual Respondent Burden Hours: 3,850 hours per year.

Estimated Total Annual Respondent Cost Burden: $1,251,250 per year. The USPTO expects that the information in this collection will be prepared by attorneys. Using the professional rate of $325 per hour for attorneys in private firms, the USPTO estimates that the respondent cost burden for this collection will be approximately $1,251,250 per year.

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Request for Green Technology Pilot Program (PTO/SB/420)	1 hour	2,000	2,000
Protests by the public against pending applications under 37 CFR 1.291	10 hours	65	650
Third-party submissions in published applications under 37 CFR 1.99	7.5 hours	160	1,200
Total		2,225	3,850

Estimated Total Annual Non-hour Respondent Cost Burden: $36,410 per year. There are no capital start-up or maintenance costs associated with this information collection. However, this collection does have record keeping costs and filing fees for the second or subsequent protest filed by the same real party in interest and for a third-party submission under 37 CFR 1.99.

When submitting the information in this collection to the USPTO electronically through EFS–Web, the applicant is strongly urged to retain a copy of the file submitted to the USPTO as evidence of authenticity in addition to keeping the acknowledgment receipt as clear evidence of the date the file was received by the USPTO. The USPTO estimates that it will take 2 minutes (0.03 hours) to print and retain a copy of the EFS–Web submissions and that approximately 2,225 submissions per year will be submitted electronically, for a total of approximately 67 hours per year for printing this receipt. Using the paraprofessional rate of $100 per hour, the USPTO estimates that the record keeping cost associated with this collection will be approximately $6,700 per year.

There is no fee for filing protests under 37 CFR 1.291 unless the filed protest is the second or subsequent protest by the same real party in interest, in which case the 37 CFR 1.17(i) fee of $130 must be included (the USPTO estimates 7 of the 65 protests filed per year will trigger this fee). Third-party submissions under 37 CFR 1.99 must include the 37 CFR 1.17(p) fee of $180. The USPTO estimates that the total fees associated with this collection will be approximately $29,710 per year.

The total non-hour respondent cost burden for this collection in the form of record keeping costs ($6,700) and filing fees ($29,710) is approximately $36,410 per year.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents; *e.g.,* the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 14, 2010.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2010–26376 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 59–2010]

Proposed Foreign-Trade Zone—Greenup and Boyd Counties, Kentucky; Application and Public Hearing

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Greenup Boyd Riverport Authority to establish a general-purpose foreign-trade zone in Greenup and Boyd Counties, Kentucky, adjacent to the Charleston CBP port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on October 15, 2010. The applicant is authorized to make the proposal under the Kentucky Revised Statutes section 65.530.

The proposed zone would consist of one site covering 64 acres in Greenup County, Kentucky: Proposed Site 1 (64 acres)—Greenup Boyd Riverport Site located at 215 Pier One Drive, Wurtland. The site is owned by the Greenup Boyd Riverport Authority, Greenup and Boyd County Fiscal Courts, and Great Lakes Minerals, LLC.

The application indicates a need for zone services in the Greenup and Boyd Counties, Kentucky, area. Several firms have indicated an interest in using zone procedures for warehousing/distribution activities for a variety of products. Specific manufacturing approvals are not being sought at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

As part of the investigation, the Commerce examiner will hold a public hearing on November 5, 2010 at 9 a.m., at the Fiscal Court Room, beside the Greenup County Courthouse on Main Street, Greenup, Kentucky.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is December 20, 2010. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to January 3, 2011.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: October 15, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–26420 Filed 10–19–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1715]

Approval for Expanded Manufacturing Authority; Foreign-Trade Subzone 33E; DNP IMS America Corporation (Thermal Transfer Ribbon Printer Roll Manufacturing); Mount Pleasant, PA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Regional Industrial Development Corporation of Southwestern Pennsylvania, grantee of FTZ 33, has requested an expansion of the scope of manufacturing authority on behalf of DNP IMS America Corporation (DNP), within Subzone 33E in Mount Pleasant, Pennsylvania, (FTZ Docket 9–2010, filed 2/4/2010);

Whereas, notice inviting public comment has been given in the **Federal Register** (75 FR 6635–6636, 2/10/2010) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand the scope of manufacturing authority under zone procedures to include activity related to thermal transfer ribbon printer roll manufacturing within Subzone 33E, as described in the application and **Federal Register** notice, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 7th day of October 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–26416 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–905]

Second Antidumping Duty Administrative Review of Certain Polyester Staple Fiber From the People's Republic of China: Extension of Time Limit for the Final Results

Agency: Import Administration, International Trade Administration, Department of Commerce.

Dates: Effective Date: October 20, 2010.

For Further Information Contact: Steven Hampton or Jerry Huang, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0116 or (202) 482–4047, respectively.

Background

On July 14, 2010, the Department of Commerce ("Department") published in the **Federal Register** the *Preliminary Results* of the second administrative review of certain polyester staple fiber ("PSF") from the People's Republic of China ("PRC"), covering the period June 1, 2008–May 31, 2009. *Certain Polyester Staple Fiber From the People's Republic of China: Notice of Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review,* 75 FR 40777 (July 14, 2010) ("*Preliminary Results*").

Extension of Time Limit for the Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), requires the Department to issue the final results of an administrative review within 120 days after the date on which the *Preliminary Results* have been published. If it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend this deadline to a maximum of 180 days. The current deadline for the completion of the final results of this review is November 11, 2010.

The Department has determined that completion of the final results of this review by the current deadline is not practicable. The Department requires more time to analyze a significant amount of information pertaining to the respondents' corporate structure and ownership, sales practices and manufacturing methods, as well as the labor wage rate surrogate value. Therefore, given the number and complexity of issues in this case, and in accordance with section 751(a)(3)(A) of the Act, we are extending the time period for issuing the final results of review until December 20, 2010.

This notice is published pursuant to sections 751(1)(3)(A) and 777(i)(1) of the Act and 19 CFR 351.213(h)(2).

Dated: October 13, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–26457 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–908]

First Administrative Review of Sodium Hexametaphosphate From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review

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

SUMMARY: On April 15, 2010, the Department of Commerce ("Department") published the *Preliminary Results* of the first administrative review of the antidumping duty order on sodium hexametaphosphate ("sodium hex") from the People's Republic of China ("PRC").[1] We gave interested parties an opportunity to comment on the *Preliminary Results.* Based upon our analysis of the comments and information received, we made changes to the margin calculation for the final results. We find that the sole participating respondent in this review, Hubei Xingfa Chemical Group Co., Ltd. ("Xingfa"), sold subject merchandise at less than normal value ("NV") during the period of review ("POR"), September 14, 2007–February 28, 2009.

DATES: *Effective Date:* October 20, 2010.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0413.

SUPPLEMENTARY INFORMATION:

Background

As noted above, on April 15, 2010, the Department published the Preliminary Results of this administrative review. On August 10, 2010, the Department published a notice extending the time period for issuing the final results by 53 days to October 5, 2010.[2] On October 5, 2010, the Department extended the time period for issuing the final results by an additional 7 days to October 12, 2010.[3] On July 26, 2010, the Department placed wage rate data on the record for comment following the recent decision in *Dorbest Limited et al.* v. *United States,* 2009–1257, –1266, issued by the United States Court of Appeals for the Federal Circuit ("CAFC") on May 14, 2010.[4] Between May 21, 2010 and August 13, 2010, we received case and rebuttal briefs from the Petitioners[5] and Xingfa.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties are addressed in the "First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Issues and Decision Memorandum for the Final Results," which is dated concurrently with this notice ("I&D Memo"). A list of the issues which parties raised, and to which we respond in the I&D Memo, is attached to this notice as an Appendix. The I&D Memo is a public document and is on file in the Central Records Unit ("CRU"), Main Commerce Building, Room 7046, and is accessible on the Department's Web site at *http://www.trade.gov/ia.* The paper copy and electronic version of the memorandum are identical in content.

Changes Since the Preliminary Results

Based on a review of the record, as well as comments received from parties regarding our *Preliminary Results,* we have made revisions to Xingfa's margin calculation for the final results. We have revised classifications for certain expenses in the surrogate financial ratios used in the *Preliminary Results.* Specifically, we have excluded packing costs and freight and forwarding costs because it is the Department's practice to exclude certain expenses in order to avoid double-counting costs where the requisite data are available to do so.[6] Moreover, consistent with the Department's practice, we have included purchased goods in the denominator of the SG&A and profit ratio calculations.[7]

Pursuant to a recent decision by the CAFC,[8] we have calculated a revised hourly wage rate to use in valuing Xingfa's reported labor. The revised wage rate is calculated by averaging earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise.[9] Additionally, we have revised the surrogate value for sodium pyrophosphate.[10]

Scope of the Order

The merchandise subject to this review is sodium hexametaphosphate. Sodium hexametaphosphate is a water-soluble polyphosphate glass that

[1] *See First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review, 75 FR 19613 (April 15, 2010) ("Preliminary Results").*

[2] *See First Antidumping Duty Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Extension of Time Limit for the Final Results,* 75 FR 48309 (August 10, 2010).

[3] *See First Antidumping Duty Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Extension of Time Limit for the Final Results,* dated October 5, 2010.

[4] *See* the "Changes Since the Preliminary Results" section below for a detailed explanation of the Department's revised wage rate for these final results.

[5] ICL Performance Products and Innophos, Inc. (collectively, the "Petitioners").

[6] *See, e.g., Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 73 FR 4175 (January 24, 2008) (where the Department clearly articulated its practice to avoid double-counting costs in calculating dumping margins); *see also* I&D Memo at Comment 4.

[7] *See Amended Final Results of the First Antidumping Duty Administrative Review: Folding Metal Tables and Chairs From the People's Republic of China,* 70 FR 3187 (January 21, 2005); *see also* I&D Memo at Comment 4.

[8] *Dorbest* v. *United States,* 604 F. 3d 1363 (Fed. Cir. 2010).

[9] *See* I&D Memo at Comment 3E; *see also* Final SV Memo for the details of the calculation and supporting data.

[10] *See* I&D Memo at Comment 3A; *see also* Memorandum to the File, through Scot T. Fullerton, Program Manager, Office IX, from Paul Walker, Case Analyst, Office IX, "First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Surrogate Factor Valuations for the Final Results" ("Final SV Memo"), dated concurrently with this notice.

consists of a distribution of polyphosphate chain lengths. It is a collection of sodium polyphosphate polymers built on repeating $NaPO_3$ units. Sodium hexametaphosphate has a P_2O_5 content from 60 to 71 percent. Alternate names for sodium hexametaphosphate include the following: Calgon; Calgon S; Glassy Sodium Phosphate; Sodium Polyphosphate, Glassy; Metaphosphoric Acid; Sodium Salt; Sodium Acid Metaphosphate; Graham's Salt; Sodium Hex; Polyphosphoric Acid, Sodium Salt; Glass H; Hexaphos; Sodaphos; Vitrafos; and BAC–N–FOS. Sodium hexametaphosphate is typically sold as a white powder or granule (crushed) and may also be sold in the form of sheets (glass) or as a liquid solution. It is imported under heading 2835.39.5000, HTSUS. It may also be imported as a blend or mixture under heading 3824.90.3900, HTSUS. The American Chemical Society, Chemical Abstract Service ("CAS") has assigned the name "Polyphosphoric Acid, Sodium Salt" to sodium hexametaphosphate. The CAS registry number is 68915–31–1. However, sodium hexametaphosphate is commonly identified by CAS No. 10124–56–8 in the market. For purposes of the review, the narrative description is dispositive, not the tariff heading, CAS registry number or CAS name.

The product covered by this review includes sodium hexametaphosphate in all grades, whether food grade or technical grade. The product covered by this review includes sodium hexametaphosphate without regard to chain length *i.e.,* whether regular or long chain. The product covered by this review includes sodium hexametaphosphate without regard to physical form, whether glass, sheet, crushed, granule, powder, fines, or other form, and whether or not in solution.

However, the product covered by this review does not include sodium hexametaphosphate when imported in a blend with other materials in which the sodium hexametaphosphate accounts for less than 50 percent by volume of the finished product.

Final Results of Review

The weighted-average dumping margin for the POR is as follows:

Manufacturer/exporter	Weighted average margin (percent)
Hubei Xingfa	82.62

Assessment

Upon issuance of the final results, the Department will determine, and U.S. Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Pursuant to 19 CFR 351.212(b)(1), we 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. In accordance with 19 CFR 351.106(c)(2), we will instruct CBP to liquidate, without regard to antidumping duties, all entries of subject merchandise during the POR for which the importer-specific assessment rate is zero or *de minimis.*

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be the rate established in these final results of review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 188.05 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: October 12, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I—Issues & Decision Memorandum

Comment 1: Inputs to Inputs—Electricity
Comment 2: Date of Sale
Comment 3: Surrogate Values
  A. Sodium Pyrophosphate
  B. Coal
  C. Coke
  D. Phosphate Slag
  E. Labor
Comment 4: Surrogate Financial Ratios
Comment 5: Placement of By-products in the Normal Value Calculation

[FR Doc. 2010–26458 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–502]

Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review

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

SUMMARY: On April 13, 2010, the Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping duty order on circular

welded carbon steel pipes and tubes (pipes and tubes) from Thailand. The review was requested by Allied Tube and Conduit Corporation (Allied Tube), by Wheatland Tube Company (Wheatland) (collectively, domestic interested parties or petitioners), and by Saha Thai Steel Pipe (Public) Company Ltd. (Saha Thai) (respondent). This review covers one producer/exporter of the subject merchandise, Saha Thai. The period of review (POR) is March 1, 2008 through February 28, 2009. Based on the results of verification and our analysis of the comments received, we have made changes to the preliminary results, which are discussed in the "Changes Since the Preliminary Results" section below. For the final dumping margins, see the "Final Results of Review" section below.

DATES: *Effective Date:* October 20, 2010.

FOR FURTHER INFORMATION CONTACT: Myrna Lobo or Jacqueline Arrowsmith, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2371 or (202) 482–5255, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 13, 2010, the Department published in the **Federal Register** the preliminary results of administrative review of the antidumping duty order on pipes and tubes from Thailand. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results and Rescission, in Part, of Antidumping Duty Administrative Review,* 75 FR 18788 (April 13, 2010) (*Preliminary Results*).

In the *Preliminary Results,* the Department stated that its decision to apply the quarterly cost methodology and to perform quarterly price-to-price comparisons raised a novel issue with respect to the level of trade (LOT) analysis of the pattern of price differences and any possible LOT adjustment warranted by that analysis. The Department, therefore, invited parties to comment on whether the application of the quarterly cost methodology necessarily requires an evaluation on a quarterly basis of the pattern of price differences and how any such differences should be analyzed. Parties were also invited to comment on whether, if a pattern of price differences is found to exist, any LOT adjustment should be done on a yearly basis or on a quarterly basis. On April 23, 2010, the Department received comments from Saha Thai.

On May 4, 2010 we revised the due dates for comments on the *Preliminary Results,* due to the anticipated timing of verification, and informed parties of the same. The Department conducted a verification of Saha Thai's questionnaire responses in Bangkok, Thailand, from July 12, 2010 through July 23, 2010. *See* "Verification" section below.

On August 20, 2010 we informed parties of the deadlines to comment on the *Preliminary Results* and verification reports and requested Saha Thai to submit revised sales databases in view of the minor corrections presented at verification. On August 23, 2010 Saha Thai submitted its revised sales databases. On August 27, 2010 we received a timely case brief from Saha Thai, and on September 1, 2010, we received a timely rebuttal brief from Allied Tube on behalf of domestic interested parties. The Department did not receive a request for a hearing.

On May 21, 2010, the Department extended the deadline for issuing the final results until no later than October 12, 2010. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review,* 75 FR 28557 (May 21, 2010). On October 12, 2010, the Department tolled the deadline for the final results by one day, to October 13, 2010, due to the occurrence of a fire and the closure of the main Commerce building on Friday, October 8, 2010.

Period of Review

The period of review (POR) is March 1, 2008 through February 28, 2009.

Scope of the Order

The products covered by this antidumping order are certain welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inches or more, but not exceeding 16 inches. These products, which are commonly referred to in the industry as "standard pipe" or "structural tubing" are hereinafter designated as "pipes and tubes." The merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085 and 7306.30.5090. Although the HTSUS subheadings are provided for the convenience and purposes of CBP, our written description of the scope is dispositive.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended ("the Act"), from July 12 through July 23, 2010, the Department verified the cost and sales information submitted by Saha Thai in its questionnaire responses provided during the course of this review. We used standard verification procedures including examination of relevant accounting and production records, and original source documents provided by the respondent. *See* Memorandum from Heidi Schriefer, Senior Accountant, to The File, "Verification of the Cost Response of Saha Thai Steel Pipe (Public) Company, Limited, in the Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand," dated August 17, 2010 ("*Cost Verification Report*"); *see also* Memorandum from Jacqueline Arrowsmith and Myrna Lobo, International Trade Compliance Analysts, to The File, "Verification of the Sales Response of Saha Thai Steel Pipe (Public) Co., Ltd. in the Antidumping Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand," dated August 18, 2010 ("*Sales Verification Report*"). The public versions of both verification reports are on file in the Central Records Unit (CRU), Room 7046 of the main Commerce Building.

Analysis of Comments Received

The issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Memorandum from Susan H. Kuhbach, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand" (*Decision Memorandum*), dated concurrently with this notice and which is hereby adopted by this notice. A list of the issues addressed in the *Decision Memorandum* is appended to this notice. The *Decision Memorandum* is on file in the CRU, and can be accessed directly on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Changes Since the Preliminary Results

Based on the results of verification and our analysis of comments received, we have made adjustments to our margin calculations. At the preliminary results, we made an adjustment under section 773(f)(2) of the Act, the "transactions disregarded rule," to Saha Thai's purchases of coils from an affiliated party. We have now determined that record evidence shows that these transactions were made at arm's length prices, and thus we are not making any adjustment under section 773(f)(2) of the Act for the final results. In addition, we have revised the general and administrative and financial expense rates by no longer adjusting the cost of goods sold denominator to reflect an adjustment for the transactions disregarded rule. Further, we have revised the financial expense rate calculation from the preliminary results to exclude interest income generated from long-term assets. We have revised the calculation of the total cost of manufacturing from the preliminary results to exclude the "other materials" ("OTHMAT") field. We have determined that this field serves only as a subtotal of other material costs; therefore, the inclusion of both the individual other material cost fields and the "OTHMAT" field double counts these costs. We have also revised the calculation of the cost of production to exclude the "DUTY" field because these costs were already included in the direct materials costs field. We have also made adjustments to hot-rolled coil costs, conversion costs, and other material costs based on our verification findings.

In addition, based on the results of verification and the minor corrections reported by Saha Thai at verification, there are changes to the sales databases including changes to U.S. sales ship dates and certain U.S. and home market movement and selling expenses, and the correction of one reseller's home market prices. These adjustments are discussed in detail in the *Decision Memorandum;* and/or Memorandum to File from Myrna Lobo, "Analysis of Saha Thai Steel Pipe (Public) Company, Ltd., for the Final Results of the Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand for the period 03/01/2008 through 02/28/2009," dated concurrently with this notice ("*Final Results Analysis Memorandum*"); and/or Memorandum to Neal M. Halper, Director, Office of Accounting, from Heidi K. Schriefer, Senior Accountant, "Cost of Production and Constructed Value Calculation Adjustments for the Final Results—Saha Thai Steel Pipe (Public) Company, Ltd.," also dated concurrently with this notice, all of which are on file in the CRU.

Level of Trade (LOT)

In the *Preliminary Results* we determined that Saha Thai had two distinct levels of trade (LOT 1 and LOT 2) in the home market, and a single LOT in the U.S. market which matched LOT 1 in the home market. For U.S. sales for which there is not a match in the home market at LOT 1, that are matched with LOT 2 sales, we must consider whether an LOT adjustment is warranted when the difference in LOT is demonstrated to affect price comparability, based on a pattern of consistent price differences. However, our decision to apply the quarterly cost methodology raised a novel issue with respect to the LOT analysis of pattern of price differences and any possible LOT adjustment based on that analysis. We therefore invited parties to comment on this issue and we received comments from Saha Thai recommending that the Department calculate a POR-wide LOT adjustment even when a quarterly methodology had been used to calculate costs and make price to price comparisons. However, after incorporating all the changes to the cost and sales information necessitated by verification, we find that all of Saha Thai's U.S. market sales are matched to sales in the home market at the same level of trade. Therefore, there is no basis for conducting a level of trade analysis and an LOT adjustment is unwarranted.

Final Results of Review

As a result of our review, we determine that the following weighted-average margin exists for the period of March 1, 2008 through February 28, 2009:

Manufacturer/exporter	Weighted-average margin (percent)
Saha Thai Steel Pipe (Public) Company, Ltd	2.13

Assessment Rates

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1) of the Department's regulations, the Department calculates an assessment rate for each importer of the subject merchandise. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of these final results of review.

The Department clarified its "automatic assessment" regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the period of review produced by the company included in these final results of review for which the reviewed company did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate from the investigation if there is no rate for the intermediate company involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided by section 751(a)(2)(C) of the Act: (1) For the company covered by this review, the cash deposit rate will be the rate listed above; (2) for merchandise exported by producers or exporters not covered in this review but covered in a previous segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published in the most recent final results in which that producer or exporter participated; (3) if the exporter is not a firm covered in this review or in any previous segment of this proceeding, but the producer is, the cash deposit rate will be that established for the producer of the merchandise in these final results of review or in the most recent final results in which that producer participated; and, (4) if neither the exporter nor the producer is a firm covered in this review or in any previous segment of this proceeding, the cash deposit rate will be 15.67 percent, the all-others rate established in the less than fair value investigation. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Determination of Sales at Less Than Fair Value,* 51 FR 3384 (January 27, 1986).

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred, and in the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice is the only reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3) of the Department's regulations. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these final results and this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: October 13, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I—Issues in Decision Memorandum Circular Welded Carbon Steel Pipes and Tubes From Thailand Final Results of Antidumping Duty Administrative Review for the Period of Review: 3/1/2008—2/28/2009

Comment 1: Analysis of Transactions With an Affiliated Supplier
Comment 2: Treatment of Unpaid Exempted Duties
Comment 3: Use of Single Average Coil Costs
Comment 4: Use of Lower of Cost or Market (LCM) Write-Down for Raw Materials
Comment 5: Treatment of LCM Write-Downs When Using the Alternative Cost Methodology
Comment 6: Annualizing Costs Over the Entire Cost Reporting Period
Comment 7: Total Cost Reconciliation
Comment 8: Treatment of Paid Import Duties on Raw Materials
Comment 9: Treatment of Other Material Costs
Comment 10: Level of Trade Adjustment
Comment 11: Use of the Zeroing Methodology

[FR Doc. 2010–26424 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1714]

Grant of Authority for Subzone Status; VF Corporation (Apparel, Footwear and Luggage Distribution), Martinsville, VA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for "* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the New River Economic Development Alliance, Inc., grantee of Foreign-Trade Zone 238, has made application to the Board for authority to establish a special-purpose subzone at the warehouse/distribution facilities of VF Corporation, located in Martinsville, Virginia (FTZ Docket 54–2009, filed 12/02/2009);

Whereas, notice inviting public comment has been given in the **Federal Register** (74 FR 66621–66622, 12/16/2009) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status for activity related to apparel, footwear and luggage warehousing and distribution at the facilities of VF Corporation, located in Martinsville, Virginia (Subzone 238A), as described in the application and **Federal Register** notice, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC this 7th day of October 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–26418 Filed 10–19–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Commerce Spectrum Management Advisory Committee Meeting

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a public meeting of the Commerce Spectrum Management Advisory Committee (Committee). The Committee provides advice to the Assistant Secretary of Commerce for Communications and Information on spectrum management policy matters.

DATES: The meeting will be held on November 8, 2010, from 10 a.m. to 1 p.m., Eastern Standard Time.

ADDRESSES: The meeting will be held at the U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 4830, Washington, DC. Public comments may be mailed to Commerce Spectrum Management Advisory Committee, National Telecommunications and Information Administration, 1401 Constitution Avenue, NW., Room 4725, Washington, DC 20230, or e-mailed to *spectrumadvisory@ntia.doc.gov.*

FOR FURTHER INFORMATION CONTACT: Joe Gattuso, Designated Federal Officer, at (202) 482–0977 or *jgattuso@ntia.doc.gov;* and/or visit NTIA's Web site at *http://www.ntia.doc.gov/advisory/spectrum.*

SUPPLEMENTARY INFORMATION:

Background: The Committee provides advice to the Assistant Secretary of Commerce for Communications and Information on needed reforms to domestic spectrum policies and management in order to: License radio frequencies in a way that maximizes their public benefits; keep wireless networks open to innovation; and make wireless services available to all Americans (*see* charter, at *http://www.ntia.doc.gov/advisory/spectrum/csmac_charter.html*). This Committee is subject to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and is consistent with the National Telecommunications and Information Administration Act, 47 U.S.C. 904(b). The Committee functions solely as an advisory body in compliance with the FACA. For more information about the Committee visit: *http://www.ntia.doc.gov/advisory/spectrum.*

Matters to be Considered: The Committee will hear presentations on issues and will receive status reports and draft recommendations from one or more of its subcommittees. NTIA will post a detailed agenda on its Web site, *http://www.ntia.doc.gov,* prior to the meeting. There also will be an opportunity for public comment at the meeting.

Time and Date: The meeting will be held on November 8, 2010, from 10 a.m. to 1 p.m., Eastern Standard Time. The times and the agenda topics are subject to change. The meeting may be webcast or made available via audio link. Please refer to NTIA's Web site, *http://www.ntia.doc.gov,* for the most up-to-date meeting agenda and access information.

Place: The meeting will be held at the U.S. Department of Commerce, National Telecommunications and Information Administration, 1401 Constitution Avenue, NW., Room 4830, Washington, DC. The meeting will be open to the public and press on a first-come, first-served basis. Space is limited. The public meeting is physically accessible to people with disabilities. Individuals requiring accommodations, such as sign language interpretation or other ancillary aids, are asked to notify Mr. Gattuso, at (202) 482–0977 or *jgattuso@ntia.doc.gov,* at least five (5) business days before the meeting.

Status: Interested parties are invited to attend and to submit written comments to the Committee at any time before or after the meeting. Parties wishing to submit written comments for consideration by the Committee in advance of this meeting should send them to NTIA's Washington, DC office at the above-listed address and such comments must be received by close of business on November 3, 2010, to provide sufficient time for review. Comments received after November 3, 2010, will be distributed to the Committee, but may not be reviewed prior to the meeting. It would be helpful if paper submissions also include a compact disc (CD) in HTML, ASCII, Word or WordPerfect format (please specify version). CDs should be labeled with the name and organizational affiliation of the filer, and the name of the word processing program used to create the document. Alternatively, comments may be submitted electronically to *spectrumadvisory@ntia.doc.gov.* Comments provided via electronic mail also may be submitted in one or more of the formats specified above.

Records: NTIA maintains records of all Committee proceedings. Committee records are available for public inspection at NTIA's Washington, DC office at the address above. Documents including the Committee's charter, membership list, agendas, minutes, and any reports are available on NTIA's Committee Web page at *http://www.ntia.doc.gov/advisory/spectrum.*

Dated: October 15, 2010.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2010–26382 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Transportation and Related Equipment Technical Advisory Committee; Notice of Partially Closed Meeting

The Transportation and Related Equipment Technical Advisory Committee will meet on November 4, 2010, 9:30 a.m., in the Herbert C. Hoover Building, Room 6087B, 14th Street between Constitution & Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to transportation and related equipment or technology.

Public Session

1. Welcome and Introductions.
2. Review Status of Working Groups.
3. Proposals from the Public.

Closed Session

4. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than October 26, 2010.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on October 15, 2010, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 §§ (10)(d)), that the portion of the meeting dealing with matters the disclosure of portion of the meeting dealing with matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: October 15, 2010.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2010–26408 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–351–829]

Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Preliminary Results of Countervailing Duty Administrative Review

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

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the countervailing duty (CVD) order on certain hot-rolled flat-rolled carbon-quality steel products (HRS) from Brazil for the period January 1, 2008 through December 31, 2008. For information on the net subsidy for the company reviewed, *see* the "Preliminary Results of Administrative Review" section of this notice. Interested parties are invited to comment on the preliminary results of this administrative review. *See* the "Disclosure and Public Comment" section of this notice, below.

DATES: *Effective Date:* October 20, 2010.

FOR FURTHER INFORMATION CONTACT: Myrna Lobo, Justin Neuman or Milton Koch, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2371, (202) 482–0486 and (202) 482–2584, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 17, 2004, the Department published in the **Federal Register** the CVD order on HRS from Brazil. *See Agreement Suspending the Countervailing Duty Investigation on Hot-Rolled Flat-Rolled Carbon-Quality Steel From Brazil; Termination of Suspension Agreement and Notice of Countervailing Duty Order,* 69 FR 56040 (September 17, 2004) (*HRS Order*). The order was issued five years after the completion of the countervailing duty investigation, and after the termination of the agreement that suspended the investigation. *See Suspension of Countervailing Duty Investigation: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil,* 64 FR 38797 (July 19, 1999); *see also Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil,* 64 FR 38742 (July 19, 1999) (*HRS Final Determination*).

On September 1, 2009, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 74 FR 45179 (September 1, 2009). On September 30, 2009, the Department received a timely request from Usinas Siderurgicas de Minas Gerais (USIMINAS) and its subsidiary, Companhia Siderurgica Paulista (COSIPA), to conduct an administrative review of the countervailing duty order applicable to its exports to the United States for the period of January 1 through December 31, 2008. USIMINAS and COSIPA (collectively, USIMINAS/COSIPA) are related companies that produce and export subject merchandise. On October 26, 2009, the Department initiated an administrative review of the CVD order on HRS from Brazil covering USIMINAS/COSIPA for the period January 1, 2008 through December 1, 2008. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 54956 (October 26, 2009).

The Department issued questionnaires to the Government of Brazil (GOB) and USIMINAS/COSIPA on December 10, 2009. USIMINAS/COSIPA submitted their joint questionnaire response on February 1, 2010. On February 4, 2010, the GOB submitted its questionnaire response. Subsequently, at the Department's request, USIMINAS/COSIPA submitted a revised copy of their original questionnaire response removing unrelated materials inadvertently included in the original response.

On February 3, 2010, United States Steel Corporation (petitioner) submitted a timely request for the Department to conduct on-site verifications of the questionnaire responses submitted by USIMINAS/COSIPA and the GOB. On March 5, 2010, in response to a request from the petitioner, the Department extended the deadline for the submission of new factual information to April 1, 2010. On April 1, 2010, petitioner submitted factual information for consideration in this administrative review. On June 7, 2010, the Department extended the time limit for the preliminary results of the countervailing duty administrative review until October 7, 2010. *See Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review,* 75 FR 32160 (June 7, 2010). Included in this extension was the Department's decision to toll all deadlines related to this proceeding by seven days due to the closure of the Federal Government from February 5 through February 12, 2010. *See* Memorandum to the Record from Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm" (February 12, 2010).

The Department issued supplemental questionnaires to the GOB and USIMINAS/COSIPA on June 25, 2010. On July 26 and 27, respectively, the GOB and USIMINAS/COSIPA submitted their supplemental responses. The Department issued supplemental questionnaires to the GOB and USIMINAS/COSIPA on September 14, 2010. On September 24 and 27, respectively, the GOB and USIMINAS/COSIPA submitted their supplemental responses. On September 28, USIMINAS/COSIPA submitted additional supplemental information requested by the Department.

Scope of the Order

For purposes of this review, the products covered are certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of these investigations.

Specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free ("IF")) steels, high strength low alloy ("HSLA") steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of this investigation, regardless of HTSUS definitions, are products in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated: 1.80 percent of manganese, or 1.50 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.012 percent of boron, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.41 percent of titanium, or 0.15 percent of vanadium, or 0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this order:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including *e.g.,* ASTM specifications A543, A387, A514, A517, and A506).
- SAE/AISI grades of series 2300 and higher.
- Ball bearing steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 percent.

• ASTM specifications A710 and A736.

• USS Abrasion-resistant steels (USS AR 400, USS AR 500).

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

[In percent]

C	Mn (max)	P (max)	S (max)	Si	Cr	Cu	Ni (max)
0.10–0.14	0.90	0.025	0.005	0.30–0.50	0.30–0.50	0.20–0.40	0.20

Width = 44.80 inches maximum; Thickness = 0.063–0.198 inches; Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000–88,000 psi.

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

[In percent]

C	Mn	P (max)	S (max)	Si	Cr	Cu (max)	Ni (max)	Mo
0.10–0.16	0.70–0.90	0.025	0.006	0.30–0.50	0.30–0.50	0.25	0.20	0.21

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

[In percent]

C	Mn	P (max)	S (max)	Si	Cr	Cu	Ni (max)	V (wt.) (max)	Cb (max)
0.10–0.14	1.30–1.80	0.025	0.005	0.30–0.50	0.50–0.70	0.20–0.40	0.20	0.10	0.08

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

[In percent]

C (max)	Mn (max)	P (max)	S (max)	Si (max)	Cr (max)	Cu (max)	Ni (max)	Nb (min)	Ca	Al
0.15	1.40	0.025	0.010	0.50	1.00	0.50	0.20	0.005	Treated	0.01–0.07

Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses ≤ 0.148 inches and 65,000 psi minimum for thicknesses > 0.148 inches; Tensile Strength = 80,000 psi minimum.

• Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, contains 0.9 percent up to and including 1.5 percent silicon by weight, further characterized by either (i) tensile strength between 540 N/mm2 and 640 N/mm2 and an elongation percentage ≥ 26 percent for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm2 and 690 N/mm2 and an elongation percentage ≥ 25 percent for thicknesses of 2 mm and above.

• Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012 percent maximum phosphorus, 0.015 percent maximum sulfur, and 0.20 percent maximum residuals including 0.15 percent maximum chromium.

• Grade ASTM A570–50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inch nominal), mill edge and skin passed, with a minimum copper content of 0.20%.

The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, 7211.19.75.90, 7212.40.10.00, 7212.40.50.00, 7212.50.00.00. Certain hot-rolled flat-rolled carbon-quality steel covered by this order, including: vacuum degassed, fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the merchandise covered by this order is dispositive.

Period of Review

The period for which we are measuring subsidies, *i.e.,* the period of review (POR), is January 1, 2008 through December 31, 2008.

Subsidies Valuation Information

Cross-Ownership

The Department's regulations state that cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. *See* 19 CFR 351.525(b)(6)(vi). The regulation specifies that this standard will normally be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. *Id.* The preamble to the Department's regulations further clarifies the Department's cross-ownership standard. *See Countervailing Duties; Final Rule,* 63 FR 65347, 65401 (November 25, 1998) (*CVD Preamble*). According to the *CVD Preamble,* relationships captured by the cross-ownership definition include those where the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (including subsidy benefits) of the other corporation in essentially the same way it can use its own assets (including subsidy benefits). *Id.* The cross-ownership standard does not require one corporation to own 100 percent of the other corporation. In certain circumstances, a large minority voting interest (for example, 40 percent) or a "golden share" may also result in cross-ownership. *Id.* at 65401.

As such, the Department's regulations make it clear that we must examine the facts presented in each case in order to determine whether cross-ownership exists. If we find that cross-ownership exists and if one or more of the relationships identified in 19 CFR 351.525(b)(6) exists, we treat all cross-owned companies, to which at least one of those relationships applies, as one company, and calculate a single rate for any countervailable subsidies that we identify and measure, in accordance with 19 CFR 351.525(b)(6).

Further, in accordance with 19 CFR 351.525(b)(6)(iv), if the Department determines that the suppliers of inputs primarily dedicated to the production of the downstream product are cross-owned with the producers/exporters under investigation, then the Department will treat subsidies provided to the input producers as subsidies attributable to the production of the downstream product.

In the original HRS investigation in 1999, the Department determined that USIMINAS and COSIPA should be treated as a single company because of USIMINAS' 49.79 percent ownership stake in COSIPA and the fact that both companies produced subject merchandise. *See HRS Final Determination* at 38744. This finding on the relationship between USIMINAS and COSIPA was reaffirmed in the Department's countervailing duty investigation in 2002 of certain cold-rolled carbon steel flat products (CRS) from Brazil, in which both USIMINAS and COSIPA were respondents. *See Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From Brazil,* 67 FR 62128 (October 3, 2002) (*CRS Final Determination*) and the accompanying Issues and Decision Memorandum (*CRS I&D Memorandum*) at 4–5. Since the CRS investigation, COSIPA has become a wholly-owned subsidiary of USIMINAS, and remained so throughout the current POR. COSIPA produced the same steel products as its parent company; USIMINAS produced audited consolidated financial statements for 2008 that included COSIPA's financial information; and COSIPA's own audited financial statement for 2008 indicates that the majority of its Board of Directors also hold positions on USIMINAS' Executive Board. Based on this information, the Department has determined that USIMINAS and COSIPA were cross-owned during the POR in accordance with 19 CFR 351.525(b)(6)(vi). Further, since they both produce and export subject merchandise, we are treating them as a single entity, USIMINAS/COSIPA.

USIMINAS/COSIPA reported affiliations during the POR with three warehousing/processing/distributing companies involved in the production and sale of HRS, Fasal, S.A. (Fasal), Dufer, S.A. (Dufer), and Rio Negro Comercio e Industrial (Rio Negro), and two of its suppliers of iron ore consumed in the production of HRS, Mineração J. Mendes Ltda. (J. Mendes) and Companhia do Vale do Rio Doce (Vale). To the extent that the subsidies we are investigating are conferred on these companies, we must examine whether cross-ownership exists among and across producers, the inventory/processing/distributor companies, and the iron ore producers/suppliers.

USIMINAS/COSIPA submitted information indicating that at the beginning of 2008, COSIPA owned 51 percent of Dufer. In October 2008, COSIPA purchased the remaining shares of Dufer, making the company a wholly-owned subsidiary of COSIPA. USIMINAS/COSIPA also reported in its July 27, 2010 supplemental questionnaire response that "some members of Usiminas' (Cospa's) {sic} top management also sat on Dufer's board of directors." USIMINAS/COSIPA indicates that it was the sole supplier of all the steel products that Dufer sells or further processes. Based on this information, we preliminarily determine that Dufer and USIMINAS/COSIPA were cross-owned during the POR in accordance with 19 CFR 351.525(b)(6)(vi).

During the POR, USIMINAS owned 65.69 percent of Rio Negro's shares. Respondents also indicate in their July 27, 2010 response that "(s)ome members of Usiminas' top management also sit on Rio Negro's board of directors." USIMINAS/COSIPA indicates that it was the sole supplier of all steel that Rio Negro sells or processes. Based on this information, we preliminarily determine that Rio Negro and USIMINAS/COSIPA were cross-owned during the POR in accordance with 19 CFR 351.525(b)(6)(vi).

On February 1, 2008, USIMINAS/COSIPA acquired all the shares of J. Mendes and its wholly-owned subsidiaries, Somisa Siderurgica Oeste de Minas Ltda. (Somisa) and Global Mineração Ltda. On July 1, 2008, the stockholders of USIMINAS/COSIPA approved the merger of J. Mendes and its two wholly-owned subsidiaries into USIMINAS; those companies were then extinguished. Based on information on the record, we preliminarily determine that J. Mendes was cross-owned with USIMINAS/COSIPA, from February 1, 2008 through July 1, 2008, the date on which it was extinguished and absorbed by USIMINAS/COSIPA, in accordance with 19 CFR 351.525(b)(6)(vi). Because USIMINAS/COSIPA also absorbed the subsidiaries Somisa and Global Mineração Ltda. when it merged with J. Mendes, and because Somisa had outstanding loans under the FINAME program under review (*see* "Analysis of Programs" section, below), any countervailable benefit that Somisa received from these loans during the POR will be attributed to USIMINAS/COSIPA.

The Department also finds that Fasal is cross-owned with USIMINAS/COSIPA, and that Vale is not cross-owned with the companies under review. Since much of the analysis supporting our findings on cross-ownership regarding Fasal and Vale involves business proprietary information, this analysis is fully set forth in the Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, from Justin M. Neuman, International Trade Compliance Analyst; Countervailing Duty Administrative Review: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel from Brazil, dated concurrently with this notice (*Cross-Ownership Memorandum*), a public version of which is on file in the Department's Central Records Unit (CRU) in Room 7046 of the main Department building.

Based on information on the record, for purposes of these preliminarily results, we determine that cross-ownership exists, as defined by 19 CFR 351.525(b)(6), among and across the following companies involved in the production and sale of the subject merchandise: respondent HRS producers/exporters, USIMINAS and COSIPA; the inventory/processing/distribution companies involved in the production and distribution of HRS, Fasal, Dufer, and Rio Negro; and the iron-ore supply company, J. Mendes.

Allocation Period

Under 19 CFR 351.524(d)(2)(i), we will presume the allocation period for non-recurring subsidies to be the average useful life (AUL) prescribed by the Internal Revenue Service (IRS) for renewable physical assets of the industry under consideration (as listed in the IRS's 1977 Class Life Asset Depreciation Range System, and as updated by the Department of the Treasury). This presumption will apply unless a party claims and establishes that these tables do not reasonably reflect the AUL of the renewable physical assets of the company or industry under investigation. Specifically, the party must establish that the difference between the AUL from the tables and the company-specific AUL or country-wide AUL for the industry under investigation is significant, pursuant to 19 CFR 351.524(d)(2)(i) and (ii). For assets used to manufacture steel products such as HRS, the IRS tables prescribe an AUL of 15 years.

USIMINAS/COSIPA did not rebut the presumption that the IRS tables should be used. Therefore, we are using the 15-year AUL as reported in the IRS tables to allocate any non-recurring subsidies under investigation which were provided directly to the producers and exporters of the subject merchandise.

Benchmark Rate Information

For programs requiring the application of a benchmark interest rate, 19 CFR 351.505(a)(1) states a preference for using an interest rate that the company would have paid on a comparable commercial loan [1] on the market. Also, 19 CFR 351.505(a)(3)(i) stipulates that when selecting a comparable commercial loan that the recipient "could actually obtain on the market" the Department will normally rely on actual short-term and long-term loans obtained by the firm. However, when there are no comparable commercial loans, the Department "may use a national average interest rate for comparable commercial loans," pursuant to 19 CFR 351.505(a)(3)(ii).

Pursuant to 19 CFR 351.505(a)(2)(iii) and (a)(2)(iv), if a program under review is a government-provided loan program, the preference would be to use a company-specific annual average of interest rates of comparable commercial loans during the year in which the government-provided loan was approved. For this review, the Department required benchmark rates to determine benefits received from FINAME loans provided by Banco Nacional de Desenvolvimento Economico e Social (BNDES), the Brazilian National Development Bank. USIMINAS/COSIPA did not report having any comparable commercial loans meeting the above criteria outstanding during the POR. Therefore, to calculate the benefit to USIMINAS/COSIPA from FINAME loans, for these preliminary results, in accordance with 19 CFR 351.505(a)(3)(ii), the Department has used national average interest rates.

In response to our initial questionnaire, the GOB provided information regarding national average interest rates in the form of the CDI rate and the SELIC rate; the CDI rate is the Interbank Deposit Rate and the SELIC rate is the rate at which the central bank provides overnight funds to banks. Neither represents an interest rate at which a commercial borrower could obtain financing on the market. Therefore for the purposes of these preliminary results, we will rely on information available from the Banco Central do Brasil, Brazil's central bank. Specifically, for the fixed-rate loans in Brazilian reais, we have used use an annual average of the monthly rates identified as interest rates for working capital, for corporate entities for fixed operations. For the loans denominated in reais with the application of an indexation factor, we are using an annual average of the monthly rates identified as the consolidated rate for corporate entities. For these loans, because there are inconsistencies in the reported information about how the loan program operates and the loan information provided by USIMINAS/COSIPA, and there are multiple components of the loans, including indexation, we believe it is appropriate to use the consolidated rates which represent a composite of the fixed, indexed, and floating interest rates available to corporate entities. For a more detailed discussion of our selection and use of the benchmark interest rates, *see* Memorandum to the File from The Team; Calculations for the Preliminary Results: Usinas Siderurgicas de Minas Gerais S.A. and Companhia Siderugica Paulista (USIMINAS/COSIPA), dated concurrently with this notice (*HRS Calculation Memorandum*).

Analysis of Programs

A. Program Preliminarily Determined To Be Countervailable

National Bank for Economic and Social Development Loans (BNDES) Loan Program: FINAME

In the *CRS Final Determination,* we determined that the FINAME loan program was countervailable as an import substitution program in accordance with section 771(5A)(C) of the Tariff Act of 1930, as Amended (the Act). In a prior administrative review of the instant order, the Department decided that it was appropriate to examine programs discovered in that investigation that reasonably appeared to provide countervailable subsidies to USIMINAS/COSIPA, such as FINAME loans. *See* Memorandum to the File, from The Team; Additional Subsidy Programs to be Included in the Questionnaire for the Countervailing Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from Brazil (December 19, 2005), a public document available in the CRU. Although the prior administrative review was subsequently rescinded (*see Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Flat Products from Brazil: Notice of Rescission of Countervailing Duty Administrative Review,* 71 FR 8278 (February 16, 2006)), the decision to examine FINAME loans to producers of HRS stands. Therefore, we requested

[1] A comparable commercial loan is a loan in the same currency, with a similar maturity, and interest rate structure (*i.e.,* fixed vs. variable interest rate). *See Countervailing Duties; Final Rule,* 63 FR 65348, 65362.

complete information on all FINAME loans outstanding during the POR.

The FINAME program was established by BNDES in the 1990s to finance purchases of Brazilian-produced equipment. Essentially, financing was only provided by BNDES for the purchase of Brazilian-made equipment and financing for imported equipment could only be provided if that equipment could not be obtained in Brazil. Financing was not provided for foreign-made equipment if the same equipment was produced in Brazil. FINAME loans are primarily made on an indirect basis through agent banks.

The terms of FINAME loans vary depending on whether the financing is for imported or domestically-produced equipment. For domestically-produced equipment, FINAME finances up to 90 percent of the purchase for a small business and up to 80 percent of the purchase for a large company. If the equipment is imported, or less than 60 percent Brazilian content, the financing must be made from a basket of foreign currencies. For imported equipment, a maximum financing term of five years is applied, and financing is available for 85 percent of the value of the equipment for small businesses and for 80 percent of the value for large businesses. During the POR, USIMINAS/COSIPA had outstanding FINAME loans granted for the purchase of Brazilian-made equipment. *See* "Benchmark Rate Information," above.

We are examining the specificity of the FINAME financing that USIMINAS/COSIPA received. In the absence of new information or evidence of changed circumstances that would warrant a reconsideration of the countervailability of this program, we continue to find this program to be *de jure* specific as an import substitution program because it is only available to finance the purchase of domestically-produced equipment. *See* section 771(5A)(C) of the Act. We further find that there is a financial contribution, through the provision of loans, under section 771(5)(D)(i) of the Act.

To the extent that the interest rates on these loans are lower than the benchmark rate, a benefit exists in accordance with 19 CFR 351.505(a). We calculated the benefit in accordance with sections 351.505(a)(5)(i) and 351.505(a)(5)(ii) of the Department's regulations, by comparing the actual interest paid on the outstanding FINAME loans during the POR, to the amount of interest that would have been paid on these loans using the comparable commercial benchmark rates noted in the "Benchmark Rate Information" section above. The FINAME loans received by USIMINAS/COSIPA have unique interest rates and structures including monetary correction (indexation) of the loan principal. Because the structure of these loans is complex, and much of the information is business proprietary, the calculation methodology for these loans is discussed in more detail in the preliminary calculation memorandum. *See HRS Calculation Memorandum.* We preliminarily determine that USIMINAS/COSIPA received benefits under the FINAME financing program during the POR. We summed the benefits from all loans to the cross-owned companies, and divided this total by the combined total sales of USIMINAS/COSIPA during the POR. We thus determine the countervailable subsidy from FINAME loans to USIMINAS/COSIPA to be 0.02 percent *ad valorem.*

B. Program Preliminarily Determined To Be Not Countervailable

Presumed Tax Credit for the Program of Social Integration and the Social Contributions of Billings on Inputs Used in Exports (PIS/COFINS)

In 1970, through Supplementary Law No. 7, the GOB established PIS. Under the law, companies make PIS contributions to a fund which is "a means of creating wealth for * * * employees." In 1991, through Supplementary Law No. 70, the GOB established COFINS as a contribution for the financing of social insurance "intended solely to defray the cost of health care and social security and assistance work." At the time of the CRS investigation, the Department determined that PIS and COFINS taxes were assessed on all products purchased domestically but did not apply to the sale of products that are exported. *See CRS I&D Memorandum* at 15. Each company was responsible for making monthly payments of PIS and COFINS based on the total value of its domestic sales of goods and services.

In 1996, through Law No. 9363, the GOB established the PIS/COFINS tax credit program to provide a rebate of PIS/COFINS contributions assessed on the purchase of raw materials, intermediate products, and packing materials used in the production of exports. The PIS and COFINS "presumed" tax credit was established to prevent the cascading effect of these taxes which accrue at each point in the chain of production. Companies calculated PIS/COFINS credits on a monthly basis, and used the credit by making deductions from the Industrial Products Tax (IPI) due.

The "presumed" tax credit rate for PIS and COFINS was 5.37 percent and applied to exporters in all industries. The Department determined in the CRS investigation that the GOB did not determine the value, quantity or type of inputs consumed in the production, by any particular producer, of subject merchandise, nor did the GOB take into account any yield factors; this tax credit rate was arbitrarily chosen for administrative convenience. To calculate its credit, a company divided its export revenues, accumulated through the prior month, by its total sales revenues for the same period. This export revenue ratio was then multiplied by the company's total value of purchases as reflected in the supplier's sale invoices for raw materials, semi-finished products, and packaging materials used in the production process. This amount was then multiplied by the tax credit rate of 5.37 percent to yield the year-to-date accumulated tax credit. In order to calculate the credit for the current month, the credit used through the prior month was deducted from this accumulated tax credit.

Consistent with the definition provided in 19 CFR 351.102(b), we treated PIS/COFINS taxes as indirect taxes. (*See CRS I&D Memorandum* at Comment 2). Further, because PIS/COFINS was charged on inputs used to make cold-rolled steel, it was charged on goods at one stage of production that were used in a succeeding stage of production, thus falling within the definitions provided in 19 CFR 351.102(b) of "cumulative indirect tax" and "prior-stage indirect tax." *See CRS I&D Memorandum* at 16.

In the CRS investigation, based on our determination that PIS and COFINS were prior-stage cumulative indirect taxes, we examined whether the GOB had a system or procedure in place, within the meaning of 19 CFR 351.518(a)(4)(i), to confirm which inputs and in what amounts were used in the production of subject merchandise. We determined that this system was established as a simplified and streamlined methodology to implement and administer the tax rebate for all companies in Brazil. The only limitation imposed on companies making rebate claims was that the claims be limited to those inputs defined under the PIS/COFINS rebate law, which was broader than the "consumed in production" standard provided for in 19 CFR 351.518(a)(1). Companies reported their purchases of inputs based on the assumption that all goods purchased were consumed equally in exported and domestically sold goods. Further confirmation was not conducted by the government. As such, we found that this system did not permit the GOB to confirm which inputs are being consumed in the production of exported goods and in what amounts.

In addition, in the CRS investigation, we found that the system did not account for the fact that domestic and export sales may include imported inputs. Further, in determining the actual amounts of inputs consumed in final products, the GOB did not make due allowance for waste, thereby raising the concern that the claim amounts were overstated. Because we found that the GOB had not met the requirements under 19 CFR 351.518(a)(4)(i), we determined that the entire amount of the credit granted on PIS/COFINS payments conferred a benefit to the respondent companies. In the *CRS Final Determination,* we determined that, according to section 771(5)(D)(ii) of the Act, the granting of tax credits constituted a financial contribution, and because the PIS/COFINS rebates were calculated based on a company's export revenue, *i.e.,* were available only to exporters, we found that this program was *de jure* specific as an export subsidy according to section 771(5A)(B) of the Act.

In the current review of HRS, in response to the initial questionnaire, the GOB has reported widespread changes to the administration of PIS/COFINS since the CRS investigation. In order to eliminate the distortions caused by the cumulative regime of PIS/COFINS and to promote tax neutrality, the GOB introduced Law No. 10.637 of December 30, 2002, and Law No. 10.833 of December 29, 2003, for PIS and COFINS, respectively. These laws revised the PIS/COFINS programs such that they now operate as a value-added tax (VAT) system. For the reasons discussed above, as in the CRS investigation we preliminarily determine that the PIS/COFINS taxes meet the definitions of an "indirect tax" and a "prior-stage indirect tax" within the meaning of 19 CFR 351.102(b).

According to the revisions in the legislation, PIS and COFINS taxes are now collected at 1.65 percent and 7.6 percent, respectively, when companies sell goods in the domestic market. Companies also pay PIS and COFINS at the rates of 1.65 percent and 7.6 percent, respectively, when domestically purchasing goods for resale, goods and services used as inputs in the production or manufacture of goods for sale, storage of merchandise related to sales, freight expenses related to sales, *etc.* Goods that are exported do not generate any tax liability under the non-cumulative PIS/COFINS regime.

To calculate the difference between the taxes paid by a company on its purchases and the taxes collected by a company on its sales under the non-cumulative PIS/COFINS system, the total value of the company's exports is subtracted from the company's overall revenue before applying the combined PIS/COFINS tax rate of 9.25 percent to determine the amount of PIS/COFINS taxes due to the government. Eligible purchases of inputs, goods for resale, *etc.,* that were subject to PIS/COFINS taxation are summed and multiplied by the same 9.25 percent rate to determine the total amount of PIS/COFINS taxes already paid by the company on its purchases. When a company has paid more in PIS/COFINS taxes on its purchases than it collects on its sales, the company is due the difference. When a company collects more in PIS/COFINS on its sales than it pays on its purchases, the company remits the difference to the government. Brazilian companies prepare monthly documents that reconcile the amount of PIS/COFINS taxes they paid on their purchases and the amount of PIS/COFINS taxes they collected on the company's total sales in each month. These documents are filed with the Brazilian Federal income tax authority.

In the CRS investigation, we found that PIS/COFINS operated as a cumulative, indirect tax for which excessive remission was received by respondents within the meaning of 19 CFR 351.518(a)(2). However, because information provided by the GOB indicates widespread changes in the administration of PIS/COFINS since the Department last examined this program in the CRS investigation, we have reexamined this program. For the purposes of this review, we preliminarily determine that the PIS/COFINS program has been transformed via Laws No. 10.637 and 10.833 and now operates like a standard VAT system. Based on the information on the record, the PIS/COFINS program no longer operates as a cumulative indirect tax within the meaning of 19 CFR 102(b). Therefore, an analysis of the program under 19 CFR 351.518 is no longer appropriate. Because of the program's transformation into a standard VAT program, we have reexamined whether any remittance or rebate received under this program is excessive within the meaning of 19 CFR 351.517. *See CVD Preamble* at 65383. Under 19 CFR 351.517, which addresses the exemption or remission upon export of indirect taxes, a benefit exists to the extent that the amount remitted or exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption. The record demonstrates that the changes to the program have eliminated the tax credits granted upon export. The only credit is itself based on the actual amount of PIS/COFINS taxes already paid by a company on its purchases, and there are no credits granted upon export. Thus, there is no benefit as defined under the provisions of 19 CFR 351.517(a), which define a benefit as the amount by which the credit upon export exceeds the taxes levied on the production and distribution of like products sold for domestic consumption. Therefore, for purposes of these preliminary results, we find that there is no benefit within the meaning of 19 CFR 351.517(a). Furthermore, we find that the laws transforming these PIS/COFINS tax credits into a VAT-like system did not provide any "grandfathering" provisions and therefore we find that there are no benefits available under the old PIS/COFINS structure. As such, we preliminarily determine that the PIS/COFINS program is not countervailable within the meaning of section 771(5) of the Act.

C. Programs Preliminarily Determined To Be Not Used

We preliminarily determine that USIMINAS/COSIPA did not apply for or receive benefits during the POR under the programs listed below:

1. Equity Infusions

In the investigation of HRS, we found that the GOB had granted subsidies in the form of equity infusions to USIMINAS from 1983 through 1988, and to COSIPA from 1983 through 1989, and in 1991. The countervailable benefits from those equity infusions were fully allocated prior to the POR. USIMINAS/COSIPA has not received any other equity infusions that provide countervailable benefits in the POR.

2. GOB Debt-to-Equity Conversions

In the investigation of HRS, we found that the GOB had granted subsidies in the form of debt-to-equity conversions to COSIPA in 1992 and 1993 in preparation for COSIPA's privatization. The countervailable benefits from those debt-to-equity conversions were fully allocated prior to the POR. USIMINAS/COSIPA has not received any other debt-to-equity conversions that provide countervailable benefits in the POR.

3. National Bank for Economic and Social Development Loans (BNDES) Loan Programs

a. *BNDES EXIM*
b. *BNDES Participacoes S.A. (BNDESPAR)*

4. Provincial Government Program: PRO–INDUSTRIA

5. Programa de Financiamento as Exportacoes (PROEX)

6. Program to Induce Industrial Modernization of the State of Minas Gerais (PROIM)

D. Program For Which More Information Is Required

BNDES FINEM Loan Program

In the *CRS Final Determination,* we found the FINEM loan program not countervailable based on information provided by the GOB that showed that FINEM loans were not specific: there was no indication of *de jure* specificity under section 771(5A)(D)(i) of the Act. Further, the financing was provided to a wide variety of industries ranging from paper to electricity to farming products, and the breakdown of FINEM financing by industry indicated that the steel industry was neither a predominant user nor disproportionate recipient of FINEM financing, and the program was not *de facto* specific under section 771(5A)(D)(iii) of the Act.

In the original questionnaire, the companies reported FINAME loans and other BNDES loans. *See* USIMINAS/COSIPA's February 1, 2010 questionnaire response at 17. In our supplemental questionnaires, we sought clarification of the BNDES programs under which the loans reported by USIMINAS/COSIPA had been provided. The GOB identified certain BNDES loans as FINEM loans for the financing of investment projects. *See* the GOB's July 26, 2010 supplemental response at 1. These loans had been granted to USIMINAS/COSIPA after the POI. Our decision in the *CRS Final Determination* that FINEM loans were *de facto* not specific was based on our analysis of the distribution of loans granted contemporaneously with USIMINAS/COSIPA's FINEM loans outstanding during the POI. Because the FINEM loans outstanding during the POR are new loans granted to USIMINAS/COSIPA since the POI, it is appropriate to examine whether this program is *de facto* specific for the purposes of this review. In the second supplemental questionnaire, we asked the GOB to provide information regarding this program, in particular, the distribution of loans by industry for the years in which USIMINAS/COSIPA's loans were approved and the prior three years. The GOB responded to this questionnaire on September 24, 2010, but did not provide detailed information. Given that the FINEM loan issue arose late in the proceeding, and the Department has not had sufficient time to gather and assess the information provided by the GOB, the Department will continue to examine the information provided by the GOB and will request additional information in order to complete our analysis of whether this program provides a countervailable subsidy to USIMINAS/COSIPA for the final results.

Preliminary Results of Administrative Review

In accordance with 19 CFR 351.221(b)(4)(i), we have calculated a combined subsidy rate for USIMINAS/COSIPA for the POR. We preliminarily determine the total countervailable subsidy to be 0.02 percent *ad valorem* for USIMINAS/COSIPA, which is a *de minimis* rate. *See* 19 CFR 351.106(c)(1).

Assessment Rates/Cash Deposits

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of the final results of this review. If the final results remain the same as these preliminary results, the Department will instruct CBP to liquidate without regard to countervailing duties all shipments of subject merchandise produced by USIMINAS/COSIPA, entered, or withdrawn from warehouse, for consumption from January 1, 2008 through December 31, 2008. The Department will also instruct CBP to collect cash deposits of estimated countervailing duties at a rate of 0.00 percent on shipments of the subject merchandise produced by USIMINAS/COSIPA, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

We will instruct CBP to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to companies covered by this order, but not examined in this review, are those established in the most recently completed administrative proceeding for each company. These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested.

Disclosure and Public Comment

We will disclose the calculations used in our analysis to parties to this segment of the proceeding within five days of the public announcement of this notice. *See* 19 CFR 351.224(b). Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Unless the time period is extended by the Department, case briefs are to be submitted within 30 days after the date of publication of this notice in the **Federal Register**. *See* 19 CFR 351.309(c). Rebuttal briefs, which must be limited to arguments raised in case briefs, are to be submitted no later than five days after the time limit for filing case briefs. *See* 19 CFR 351.309(d). Parties who submit arguments in this proceeding are requested to submit with the argument: (1) A statement of the issues; (2) a brief summary of the argument; and (3) a table of authorities cited. Further, we request that parties submitting written comments provide the Department with a diskette containing an electronic copy of the public version of such comments. Case and rebuttal briefs must be served on interested parties, in accordance with 19 CFR 351.303(f).

Interested parties may also request a hearing pursuant to 19 CFR 351.310(c). Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, within 30 days of the date of publication of this notice. *See id.* Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed.

Unless extended, the Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act. These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: October 7, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–26403 Filed 10–19–10; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1717]

Reorganization and Expansion of Foreign-Trade Zone 5 Under Alternative Site Framework; Seattle, WA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) in December 2008 (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the Port of Seattle, grantee of Foreign-Trade Zone 5, submitted an application to the Board (FTZ Docket 30–2010, filed 04/29/2010) for authority to reorganize and expand under the ASF with a service area of King and Snohomish Counties, Washington (dependent on case-by-case concurrence from the Port of Everett for the latter county), within and adjacent to the Seattle Customs and Border Protection port of entry, FTZ 5's existing Sites 1, 2 and 4 would be categorized as magnet sites, existing Site 3 would be categorized as a usage-driven sites, and the grantee proposes one additional usage-driven site (Site 5);

Whereas, notice inviting public comment was given in the **Federal Register** (75 FR 24571, 05/05/10) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize and expand FTZ 5 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, to a five-year ASF sunset provision for magnet sites that would terminate authority for Sites 2 and 4 if not activated by October 31, 2015, and to a three-year ASF sunset provision for usage-driven sites that would terminate authority for Sites 3 and 5 if no foreign-status merchandise is admitted for a *bona fide* customs purpose by October 31, 2013.

Signed at Washington, DC, this 7th day of October 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–26409 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1718]

Reorganization of Foreign-Trade Zone 3 Under Alternative Site Framework; San Francisco, CA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) in December 2008 (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the San Francisco Port Commission, grantee of Foreign-Trade Zone 3, submitted an application to the Board (FTZ Docket 39–2010, filed 05/21/2010) for authority to reorganize under the ASF with a service area of the City and County of San Francisco and San Mateo County, California, within and adjacent to the San Francisco Customs and Border Protection port of entry, FTZ 3's existing Site 1 would be deleted and Sites 2 through 4 would be categorized as usage-driven sites;

Whereas, notice inviting public comment was given in the **Federal Register** (75 FR 29974, 05/28/10) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 3 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and to a three-year ASF sunset provision for usage-driven sites that would terminate authority for Sites 2, 3 and 4 if no foreign-status merchandise is admitted for a *bona fide* customs purpose by October 31, 2013.

Signed at Washington, DC, this 7th day of October 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–26407 Filed 10–19–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1716]

Reorganization of Foreign-Trade Zone 75 under Alternative Site Framework; Phoenix, AZ

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) in December 2008 (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the City of Phoenix, grantee of Foreign-Trade Zone 75, submitted an application to the Board (FTZ Docket 24–2010, filed 03/31/10) for authority to reorganize under the ASF with a service area of Maricopa County and portions of Pinal and Yavapai Counties, Arizona, within and adjacent to the Phoenix Customs and Border Protection port of entry, and FTZ 75's existing Sites 1 through 5 would be categorized as magnet sites;

Whereas, notice inviting public comment was given in the **Federal Register** (75 FR 17692, 04/07/10) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 75 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and to a five-year ASF sunset provision for magnet sites that would terminate authority for Sites 2 through 5 if not activated by October 31, 2015.

Signed at Washington, DC, this *7th* day of *October* 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–26414 Filed 10–19–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–423–808]

Stainless Steel Plate in Coils From Belgium: Notice of Rescission of Antidumping Duty Administrative Review

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

DATES: *Effective Date:* October 20, 2010.

FOR FURTHER INFORMATION CONTACT: Joy Zhang or George McMahon, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone: (202) 482–1168 or (202) 482–1167, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 3, 2010, the Department of Commerce ("the Department") published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" of the antidumping duty order on stainless steel plate in coils from Belgium for the period of review ("POR"), May 1, 2009, through April 30, 2010. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 23236, (May 3, 2010).

On June 1, 2009, in accordance with 19 CFR 351.213(b), the Department received a timely request from ArcelorMittal Stainless Belgium N.V. ("AMS Belgium") to conduct an administrative review of AMS Belgium. AMS Belgium was the only party to request this administrative review.

On June 30, 2010, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on stainless steel plate in coils from Belgium covering one respondent, AMS Belgium. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 37759 (June 30, 2010).

On September 17, 2010, AMS Belgium timely withdrew its request for review. Thus, we are rescinding this administrative review.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation of the requested review. On September 17, 2010, AMS Belgium withdrew its request for an administrative review. AMS Belgium withdrew its request before the 90-day deadline, and no other party requested an administrative review of the antidumping duty order on stainless steel plate in coils from Belgium for the POR. Therefore, in response to AMS Belgium's withdrawal of its request for review, and pursuant to 19 CFR 351.213(d)(1), the Department hereby rescinds the administrative review of the antidumping duty order on stainless steel plate in coils from Belgium for the period May 1, 2009, through April 30, 2010.

Assessment Instructions

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries.[1] For the company for which this review is rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

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 and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent increase in antidumping duties by the amount of antidumping duties and/or countervailing duties reimbursed.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: October 13, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–26460 Filed 10–19–10; 8:45 am]

BILLING CODE 3510–DS–P

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[1] On August 16, 2010, the Court of International Trade ("CIT") issued an Order modifying the preliminary injunction. *See* Order Granting Plaintiff's Motion to Modify the Preliminary Injunction Order, *ArcelorMittal Stainless Belgium N.V.* v. *United States,* No. 08–434 (CIT August 16, 2010). In this Order, the CIT modified its January 16, 2009, Order granting Plaintiff's Motion for Preliminary Injunction, and enjoined liquidation of any unliquidated entries of SSPC from Belgium which contain merchandise that (i) is 4.75 mm or more in nominal thickness, but which has an actual thickness of less than 4.75 mm, and within the dimensional tolerances specified under ASTM standard A480/480M, (ii) was produced and exported by Ugine & ALZ Belgium N.V., any of its predecessors-in-interest, as determined by the Department of Commerce, and/or any of its successors-in-interest, as determined by the Department of Commerce, and (iii) is otherwise subject to the antidumping duty order and countervailing duty order on certain SSPC from Belgium. *See* 64 FR 27756 (May 21, 1999) and 64 FR 25288 (May 11, 1999), respectively. The modified preliminary injunction therefore enjoins certain entries subject to this review.

COMMODITY FUTURES TRADING COMMISSION

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63112, File No. 4–615]

Joint Public Roundtable on Issues Related to the Clearing of Credit Default Swaps

AGENCIES: Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC") (each, an "Agency," and collectively, the "Agencies").

ACTION: Notice of roundtable discussion; request for comment.

SUMMARY: On October 22, 2010, commencing at 9 a.m. and ending at 12 p.m., staff of the Agencies will hold a public roundtable discussion at which invited participants will discuss certain issues related to the clearing of Credit Default Swaps in the context of the Agencies rulemaking efforts pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). The discussion will be open to the public with seating on a first-come, first-served basis. Members of the public may also listen by telephone. Call-in participants should be prepared to provide their first name, last name, and affiliation. The information for the conference call is set forth below.

- *US Toll-Free:* (866) 844–9416.
- *International Toll:* 1–203–369–5026.
- *Passcode:* 8693978.

A transcript of the public roundtable discussion will be published on the CFTC's Web site at *http://www.cftc.gov/LawRegulation/DoddFrankAct/OTC_7_DCORules.html.* The roundtable discussion will take place in Lobby Level Hearing Room (Room 1000) at the CFTC's headquarters at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: the CFTC's Office of Public Affairs at (202) 418–5080 or the SEC's Office of Public Affairs at (202) 551–4120.

SUPPLEMENTARY INFORMATION: The roundtable discussion will take place on Friday, October 22, 2010, commencing at 9 a.m. and ending at 12 p.m. Members of the public who wish to comment on the topics addressed at the discussion may do so via:

- Paper submission to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, or Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; or
- E-mail to *DCORules@cftc.gov* (all emails must reference "Dodd-Frank CDS Roundtable" in the subject field); and/or *rule-comments@sec.gov* or through the comment form available at: *http://www.sec.gov/rules/other.shtml.*

All submissions will be reviewed jointly by the Agencies. All comments must be in English or be accompanied by an English translation. All submissions provided to either Agency in any electronic form or on paper may be published on the website of the respective Agency, without review and without removal of personally identifying information. Please submit only information that you wish to make publicly available.

By the Securities and Exchange Commission.

Dated: October 15, 2010.

Elizabeth M. Murphy,

Secretary.

By the Commodity Futures Trading Commission.

David A. Stawick,

Secretary.

[FR Doc. 2010–26430 Filed 10–19–10; 8:45 am]

BILLING CODE P

COMMODITY FUTURES TRADING COMMISSION

Public Roundtable on Individual Customer Collateral Protection

AGENCY: Commodity Futures Trading Commission ("CFTC").

ACTION: Notice of roundtable discussion; request for comment.

SUMMARY: On October 22, 2010, commencing at 1 p.m. and ending at 4 p.m., staff of the CFTC will hold a public roundtable discussion at which invited participants will discuss certain issues related to individual customer collateral protection in the context of the CFTC's rulemaking efforts pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). The roundtable will focus on protection of customer assets used as collateral in the cleared swap market under section 724(a) of the Act including the appropriate treatment of customer collateral by clearinghouses in the event of a default by a futures commission merchant. The discussion will be open to the public with seating on a first-come, first-served basis. Members of the public may also listen by telephone. Call-in participants should be prepared to provide their first name, last name, and affiliation. The information for the conference call is set forth below.

- US Toll-Free: (866) 844–9416.
- International Toll: 1–203–369–5026.
- Passcode: 8693978.

A transcript of the public roundtable discussion will be published on the CFTC's Web site at *http://www.cftc.gov/LawRegulation/DoddFrankAct/OTC_6_SegBankruptcy.html.* The roundtable discussion will take place in Lobby Level Hearing Room (Room 1000) at the CFTC's headquarters at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: The CFTC's Office of Public Affairs at (202) 418–5080.

SUPPLEMENTARY INFORMATION: The roundtable discussion will take place on Friday, October 22, 2010, commencing at 1 p.m. and ending at 4 p.m. Members of the public who wish to comment on the topics addressed at the discussion, or on any other topics related to customer collateral protection in the context of the Act, may do so via:

- paper submission to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; or
- electronic submission to *SegBankruptcy@CFTC.gov.* (all e-mails should reference "Dodd-Frank Individual Customer Collateral Protection Roundtable" in the subject field)."

All comments must be in English or be accompanied by an English translation. All submissions provided to the CFTC in any electronic form or on paper may be published on the website of the CFTC, without review and without removal of personally identifying information. Please submit only information that you wish to make publicly available.

Dated: October 15, 2010.

By the Commodity Futures Trading Commission.

David A. Stawick,

Secretary.

[FR Doc. 2010–26397 Filed 10–19–10; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Availability of the Fiscal Year 2009 Department of Defense Services Contracts Inventory

AGENCY: Department of Defense (DoD).

ACTION: Notice of availability.

SUMMARY: In accordance with section 2330a of title 10 United States Code as amended by the National Defense Authorization Act for Fiscal Year 2008 (NDAA 08) section 807, the Office of the Director, Defense Procurement and Acquisition Policy, Office of Program Acquisition and Strategic Sourcing (DPAP/PASS) will make available to the public the inventory of activities performed pursuant to contracts for services. The inventory will be published to the Defense Procurement and Acquisition Policy Web site at the following location: *http://www.acq.osd.mil/dpap.* The services contract inventory for the Dept of the Army is included in the DoD Inventory; however, a more extensive inventory of Army service contracts can be found at *http://www.asamra.army.mil/insourcing.*

DATES: Inventory to be made publically available within 30 days after publication of this notice.

ADDRESSES: Send written comments and suggestions concerning this inventory to Victoria Revel, Procurement Analyst, (AT&L)DPAP/PASS, 3060 Defense Pentagon, Washington, DC 20301–3060.

FOR FURTHER INFORMATION CONTACT: Victoria Revel at (703) 695–8567 or e-mail *victoria.revel@osd.mil.*

Dated: October 15, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–26353 Filed 10–19–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Defense Science Board

AGENCY: Department of Defense (DoD).

ACTION: Notice of advisory committee meeting.

SUMMARY: The Defense Science Board will meet in closed session on October 27–28, 2010, at the Pentagon, Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Ms. Debra Rose, Executive Officer, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301–3140, via e-mail at *debra.rose@osd.mil*, or via phone at (703) 571–0084.

SUPPLEMENTARY INFORMATION: The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting, the Board will discuss interim finding and recommendations resulting from ongoing Task Force activities. The Board will also discuss plans for future consideration of scientific and technical aspects of specific strategies, tactics, and policies as they may affect the U. S. national defense posture and homeland security.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law No. 92–463, as amended (5 U.S.C. App. 2) and 41 CFR 102–3.155, the Department of Defense has determined that the Defense Science Board Quarterly meetings will be closed to the public. Specifically, the Under Secretary of Defense (Acquisition, Technology and Logistics), with the coordination of the DoD Office of General Counsel, has determined in writing that all sessions of these meetings will be closed to the public because they will be concerned throughout with matters listed in 5 U.S.C. 552b(c)(1).

Interested persons may submit a written statement for consideration by the Defense Science Board. Individuals submitting a written statement must submit their statement to the Designated Federal Official (*see* **FOR FURTHER INFORMATION CONTACT**), at any point, however, if a written statement is not received at least 10 calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the Defense Science Board. The Designated Federal Official will review all timely submissions with the Defense Science Board Chairperson, and ensure they are provided to members of the Defense Science Board before the meeting that is the subject of this notice.

Due to internal DoD difficulties, beyond the control of the Defense Science Board or its Designated Federal Officer, the Government was unable to process the **Federal Register** notice for the October 27–28, 2010 meeting of the Defense Science Board as required by 41 CFR 102–3.150(a). Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Dated: October 15, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–26351 Filed 10–19–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Threat Reduction Advisory Committee; Correction

AGENCY: Office of the Under Secretary of Defense (Acquisition, Technology and Logistics); DoD.

ACTION: Notice of closed meeting; correction.

SUMMARY: On September 30, 2010 (75 FR 60430) the Department of Defense published a notice in the **Federal Register** announcing an October 21, 2010, meeting of the Threat Reduction Advisory Committee in Chantilly, VA. The Department is now announcing that the October 21 meeting has been cancelled.

FOR FURTHER INFORMATION CONTACT: *Designated Federal Officer or Point of Contact:* Mr. Eric Wright, Defense Threat Reduction Agency/AST, 8725 John J. Kingman Road, MS 6201, Fort Belvoir, VA 22060–6201, or by e-mail: *eric.wright@dtra.mil,* phone: (703) 767–4759, fax: (703) 767–5701.

Dated: October 15, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–26411 Filed 10–19–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2010–OS–0144]

Privacy Act of 1974; System of Records

AGENCY: Defense Information Systems Agency; DoD.

ACTION: Notice to amend a system of records.

SUMMARY: The Defense Information Systems Agency proposes to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on November 19, 2010, unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket 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, Room 3C843 Pentagon, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number 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: Ms. Jeanette M. Weathers-Jenkins at (703) 681–2409.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the Defense Information Systems Agency, 5600 Columbia Pike, Room 505, Falls Church, VA 22041–2705.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems reports.

Dated: October 15, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

KEUR.07

SYSTEM NAME:

Postal Directory File (February 22, 1993; 58 FR 10562).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with “Command Support Division, EU1, Defense Information System Agency-Europe, APO AE 09131–4103.”

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with “Records consist of designating Mail Clerks/supervisors (DD Form 285); change of address recorded on locator cards (DA Form 3955), comprising a directory of individuals assigned, en route, and/or departing given installation, showing individual’s full name, grade, current mailing address, date of assignment/detachment, and Social Security Number (SSN).”

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with “5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 133, Under Secretary of Defense for Acquisition Technology and Logistics; DoD 4525.6–M, DoD Postal Manual; and E.O. 9397 (SSN), as amended.”

PURPOSE(S):

Delete entry and replace with “Card files are maintained by the Commander to designate individuals authorized to perform DISA–Europe postal functions and to maintain current addresses of individuals arriving/departing from units for the purpose of handling personal mail. Information is used by system manager to direct mail delivery to the proper address.”

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with “In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD ‘Blanket Routine Uses’ set forth at the beginning of the DISA’s compilation of systems of records notices apply to this system.”

* * * * *

STORAGE:

Delete entry and replace with “Paper records in file folders and electronic storage media.”

RETRIEVABILITY:

Delete entry and replace with “By individual’s name and/or Social Security Number (SSN).”

SAFEGUARDS:

Delete entry and replace with “Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Physical and electronic access is restricted to designated individuals having a need in the performance of official duties and who are properly screened and cleared for need to know.”

RETENTION AND DISPOSAL:

Delete entry and replace “Documents designating postal personnel are destroyed two years from the termination/revocation date of designation. Directory locator cards (DA Form 3955) are retained for 12 months after member’s departure from the agency and then destroyed.”

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with “Command Support Division, EU1, Defense Information System Agency-Europe, APO AE 09131–4103.”

NOTIFICATION PROCEDURE:

Delete entry and replace with “Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Command Support Division, EU1, Defense Information System Agency-Europe, APO AE 09131–4103.

Individual must provide their full name, Social Security Number (SSN), current address, and signature to assist in locating the records.”

RECORD ACCESS PROCEDURES:

Delete entry and replace with “Individuals seeking access to information about themselves contained in this system should address written inquiries to the Command Support Division, EU1, Defense Information System Agency-Europe, APO AE 09131–4103.

Individual must provide their full name, Social Security Number (SSN), current address, and signature to assist in locating the records.”

* * * * *

KEUR.07

SYSTEM NAME:

Postal Directory File.

SYSTEM LOCATION:

Command Support Division, EU1, Defense Information System Agency-Europe, APO AE 09131–4103.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All individuals currently assigned to DISA Europe and those who departed within preceding 12 months.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records consist of designating Mail Clerks/supervisors (DD Form 285); change of address recorded on locator cards (DA Form 3955), comprising a directory of individuals assigned, en route, and/or departing given installation, showing individual’s full name, grade, current mailing address, date of assignment/detachment, and Social Security Number (SSN).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 133, Under Secretary of Defense for Acquisition Technology and Logistics; DoD 4525.6–

M, DoD Postal Manual; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

Card files are maintained by the Commander to designate individuals authorized to perform DISA-Europe postal functions and to maintain current addresses of individuals arriving/departing from units for the purpose of handling personal mail. Information is used by system manager to direct mail delivery to the proper address.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the DISA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

By individual's name and/or Social Security Number (SSN).

SAFEGUARDS:

Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Physical and electronic access is restricted to designated individuals having a need in the performance of official duties and who are properly screened and cleared for need to know.

RETENTION AND DISPOSAL:

Documents designating postal personnel are destroyed two years from the termination/revocation date of designation. Directory locator cards (DA Form 3955) are retained for 12 months after member's departure from the agency and then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Command Support Division, EU1, Defense Information System Agency-Europe, APO AE 09131–4103.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Command Support Division, EU1, Defense Information System Agency-Europe, APO AE 09131–4103.

Individual must provide their full name, Social Security Number (SSN), current address, and signature to assist in locating the records.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Command Support Division, EU1, Defense Information System Agency-Europe, APO AE 09131–4103.

Individual must provide their full name, Social Security Number (SSN), current address, and signature to assist in locating the records.

CONTESTING RECORD PROCEDURES:

DISA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DISA Instruction 210–225–2; 32 CFR part 316; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is provided by individuals upon initial assignment to DISA Europe.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–26350 Filed 10–19–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2010–OS–0145]

Privacy Act of 1974; System of Records

AGENCY: Department of Defense (DoD).

ACTION: Notice to add a system of records.

SUMMARY: The Office of the Secretary of Defense proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on November 19, 2010, unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket 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, Room 3C843 Pentagon, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number 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: Ms. Cindy Allard at (703) 588–6830.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on October 6, 2010, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996; 61 FR 6427).

Dated: October 14, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DPFPA 02

SYSTEM NAME:

Pentagon Reservation Vehicle Parking Program.

SYSTEM LOCATION:

Parking Management Branch, Pentagon Force Protection Agency, 9000 Defense Pentagon, Washington, DC 20301–9000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All DoD Civilians, military, and contractors holding DoD parking permits, participating in DoD carpools, or are otherwise authorized to park at the Pentagon or Federal Office Building No. 2 (FOB2).

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), organizational affiliation of the individual, office work number, current address, home zip code, vehicle tag number, and work e-mail address.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 2674(c)(1) Operation and Control of Pentagon Reservation and Defense Facilities in National Capital Region; E.O. 12191, Federal Facility Ridesharing Program; Administrative Instruction 88, Pentagon Reservation Vehicle Parking; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To manage the Pentagon parking permit program for DoD military and civilian personnel applying for and in receipt of Pentagon parking permits.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records or contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the OSD compilation of systems of records notices apply to this system of records.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper file folders and electronic storage media.

RETRIEVABILITY:

Information is retrieved by individual's name, Social Security Number (SSN), parking permit number, and vehicle tag number.

SAFEGUARDS:

Records are stored in a secured area accessible only to authorized personnel. Records are accessed by the custodian of the record system, by individuals responsible for using or servicing the system, and individuals properly screened and that have a need-to-know. Computer hardware is CAC enabled and located in controlled areas with access limited to authorized personnel.

RETENTION AND DISPOSAL:

Applications and parking permits are destroyed three months after returned to Pentagon Parking Office. Records are shredded.

SYSTEM MANAGER(S) AND ADDRESS:

Parking Management Branch, Pentagon Force Protection Agency, 9000 Defense Pentagon, Washington, DC 20301–9000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Parking Management Branch, Pentagon Force Protection Agency, 9000 Defense Pentagon, Washington, DC 20301–9000.

Written requests for information should contain the full name of the individual, Social Security Number (SSN), and current address.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Written requests for information should contain the full name of the individual, the number of the system notice, and be signed.

CONTESTING RECORD PROCEDURES:

The Office of the Secretary of Defense rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individuals.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–26352 Filed 10–19–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Chief of Naval Operations Executive Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice of closed meeting.

SUMMARY: The Chief of Naval Operations (CNO) Executive Panel will report to the Chief of Naval Operations on the findings and recommendations of the Subcommittee on Navy's Role in Ballistic Missile Defense. The meeting will consist of discussions of Navy's role in ballistic missile defense, development of the global missile defense network and evolution of the growing ballistic missile threat.

DATES: The meeting will be held on November 12, 2010, from 9 a.m. to 11 a.m.

ADDRESSES: The meeting will be held in the CNA Conference Room at CNA, 4825 Mark Center Drive, Alexandria, VA 22311–1846.

FOR FURTHER INFORMATION CONTACT: CDR Michael Hart, CNO Executive Panel, 4825 Mark Center Drive, Alexandria, VA 22311–1846, 703–681–4908.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), these matters constitute classified information that is specifically authorized by Executive Order to be kept secret in the interest of national defense and are, in fact, properly classified pursuant to such Executive Order. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of this meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of title 5, United States Code.

Individuals or interested groups may submit written statements for consideration by the CNO Executive Panel at any time or in response to the agenda of a scheduled meeting. All requests must be submitted to the Designated Federal Officer at the address detailed below.

If the written statement is in response to the agenda mentioned in this meeting notice then the statement, if it is to be considered by the Panel for this meeting, must be received at least five days prior to the meeting in question.

The Designated Federal Officer will review all timely submissions with the CNO Executive Panel Chairperson, and ensure they are provided to members of the CNO Executive Panel before the meeting that is the subject of this notice.

To contact the Designated Federal Officer, write to Executive Director, CNO Executive Panel (N00K), 4825 Mark Center Drive, 2nd Floor, Alexandria, VA 22311–1846.

Dated: October 14, 2010.

D.J. Werner,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2010–26373 Filed 10–19–10; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID USN–2010–0037]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy; DoD.

ACTION: Notice to add a system of records.

SUMMARY: The Department of the Navy proposes to add a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on November 19, 2010, unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket 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, Room 3C843 Pentagon, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number 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: Robin Patterson, (202) 685–6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from Robin Patterson, FOIA/Privacy Act Policy Branch, the Department of the Navy, 2000 Navy Pentagon, Washington, DC 20350–2000.

The proposed systems report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on October 7, 2010, to the House Committee on Government Report, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining records About Individual," dated February 8, 1996 (February 20, 1996; 61 FR 6427).

Dated: October 14, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

N05230–1

SYSTEM NAME:

Total Workforce Management Services (TWMS)

SYSTEM LOCATION:

Commander, Navy Installations Command, Service Delivery Point, Grace Hopper Ctr, Bldg 1482, Read Road, NAS North Island, San Diego, CA 92135–7056.

Fail-over servers are located at: Naval Base Norfolk, Building W143, Room 647A, 1968 Gilbert Street, Norfolk, VA 23511.

Organizational elements of the Department of the Navy. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices and can be found at *http://doni.daps.dla.mil/sndl.aspx.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty and Reservists, appropriated and nonappropriated civilian personnel, Navy contract personnel, other DoD and federal personnel assigned to Navy commands.

CATEGORIES OF RECORDS IN THE SYSTEM:

Personnel employment information (name, Social Security Number (SSN)), internally generated record ID number), law enforcement information, medical information, recall and contact information (personal cell telephone number, home telephone number, personal e-mail address, mailing/home address), emergency contact information, personnel demographic information (gender, race/ethnicity, birth date, religious preference, disability information), completed and required training information education information, skills, certifications and competencies required, certifications and skills acquired, security clearance information (citizenship, place of birth), work history, leave and payroll information, marital status, assigned billet information, personnel accountability information, assigned asset information, awards and qualifications information, dependant information including age and co-location indicator for emergency evacuation procedures and Morale, Welfare and Recreation (MWR) demographic accounting.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; CNICINST 5230.1, Total Workforce Management Services; OPNAVINST 3440.17, Navy Installation Emergency Management Program and E.O. 9397 (SSN), as amended.

PURPOSE:

Allows authorized budget submitting office/claimant and subordinate commands financial management personnel, human resources specialists, administrative support personnel, and supervisors to manage their entire workforce from one single web based interface utilizing one consolidated data warehouse.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of Department of Navy compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Name, Social Security Number (SSN), Internal assigned employee ID, Billet ID number.

SAFEGUARDS:

Access to data is multi-tiered and based on a need to know, and is managed by a designated command representative knowledgeable in the area of that command's total workforce. The first tier of a user account is profile based, which limits the user to specific employee types and/or data. Users in a specific profile cannot view data outside of that profile's restriction. The second tier further restricts access by use of permissions, which allow a user specific access to application functions. Physical access to terminals, terminal rooms, buildings and activities' grounds are controlled by locked terminals and rooms, guards, personnel screening and visitor registers. Password complexity, expiration, minimum length, and history, as well as use of profiles and permissions assists in assuring only appropriate personnel have access to data.

RETENTION AND DISPOSAL:

PERMANENT. Retire to Washington National Records Center (WNRC) when 4 years old, then are transferred to the National Archives and Records Administration (NARA) when 20 years old.

SYSTEM MANAGER(S) AND ADDRESS(ES):

Commander Navy Installations Command, 716 Sicard St., SE., Suite 1000, Washington Navy Yard, DC 20374–5140.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to TWMS Support & Mgmt, Commander Navy Installations Command, 716 Sicard St., SE., Suite 1000, Washington Navy Yard, DC 20374–5140.

The request should be signed and include full name, dates of service, Social Security Number (SSN), and a complete return mailing address.

The system manager may require an original signature or a notarized signature as a means of proving the identity of the individual requesting access to the records.

Department of Navy individuals may also review their records online by using their DoD issued Common Access Card (CAC) at a CAC enabled computer at *https://twms.nmci.navy.mil/selfservice.*

RECORD ACCESS PROCEDURE:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to TWMS Support & Mgmt, Commander Navy Installations Command, 716 Sicard St., SE., Suite 1000, Washington Navy Yard, DC 20374–5140.

The request should be signed and include full name, dates of service, Social Security Number (SSN), and a complete return mailing address.

The system manager may require an original signature or a notarized signature as a means of proving the identity of the individual requesting access to the records.

Department of Navy individuals may also review their records online by using their DoD issued Common Access Card (CAC) at a CAC enabled computer at *https://twms.nmci.navy.mil/selfservice.*

CONTESTING RECORD PROCEDURE:

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is obtained primarily from official Department of Navy and Department of Defense official programs of record; Defense Civilian Personnel Data System (DCPDS), Scientific Applied Programs (SAP–HR), PeopleSoft HR, Navy Standard Information Processing System (NSIPS), Navy Department Awards Web Service (NDAWS), Contractor Verification Systems (CVS)/DEERS, Navy Training Management & Planning System (NTMPS), and Total Force Manpower Management System (TFMMS) and from the individual and/or support staff.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–26354 Filed 10–19–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

National Advisory Council on Indian Education (NACIE)

AGENCY: U.S. Department of Education.

ACTION: Notice of an open meeting with a closed session.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the National Advisory Council on Indian Education (the Council) and is intended to notify the general public of the meeting. This notice also describes the functions of the Council. Notice of the Council's meetings is required under Section 10(a)(2) of the Federal Advisory Committee Act.

Date and Time: November 3–4, 2010;

November 3, 2010—11 a.m.–5 p.m. Eastern Standard Time.

November 4, 2010—11 a.m.–5 p.m. Eastern Standard Time.

Location: Holiday Inn—Washington Capitol, Columbia Room, 550 C Street, SW., Washington, DC 20024. Phone: (202) 479–4000. Web site: *http://*www.NACIE–ED.org (To RSVP, and for NACIE Meeting Updates, and Final Agenda).

SUPPLEMENTARY INFORMATION: The National Advisory Council on Indian Education is authorized by Section 7141 of the Elementary and Secondary Education Act. The Council is established within the Department of Education to advise the Secretary of Education on the funding and administration (including the development of regulations, and administrative policies and practices) of any program over which the Secretary has jurisdiction and includes Indian children or adults as participants or programs that may benefit Indian children or adults, including any program established under Title VII, Part A of the Elementary and Secondary Education Act. The Council submits to the Congress, not later than June 30 of each year, a report on the activities of the Council that includes recommendations the Council considers appropriate for the improvement of Federal education programs that include Indian children or adults as participants or that may benefit Indian children or adults, and recommendations concerning the funding of any such program.

The purpose of this meeting is to convene the Council for the first meeting at which time the Council will elect a Chairperson and Vice Chairperson. Additionally, the Council will commence its responsibilities for developing recommendations to the Secretary of Education on the funding and administration (including the development of regulations, and administrative policies and practices) of any program over which the Secretary has jurisdiction and includes Indian children or adults as participants or programs that may benefit Indian children or adults, including any program established under Title VII, Part A of the Elementary and Secondary Education Act as well as the report to Congress.

On November 3, 2010, the Council will meet in closed session from 8:30 a.m. to 10:45 a.m. to receive Ethics training, review their roles and responsibilities as a Council member, and review and discuss the details of their appointment as special government employees. These discussions pertain solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of section 552b(c) of Title 5 U.S.C. In addition, members will meet in closed session to deliberate on recommendations to the Secretary of Education for a Director of the Office of Indian Education. This closed discussion will take place November 4, 2010 from 8:30 a.m. to 10:45 a.m. This discussion pertains solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, this discussion is protected by exemptions 2 and 6 of section 552b(c) of Title 5 U.S.C.

Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistive listening devices, or material in alternative format) should notify Terrie Nelson at (202) 401–0424 no later than October 25, 2010. We will make every attempt to meet requests for accommodations after this date, but, cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Public Comment: Time is scheduled on the agenda to receive public comment at approximately 3 p.m.–5 p.m. Eastern Standard Time November 4, 2010. OR **Those members of the public interested in submitting written comments may do so by submitting comments to the attention of Jenelle Leonard, Office of Indian Education, U.S. Department of Education, and 400 Maryland Avenue, SW., Room 3W203, Washington, DC 20202–6400 by October 28, 2010.**

FOR FURTHER INFORMATION CONTACT: Jenelle Leonard, Acting Director, Office of Indian Education, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202. Telephone: 202–205–2161. Fax: 202–205–5870.

Detailed minutes of the meeting, including a summary of the activities of the closed session and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Council proceedings and are available for public inspection at the Office of Indian Education, United States Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202. Monday-Friday, 8:30 a.m.–5 p.m. Eastern Daylight Time.

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

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–866–512–1830; or in the Washington, DC, area at (202) 512–0000.

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

Thelma Melendez de Santa Ana,

Assistant Secretary, Office of Elementary and Secondary Education.

[FR Doc. 2010–26405 Filed 10–19–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Notice of extension of public comment period for reply comments.

SUMMARY: On July 27, 2010, the Department of Energy (DOE) published in the **Federal Register** a notice of inquiry (NOI) and request for comment from the public in its development of regulations pertaining to section 934, of the Energy Independence and Security Act of 2007 ("Act"). Section 934 addresses how the United States will meet its obligations under the Convention for Supplementary Compensation for Nuclear Damage ("CSC") including its obligation to contribute to an international supplementary fund in the event of certain nuclear incidents. The NOI provided a September 27, 2010, deadline for comments, which was subsequently extended to October 27, 2010 in response to a public request for extension. This notice announces a second and final extension of the comment period to November 30, 2010.

DATES: DOE will accept comments and information regarding the NOI and the development of regulations under the Act received no later than November 30, 2010.

ADDRESSES: Any comments submitted must identify section 934 of the Act, as appropriate. Comments may be submitted using any of the following methods:

- *E-mail: Section934Rulemaking@Hq.Doe.Gov* Include Section 934 in the subject line of the message.
- *Postal Mail:* Sophia Angelini. Attorney-Advisor, Office of the General Counsel for Civilian Nuclear Programs, GC–52, U.S. Department of Energy, 1000 Independence Avenue, SW., Room 6A–167, Washington, DC 20585; Telephone (202) 586–0319. Please submit one signed original and three paper copies of all comments.

FOR FURTHER INFORMATION CONTACT: Sophia Angelini, Attorney-Advisor, Office of the General Counsel for Civilian Nuclear Programs, GC–52, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; Telephone (202) 586–0319.

SUPPLEMENTARY INFORMATION: On July 27, 2010, the DOE published an NOI in the **Federal Register** (75 FR 43945) on the development of regulations under section 934 of the Act, entitled "Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation." Section 934 addresses how the United States will meet its obligations under the CSC and, in particular, its obligation to contribute to an international supplementary fund in the event of certain nuclear incidents. Section 934 authorizes the Secretary of Energy to issue regulations establishing a retrospective risk pooling program by which nuclear suppliers will reimburse the United States government for any such contribution. This retrospective risk pooling program will operate with respect to nuclear incidents that are covered by the international supplementary fund, take place outside the United States, and are not covered by the Price-Anderson Act indemnification.

The NOI requested public comment from interested persons regarding specific as well as general questions and provided for the submission of comments by September 27, 2010. Thereafter, DOE received comments dated August 10, 2010, from the Nuclear Energy Institute (NEI) stating that the issues related to the risk pooling program warranted additional time for nuclear suppliers to provide comments to DOE and requesting an extension to October 27, 2010. Accordingly, on August 24, 2010, DOE published a notice in the **Federal Register** (75 FR 51986) extending the period for submitting public comments to October 27, 2010.

DOE has now received comments dated October 8, 2010, from Contractors International Group on Nuclear Liability (CIGNL), a nongovernmental group of major U.S. nuclear suppliers, requesting an extension of the public comment period to November 30, 2010. CIGNL stated that the complexity and number of issues presented in the NOI for public comment has made it difficult for CIGNL members to carefully review and coordinate comments. For example, CIGNL noted that there is little or no data now available to identify which entities located in, or carrying out activities in, the United States have or are furnishing goods or services to foreign nuclear installations and that it has so far identified as many as 300 to 1,800 types of goods or services that go into constructing and operating a nuclear power plant. CIGNL stated its intent to work through these issues and difficulties with a view toward development of an approach to propose to DOE for establishing the CSC cost allocation formula among U.S. nuclear suppliers. As observed by CIGNL, it would be beneficial if the major U.S. nuclear suppliers provided to DOE comprehensive and informed comments on the cost allocation formula and related issues in response to the NOI.

DOE has determined that extension of the comment period is appropriate based on the foregoing reasons and is hereby extending the comment period to November 30, 2010. Given the importance of proceeding in a timely manner toward development of regulations pertaining to section 934, DOE does not intend to grant any further extensions. Accordingly, DOE will consider any comments received by November 30, 2010 to be timely submitted.

Issued in Washington, DC, on October 14, 2010.

Scott Blake Harris,

General Counsel.

[FR Doc. 2010–26459 Filed 10–19–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Industrial Sites and Soils Committees of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. 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, November 2, 2010, 3 p.m.

ADDRESSES: Nevada Support Facility, 232 Energy Way, North Las Vegas, Nevada 89030.

FOR FURTHER INFORMATION CONTACT: Denise Rupp, Board Administrator, 232 Energy Way, M/S 505, North Las Vegas, Nevada 89030. Phone: (702) 657–9088; Fax (702) 295–5300 or E-mail: *ntscab@nv.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Purpose of the Industrial Sites Committee: The purpose of the Committee is to review and make recommendations on industrial sites at the Nevada Test Site including decontamination, closure, re-use and/or demolition.

Purpose of the Soils Committee: The purpose of the Committee is to focus on issues related to soil contamination at the Nevada Test Site including decontamination and closure.

Tentative Agenda: The Committee members will meet with the Environmental Restoration Project Director to discuss current activities.

Public Participation: The EM SSAB, Nevada, welcomes the attendance of the public at its 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 Denise Rupp at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Denise Rupp at the 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 prior to the meeting date due to programmatic issues that had to be resolved prior to the meeting date.

Minutes: Minutes will be available by writing to Denise Rupp at the address listed above or at the following website: *http://www.ntscab.com/MeetingMinutes.htm.*

Issued at Washington, DC, on October 13, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–26470 Filed 10–19–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford

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), Hanford. 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: Thursday, November 4, 2010; 9 a.m.–5 p.m. Friday, November 5, 2010; 8:30 a.m.–4 p.m.

ADDRESSES: Red Lion Hanford House, 802 George Washington Way, Richland, Washington.

FOR FURTHER INFORMATION CONTACT: Paula Call, Federal Coordinator, Department of Energy Richland Operations Office, 825 Jadwin Avenue, P.O. Box 550, A7–75, Richland, WA 99352; Phone: (509) 376–2048; or e-mail: *Paula.Call@rl.doe.gov.*

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

- Agency Updates, including progress on the American Recovery and Reinvestment Act (Office of River Protection and Richland Operations Office; Washington State Department of Ecology; U.S. Environmental Protection Agency).
- Committee Updates, including: Tank Waste Committee; River and Plateau Committee; Health, Safety and Environmental Protection Committee; Public Involvement Committee; and Budgets and Contracts Committee.
- Board Business.
- Hanford Site Chronic Beryllium Disease Prevention Program Update.
- Consent Decree Update.
- CERCLA Five-Year Review Update.
- Potential Board Advice.
  - Public Involvement Strategic Planning.
  - Open Government Plan.

Public Participation: The meeting is open to the public. The EM SSAB, Hanford, 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 Paula Call at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Paula Call at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Paula Call's office at the address or phone number listed above. Minutes will also be available at the following Web site: *http://www.hanford.gov/page.cfm/hab.*

Issued at Washington, DC, on October 14, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–26451 Filed 10–19–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Coal Council; Notice of Open Meeting

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the National Coal Council (NCC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Friday, November 5, 2010, 9 a.m. to noon.

ADDRESSES: The DoubleTree Hotel, 1515 Rhode Island Avenue, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Michael J. Ducker, U.S. Department of Energy; 4G–036/Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290; Telephone: 202–586–7810.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To conduct an open meeting of the NCC and to provide an update of the current NCC study.

Tentative Agenda:

• Welcome and Call to Order by NCC Chair.

• Keynote address by Secretary Steven Chu, Department of Energy.

• Presentation by Mr. Ben Yamagata, Executive Director of the Coal Utilization Research Council on Carbon Dioxide Emissions Control Research and Development.

• Presentation by American Electric Power Company on the carbon capture and storage project at the Mountaineer Plant.

• Presentation by the American Coal Council Coal 2.0 Alliance on the development of engineered products that combine coal and biomass into one product.

• Update on the current Council study on carbon dioxide emissions capture, transport and storage.

• Other Business.

• Adjourn.

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any potential items on the agenda, you should contact Michael J. Ducker, 202–586–7810 or *Michael.Ducker@HQ.DOE.GOV* (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The NCC will prepare meeting minutes within 45 days of the meeting. The minutes will be posted on the NCC Web site at *http://www.nationalcoalcouncil.org/.*

Issued at Washington, DC, on October 14, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–26471 Filed 10–19–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

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), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, November 17, 2010, 1 p.m.–7 p.m.

ADDRESSES: The Lodge at Santa Fe, 750 North St. Francis Drive, Santa Fe, New Mexico.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 1660 Old Pecos Trail, Suite B, Santa Fe, NM 87505. Phone (505) 995–0393; Fax (505) 989–1752 or E-mail: *msantistevan@doeal.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

1 p.m. Call to Order by Co-Deputy Designated Federal Officers (DDFO), Ed Worth and Lee Bishop

Establishment of a Quorum: Roll Call and Excused Absences, Lorelei Novak.

Welcome and Introductions, Ralph Phelps.

Approval of Agenda and September 29, 2010 Meeting Minutes.

1:30 p.m. Public Comment Period.

1:45 p.m. Old Business.

• Written Reports

• Other Items

2 p.m. New Business.

• Report on Decision Makers Forum, Ralph Phelps and Nicole Castellano

• Report from Ad Hoc Committee for Annual Evaluation, Pam Henline

• Other items

2:45 p.m. Items from DOE, Ed Worth and Lee Bishop.

3 p.m. Presentation on Los Alamos National Laboratory's (LANL) Environmental Surveillance Report for 2009.

3:15 p.m. Break.

3:30 p.m. Continue Presentation on LANL's Environmental Surveillance Report.

5 p.m. Dinner Break.

6 p.m. Public Comment Period.

6:15 p.m. Consideration and Action on Draft Recommendation(s), Ralph Phelps.

6:45 p.m. Open Forum for Board Members.

7 p.m. Adjourn, Ed Worth and Lee Bishop.

Public Participation: The EM SSAB, Northern New Mexico, 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 Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.org/.*

Issued at Washington, DC, on October 14, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–26473 Filed 10–19–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

DOE/Advanced Scientific Computing Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Advanced Scientific Computing Advisory Committee (ASCAC). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, November 9, 2010, 9 a.m. to 5 p.m.; Wednesday, November 10, 2010, 9 a.m. to 12 p.m.

ADDRESSES: Argonne National Laboratory, 9700 South Cass Ave., Bldg. 240/TCS, Argonne, IL 60439.

FOR FURTHER INFORMATION CONTACT: Melea Baker, Office of Advanced Scientific Computing Research; SC–21/ Germantown Building; U. S. Department of Energy; 1000 Independence Avenue, SW.; Washington, DC 20585–1290; Telephone (301) 903–7486, (E-mail: *Melea.Baker@science.doe.gov*).

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance with respect to the advanced scientific computing research program.

Tentative Agenda: Agenda will include discussions of the following:

Tuesday, November 9, 2010: View from Washington, ASCR Update, Program Response to Math COV, Exascale Report, Tour of Argonne National Laboratory and Leadership Computing Facility, Public Comment.

Wednesday, November 10, 2010: ASCR Annual Performance Metric—Code Improvements, New Charge to ASCAC, Recovery Act Update, Public Comment.

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, or participate in the tour, you should contact Melea Baker via FAX at 301–903–4846 or via e-mail (*Melea.Baker@science.doe.gov*). You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; 1G–051, Forrestal Building; 1000 Independence Avenue, SW.; Washington, DC 20585; between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC, on October 15, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–26475 Filed 10–19–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Blue Ribbon Commission on America's Nuclear Future, Transportation and Storage Subcommittee

AGENCY: Office of Nuclear Energy, Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces an open meeting of the Transportation and Storage (T&S) Subcommittee. The T&S Subcommittee is a subcommittee of the Blue Ribbon Commission on America's Nuclear Future (the Commission). The establishment of subcommittees is authorized in the Commission's charter. The Commission was organized pursuant to the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) (the Act). This notice is provided in accordance with the Act.

DATES: Tuesday, November 2, 2010, 8 a.m.–1:20 p.m.

ADDRESSES: Wyndham Chicago, 633 North St. Clair Street, Chicago, Illinois 60611, Telephone: 312–573–0300.

FOR FURTHER INFORMATION CONTACT: Timothy A. Frazier, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; telephone (202) 586–4243 or facsimile (202) 586–0544; e-mail *CommissionDFO@nuclear.energy.gov.* Additional information will be available at *http://www.brc.gov.*

SUPPLEMENTARY INFORMATION:

Background: The President directed that the Commission be established to conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle. The Commission will provide advice and make recommendations on issues including alternatives for the storage, processing, and disposal of civilian and defense spent nuclear fuel and nuclear waste.

The Co-chairs of the Commission requested the formation of the T&S Subcommittee to answer the question: "[s]hould the US change the way in which it is storing used nuclear fuel and high level waste while one or more final disposal locations are established?"

Purpose of the Meeting: The meeting will explore specific issues related to the safe storage and transportation of spent/used nuclear fuel in the Midwest. Discussion items will include the findings and recommendations of recent technical studies, and will include input from State and local officials responsible for public safety, emergency preparedness, and law enforcement.

Tentative Agenda: The meeting is expected to begin at approximately 8 a.m. on Tuesday, November 2, 2010, with Subcommittee Co-chairs' opening statements and then speaker presentations and panel discussions beginning ending at approximately 12:20 p.m. A public comment period will be held from 12:20 p.m. to 1:20 p.m.

Public Participation: Subcommittee meetings are not required to be open to the public; however, the Commission has elected to open the presentation sessions of the meeting to the public. Individuals and representatives of organizations who would like to offer comments and suggestions may do so at the end of the public session on Tuesday, November 2, 2010. Approximately 1 hour will be reserved for public comments from 12:20 p.m. to 1:20 p.m. Time allotted per speaker will depend on the number who wish to speak but will not exceed 5 minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so beginning at 8 a.m. on November 2, 2010, at the Wyndham Chicago. Registration will close at noon on November 2, 2010.

Those not able to attend the meeting or have insufficient time to address the subcommittee are invited to send a written statement to Timothy A. Frazier, U.S. Department of Energy 1000 Independence Avenue, SW., Washington DC 20585, e-mail to *CommissionDFO@nuclear.energy.gov,* or post comments on the Commission Web site at *http://www.brc.gov.*

Additionally, the meeting will be available via live video webcast. The link will be available at *http://www.brc.gov.*

Minutes: The minutes of the meeting will be available at *http://www.brc.gov* or by contacting Mr. Frazier. He may be reached at the postal address or e-mail address above.

Issued in Washington, DC, on October 15, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–26476 Filed 10–19–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 8, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2260–001.
Applicants: Cabrillo Power I LLC.
Description: Cabrillo Power I LLC submits tariff filing per 35: Cabrillo I—Amendment to Market-Based Rate Tariffs to be effective 10/11/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5096.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER10–2261–001.
Applicants: Cabrillo Power II LLC.
Description: Cabrillo Power II LLC submits tariff filing per 35: Cabrillo Power II—Amendment to Market-Based Rate Tariffs to be effective 10/11/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5099.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER10–2263–001.
Applicants: El Segundo Power II LLC.
Description: El Segundo Power II LLC submits tariff filing per 35: El Segundo Power II—Amendment to Market-Based Rate Tariffs to be effective 10/11/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5111.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER10–2264–001.
Applicants: Long Beach Generation LLC.
Description: Long Beach Generation LLC submits tariff filing per 35: Long Beach Generation—Amendment to Market-Based Rate Tariffs to be effective 10/11/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5118.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER11–29–000.
Applicants: Safe Harbor Water Power Corporation.
Description: Safe Harbor Water Power Corporation requests an extension of time until 11/1/10 to submit the baseline tariff filing of its cost-based rate *etc.*
Filed Date: 10/04/2010.
Accession Number: 20101004–0041.
Comment Date: 5 p.m. Eastern Time on Monday, October 25, 2010.

Docket Numbers: ER11–54–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii: Cedar Creek E&P Agreement to be effective 9/15/2010.
Filed Date: 10/07/2010.
Accession Number: 20101007–5131.
Comment Date: 5 p.m. Eastern Time on Thursday, October 28, 2010.

Docket Numbers: ER11–55–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii: Logan City Construction Agreement to be effective 12/7/2010).
Filed Date: 10/07/2010.
Accession Number: 20101007–5132.
Comment Date: 5 p.m. Eastern Time on Thursday, October 28, 2010.

Docket Numbers: ER11–56–000.
Applicants: Enjet, Inc.
Description: Enjet, Inc. submits tariff filing per 35.12: Baseline to be effective 10/7/2010.
Filed Date: 10/07/2010.
Accession Number: 20101007–5133.
Comment Date: 5 p.m. Eastern Time on Thursday, October 28, 2010.

Docket Numbers: ER11–57–000.
Applicants: Black Hills Power, Inc.
Description: Black Hills Power, Inc. submits its Spinning Reserve Service Agreement, to be effective 10/9/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5002.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER11–60–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: ISA No. 2654, T42, among PJM, PSEG Fossil and PSEG Company to be effective 9/17/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5042.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER11–61–000.
Applicants: 3Degrees Group, Inc.
Description: 3Degrees Group, Inc. submits tariff filing per 35.12: 3Degrees FERC Electric MBR Filing to be effective 10/8/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5077.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER11–64–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 10–8–10 Attachment L Credit Cap Filing to be effective 12/8/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5128.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER11–65–000.
Applicants: Capitol District Energy Center Cogeneration Associates.
Description: Capitol District Energy Center Cogeneration Associates submits tariff filing per 35.13(a)(2)(iii: Revised Market-Based Rate Tariff Filing to be effective 10/9/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5129.
Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Docket Numbers: ER11–66–000.
Applicants: Saguaro Power Company LP.
Description: Saguaro Power Company LP submits tariff filing per 35.12: Saguaro Power—Amendment to Market-Based Rate Tariffs to be effective 10/11/2010.
Filed Date: 10/08/2010.
Accession Number: 20101008–5130.

Comment Date: 5 p.m. Eastern Time on Friday, October 29, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–26370 Filed 10–19–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2004–0065; FRL–9215–7]

Agency Information Collection Activities; Proposed Collection; Comment Request; Application Requirements for the Approval and Delegation of Federal Air Toxics Programs to State, Territorial, Local, and Tribal Agencies; EPA ICR No. 1643.07, OMB Control No. 2060–0264

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 a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on January 31, 2011. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before December 20, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0065 by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* Air and Radiation Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2004–0065. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Tina Ndoh, OAQPS/SPPD, D205–02, Environmental Protection Agency, RTP, NC 27711; telephone number: 919–541–2750; fax number: 919–541–6500; e-mail address: *ndoh.christina@epa.gov.*

SUPPLEMENTARY INFORMATION:

How can I access the docket and/or submit comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2004–0065, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified in this document.

What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What information collection activity or ICR does this apply to?

Affected entities: Entities potentially affected by this action are S/L/Ts participating in this voluntary program. These government establishments are classified as Air and Water Resource and Solid Waste Management Programs under Standard Industrial Classification (SIC) code 9511 and North American Industry Classification System (NAICS) code 92411. No industries under any SIC or NAICS codes will be included among respondents.

Title: Application Requirements for the Approval and Delegation of Federal Air Toxics Programs to State, Territorial, Local, and Tribal Agencies.

ICR numbers: EPA ICR No. 1643.07, OMB Control No. 2060–0264.

ICR status: This ICR is currently scheduled to expire on January 31, 2011. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This information collection is an application from State, territorial, local, or tribal agencies (S/L/Ts) for delegation of regulations developed under section 112 of the Clean Air Act (Act). The five options for delegation are straight delegation, rule adjustment, rule substitution, equivalency by permit, or state program approval. The information is needed and used to determine if the entity submitting an application has met the criteria established in the subpart E rule, codified as 40 CFR part 63, subpart E, in accordance with section 112(l) of the Act. This information is necessary and required for the Administrator to determine the acceptability of approving the S/L/T's rules, requirements or programs in lieu of the Federal section 112 rules or programs. Additionally, it is also necessary for the proper performance of our function, and will be used to ensure that the subpart E approval criteria have been met. The collection of information is authorized under 42 U.S.C. 7401–7671q.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average about 507 hours per S/L/T and 41 hours per application. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 124 S/L/Ts for maximum achievable control technology standards and 99 S/L/Ts for area source standards per year.

Frequency of response: One time per delegation request.

Estimated total average number of responses for each respondent: 15.

Estimated total annual burden hours: 62,844 hours.

Estimated total annual costs: about $3,012,300. This includes an estimated labor burden cost of $2,959,000 and an estimated cost of $53,000 for operation and maintenance costs resulting from photocopying and postage expenses.

Are there changes in the estimates from the last approval?

We are in the process of reviewing the key assumptions in the ICR that affect the overall burden estimation. These include, the number of delegation activities expected to occur during the upcoming clearance period, the delegation options most likely to be used by the delegated S/L/Ts, and the burden associated with each of the options. Depending on the outcome of this review, there could be changes in the overall burden estimates.

What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: October 12, 2010.

Peter Tsirigotis,

Director, Sector Policies and Program Division.

[FR Doc. 2010–26452 Filed 10–19–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2010–0413; FRL–9216–2; EPA ICR No. 0234.10; OMB Control No. 2080–0021]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Performance Evaluation Studies on Wastewater Laboratories (Renewal)

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 an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before November 19, 2010.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OECA–2010–0413 to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Enforcement and Compliance Docket, Mailcode 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Office of Compliance, Agriculture Division, 2225A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–2970; fax number: 202–564–0085; e-mail address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 16, 2010 (75 FR 34110), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OECA–2010–0413, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Enforcement and Compliance Docket is 202–566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Performance Evaluation Studies on Wastewater Laboratories (Renewal).

ICR numbers: EPA ICR No. 0234.10, OMB Control No. 2080–0021.

ICR Status: This ICR is scheduled to expire on December 31, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Discharge Monitoring Report-Quality Assurance (DMR–QA) participation is mandatory for major and selected minor permit holders under the Clean Water Act's National Pollution Discharge Elimination System (NPDES), Section 308. The DMR–QA study is designed to evaluate the analytic ability of the laboratories that perform chemical, microbiological and whole effluent toxicity (WET) analyses required in the NPDES permits for reporting results in the Discharge Monitoring Reports (DMR). Under DMR–QA, the permit holder is responsible: For having their in-house and/or contract laboratories perform proficiency test samples and submit results for grading by proficiency testing (PT) providers. Graded results are transmitted by either the permittee or PT provider to the appropriate Federal or State NPDES regulatory authority. Permit holders are responsible for submitting corrective action reports to the appropriate regulatory authority.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 6.3 hours per response. 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.

Respondents/Affected Entities: NPDES permittees designated by the EPA region or State with permitting responsibility and laboratories doing chemical/microbiological analysis and whole-effluent toxicity testing for these major dischargers.

Estimated Number of Respondents: 6,589.

Frequency of Response: Annual.

Estimated Total Annual Hour Burden: 41,511.

Estimated Total Annual Cost: $2,461,426, includes $1,251,910 annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 5,840 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease reflects EPA's granting a waiver for four States to use their laboratory certification program as a substitute for the DMR–QA program. This resulted in a reduction in the average number of participants from 7,516 to 6,589. The maintenance and operational cost has increased by $11,770 due to increased costs for obtaining proficiency testing samples.

Dated: October 13, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–26455 Filed 10–19–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0842; FRL–8849–1]

Methamidophos Registration Review Final Decision; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's final registration review decision for the pesticide, methamidophos, case 0043. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, that the pesticide can perform its intended function without causing unreasonable adverse effects on human health or the environment. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

FOR FURTHER INFORMATION CONTACT: *For pesticide specific information, contact:* K. Avivah Jakob, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–1328; fax number: (703) 308–8090; e-mail address: *jakob.kathryn@epa.gov.*

For general information on the registration review program, contact: Kevin Costello, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin @epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the pesticide specific contact 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 identification (ID) number EPA–HQ–OPP–2008–0842. 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. Background

A. What action is the agency taking?

Pursuant to 40 CFR 155.58(c), this notice announces the availability of EPA's final registration review decision for methamidophos, case 0043. Methamidophos is a restricted use organophosphate insecticide, that as of 2009 was registered for use on potato, cotton, tomato, and alfalfa grown for seed. However, in 2009, the sole methamidophos registrant, Bayer CropScience, informed the Agency that they were requesting to voluntarily cancel all of their remaining methamidophos product registrations. Following publication of a **Federal Register** notice announcing receipt of those requests and the completion of the corresponding public comment period, the Agency issued the product cancellation order on September 23, 2009, for all methamidophos product registrations. Details of the cancellation dates can be found in the Methamidophos Registration Review Decision document.

Pursuant to 40 CFR 155.57, a registration review decision is the Agency's determination whether a pesticide meets, or does not meet, the standard for registration in FIFRA. EPA has considered methamidophos in light of the FIFRA standard for registration and has concluded the methamidophos registration review. No further action is needed as all registrations of methamidophos have been cancelled. The Methamidophos Final Decision document in the docket describes the Agency's rationale for issuing a registration review final decision for this pesticide.

In addition to the final registration review decision document, the registration review docket for methamidophos also includes other relevant documents related to the registration review of this case. The proposed registration review decision was posted to the docket and the public was invited to submit any comments or new information. During the 60-day comment period, no public comments were received.

Pursuant to 40 CFR 155.58(c), the registration review case docket for methamidophos will remain open until all actions required in the final decision have been completed.

Background on the registration review program is provided at: *http://www.epa.gov/oppsrrd1/registration_review.* Links to earlier documents related to the registration review of this pesticide are provided at: *http://www.epa.gov/oppsrrd1/registration_review/methamidophos/index.htm.*

B. What is the agency's authority for taking this action?

Section 3(g) of FIFRA and 40 CFR part 155, subpart C, provide authority for this action.

List of Subjects

Environmental protection, Registration review, Pesticides and pests, methamidophos.

Dated: October 14, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–26453 Filed 10–19–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9215–6]

Science Advisory Board Staff Office; Request for Nominations of Experts To Serve on the Clean Air Scientific Advisory Committee (CASAC) Air Monitoring and Methods Subcommittee (AMMS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office is requesting public nominations of experts to serve on the Clean Air Scientific Advisory Committee (CASAC) Air Monitoring and Methods Subcommittee (AMMS).

DATES: Nominations should be submitted by November 10, 2010, per instructions below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding this Notice and Request for Nominations may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 564–2073; by fax at (202) 565–2098 or via e-mail at *stallworth.holly@epa.gov.* General information concerning the CASAC can be found on the EPA CASAC Web site at *http://www.epa.gov/casac.*

SUPPLEMENTARY INFORMATION:

Background: The Clean Air Scientific Advisory Committee (CASAC) was established under section 109(d)(2) of the Clean Air Act (CAA or Act) (42 U.S.C. 7409) as an independent scientific advisory committee. CASAC provides advice, information and recommendations on the scientific and technical aspects of air quality criteria and national ambient air quality standards (NAAQS) under sections 108 and 109 of the Act.

Section 109(d)(1) of the CAA requires that the Agency periodically review and revise, as appropriate, the air quality criteria and the National Ambient Air Quality Standard (NAAQS) for the six "criteria" air pollutants. EPA's Office of Air Quality Planning and Standards (OAQPS) requests independent review and advice from CASAC on the following subjects:

- *Oxides of Nitrogen (NO_X)-Sulfur Oxides (SO_X)* Monitoring and Network *Design*—A review of candidate methods for assessing levels of N and S deposition; specifically constituents such as particulate sulfate, total oxidized nitrogen (NO_y), sulfur dioxide (SO_2), and ammonia gas and ammonia ion combined (NH_X) in the assessment of an Atmospheric Acidification Potential Index, and the potential network design for a monitoring system in support of a secondary NO_X/SO_X NAAQS.
- *Photochemical Assessment Monitoring Stations (PAMS):* Network Re-engineering—Advice on potential revisions to the technical and regulatory aspects of the PAMS program; including changes to required measurements and associated network design requirements and a review of appropriate technology, sampling frequency, and overall program objectives in the context of the most recently revised ozone NAAQS and changes to atmospheric chemistry that have occurred over the past 10–15 years in the most significantly impacted areas.
- *Network Design Guidance Development for Near-road Ambient Air Monitoring Requirements: Multi-pollutant Focus*—Review of the progress of a pilot monitoring study including site selection, planned measurements, and timeline; review of EPA's Near-road Network Design Technical Assistance Document (first Draft) including assessment of procedures for identifying maximum site location(s) including dispersion modeling and evaluation of potential biasing factors and recommended measurements for near-road compliance network; and a review of the role of alternative technology such as passive measurement in compliance and research monitoring studies.
- *Methods for Volatile Organic Compounds (VOCs)*—Advice on potential improvements to TO–15 with particular emphasis on improving the characterization of acrolein; review method revisions for canister cleaning procedures, preparation of calibration standards, performance testing protocols, and subsequent changes to air quality system reporting procedures; advice on improvements for TO–13A methodology for compounds such as naphthalene, other polyaromatic hydrocarbons (PAHs) and branched PAHs; and advice on role of new technology in characterizing volatile and semi-volatile compounds on a real-time or near real-time basis.

In response to OAQPS request, the Science Advisory Board Staff Office is requesting public nominations of scientific and technical experts to form a new subcommittee of the CASAC to provide advice on the four advisory topics as described above. This subcommittee, the CASAC Air Monitoring and Methods Subcommittee (AAMS) may in the future address additional monitoring and methods issues related to other criteria pollutants and hazardous air pollutants. The AMMS will provide independent advice to the Administrator through the CASAC, a chartered Federal Advisory Committee, under the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App.). The AMMS will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Request for Nominations: The SAB Staff Office is seeking nominations of recognized, national experts in one or more of the following disciplines: Atmospheric sciences, dispersion modeling, atmospheric chemistry, ecosystem modeling, aquatic chemistry, environmental science and engineering, risk assessment, and statistical analysis. In particular, we seek nominees with knowledge of ambient air monitoring methods for criteria pollutants and air toxics, ambient air network design, environmental data analysis, quality assurance, dispersion modeling, emission inventories for point and mobile sources, source apportionment techniques, atmospheric chemistry, meteorology, and assessment of ecosystem impacts.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate individuals qualified in the area of science as described above to be considered for appointment to augment the Council for this review. Candidates also may nominate themselves. Nominations should be submitted in electronic format (which is preferred over hard copy) following the instructions for "Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed" *http://www.epa.gov/sab* provided on the SAB Web site. The form can be accessed through the "Nomination of Experts" link on the blue navigational bar on the SAB Web site at *http://www.epa.gov/casac.* To receive full consideration, nominations should include all of the information requested, and should be submitted in time to arrive no later than November 10, 2010. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

EPA's SAB Staff Office requests contact information about: The person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vitae; sources of recent grant and/or contract support; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Dr. Stallworth, DFO, at the contact information provided above in this notice. Non-electronic submissions must follow the same format and contain the same information as the electronic.

The SAB Staff Office will acknowledge receipt of the nomination and inform nominees of the Subcommittee for which they have been nominated. From the nominees identified by respondents to this **Federal Register** notice and other sources, the SAB Staff Office will develop a list of candidates for more detailed consideration. The list of candidates will be posted on the SAB Web site at *http://www.epa.gov/casac* and will include, for each candidate, the nominee's name and biosketch. Public comments on the list of candidates will be accepted for 21 calendar days. During this comment period, the public will be requested to provide information, analysis, or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates for the Committee.

For the SAB Staff Office, a balanced Committee is characterized by inclusion of candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation) and the collective breadth of experience to adequately address the charge. Public responses to the list of candidates will be considered in the selection of the Committee, along with information provided by candidates and information gathered by SAB Staff independently concerning the background of each candidate (*e.g.,* financial disclosure information and computer searches to evaluate a nominee's prior involvement with the topic under review). Specific criteria to be used in evaluation of an individual Committee member include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) absence of financial conflicts of interest; (c) scientific credibility and impartiality; (d) availability and willingness to serve; (e) ability to work constructively and effectively in committees; and (f) for the Committee as a whole, diversity of scientific expertise and viewpoints.

Prospective candidates will be required to fill-out the "Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency" (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal Advisory Committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. Ethics information, including EPA Form 3110–48, is available on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/Web/ethics?OpenDocument*.

Dated: October 14, 2010.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–26448 Filed 10–19–10; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

RIN 3052–AC64

Joint and Several Liability Reallocation Agreement

AGENCY: Farm Credit Administration.

ACTION: Notice of approval of the draft joint and several liability reallocation agreement.

SUMMARY: The Farm Credit Administration (FCA or we) is announcing that it has given approval of a Joint and Several Liability Reallocation Agreement (Agreement) to be entered into by all of the banks (System Banks) of the Farm Credit System (Farm Credit or System) and the Federal Farm Credit Banks Funding Corporation (Funding Corporation). The Agreement is designed to establish a procedure for non-defaulting banks to pay maturing System-wide debt on behalf of defaulting banks prior to a statutory joint and several call by the FCA.

FOR FURTHER INFORMATION CONTACT: Chris Wilson, Financial Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4204, TTY (703) 883–4434, or Rebecca S. Orlich, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION: The FCA published the draft Agreement in the **Federal Register** on August 18, 2010 (75 FR 51061) with a request for public comment. The draft Agreement had a 30-day comment period that ended on September 17, 2010. See 75 FR 51061 for the text of the entire Agreement, along with our preamble describing the background of the Agreement and providing other information. We received no public comments on the Agreement.

The Agreement is a voluntary agreement by the System Banks and the Funding Corporation that uses a debt-based formula to allocate payments of non-defaulting banks should a System bank default on a maturing insured consolidated or System-wide debt obligation and the amount of the default exceeds the amount available in the Farm Credit Insurance Fund to pay defaulted insured debt obligations. The parties to the draft Agreement submitted it to the FCA for approval under § 627.2750(h) of our regulations and also requested the Farm Credit System Insurance Corporation (FCSIC) to provide an expression of non-objection to the Agreement. The FCSIC insures consolidated and System-wide obligations using funds in the Farm Credit Insurance Fund. The Agreement will terminate if the FCA withdraws its approval, and the FCA retains full authority and responsibility to invoke statutory joint and several calls as prescribed under section 4.4(a)(2) and (d) of the Farm Credit Act of 1971, as amended (Act).[1] The FCA and the FCSIC are not parties to the Agreement.

The System Banks and Funding Corporation are also making conforming amendments to the Market Access Agreement (MAA) by adding three new sections to it. The conforming amendments are merely to ensure that provisions in the MAA do not prevent necessary payments under the Agreement. The FCA will publish the conforming MAA amendments in a separate **Federal Register** document.

The FCA believes that holders of System-wide debt obligations are unlikely to be harmed by this Agreement. The Agreement could create

[1] 12 U.S.C. 2155(a)(2) and (d).

the potential for building more capital at the bank level. After giving the public notice with the opportunity to comment and receiving no comments, the FCA Board has approved the draft Agreement in accordance with § 627.2750(h) of our regulations. The FCA's approval of the draft Agreement is conditioned on the board of directors of each bank and the Funding Corporation approving the Agreement and the FCSIC providing an expression of non-objection to the Agreement. The Agreement cannot be modified or amended without our approval.

Neither the Agreement (upon its effective date) nor our approval of it will in any way restrict or qualify the FCA's authority to exercise our powers, rights, and duties as a regulator or, as stated above, to invoke joint and several liability provisions under the Act. Furthermore, the Agreement does not provide any grounds or basis for challenging the FCA's or the FCSIC's actions with respect to the creation or conduct of conservatorships or receiverships. Finally, the FCA retains the right to modify or revoke its approval of the Agreement at any time.

Dated: October 14, 2010.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. 2010–26434 Filed 10–19–10; 8:45 am]

BILLING CODE 6705–01–P

FARM CREDIT ADMINISTRATION

[BM–14–OCT–10–02]

Cooperative Operating Philosophy—Serving the Members of Farm Credit System Institutions

AGENCY: Farm Credit Administration.

ACTION: Policy statement.

SUMMARY: The Farm Credit Administration (FCA) Board recently adopted a policy statement that reaffirms the FCA's support of members' participation in their Farm Credit System (System) institution and identifies three business practices for operating the cooperative with a focus on serving the members. Those practices are engaging members as owners, communicating with members, and providing value-added benefits to members.

DATES: *Effective Date:* October 14, 2010.

FOR FURTHER INFORMATION CONTACT: Deborah Wilson, Senior Accountant, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434, or Laura McFarland, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION: The FCA Board adopted a policy statement reaffirming its support for the cooperative structure and operation of System institutions. The policy statement, in its entirety, follows:

The FCA Board Hereby Adopts the Following Policy Statement:

Cooperative Operating Philosophy—Serving the Member of Farm Credit System Institutions FCA–PS–80 [BM–14–OCT–10–02]

Effective Date: 14–OCT–10.

Effect on Previous Actions: None.

Source of Authority: Preamble and section 1.1 of the Farm Credit Act of 1971, as amended.

Cooperative Commitment

The Farm Credit Administration (FCA) is committed to the cooperative structure under which Farm Credit System (System) institutions are required to operate.[1] The FCA emphasizes cooperative principles by advancing regulatory proposals that encourage farmer, rancher, and cooperative borrowers to participate in the management, control, and ownership of their institutions.[2] The FCA also emphasizes cooperative principles in the examination function and Financial Institution Rating System (FIRS) used to categorize the safety and soundness of System institutions.[3]

The FCA supports cooperative values that encourage member participation in System institutions. Cooperatives are, by definition, entities with a "member focus." They are owned and controlled by their members, and the members benefit from doing business with their cooperatives. Cooperative entities that focus on serving and fulfilling the needs of their members often realize greater participation in their institutions. While System institutions have strong reputations as effective cooperatives, they should build on this tradition through a cooperative business culture that goes beyond that required by statute and regulation.

History

The System is a Government-sponsored enterprise of cooperative institutions owned and controlled by their member-borrowers.[4] Prior to establishment of the System, a political consensus had been forming in Congress on a need for an improved system of credit delivery to agriculture. When Congress established the System in 1916,[5] it determined that the cooperative structure was the best model for furnishing sound, adequate and constructive credit and closely related services to rural areas.[6] Subsequent Farm Credit legislation, including the Farm Credit Act of 1971, as amended, has reaffirmed the cooperative nature of the System.

Policy on Implementing a Cooperative Operating Philosophy—Serving the Members

The System, through its cooperative structure, makes competitive credit available to creditworthy farmers, ranchers, producers and harvesters of aquatic products, and their cooperatives. The FCA believes the following three core cooperative principles are the foundation of the System's structure:[7]

(1) The cooperative is owned by its members.[8]

(2) The cooperative is controlled by its members.

(3) The members benefit from doing business with, and participating in, the management, control, and ownership of their institution.

While business practices may change over time, these underlying cooperative

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[1] *See* § 615.5230, "Implementation of cooperative principles."

[2] *See* FCA Policy Statement "Regulatory Philosophy" (FCA–PS–59), dated June 8, 2005.

[3] Under FIRS, each institution is assigned composite and component ratings based on an evaluation of the adequacy of *C*apital, *A*ssets, *M*anagement, *E*arnings, *L*iquidity, and *S*ensitivity to market risk (commonly referred to as "CAMELS"). Composite and component ratings are assigned based on a 1 to 5 numerical scale, with 1 being the highest rating indicating the strongest level of performance and risk management practices and the least degree of supervisory concern. Within the Management component, FCA qualitatively rates the use of cooperative principles in the conduct of business activities. Please visit *www.fca.gov* for further information on FIRS.

[4] The Preamble and section 1.1 of the Farm Credit Act of 1971, as amended (Act), Public Law 92–181, 85 Stat. 583.

[5] The Federal Farm Loan Act, Public Law 64–158, 39 Stat. 360.

[6] The cooperative structure of the System was viewed by Congress as providing greater safeguards than other structures under consideration at the time.

[7] The International Co-operative Alliance (ICA), an independent, non-governmental association, has issued a statement on cooperative identity in which they espouse seven principles as guidelines for cooperatives to put their values into practice. Those seven principles are voluntary and open membership, democratic member control, member economic participation, autonomy and independence, training and information, cooperation among cooperatives, and concern for community. The principles can be found on the ICA Web site, *http://www.ica.coop.*

[8] Under 4.3A of the Act, borrower-members of a System institution acquire voting stock at loan origination and hold allocated equities generated by patronage distributions from net earnings. Borrower-members' voting stock and allocated equities are at-risk investments.

principles have sufficient flexibility to ensure changes in best practices remain member focused. System institutions should apply cooperative business practices in a manner that best serves their members and meets their mission as Government–sponsored enterprises, while continuing to operate in a safe and sound manner, by

(1) Engaging members as owners,

(2) Communicating with members, and

(3) Providing value-added benefits to members.

Serving the Members of Farm Credit System Institutions

Operating in a cooperative manner requires the boards of directors and management to engage, communicate, and provide value-added benefits to members. System institutions should proactively identify opportunities to reach out to member-borrowers beyond the lending and related services relationship.[9]

Many System institutions have been innovative and diligent in maintaining a cooperative philosophy in their business operations. The FCA encourages System institutions to continue and further their efforts to uphold a cooperative business culture. In addition, the FCA Board challenges the board and management of each System institution to periodically review and update their cooperative philosophies and practices and ensure that they maintain the focus to serve the members.

Dated this 14th day of October 2010.

By Order of the Board.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. 2010–26433 Filed 10–19–10; 8:45 am]

BILLING CODE 6705–01–P

[9] At a later date, the FCA will issue an Informational Memorandum to share its perspective on cooperative business practices that System institutions could use to reach out to their member-borrowers.

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

October 12, 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 (PRA) 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 valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 20, 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 via fax at 202–395–5167 or via e-mail to *Nicholas_A._Fraser@omb.eop.gov* and to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.* Include in the e-mail the OMB control number of the collection. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at 202–418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Numbers: 3060–0906.

Title: 47 CFR Section 73.624(g), FCC Form 317.

Form Numbers: 317.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit entities; Not for profit institutions; State, local or Tribal government.

Number of Respondents/Responses: 9,351 respondents; 18,702 responses.

Estimated Hours per Response: 2–4 hours.

Frequency of Response: Recordkeeping requirement; Annual reporting requirement.

Total Annual Burden: 56,106 hours.

Total Annual Cost: $1,402,650.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 301, 303, 336 and 403 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Act Assessment: No impact(s).

Needs and Uses: On September 30, 2004, the Commission adopted the Report and Order, In the Matter of Amendments of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television Translator, Television Booster Stations, and to Amend Rules for Digital Class A Television Stations, MB Docket No. 03–185, FCC 04–220 (released September 30, 2004). In this Report and Order, the Commission establishes rules and policies for digital low power television ("LPTV") and television translator ("TV translator") stations and modifies certain rules applicable to digital Class A TV stations ("Class A"). The Commission addresses important issues such as: (1) The digital low power television transition; (2) channel assignments; (3) authorization of digital service; (4) permissible service; (5) mutually exclusive applications; (6) protected service area; and (7) equipment and other technical and operational requirements. Furthermore, the Report and Order adopts the following information collection requirement:

47 CFR 73.624(g) adds a new group of respondents to this collection (namely, "low power television, TV translator, and Class A television station DTV licensees"). The Commission has also revised FCC Form 317 and its instructions to indicate that low power television, TV translator, and Class A television station DTV licensees are required to file FCC Form 317 and to report their ancillary and supplementary services, make the required payment to the Commission, and retain the appropriate records.

OMB Control Numbers: 3060–0386.

Title: Special Temporary Authorization (STA) Requests; Notifications; and Informal Filings; Sections 1.5, 73.1615, 73.1635, 73.1740, and 73.3598; CDBS Informal Forms; Section 73.788; FCC Form 337.

Form Numbers: 337.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit entities; Not for profit institutions; State, local or Tribal government.

Number of Respondents/Responses: 4,070 respondents; 4,070 responses.

Estimated Hours per Response: 0.5 to 4 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 4,105 hours.

Total Annual Cost: $2,059,410.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 1, 4(i) and (j), 7, 301, 302, 303, 307, 308, 309, 312, 316, 318, 319, 324, 325, 336 and 337 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Act Assessment: No impact(s).

Needs and Uses: On September 30, 2004, the Commission adopted the Report and Order, In the Matter of Amendments of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television Translator, Television Booster Stations, and to Amend Rules for Digital Class A Television Stations, MB Docket No. 03–185, FCC 04–220 (released September 30, 2004). In this Report and Order, the Commission establishes rules and policies for digital low power television ("LPTV") and television translator ("TV translator") stations and modifies certain rules applicable to digital Class A TV stations ("Class A"). The Commission addresses important issues such as: (1) The digital low power television transition; (2) channel assignments; (3) authorization of digital service; (4) permissible service; (5) mutually exclusive applications; (6) protected service area; and (7) equipment and other technical and operational requirements. Furthermore, the Report and Order adopts a new information collection requirement, which provides that new digital low power television, television translator, and Class A permittees may submit FCC Form 337, Application for Extension of Time to Construct a Digital Television Broadcast Station, should an acceptable reason for failing to construct, as set forth in 47 CFR 74.788(c)(1)–(2), apply.

Also, the other information collection requirements contained under OMB control number 3060–0386, Special Temporary Authorization (STA) Requests; Notifications; and Informal Filings; §§ 1.5, 73.1615, 73.1635, 73.1740, and 73.3598 of the Commission rules; CDBS Informal Forms, have already been approved by OMB and remain unchanged.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–26427 Filed 10–19–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 12, 2010.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. First State Associates, Inc., Hawarden, Iowa; to acquire 100 percent of the voting shares of Farmers State Holding Company, Marion, South Dakota, and thereby indirectly acquire voting shares of Farmers State Bank, Marion, South Dakota.

Board of Governors of the Federal Reserve System, October 14, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–26285 Filed 10–19–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 15, 2010.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. Old National Bancorp, Evansville, Indiana, to merge with Monroe Bancorp, Bloomington, Indiana, and thereby indirectly acquire Monroe Bank, Bloomington, Indiana.

2. German American Bancorp, Inc., Jasper, Indiana, to merge with American Community Bancorp, Inc., Evansville, Indiana, and thereby indirectly acquire Bank of Evansville, Evansville, Indiana.

Board of Governors of the Federal Reserve System, October 15, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–26357 Filed 10–19–10; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Request for Information (RFI) for Consumer Health Initiative To Develop Collaborations That Produce Evidence-Based Informatics Resources and Products[1]

The National Cancer Institute, Division of Cancer Control and Population Sciences, Behavioral Research Program requests information to expand the 2009 Consumer Health Summit post-conference activities. Information of interest includes: Current journal articles, funding opportunities, and product development plans, which will be shared publicly on *http://www.InformaticsforConsumerHealth.org.*

Contributions should be targeted toward informatics that support behavior change as outlined in the Office of the National Coordinator for Health Information Technology's (ONC) Meaningful Use Matrix (*http://healthit.hhs.gov*) with the end-goal of dissemination into public, clinical and/or home settings. Content areas may include, but are not limited to, care coordination, eHealth tools and strategies, early prevention and detection, electronic health records, clinical decision support, health care disparities, and telehealth/telemedicine.

The purpose of this request is to solicit ongoing information from commercial Information Technology (IT), government, health care, education, research, and advocacy organizations on the state of informatics for consumer health. The overarching goal is to promote transparency, stimulate original development and partnerships, and minimize overlap in projects in the consumer health arena.

DATES: Comments should be submitted by February 1, 2011.

ADDRESSES: Individuals, groups and organizations interested in contributing may submit information through an electronic document online *http://informaticsforconsumerhealth.org/index.php?q=collaborate,* or via e-mail *contact@InformaticsforConsumerHealth.org.* Information will be made publicly available; trade secrets should not be submitted. A response to this RFI will not be viewed as a binding commitment to develop or pursue the ideas discussed. NCI will not pay for information provided under this RFI. This RFI is not accepting applications for financial assistance or financial incentives. NCI has no obligation to respond to those who submit comments or questions, and/or give any feedback on any decision made based on the comments received.

FOR FURTHER INFORMATION CONTACT: Connie Dresser, RDPH, LN, Program Director, Health Communication and Informatics Research Branch, Behavioral Research Program, Division of Cancer Control & Population Sciences, National Cancer Institute, 6130 Executive Blvd, EPN–Rm. 4072, Bethesda, MD 20892; *cd34b@nih.gov.*

Background: In a report released in 2009, the National Research Council warned that efforts to invest in health IT would be fruitless unless they were aimed at providing better cognitive support for physicians, patients and their caregivers. As part of an inter-agency effort to *increase the quality and utilization of evidence-based consumer products for integration into health information exchange (HIE) networks,* the November 2009 Informatics for Consumer Health Summit on Communication, Collaboration, & Quality was convened. This federally sponsored summit aimed to: (1) Convene leaders across industry to open a dialogue for improving health care quality through enhanced behavioral support for consumers across the health care spectrum, (2) develop products, including a journal supplement and alert service, and (3) foster collaborations to integrate evidence-based commercial and non-commercial products.

Following the summit, an online hub of consumer health-related resources (*http://www.InformaticsforConsumerHealth.org*) was created to assist public and private collaborators in the development and dissemination of evidence-based, user-centered products that will aid providers in clinical settings and promote positive health behaviors among consumers. The site includes evidence-based journal articles, Web articles, expert guest blog posts, and funding opportunities.

Dated: October 12, 2010.

Connie Dresser,

Program Director, Health Communication and Informatics Research Branch, Behavioral Research Program, DCCPS, National Cancer Institute.

[FR Doc. 2010–26360 Filed 10–19–10; 8:45 am]

BILLING CODE 4140–01–P

[1] Products include interventions, services, technology tools, and systems.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, e-mail: *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the agency; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: The National Health Service Corps (NHSC) Scholarship Program Application (OMB No. 0915–0146)—Revision

The National Health Service Corps (NHSC) Scholarship Program provides the NHSC with the health professionals it requires to carry out its mission of providing primary health care to populations residing in areas of greatest need. Under this program, health professions students are awarded scholarships in return for service in a federally designated Health Professional Shortage Area (HPSA). Students are supported who are well qualified to participate in the NHSC Scholarship Program and who want to assist the NHSC in its mission, both during and after their period of obligated service. The NHSC Scholarship Program forms are used to collect relevant information necessary to make determinations of award. Scholars are selected for these competitive awards based on the information provided in the application, forms, and supporting documentation. Awards are made to applicants who demonstrate a high potential for providing quality primary health care services in HPSAs.

The program forms include the following: The NHSC Scholarship Program Application, Letter of Recommendation, the Authorization to Release Information, the Verification of Acceptance/Good Standing Report, the Receipt of Exceptional Financial Need Scholarship, and the Verification Regarding Disadvantaged Background.

The annual estimate of burden is as follows:

Instrument	Number of respondents	Responses/ respondent	Total responses	Hours per response	Total burden hours
NHSC Scholarship Program Application	1800	1	1800	2.0	3600
Letter of Recommendation	1800	2	3600	.50	1800
Authorization to Release Information	1800	1	1800	.10	180
Verification of Acceptance/Good Standing Report	1800	1	1800	.25	450
Receipt of Exceptional Financial Need Scholarship	100	1	100	.25	25
Verification Regarding Disadvantaged Background	300	1	300	.25	75
Total			9400		6130

E-mail comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: October 14, 2010.

Robert Hendricks,

Director, Division of Policy and Information Coordination.

[FR Doc. 2010–26329 Filed 10–19–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–11–0753]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Evaluation of the Centers for Disease Control and Prevention's Consumer Response Service Center, CDC INFO (OMB No. 0920–0753 exp. 10/31/2010) —Revision—Office for the Associate Director of Communication, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In September 2005, the Centers for Disease Control and Prevention launched CDC–INFO, a consolidated, comprehensive effort to respond to consumer, provider and partner inquiries on a broad spectrum of public health topics by telephone or e-mail. More than 40 nationwide public health hotlines and warm lines were consolidated into one central phone number using a phased approach from 2005 to 2008. Management of CDC–INFO services is increasingly guided by a comprehensive evaluation that includes point-of-service and follow-up customer satisfaction surveys. These surveys provide the public with ongoing opportunity to express their level of satisfaction and report how they have used this information. All members of the public, health care providers and businesses can contact CDC–INFO by phone, e-mail, or postal mail to request health information or order CDC publications. CDC–INFO is a proactive, unified, and integrated approach to the delivery of public health information and is designed to contribute to improving the health and safety of the public. Customers are defined as any individual or group seeking health or public health information from CDC. This includes the public, media, medical and healthcare professionals, public health professionals, partner groups, businesses, researchers, and others.

The data collected since the approval of the original CDC–INFO study have been used for assessment of contact center performance and customer satisfaction.

This request is for a three year extension and revision of the existing data collection. Due to budget cuts, the following evaluation activities which were previously approved will be discontinued and are not included in the revised request: CDC–INFO Live Phone Follow-up Survey, Postcard Survey for Single Publication Orders, Postcard Survey for Bulk Mailing, Web Survey for Internet Publication Orders, Web Survey for E–Mailed Publication Orders, Customer Representative Survey, Special Outreach Surveys (General Public), Special Outreach Surveys (Professionals), Emergency Response Surveys (General Public), Emergency Response Surveys (Professionals). CDC–INFO will continue to offer two of the previously approved customer satisfaction surveys. The Interactive Voice Response Survey—offered in English and Spanish and the Web Survey for E–Mail Inquirers—offered in English and Spanish. Both surveys underwent minimal changes. The changes to the surveys will allow CDC–INFO to collect race/ethnicity data that is consistent with the Census form which gives participants the opportunity to identify as multi-racial.

Sample size, respondent burden, and intrusiveness have been minimized to be consistent with national evaluation objectives. There is no cost to the respondent, other than their time. The total estimated annual burden hours are 6,206.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hrs)
General Callers	Brief Interactive Voice Response Survey (English & Spanish).	92,000	1	4/60
Email Inquirers	Web Survey for E-mail Inquires (English & Spanish)	1,460	1	3/60

Dated: October 14, 2010.

Carol E. Walker,

Acting Reports Clear Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–26386 Filed 10–19–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–F–0537]

Arcadia Biosciences, Inc.; Filing of Food Additive Petition (Animal Use); Safflower Seed Meal

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Arcadia Biosciences, Inc., has filed a petition proposing that the food additive regulations be amended to provide for the safe use of seed meal from a variety of bioengineered safflower in cattle and poultry feeds.

DATES: Submit either electronic or written comments on the petitioner's environmental assessment by November 19, 2010.

ADDRESSES: Submit electronic comments to: *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Isabel W. Pocurull, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6853, e-mail: *isabel.pocurull@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 2267) has been filed by Arcadia Biosciences, Inc., 202 Cousteau Pl., suite 105, Davis, CA 95618. The petition proposes to amend the food additive regulations in part 573 *Food Additives Permitted in Feed and Drinking Water of Animals* (21 CFR part 573) to provide for the safe use of seed meal from a variety of bioengineered safflower (*Carthamus tinctorius* L.) in cattle and poultry feeds. The safflower variety has been bioengineered to contain a gene from the water mold *Saprolegnia diclina* responsible for production of γ-linolenic acid in the seed oil. Seed meals are the ground residues obtained after processing seeds to extract their oil and are a common ingredient in livestock feed.

The potential environmental impact of this action is being reviewed. To encourage public participation consistent with regulations issued under the National Environmental Policy Act (40 CFR 1501.4(b)), the agency is placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Division of Dockets Management (*see* **DATES** and **ADDRESSES**) for public review and comment.

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the **Federal Register.** If, based on its review, the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.51(b).

Dated: October 14, 2010.

William T. Flynn,

Acting Director, Center for Veterinary Medicine.

[FR Doc. 2010–26345 Filed 10–19–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; 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 USC, as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, 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 Alcohol Abuse and Alcoholism, Special Emphasis Panel, NIAAA Member Conflict Applications.

Date: October 26, 2010.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Ranga Srinivas, PhD, Chief, Extramural Project Review Branch, EPRB, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2085, Bethesda, MD 20892. 301–451–2067. *srinivar@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: October 7, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–26361 Filed 10–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee H—Clinical Groups, NCI–H Cooperative Groups.

Date: November 1, 2010.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6116 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call)

Contact Person: Timothy C. Meeker, MD, PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8103, Bethesda, MD 20892, (301) 594–1279, *meekert@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to scheduling conflicts.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: October 14, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–26390 Filed 10–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Meeting

Notice is hereby given of a Services Workshop convened by the Interagency Autism Coordinating Committee (IACC), Services Subcommittee.

The purpose of the IACC Services Workshop: Building a Seamless System of Quality Services and Supports Across the Lifespan is to gather State agency officials and disability experts to describe solutions and innovations to systems that result in services, supports, and policies that help people with disabilities, including Autism Spectrum Disorders (ASD), to improve the quality of their lives across the lifespan.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of meeting: Services Workshop.

Date: November 8, 2010.

Time: 9 a.m. to 5:30 p.m. Eastern Time.

Agenda: The workshop will focus on policy issues related to the system of services and supports for people with ASD and their families.

Place: Hilton Washington DC/Rockville Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

Webcast Live: http://videocast.nih.gov/.

Conference Call Access: Phone number: 888–577–8995. Access code: 1991506.

Cost: The meeting is free and open to the public.

Registration: http://www.acclaroresearch.com/oarc/11-8-10/. Online pre-registration is strongly recommended to expedite check-in.

Access: Metro accessible—Red Line—Twinbrook Metro Station Hotel parking validation available.

Contact Person: Ms. Lina Perez, Office of Autism Research Coordination, Office of the Director, National Institute of Mental Health, NIH, 6001 Executive Boulevard, NSC, Room 8185a, Bethesda, MD 20892–9669, Phone: 301–443–6040, E-mail: *IACCPublicInquiries@mail.nih.gov.*

The meeting will be open to the public with attendance limited to space available. Seats in the meeting room will be on a first come, first served basis. The meeting will also be open to the public through a conference call phone number and webcast live on the Internet. Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. If you experience any technical problems with the webcast live or conference call, please e-mail *IACCTechSupport@acclaroresearch.com.*

Individuals who participate in person or by using these electronic services and who need special assistance, such as captioning of the conference call or other reasonable accommodations, should submit a request to the Contact Person listed on this notice at least 7 days prior to the meeting.

To access the webcast live on the Internet the following computer capabilities are required: (A) Internet Explorer 5.0 or later, Netscape Navigator 6.0 or later or Mozilla Firefox 1.0 or later; (B) Windows® 2000, XP Home, XP Pro, 2003 Server or Vista; (C) Stable 56k, cable modem, ISDN, DSL or better Internet connection; (D) Minimum of Pentium 400 with 256 MB of RAM (Recommended); (E) Java Virtual Machine enabled (Recommended).

Information about the IACC is available on the Web site: *http://www.iacc.hhs.gov.*

The schedule for the meeting is subject to change.

Dated: October 14, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–26389 Filed 10–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Maternal Fetal Medicine Units Network.

Date: November 2, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Peter Zelazowski, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver

National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892–7510, 301–435–6902, *peter.zelazowski@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 14, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–26387 Filed 10–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Subcommittee for Dose Reconstruction Reviews (SDRR), Advisory Board on Radiation and Worker Health (ABRWH), National Institute for Occupational Safety and Health (NIOSH)

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 following meeting of the aforementioned subcommittee.

TIME AND DATE: 9 a.m.–5 p.m., November 8, 2010.

PLACE: Cincinnati Airport Marriott, 2395 Progress Drive, Hebron, Kentucky 41018, Telephone (859) 334–4611, Fax (859) 334–4619.

Status: Open to the public, but without a public comment period. To access by conference call dial the following information: 1 (866) 659–0537, Participant Pass Code 9933701.

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines that have been promulgated by the Department of Health and Human Services (HHS) as a final rule; advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule; advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program; and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, and will expire on August 3, 2011.

Purpose: The Advisory Board is charged with (a) Providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advise the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class. The Subcommittee for Dose Reconstruction Reviews was established to aid the Advisory Board in carrying out its duty to advise the Secretary, HHS, on dose reconstruction.

Matters to be Discussed: The agenda for the Subcommittee meeting includes: Selection of individual radiation dose reconstruction cases to be considered for review by the Advisory Board; selection of individual radiation dose reconstruction cases to be considered for review by the Procedures Subcommittee for the evaluation of Program Evaluation Reports; discussion of dose reconstruction cases under review (sets 7–9); OCAS dose reconstruction quality management and assurance activities.

The agenda is subject to change as priorities dictate.

In the event an individual cannot attend, written comments may be submitted. Any written comments received will be provided at the meeting and should be submitted to the contact person below well in advance of the meeting.

CONTACT PERSON FOR MORE INFORMATION: Theodore Katz, Executive Secretary, NIOSH, CDC, 1600 Clifton Road, NE., Mailstop E–20, Atlanta, Georgia 30333, Telephone (513) 533–6800, Toll Free 1 (800) CDC–INFO, E-mail *ocas@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: October 13, 2010.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2010–26368 Filed 10–19–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Cell Biology and Signaling of Neurodevelopment.

Date: November 4, 2010.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call.)

Contact Person: Laurent Taupenot, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4811, MSC 7850, Bethesda, MD 20892, 301–435–1203, *taupenol@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Experimental Cancer Therapeutics.

Date: November 15–16, 2010.

Time: 8:30 a.m. to 5 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: Denise R. Shaw, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7804, Bethesda, MD 20892, 301–435–0198, *shawdeni@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: HIV/AIDS.

Date: November 16, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Marriott Wardman Park, 2660 Woodley Road, NW., Washington, DC 20008.

Contact Person: Jose H Guerrier, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–435–1137, *guerriej@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333,Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 14, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–26363 Filed 10–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Skeletal Muscle/Sensorimotor.

Date: November 3, 2010.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Daniel F. McDonald, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4110, MSC 7814, Bethesda, MD 20892, (301) 435–1215, *mcdonald@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cancer Drug Development and Therapeutics.

Date: November 9–10, 2010.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Jeffrey Smiley, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–594–7945, *smileyja@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Health and Health Related Behavior of Individuals and Populations.

Date: November 11, 2010.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Karin F. Helmers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7770, Bethesda, MD 20892, 301–254–9975, *helmersk@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group; AIDS Immunology and Pathogenesis Study Section.

Date: November 15, 2010.

Time: 8:30 a.m. to 6 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: Mary Clare Walker, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5208, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Immunology and Pathogenesis of HIV/AIDS.

Date: November 15, 2010.

Time: 8:30 a.m. to 6 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: Robert Freund, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3200, MSC 7848, Bethesda, MD 20892, 301–435–1050, *freundr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Vascular and Cardiac Biology.

Date: November 22, 2010.

Time: 1:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Larry Pinkus, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pinkusl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Normal and Oncogenic Signal Transduction Pathways.

Date: November 23, 2010.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Nywana Sizemore, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6204, MSC 7804, Bethesda, MD 20892, 301–435–1718, *sizemoren@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 14, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–26362 Filed 10–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0001]

Request for Nominations for Voting Members on a Public Advisory Committee; Science Board to the Food and Drug Administration

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for voting members to serve on the Science Board to FDA, Office of the Commissioner, Office of Chief Scientist.

FDA has a special interest in ensuring that women, minority groups, and individuals with disabilities are adequately represented on advisory

committees and, therefore, encourages nominations of qualified candidates from these groups.

DATES: Nominations received by November 19, 2010, will be given first consideration for membership on the Science Board. Nominations received after November 19, 2010, will be considered for nomination to the committee should nominees still be needed.

ADDRESSES: All nominations for membership should be sent electronically to *CV@FDA.HHS.GOV*, or by mail to Advisory Committee Oversight and Management Staff, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002. Information about becoming a member on an FDA advisory committee can also be obtained by visiting FDA's Web site at *http://www.fda.gov/oc/advisory/default.htm.*

FOR FURTHER INFORMATION CONTACT: Regarding all nomination questions for membership: Donna L. Mentch, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 4203, Silver Spring, MD 20993–0002, 301–796–8523, FAX: 301–847–8617, *donna.mentch@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is requesting nominations for voting members on the Science Board to FDA.

I. General Function of the Committee

The Science Board shall provide advice primarily to the Commissioner of FDA (the Commissioner) and other appropriate officials on specific complex and technical issues as well as emerging issues within the scientific community. Additionally, the Science Board will provide advice to the Agency on keeping pace with technical and scientific evolutions in the fields of regulatory science, on formulating an appropriate research agenda, and on upgrading its scientific and research facilities to keep pace with these changes. It will also provide the means for critical review of Agency sponsored intramural and extramural scientific research programs.

II. Criteria for Voting Members

FDA is requesting nominations of voting members with appropriate expertise in the following fields of food safety, nutrition, chemistry, pharmacology, toxicology, clinical research, epidemiology, product safety, product manufacturing sciences and quality or other scientific areas relevant to FDA regulated products such as systems biology, bioinformatics, wireless health care devices, nanotechnology, and combination products. Members shall be chosen from academia and industry. The Science Board may include one technically qualified member, selected by the Commissioner or designee, who is identified with consumer interests and is recommended by either a consortium of consumer-oriented organizations or other interested persons. The Science Board may also include technically qualified Federal members.

III. Nomination Procedures

Any interested person may nominate one or more qualified persons for membership on the Science Board. Self-nominations are also accepted. Nominations must include a current, complete resume or curriculum vitae for each nominee, current business and/or home address, telephone number, and email address if available. Nominations must specify the advisory committee for which the nominee is recommended. Nominations must also acknowledge that the nominee is aware of the nomination, unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters as financial holdings, employment, and research grants and/or contracts.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14 relating to advisory committees.

Dated: October 15, 2010.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2010–26400 Filed 10–19–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Automated Commercial Environment (ACE): Announcement of a National Customs Automation Program Test of Automated Manifest Capabilities for Ocean and Rail Carriers

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: U.S. Customs and Border Protection (CBP) will be conducting a National Customs Automation Program test concerning the transmission of required advance ocean and rail data through the Automated Commercial Environment (ACE). This notice provides a description of the test process, sets forth eligibility criteria for participation, opens the application period for participation, outlines the development and evaluation methodology to be used, and invites public comments. Additionally, this notice advises the public that shortly after the successful completion of the test, CBP intends to publish a notice in the **Federal Register** announcing that ACE will be the only CBP-approved electronic data interchange (EDI) for submitting advance ocean and rail data and intends to amend the regulations as necessary.

DATES: CBP will start accepting applications on October 20, 2010. Selected applicants will be notified by CBP and will then undergo a certification process to be followed by active testing. The active test will commence no earlier than December 22, 2010 and will run for no less than 90 days. Comments concerning this notice and all aspects of the announced test may be submitted at any time during the test period.

ADDRESSES: Applications to participate in the test should be sent to Susan Maskell at *Susan.Maskell@dhs.gov.* Please describe in the body of the e-mail any past EDI history with CBP. Written comments concerning program and policy issues should be sent to *ACEM1POLICY@cbp.dhs.gov.* Please indicate in the subject line whether the comment relates to ocean carriers, rail carriers, or both.

FOR FURTHER INFORMATION CONTACT: Interested parties should direct any questions to their assigned Client Representative. Interested parties without an assigned Client Representative should direct their questions to the Client Representative Branch at 571–468–5500.

SUPPLEMENTARY INFORMATION:

Background

The National Customs Automation Program (NCAP) was established in Subtitle B of Title VI—Customs Modernization, in the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (Customs Modernization Act). *See* 19 U.S.C. 1411. Through NCAP, the initial thrust of customs modernization was on trade compliance and the development of the Automated Commercial Environment (ACE), the planned successor to the Automated Commercial System (ACS). ACE is an automated and electronic system for commercial trade processing which is intended to streamline business processes, facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while ensuring compliance with U.S. laws and regulations and reducing costs for U.S. Customs and Border Protection (CBP) and all of its communities of interest.

The ability to meet these objectives depends on successfully modernizing CBP's business functions and the information technology that supports those functions. CBP's modernization efforts are accomplished through phased releases of ACE component functionality designed to replace a specific legacy ACS function. Each release will begin with a test and will end with mandatory compliance with the new ACE feature, thus retiring the legacy ACS function. Each release builds on previous releases and sets the foundation for subsequent releases.

Ocean and Rail Data

This document is announcing a test to allow ocean and rail data to be transmitted to ACE. The data includes the advance cargo information required by section 343 of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002 (*see* 68 FR 68140, December 5, 2003), and the advance data ocean carriers are required to provide pursuant to the importer security filing and additional carrier requirements interim final rule, commonly known as 10 + 2 (*see* 73 FR 71730, November 25, 2008).[1] Currently, this information is required to be transmitted via ACS in advance of arrival through a CBP-approved electronic data interchange (EDI). For ocean and rail carriers, the CBP-approved EDI is the Automated Manifest System (AMS). Ocean carriers use Vessel AMS and rail carriers use Rail AMS and the data is transmitted using one of the following AMS-compatible software data standards: ANSI X12, CAMIR, UN/EDIFACT, or BAPLIE. Currently, brokers submitting the advance data required by 10 + 2 use the Automated Broker Interface (ABI)-compatible software data standard known as CATAIR. See the Implementation of the Test section below for further explanation concerning the different software data standards.

As explained in further detail below, test participants will retain all of their current functionality. However, test participants will receive the additional benefits and functionality ACE provides. The deployment of ocean and rail manifest data through ACE continues to lay the foundation for a multimodal database that will eventually host all modes of transportation, including air.

Upon commencement of this test, ACE will be the system of record for ocean and rail data at all ports for test participants, therefore replacing ACS as their system of record. *See* ACE Systems of Record Notice (71 FR 3109), published in the **Federal Register** on January 19, 2006. As such, the creation and maintenance of specified data elements will originate in ACE and will be distributed to other CBP systems.

Authorization for the Test

The Customs Modernization Act provides the Commissioner of CBP with authority to conduct limited test programs or procedures designed to evaluate planned components of the NCAP. This test is authorized pursuant to § 101.9(b) of the CBP Regulations (19 CFR 101.9(b)) which provides for the testing of NCAP programs or procedures. This test is being conducted pursuant to this authority.

Implementation of the Test

With the publication of this notice CBP will begin accepting applications from all transmitters of required advance ocean and rail data who wish to participate in the test. Interested applicants should contact Susan Maskell (*susan.maskell@dhs.gov*) in the form of an e-mail stating their qualifications based on the below referenced selection criteria, past EDI history with CBP, and their technical specifications. The e-mail should also include a point of contact. Applications will be accepted throughout the duration of the test and will be processed in the order in which they are received. Test participants will be chosen based on the selection criteria established by CBP (explained below in the Test Participant Selection Criteria section) and will be notified directly if they are chosen to participate in the initial test.

Currently, AMS and ABI users are responsible for developing or procuring AMS or ABI-compatible software for transmitting the required advance data to CBP. The following is a list of current AMS or ABI-compatible software:

- ANSI X12—The proprietary EDI data standard of the American National Standards Institute (ANSI). This is the standard currently used by most rail and many ocean AMS transmitters.
- CAMIR—Customs Automated Manifest Interface Requirements. This is the CBP proprietary EDI data standard developed to allow ocean manifest transmitters a standard format to send their data to CBP.
- UN/EDIFACT—The United Nations Electronic Data Interchange for Administration of Commerce and Transport. This is the EDI data standard developed and maintained by the United Nations.
- BAPLIE—Bayplan/Stowage Plan Occupied and Empty Locations. This is a data message set of the UN/EDIFACT EDI data format to standardize the transmission of stowage plans associated with containerized cargo.
- CATAIR—Customs And Trade Automated Interface Requirements. This is a CBP proprietary EDI data standard used primarily for the ABI but also used for in-bond transactions, ISF, and customhouse broker queries of CBP manifest systems.

Test Participant Selection Criteria

CBP has selected its criteria for test participants to include each type of current transmitter of required advance data for ocean and rail and each type of AMS or ABI-compatible software during the test to ensure compatibility with ACE. Specifically, CBP is looking for test participants to include:

- 2–3 Ocean Carriers. At least one must be filing manifests and transmitting unified manifest/ISF data using X12 and one must be using CAMIR message formats. Carrier applicants must also be submitting stow plans via BAPLIE (UN/EDIFACT).
- 2 Service Centers. One using X12 message formats and one using CAMIR message formats. Each service center must have at least one client filing manifests and transmitting unified manifest/ISF data and who is also submitting stow plans via BAPLIE (UN/EDIFACT).
- 1 Port Authority. Preferably one that both sends and receives data.
- 2 Terminal Operators. One using X12 message formats and one using CAMIR message formats.
- 2–3 Rail Carriers. At least one from the Northern Border and one from the Southern Border.
- 1–2 ABI filers currently filing the following information electronically: In-bond applications (ABI Applications, commonly known as "QP/WP"), Bill of Lading Update (ABI Application "LN"), and Cargo/Manifest Status Query (ABI Application "IN") transactions and processing Broker Download (ABI Application "BD") and Status Notifications (ABI Application "NS").

[1] For specific information about the requirements to provide advance cargo information to CBP, please see the following sections of title 19 of the Code of Federal Regulations (CFR): 4.7 Inward foreign manifest; production on demand; contents and form; advance filing of cargo declaration; 4.7a Inward manifest; information required; alternative forms; 4.7c Vessel stow plan; 4.7d Container status messages, 123.91 Electronic information for rail cargo required in advance of arrival; and part 149 Importer Security Filing.

• 2–3 stand-alone ISF filers. This will ensure that both X12 and CAMIR message formats are represented.

Additional Eligibility Requirements:

• Participant must be a current AMS EDI transmitter for ocean or rail modes of transportation using ANSI X12 or the CAMIR interfaces or an ABI transmitter using the CATAIR interface for in-bond transactions (QP/WP);

• Participant must have, or agree to establish, an ACE Secure Data Portal account; and

• Participant must have their software ready to test with CBP once CBP begins the certification process.

CBP will post the appropriate standards needed to enable each specific type of AMS or ABI-compatible software to work with ACE on the CBP.gov Web site approximately 90 days prior to the start of the active test stage. This will enable transmitters of the required advance ocean and rail data to conform their own software or acquire new software that is compatible with ACE, in anticipation of ACE becoming the only CBP-approved EDI for submitting required ocean and rail data.

I. Certification Stage

Applicants will be notified of their selection as participants. After notification, CBP will begin a certification process with the participants. The certification process is the first step towards being able to utilize ACE and it consists of two preliminary tests designed to ensure the successful transmission of data through ACE: The systems interface test and the software test.

The systems interface test is used to verify the accuracy of the participant's communications software and hardware. Any communications problems encountered during the test will be resolved. A pre-defined test scenario must be followed by each participant to evaluate its software's effectiveness in transmitting and receiving manifest, site, user, and other data. The systems interface test is complete when the participant has retrieved and verified CBP-created client-specific files from the ACE database.

The software test allows final adjustments to the participant's system and provides an opportunity for error detection without risk to the ACE production system. CBP will process sample messages and generate error messages, reject messages, and status notifications. The software test is complete when the participant has demonstrated that its software is able to transmit sample manifests, various messages, amendments, and General Order (GO) status replies according to established test procedures.

II. Active Test Stage

After completion of the certification process, but no earlier than December 22, 2010, CBP will deploy ACE ocean and rail functionality capabilities for the initial group of test participants. Throughout the test, CBP will maintain communication with the participants in order to receive comments, address issues, and measure the functionality of ACE.

ACE Functionality

Test participants will retain all of the existing functionality currently available through ACS, including the capability to:

• Submit ocean bills of lading and rail preliminary and transit bills of lading;

• Report conveyance itinerary for ocean and rail conveyances;

• Process conveyance arrivals and departures for ocean and rail;

• Process in-bond arrivals and exports;

• Process consist information for rail;

• Process general order transactions;

• Manage holds on bills of lading, conveyances, in-bond moves, empty equipment;

• Report Freight Remaining On Board;

• Process automated line release for rail cargo;

• Process permit to transfer requests;

• Submit Bio-Terrorism Act prior notification data for the Food and Drug Administration;

• Receive general order, overdue for arrival or export in-bond advisories;

• Share status notifications with other trade partners;

• Process transfer of liability requests between bonded carriers;

• Request that bill of lading data be sent to entry filers to expedite cargo clearance;

• Receive entry advisories in advance of arrival;

• Add secondary in-bond movements;

• Receive shipment status advice from other Federal agencies; and

• Submit vessel stowage plans.

In addition to the above-referenced capabilities, the following new functionalities will be available through ACE:

• Broker Download

The broker download functionality, currently available for rail transportation, will be available for ocean transportation as well. The broker download process allows for the EDI conversion of the carrier bill of lading that CBP receives in advance of shipment arrival into the CATAIR record format used by participants in the CBP ABI application. ACE will send the ABI formatted bill of lading to the customs broker designated in the bill of lading. The broker download serves as an electronic "notification" for the broker that a shipment is incoming. This will expedite the cargo clearance process at the port of arrival.

• Holds at the Container Level

CBP will have the ability to place and remove holds at the container level. This will allow one container to be held and the balance of the containers on the bill of lading to be moved to the premises of the importer pending final delivery authorization from CBP.

• Expansion of Shipment Status Disposition Codes

The shipment status disposition code will be expanded to three positions to accommodate the participation of additional Federal Agencies that will use ACE under the International Trade Data System (ITDS) initiative of the ACE project. While this new EDI functionality is being announced in this Notice, this expansion to three positions will not be part of the initial commencement of this test, but will occur sometime thereafter. The expansion will be communicated to CBP trade partners well in advance through CSMS, publication of implementation guides on *cbp.gov* and outreach through trade associations and liaison groups.

• Enhanced Transaction Sets

The migration to the new ACE system will require changes to the EDI transaction sets that are used between CBP and the trade to send and receive cargo data and shipment status notifications. These changes will allow CBP to provide significantly more discrete and specific error messages that will allow the transmitter to quickly amend and resubmit. Error messages may be provided for multiple lines and specifically identify sections of submissions containing errors. Standardized system edits will be added to reduce the amount of customized coding that was previously required. All updated transaction sets will be posted to the CBP.gov Web site. Information regarding any changes to the ocean and/or rail manifest transaction sets will also be communicated via CSMS.

ACE Portal Account Enhancements

On October 18, 2007, CBP published a Notice in the **Federal Register** (72 FR 59105) announcing, among other things, the establishment of carrier portal accounts for all modes of transportation, including ocean and rail carriers. Carriers interested in establishing ocean and/or rail portal accounts were requested to provide CBP with their Standard Carrier Alpha Code (SCAC) and method of transportation (*i.e.,* ocean, rail). Upon establishment of those accounts, ocean and rail carriers were advised that they would only have access to the static data and basic account profile information necessary to establish their portal account.

For participants of this test, ocean and rail portal carrier accounts will now also have the following additional capabilities:

• Conveyance Maintenance for Ocean Carriers

Ocean portal carrier account users will have the ability to create and maintain vessel data via the portal using portal input screens and/or using the Excel spreadsheet upload capability. Ocean portal carrier account users will also have the ability to download their vessel data into the Excel spreadsheet.

• Custodial Bond Authorization and Verification

The bond authorization capability will be managed by the principal of the custodial bond *(i.e.,* the bonded carrier) to cover the movement of in-bond cargo between CBP ports of entry. Via the ACE Portal, the bond principal will be able to designate (by either the SCAC or ABI Filer code) those entities that are authorized to obligate the bond principal's custodial bond. A date range for this authorization is also available. Additionally, the bond principal will be able to set one of two levels of authorization:

1. *All Ports:* This level of authorization allows the bond principal to grant an authorized user the authority to obligate its Activity Code 2 custodial bond for the movement of in-bond cargo between all CBP ports, with the optional feature of setting an expiration date. If the bond principal chooses the optional expiration date, the permission to obligate the custodial bond expires at midnight on the expiration date.

2. *Specific Ports:* This level of authorization allows the bond principal to grant an authorized user the authority to obligate its bond for the movement of in-bond cargo between specified CBP ports, with an optional feature of setting an expiration date. There is no limit to how many port pairings the bond principal can establish for the authorized user. If the bond principal chooses the optional expiration, the permission to obligate the custodial bond expires at midnight on the expiration date.

The new custodial bond authorized user verification functionality is an optional feature of this test and will only work with entities that are also ACE test participants. This functionality will not apply to bonds authorized via AMS. Custodial bond principals that do not want to invoke this new authorized user validation feature need not create any authorized user records. In the absence of any authorized user records associated to a custodial bond, the bond principal may enter its own SCAC Code as the only authorized user in its account. Such processing is consistent with current custodial bond verifications in the legacy ACS ocean and rail manifest and QP/WP software applications and truck QP/WP software applications. A bonded carrier may restrict all other entities from obligating its bond by entering its own SCAC code as the only authorized user in its account.

Conversely, as soon as one party is added as an authorized user to this new "custodial bond user verification" file, the principal of the custodial bond must enter authorizing records for each of the parties that is allowed to invoke its custodial bond. For example, if a custodial bond principal allows four other parties to obligate its bond, the bond principal must enter authorizations for each one of the four parties. If the bond principal chooses not to allow any party to obligate its custodial bond, then the bond principal must enter its own SCAC Code as the only authorized user in its account.

ACE will continuously verify that the party attempting to obligate a custodial bond is authorized to do so. If the party obligating the custodial bond is NOT the bond owner, ACE will check the data base of authorized users on that bond. If the party using the custodial bond is not authorized, the bill of lading submission or ABI electronic in bond request (commonly known as "QP"), will be rejected back to the data processing site of origination with the following error message, "Not Authorized To Use Custodial Bond." A message will also be sent to the bond owner identifying the bill of lading number and the coded identity of the party that attempted to invoke the bond.

• Report Capability

Ocean and rail portal carrier account users will have the ability to run various standard bill of lading, in-bond, manifest, and equipment reports. Carrier account users will also be able to modify standard reports as well as create customized reports from scratch. Reports can be saved to a "Shared Folder" for use by others within the account.

All data submitted and entered into the ACE Portal is subject to the Trade Secrets Act (18 U.S.C. 1905) and is considered confidential, except to the extent as otherwise provided by law (*see* 19 U.S.C. 1431(c)). Participation in this or any of the previous ACE tests is not confidential and upon a written Freedom of Information Act request, a name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

III. Expansion of the Test for All AMS Transmitters Not Chosen Initially

Once the initial group of participants has demonstrated the capability to operate in ACE in the active test stage, CBP intends to expand the number of test participants until all interested ocean and rail transmitters are participating in the test. This expansion will be done on a rolling basis, beginning some time around the start of the active test stage for the initial group of participants. All ocean and rail transmitters not using ACE, including applicants not chosen to participate in the initial test group, will be contacted via CBP.gov, CSMS, and other trade outreach efforts to determine their interest in participating in the test. Later added participants must follow the same procedures as those explained above in Section I—Certification Stage and Section II—Active Test Stage.

CBP's ultimate goal is the full transition of ocean and rail data transmission to ACE. This transition would be announced in the **Federal Register** in a manner consistent with the Administrative Procedure Act and would occur no earlier than 90 days after the commencement of the active test stage. As indicated, the active test stage will start no earlier than December 22, 2010.

Misconduct Under the Test

An ACE test participant may be subject to civil and criminal penalties, administrative sanctions, liquidated damages and/or suspension from this test for any of the following:

• Failure to follow the terms and conditions of this test;

• Failure to exercise reasonable care in the execution of participant obligations;

• Failure to abide by applicable laws and regulations;

• Misuse of the ACE Portal;

• Engagement in any unauthorized disclosure or access to the ACE Portal; and

• Engagement in any activity which interferes with the successful evaluation of the new technology.

A notice proposing suspension will be provided in writing to the participant. Such notice will apprise the participant of the facts or conduct warranting suspension and will inform the participant of the date that the suspension will begin.

Any decision proposing suspension of a participant may be appealed in writing to the Assistant Commissioner, Office of Field Operations, within 15 calendar days of the notification date. Should the participant appeal the notice of proposed suspension, the participant must address the facts or conduct charges contained in the notice and state how compliance will be achieved. In cases of willful misconduct or where public health interests or safety is concerned, the suspension may be effective immediately.

Test Evaluation Criteria

To ensure adequate feedback, participants are required to participate in an evaluation of this test. CBP also invites all interested parties to comment on the design, implementation and functionality of ACE or the test program at any time during the test period. CBP will publish the final results in the **Federal Register** and the Customs Bulletin as required by 19 CFR 101.9(b).

CBP will use questionnaires to address such issues as:

- Problem resolution;
- System efficiency;
- Operational issues; and
- Other issues identified by the participants.

Next Steps

Shortly after the successful completion of the test, but no earlier than March 22, 2011, CBP plans to publish a notice in the **Federal Register** announcing that ACE will be the only CBP-approved EDI for required advance ocean and rail data.

Dated: October 15, 2010.

Thomas Winkowski,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 2010–26428 Filed 10–19–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Blackstone River Valley National Heritage Corridor Commission: Notice of Meeting

Notice is hereby given in accordance with Section 552b of Title 5, United States Code, that a meeting of the John H. Chafee Blackstone River Valley National Heritage Corridor Commission will be held on Friday, November 19, 2010.

The Commission was established pursuant to Public Law 99–647. The purpose of the Commission is to assist federal, state and local authorities in the development and implementation of an integrated resource management plan for those lands and waters within the Corridor.

The meeting will convene on November 19, 2010 at 9 a.m. at Brigham Hill Community Barn located at 37 Wheeler Road, North Grafton, MA for the following reasons:

1. *Approval of Minutes*
2. *Chairman's Report*
3. *Executive Director's Report*
4. *Financial Budget*
5. *Public Input*

It is anticipated that about thirty people will be able to attend the session in addition to the Commission members.

Interested persons may make oral or written presentations to the Commission or file written statements. Such requests should be made prior to the meeting to: Jan H. Reitsma, Executive Director, John H. Chafee, Blackstone River Valley National Heritage Corridor Commission, One Depot Square, Woonsocket, RI 02895, *Tel.:* (401) 762–0250.

FURTHER INFORMATION CONCERNING THIS MEETING MAY BE OBTAINED FROM: Jan H. Reitsma, Executive Director of the Commission at the aforementioned address.

Jan H. Reitsma,

Executive Director, BRVNHCC.

Notice of Full Commission Meeting for the John H. Chafee Blackstone River Valley National Heritage Corridor Commission

Notice is hereby given, in accordance with section 552b of Title 5, United States Code, that the meeting of the Full Commission of the John H. Chafee Blackstone River Valley National Heritage Corridor Commission will be held on Friday, November 19, 2010 at 9:00 a.m. at Brigham Hill Community Barn located at 37 Wheeler Road, North Grafton, MA. The purpose of the Commission is to assist federal, state and local authorities in the development and implementation of an integrated Resource Management Plan for those lands and waters within the Corridor in Rhode Island and Massachusetts.

[FR Doc. 2010–26328 Filed 10–19–10; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT980300–112100000–PH0000–24–1A]

Notice of Utah's Resource Advisory Council (RAC) Subcommittee Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management's (BLM) Utah Resource Advisory Council (RAC) Subcommittee will meet as indicated below.

DATES: The Utah RAC Subcommittee will meet on Tuesday, November 16, 2010, from 11 a.m. until 2 p.m., at the Utah Department of Agriculture and Food (UDAF) office, second floor conference room.

ADDRESSES: The UDAF is located at 350 North Redwood Road, Salt Lake City, Utah 84114.

FOR FURTHER INFORMATION CONTACT: Sherry Foot, Special Programs Coordinator, Utah State Office, Bureau of Land Management, P.O. Box 45155, Salt Lake City, Utah 84145–0155; phone (801) 539–4195.

SUPPLEMENTARY INFORMATION: The Utah RAC has formed a subcommittee to explore ways to involve more people and groups in the proposed Rich County Allotment Consolidation Project. While there is currently significant support for the project from many conservation organizations, those leading the effort have not yet involved many of the energy development and recreational user communities. The subcommittee will be recommending ideas and initiatives to help the RAC gain consensus for this landscape-scale effort that affects lands managed by the BLM. Agenda topics will include: Review the presentation on the Rich County Allotment Consolidation Project that was given at the September RAC meeting; review the highlights of the project and discuss relevance to all user groups; provide list of agencies & Non-Governmental Organizations (NGO's) that have been exposed to the project; identify others that should be involved and methods for involving them; and, potential to expand the concept to other areas.

A half-hour public comment period, where the public may address the Subcommittee, is scheduled from 1:30 p.m. until 2 p.m. Written comments may be sent to the BLM's address listed above. Transportation, lodging, and meals are the responsibility of the participating public.

Dated: October 13, 2010.

Kent Hoffman,

Acting State Director.

[FR Doc. 2010–26365 Filed 10–19–10; 8:45 am]

BILLING CODE 4310–DQ–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–732]

In the Matter of Certain Devices Having Elastomeric Gel and Components Thereof; Notice of Commission Determination Not To Review an Initial Determination Granting Complainant's Motion To Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 5) of the presiding administrative law judge ("ALJ") granting a motion to amend the complaint and notice of investigation.

FOR FURTHER INFORMATION CONTACT: Mark B. Rees, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3116. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On August 4, 2010, the Commission instituted this investigation based on the complaint, as supplemented, of Interactive Life Forms, LLC of Austin, Texas ("ILF"). 75 FR 47027 (Aug. 4, 2010). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain devices having elastomeric gel and components thereof by reason of infringement of certain claims of U.S. Patent No. 5,782,818 and U.S. Patent No. 5,807,360. The complaint alleges the existence of an industry in the United States as required by section 337(a)(2), names twenty six business entities as respondents (a number of which have been terminated from the investigation based on consent order stipulations and consent orders), and requests relief in the form of an exclusion order and cease and desist orders.

On August 25, 2010, ILF moved for leave to amend the complaint and notice of investigation based upon information learned after the complaint's filing. Specifically, ILF sought to add two respondents, Easybuy Inc. d/b/a Blush Novelties (135–42 39th Ave., 3rd Floor, Flushing, New York) and Spencer Gifts, LLC (6826 Black Horse Pike, Egg Harbor Township, New Jersey), and to correct the identification of two respondents, TEG, L.L.C., whose correct address is 11 Perimeter Center East, #1215, Atlanta, Georgia, and One Up Innovations, Inc., 2745 Bankers Industrial Drive, Atlanta, Georgia, which had been misidentified as Liberator, Inc. The Commission investigative attorney filed a response in support of the motion.

On September 20, 2010, the ALJ issued the subject ID. He found that ILF demonstrated good cause for each requested amendment and therefore granted the motion. No petitions for review of the subject ID were filed.

The Commission has determined not to review the subject ID.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and Commission rules 210.21, 210.42, 19 CFR 210.21, 210.42.

By order of the Commission.

Issued: October 14, 2010.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. 2010–26334 Filed 10–19–10; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[USITC SE–10–029]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: October 22, 2010 at 2 p.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: None.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701–TA–470–471 and 731–TA–1169–1170 (Final) (Certain Coated Paper Suitable for High-Quality Graphics Using Sheet-Fed Presses From China and Indonesia)—briefing and vote. (The Commission is currently scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before November 10, 2010.)
5. Outstanding action jackets:

(1) Document No. GC–10–161 concerning Inv. No. 337–TA–413 (Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing Same).

(2) Document No. GC–10–181 concerning Inv. No. 337–TA–703 (Certain Mobile Telephones and Wireless Communications Devices Featuring Digital Cameras, and Components Thereof).

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: October 15, 2010.

By order of the Commission.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2010–26423 Filed 10–18–10; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–345]

Shifts in U.S. Merchandise Trade 2010

AGENCY: United States International Trade Commission.

ACTION: Availability on Commission's Web site of the 2010 report on shifts in merchandise trade during 2009; opportunity to submit written comments relating to the 2010 report and possible content of the 2011 report.

SUMMARY: The 2010 report can now be accessed and downloaded from the Commission's Web site at *http://www.usitc.gov/tradeshifts/*. The format used by the Commission since 2004 includes links to Commission research and other resources including data, as well as links to other organizations with related information. User feedback on the revised format is encouraged by providing access to the ITC online Reader Satisfaction Survey (*http://reportweb.usitc.gov/reader_survey/readersurvey.html*).

A CD–ROM version of the 2010 report may be requested by contacting the Office of the Secretary at 202–205–2000 or by fax at 202–205–2104. Readers of the report may also provide comments by downloading the survey form and business reply mailer for this publication from the Commission's Web site.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC 20436. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm.*

FOR FURTHER INFORMATION CONTACT: Project leader, Brendan Lynch (202–205–3313 or *brendan.lynch@usitc.gov*) or deputy project leader, Michelle Koscielski (202–205–3489 or *michelle.koscielski@usitc.gov*). For information on the legal aspects, please contact William Gearhart, Office of General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Public Affairs Officer (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing impaired individuals are advised that information on this matter can be obtained by contacting the TDD terminal on 202–205–2648.

Background: The Commission has prepared and published annual reports on U.S. trade shifts in selected industries/commodity areas under investigation No. 332–345 since 1993. Beginning in 2004, the Commission converted the report to an exclusively Web-based format (with added focus on sectoral issues) that can be accessed electronically. The initial notice of institution of this investigation was published in the **Federal Register** of September 8, 1993 (58 FR 47287). The Commission expanded the scope of this investigation to cover services trade in a separate report, which it announced in a notice published in the **Federal Register** of December 28, 1994 (59 FR 66974). The merchandise trade report has been published in the current series under investigation No. 332–345 annually since September 1993.

This year's Web-based format identifies the key trends affecting principal foreign markets and 10 major U.S. sectors.

By order of the Commission.

Issued October 15, 2010.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. 2010–26364 Filed 10–19–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on August 25, 2010, 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.

Any bulk manufacturers who are presently, or are applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, **Federal Register** Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than November 19, 2010.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substances in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26447 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to Title 21 Code of Federal Regulations 1301.34(a), this is notice that on September 3, 2010, Johnson Matthey, Inc., Pharmaceutical Materials, 2003 Nolte Drive, West Deptford, New Jersey 08066–1742, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Phenylacetone (8501)	II
Coca Leaves (9040)	II
Thebaine (9333)	II
Opium, raw (9600)	II
Noroxymorphone (9668)	II
Poppy Straw Concentrate (9670)	II

The company plans to import the listed controlled substances as raw materials for use in the manufacture of bulk controlled substances for distribution to its customers.

No comments, objections, or requests for any hearings will be accepted on any application for registration or re-registration to import crude opium, poppy straw, concentrate of poppy straw, and coca leaves. As explained in the Correction to Notice of Application pertaining to Rhodes Technologies, 72 FR 3417 (2007), comments and requests for hearings on applications to import narcotic raw material are not appropriate.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances listed in schedule I or II, which fall under the authority of section 1002(a)(2)(B) of the Act (21 U.S.C. 952(a)(2)(B)) may, in the circumstances set forth in 21 U.S.C. 958(i), file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than November 19, 2010.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic classes of any controlled substances in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR § 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26454 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on September 15, 2010, Hospira Inc., 1776 North Centennial Drive, McPherson, Kansas 67460–1247, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Remifentanil (9739), a basic class of controlled substance listed in schedule II.

The company plans to import Remifentanil for use in dosage form manufacturing.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than November 22, 2010.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26445 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 20, 2010, Cayman Chemical Company, 1180 East Ellsworth Road, Ann Arbor, Michigan 48108, made application by renewal to the Drug Enforcement Administration (DEA) 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 registration.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 20, 2010.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26468 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 14, 2010, GE Healthcare, 3350 North Ridge Avenue, Arlington Heights, Illinois 60004–1412, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of Cocaine (9041), a basic class of controlled substance listed in schedule II.

The company plans to manufacture a radioactive product used in diagnostic imaging in the diagnosis of Parkinson's Disease and for manufacture in bulk for investigational new drug (IND) submission and clinical trials.

Any other such applicant, and any person who is presently registered with DEA to manufacture such a substance, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, VA 22152; and must be filed no later than December 20, 2010.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26443 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 12, 2010, Noramco Inc., 500 Swedes Landing Road, Wilmington, Delaware 19801–4417, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Codeine-N-oxide (9053)	I
Dihydromorphine (9145)	I
Morphine-N-oxide (9307)	I
Methylphenidate (1724)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Thebaine (9333)	II
Opium extracts (9610)	II
Opium fluid extract (9620)	II
Opium tincture (9630)	II
Opium, powdered (9639)	II
Opium, granulated (9640)	II
Oxymorphone (9652)	II
Noroxymorphone (9668)	II
Tapentadol (9780)	II

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substance, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administrator, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 20, 2010.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26456 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 7, 2010, National Center for Natural Products Research—NIDA MProject, University of Mississippi, 135 Coy Waller Lab Complex, University, Mississippi 38677, 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 cultivate marihuana for the National Institute on Drug Abuse for research approved by the Department of Health and Human Services.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 20, 2010.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26450 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 20, 2010, Halo Pharmaceutical Inc., 30 North Jefferson Road, Whippany, New Jersey 07981, 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
Dihydromorphine (9145)	I
Hydromorphone (9150)	II

Dihydromorphine is an intermediate in the manufacture of Hydromorphone and is not for commercial distribution. The company plans to manufacture Hydromorphone HCL for sale to other manufacturers and for the manufacture of other controlled substance dosage units for distribution to its customers.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 20, 2010.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26469 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 8, 2010, ISP Freetown Fine Chemicals, 238 South Main Street, Assonet, Massachusetts 02702, made application by renewal to the Drug Enforcement Administration (DEA) 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
Phenylacetone (8501)	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.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 20, 2010.

Dated: October 8, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–26440 Filed 10–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Submission for OMB Review: Comment Request

October 13, 2010.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation including, among other things, a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Michel Smyth on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov.*

Interested parties are encouraged to send written comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—Bureau of Labor Statistics (BLS), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–7314/ *Fax:* 202–395–5806 (these are not toll-free numbers), *E-mail: OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register.** In order to ensure the appropriate consideration, comments should reference the OMB Control Number (*see* below).

The OMB is particularly interested in comments which:

- 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;
- 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;
- Enhance the quality, utility, and clarity of the information to be collected; and
- 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.

Agency: Bureau of Labor Statistics.

Type of Review: New Collection.

Title of Collection: Forms Design and Pilot Testing for the BLS Green Practices and Processes Project.

OMB Control Number: 1220–0NEW.

Frequency: Once.

Affected Public: Business or other for-profit, Not-for-profit institutions.

Total Estimated Number of Respondents: 2,200.

Total Number of Responses: 2,450.

Total Estimated Annual Burden Hours: 858.

Total Estimated Annual Costs Burden (Operation and Maintenance): $0.

Description: The 2010 Congressional Appropriation tasks the Bureau of Labor Statistics (BLS) with producing occupational employment and wage data on green jobs. This initiative will produce information on: (1) The number of and trend over time in green jobs, (2) the industrial, occupational, and geographic distribution of green jobs, and (3) the wages of the workers in these jobs. BLS presented its approach to measuring green jobs and the proposed definition of green jobs in a March 16, 2010, **Federal Register** Notice (75 FR 12571). The measurement approach includes two types of surveys: One on jobs related to producing green goods and services, and one on jobs related to using environmentally friendly production processes and practices. This request for OMB approval concerns testing research for the second type of survey, on jobs related to environmentally friendly production processes and practices. The research described in this information collection request focuses on defining environmentally friendly production technologies and practices and the ability of firms to provide occupation and wage information on jobs associated with those defined technologies and practices.

Linda Watts Thomas,

Acting Departmental Clearance Officer.

[FR Doc. 2010–26281 Filed 10–19–10; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection, Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed extension of the "Census of Fatal Occupational Injuries." A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section of this notice on or before December 20, 2010.

ADDRESSES: Send comments to Nora Kincaid, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Nora Kincaid, BLS Clearance Officer, at 202–691–7628. (*See* **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The Bureau of Labor Statistics (BLS) was delegated responsibility by the Secretary of Labor for implementing Section 24(a) of the Occupational Safety and Health Act of 1970. This section states that "the Secretary shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses * * *"

Prior to the implementation of the Census of Fatal Occupational Injuries (CFOI), the BLS generated estimates of occupational fatalities for private sector employers from a sample survey of about 280,000 establishments. Studies showed that occupational fatalities were underreported in those estimates as well as in those compiled by regulatory, vital statistics, and workers' compensation systems. Estimates prior to CFOI varied widely, ranging from 3,000 to 10,000 fatal work injuries annually. In addition, information needed to develop prevention strategies were often missing from these earlier programs.

In the late 1980s, the National Academy of Sciences study, *Counting Injuries and Illnesses in the Workplace,* and another report, *Keystone National Policy Dialogue on Work-Related Illness and Injury Recordkeeping,* emphasized the need for the BLS to compile a complete roster of work-related fatalities because of concern over the accuracy of using a sample survey to estimate the incidence of occupational fatalities. These studies also recommended the use of all available data sources to compile detailed information for fatality prevention efforts.

The BLS tested the feasibility of collecting fatality data in this manner in 1989 and 1990. The resulting CFOI was implemented in 32 States in 1991. National data covering all 50 States and the District of Columbia have been compiled and published for 1992–2009, approximately eight months after the end of each calendar year.

The CFOI compiles comprehensive, accurate, and timely information on work-injury fatalities needed to develop effective prevention strategies. The system collects information concerning the incident, demographic information on the deceased, and characteristics of the employer.

Data are used to:

—develop employee safety training programs;
—develop and assess the effectiveness of safety standards; and
—conduct research for developing prevention strategies.

In addition, State partners use the data to publish State reports, to identify State-specific hazards, to allocate resources for promoting safety in the workplace, and to evaluate the quality of work life in the State.

II. Current Action

Office of Management and Budget clearance is being sought for the Census of Fatal Occupational Injuries.

In 2008, 5,214 workers lost their lives as a result of injuries received on the job. This official systematic, verifiable count mutes controversy over the various counts from different sources. The CFOI count has been adopted by the National Safety Council and other organizations as the sole source of a comprehensive count of fatal work injuries for the U.S. If this information were not collected, the confusion over the number and patterns in fatal occupational injuries would continue, thus hampering prevention efforts. By providing timely occupational fatality data, the CFOI program provides safety and health managers the information necessary to respond to emerging workplace hazards.

During 2009, BLS Washington staff responded to approximately 1,000 requests for CFOI data from various organizations. (This figure excludes requests received by the States for State-specific data.) In addition, the CFOI page of the BLS Web site averaged about 7,000 users per month in 2009.

Washington staff also responded to numerous requests from safety organizations for staff members to participate in safety conferences and seminars. The CFOI research file, made available to safety and health groups, is being used by 15 organizations. Study topics include fatalities by worker demographic category (young workers, older workers, Hispanic workers); by occupation or industry (construction workers, police officers, firefighters, landscaping workers, workers in oil and gas extraction); by event (heat-related fatalities, fatalities from workplace violence, suicides, falls from ladders); or other research such as safety and health program effectiveness and the impact of fatality risk on wages. (A current list of research articles and reports that include CFOI data can be found in the BLS Report 1015, dated June 2009, Appendix G. Copies of this report are available upon request.)

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

• 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.

• 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.

• Enhance the quality, utility, and clarity of the information to be collected.

• 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.

Type of Review: Extension of a currently approved collection.

Agency: Bureau of Labor Statistics.

Title: Census of Fatal Occupational Injuries.

OMB Number: 1220–0133.

Affected Public: Federal Government; Individuals or households; Private sector (Business or other for-profits, Not-for-profit institutions, Farms); State, local or tribal governments.

Frequency: On occasion.

Form	Total respondents	Total responses	Average time per response	Estimated total burden
BLS CFOI–1	1,797	1,797	20 minutes	599 hours
Source Document Letter	224	25,000	8.3352 minutes	3,473 hours
Totals	2,021	26,797		4,072 hours

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 14th day of October 2010.

Kimberley Hill,

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2010–26297 Filed 10–19–10; 8:45 am]

BILLING CODE 4510–24–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 10–13]

Amendment to the Report on the Selection of Eligible Countries for Fiscal Year 2011

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: This notice amends the previously published report entitled "Report on the Criteria and Methodology for Determining the Eligibility of Candidate countries for Millennium Challenge Account Assistance for Fiscal Year 2011," which appeared October 4, 2010 in the **Federal Register** (Volume 75, Number 191, pages 61216–61219).

Background

MCC relies on information from the International Monetary Fund (IMF) for its Fiscal Policy indicator. The amendment to the reference report is to adjust for the IMF's decision this year to replace one data series with another of slightly different technical specifications. IMF made this replacement data public on October 6, 2010 and subsequent to our earlier **Federal Register** notice.

In previous years, the data MCC used for this measure had come primarily from publicly available IMF country reports or, where public IMF data were outdated or unavailable, were provided directly by candidate country governments with input from U.S. missions in host countries. All data were cross-checked with the series General Government Balance (or Central Government Balance) as a percent of gross domestic product (GDP) from the IMF's World Economic Outlook database to try to ensure consistency across countries. However, beginning with the 2010 World Economic Outlook database, the IMF replaced the General Government Balance series with the Net Lending/Borrowing series.

Whereas General Government Balance was calculated as revenue minus expenditure and net lending operations, Net Lending/Borrowing is calculated simply as revenue minus total expenditure. It is similar to General Government Balance, but is believed to be an improved measure; its adoption is part of an IMF migration to a more rigorous, transparent, and comprehensive framework for recording government finance statistics. The Net Lending/Borrowing series is also publicly available for 182 countries as part of the World Economic Outlook database. Consequently, the substitution of the Net Lending/Borrowing series makes MCC's use of this indicator even more transparent.

Amendment

The description of the Fiscal Policy indicator appearing on page 61218 is amended to read:

Fiscal Policy: General government net lending/borrowing as a percent of GDP, averaged over a three-year period. Net lending/borrowing is calculated as revenue minus total expenditure. Source: *International Monetary Fund's World Economic Outlook Database.*

The previously published language under the heading *Fiscal Policy* is stricken.

Dated: October 15, 2010.

Melvin F. Williams, Jr.,

VP/General Counsel and Corporate Secretary, Millennium Challenge Corporation.

[FR Doc. 2010–26399 Filed 10–15–10; 4:15 pm]

BILLING CODE 9211–03–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meeting

Notice of a Matter To Be Added to the Agenda for Consideration at an Agency Meeting

TIME AND DATE: 10 a.m., Thursday, October 21, 2010.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED: 3a. Interim Final Rule—Part 702 of NCUA's Rules and Regulations, Prompt Corrective Action.

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

Mary Rupp,

Board Secretary.

[FR Doc. 2010–26549 Filed 10–18–10; 4:15 pm]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–331; NRC–2010–0048]

Nextera Energy Duane Arnold, LLC; Duane Arnold Energy Center; Notice of Availability of the Final Supplement 42 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC or Commission) has published a final plant-specific Supplement 42 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS), NUREG–1437, regarding the renewal of operating license DPR–49 for an additional 20 years of operation for the Duane Arnold Energy Center (DAEC). The DAEC is located in Linn County, Iowa, approximately two miles north-northeast of the town of Palo. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

As discussed in Section 9.4 of the final Supplement 42, based on: (1) The analysis and findings in the GEIS; (2)

the Environmental Report submitted by NextEra Energy Duane Arnold, LLC (formerly known as FPL Energy Duane Arnold, LLC (FPL–DA)); (3) consultation with Federal, State, and local agencies; (4) the staff's own independent review; and (5) the staff's consideration of public comments. The recommendation of the staff is that the NRC determines that the adverse environmental impacts of license renewal for DAEC are not great enough to deny the option of license renewal for energy-planning decision-makers.

The final Supplement 42 to the GEIS is publicly available at the NRC Public Document Room, located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, or from the NRC's Agencywide Documents Access and Management System (ADAMS). The ADAMS Public Electronic Reading Room is accessible at *http://www.nrc.gov/reading-rm/adams.html.* The accession number for the final Supplement 42 to the GEIS is ML102790308. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's Public Document Room Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by e-mail at *PDR.Resource@nrc.gov.* In addition, the Hiawatha Public Library, located at 150 West Willman Street, Hiawatha, Iowa, has agreed to make the final supplement to the GEIS available for public inspection.

For Further Information Contact: Mr. Jeremy J. Susco, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Mail Stop O–11F1, Washington, DC, 20555–0001. Mr. Susco may be contacted at 1–800–368–5642, extension 2927 or via e-mail at *Jeremy.Susco@nrc.gov.*

Dated at Rockville, Maryland, this 13th day of October, 2010.

For the Nuclear Regulatory Commission.

Bo Pham,

Chief, Project Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–26396 Filed 10–19–10; 8:45 am]

BILLING CODE 7509–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0330]

Request for Comments on the Use of Electronic Signatures for NRC Documents Related to the Medical Use of Byproduct Material Maintained at Licensees' Facilities

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comment.

SUMMARY: On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act, and on March 23, 2010, he signed the Patient Protection and Affordable Care Act. Both statutes require a transition to the use of electronic medical records by 2014. The U.S. Nuclear Regulatory Commission (NRC) is seeking public comment on specific issues related to the use of electronic signatures on these documents and is seeking to receive feedback from stakeholders on additional concerns that may be raised by this practice.

DATES: Comments on the notice should be submitted by February 17, 2011. Comments received after this date will be considered, if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID NRC–2010–0330 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *Regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0330. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Cindy Bladey, Chief, Rules, Announcements and Directives Branch (RADB), Division of Administrative Services, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RADB at 301–492–3446.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have publicly available documents copied for a fee at the NRC's PDR, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Ashley Cockerham, Office of Federal and State Materials and Environmental Management Programs, telephone 240–888–7129, e-mail, *ashley.cockerham@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In connection with the American Recovery and Reinvestment Act and the Patient Protection and Affordable Care Act, the NRC is soliciting early public input on issues associated with the use of electronic signatures on documents related to the medical use of byproduct material that are not submitted to the NRC but are maintained and inspected at the licensee's facility (*i.e.,* written directives required by 10 *Code of Federal Regulations* (CFR) 35.40 and records for inspection required by 10 CFR part 35 subpart L). For medical use licensees, 10 CFR 35.5 permits the use of electronic media to produce and store records that are maintained and inspected at the licensee's site. NRC is aware that many medical licensees already develop and store certain documents in electronic form and may use electronic signatures for electronic documents that require signatures by specific individuals.

NRC believes that electronic signatures should serve the same function as written signatures. They should uniquely identify the individual (the electronic equivalent of biometric information), provide authentication and non-repudiation, and assure data integrity. The individual providing the signature should know he/she is signing the document, and the signature process should be concise enough to assure the individual initiating the process is the same person concluding the process. An inspector must be able to see an electronic audit of the document and electronic signature process to assure the completeness and accuracy of the document. Licensees, certificate holders or other regulated individuals may use digital certificates for digitally signing electronic documents, but NRC will accept other means of obtaining the performance criteria described.

The NRC is conducting enhanced public participatory activities to solicit early and active public input on major issues associated with electronic signatures on written directives. As a first step, the NRC has prepared an issues paper which describes issues related to electronic signatures on written directives required by 10 CFR 35.40. The intent of this paper is to solicit input regarding these issues. The issues paper is contained in Section III of this document. The NRC will use its rulemaking Web site to make the issues paper available to the public and to solicit public comments.

II. Request for Comments and Plans for Public Meetings

The NRC is soliciting comments on the items presented in the issues paper in Section III of this document as well as soliciting input on any additional potential concerns that stakeholders may have with the use of electronic signatures on documents related to the medical use of byproduct material which are maintained at the licensee's facility (e.g., concerns with electronic storage; identification; reliability of this practice). Comments may be submitted as indicated under the **ADDRESSES** heading in this document. In addition to providing an opportunity for written comments, the NRC is considering holding facilitated public meetings to discuss this issue. If NRC staff determines that public meetings are necessary to allow for additional stakeholder feedback, these meetings will be announced in the **Federal Register** on a future date. The issues paper in Section III of this document provides background and topics of discussion on the major issues that would be the subject of the potential public meetings. The written public comment period will extend until after the last public meeting is held.

The Commission believes that stakeholders' comments will help to determine the potential impact of these proposed changes and will assist the NRC in developing a risk-informed, preferred option for acceptable forms of electronic signatures for those documents that must be retained for inspection in accordance with current NRC regulations. Staff will consider future actions based on the comments received in response to this document.

III. Issues Paper on the Use of Electronic Signatures for Written Directives

Introduction

Section A of this Issues Paper describes some general considerations regarding the use of electronic signatures at NRC-licensed medical use facilities. Section B of the paper discusses the major issues that need to be addressed before commencing any regulatory activities related to the use of electronic signatures.

A. Background

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act, and on March 23, 2010, he signed the Patient Protection and Affordable Care Act. Both Acts require a transition to the use of electronic medical records by 2014. Many medical facilities have already started the transition from paper records to electronic systems or are currently using electronic systems exclusively. NRC is seeking comments on acceptable forms of electronic signatures for documents that must be retained for inspection in accordance with current NRC regulations (i.e. 10 CFR 35.40 and 10 CFR part 35 subpart L).

10 CFR 35.5 permits medical use licensees to store required records in electronic media provided the electronic media has the capability for producing legible, accurate, and complete records during the required retention period. Also, records such as letters, drawings, and specifications stored in electronic media must include all pertinent information such as stamps, initials, and signatures. Licensees must maintain adequate safeguards against tampering with and loss of records. The information that is required in each record is described in other sections of the regulations.

Because the system that generates the electronic document must have functions that provide a legible document for the records retention period, the document must be readable in the future, even if the technology used to develop the document becomes outdated. Because the record must be complete for the records retention period, any electronic attachments, figures, drawings, stamps, signatures, etc., that are required to be part of the record must electronically be part of the record and remain part of the record. Because the record must be accurate for the records retention period, there must be a means of verifying the date of finalized electronic attachments, figures, drawings, stamps, signatures, etc., that are required to be part of the electronic record, the date the record itself was finalized, the date the electronic signature was affixed. There must also be a means of identifying the individual who affixed the signature and a method of verifying version control to identify dates of subsequent changes to the final record along with the names of individuals who have made these changes.

Because these electronic documents are internal licensee records that are not submitted to the agency, the criteria for electronic submissions described in NRC's Electronic Submittals Web site at *http://www.nrc.gov/site-help/e-submittals.html* do not apply. The Web site addresses the use of digital certificates for digitally signing electronic submissions pertaining to licensing actions, associated hearings, and other regulatory matters. With regard to electronic signatures on internal licensee records, licensees may chose to use digital certificates and digital signatures to affix electronic signatures to electronic records; however, they are not required to do so.

The NRC understands that there is no single accepted national standard for electronic signatures; however, several principles have been considered by NRC staff. Generally, when signing a paper document, the individual knows he/she is signing it, the physical signature provides biometric information that can be used to identify the person and provide the basis for authentication and non-repudiation. Generally, signing a completed document also functions to confirm the integrity of the document and prevent changes that would compromise "data integrity" in its broadest meaning.

The processes used to generate an electronic document and individual's electronic signature should satisfy the same functions provided by a written signature on a paper document. They should uniquely identify the individual (the electronic equivalent of biometric information), provide authentication and non-repudiation, and assure data integrity. The individual providing the signature should know that he/she is signing the document, and the signature process should be concise enough to assure that the individual initiating the process is the same person concluding the process. Systems that produce electronic records should have provisions that inform individuals electronically signing the document that they are entering their signatures. This process should be separate from the act of opening the document because most records required by NRC are produced by other individuals and may be produced and revised over an unspecified time.

The signature process should be such that it is uniquely tied to the individual whose signature is required and the period that the signature process is open should be short enough to assure that the individual starting the process is the individual completing the process. If the signature is required to demonstrate review of specific information, then completion of the electronic signature should also block alteration of that information. Subsequent changes to the information should require a new electronic signature and not overwrite previous versions of the signed document. If the document must be dated and signed to meet the regulations, the electronic signature process should also affix the date and time to each electronic signature.

Because these electronic records are kept at the facility and not sent to the NRC they have to be electronically inspected at the facility. Printing an electronic record with an electronic signature would not constitute a complete and accurate record because critical electronic information associated with the electronic record would not be available for inspection.

B. Issues for Discussion

The following is a listing of issues regarding the use of electronic signatures on documents related to the medical use of byproduct material. Each issue is followed by one or more questions about existing practices related to standards, authentication, non-repudiation, data integrity, records inspection, and improvements to software. The questions listed below are not meant to be a complete or final list of issues to be considered but are provided to initiate comments. Stakeholders are requested to comment on and recommend additions, deletions, or modifications to the issues listed below; and propose considerations for implementation of electronic signatures regarding each issue, as appropriate. These issues, and other relevant and substantial issues identified by commenters, will serve as the basis of discussion at the public meetings, if these meetings are scheduled in the future. Public feedback will also be used in developing options for implementation.

Issue No. 1—Standards

Q1.1 What standards for electronic signatures in medical records are in use or under development?

Q1.2 How do these standards address the principles of authentication, non-repudiation, data integrity, and access for inspection, as described in Issues No. 2 through 5, below?

Q1.3 Do these standards consider any additional key principles?

Issue No. 2—Authentication

Q2.1 For software applications currently in use, how does the licensee assure that the signature process is uniquely tied to the individual whose signature is required?

Issue No. 3—Non-Repudiation

Q3.1 For software applications currently in use, what provisions does the licensee use to inform persons electronically signing documents that they are entering their signature?

Issue No. 4—Data Integrity

Q4.1 For software applications currently in use, how does the licensee assure that the document being electronically signed cannot be changed after it is signed?

Q4.2 For software applications currently in use, how does the licensee assure that subsequent changes to the electronically signed document require a new electronic signature and cannot overwrite previous versions of the signed document?

Q4.3 For software applications currently in use, how does the licensee assure that the electronic signature process affixes the date and time to each electronic signature?

Issue No. 5—Records Inspection

Q5.1 For software applications currently in use, how does the licensee assure that electronically signed documents and all revisions to the electronically signed documents are accessible for inspection?

Q5.2 For software applications currently in use, how does the licensee assure that electronically signed documents and all revisions to the electronically signed documents are retained for 3 years?

Issue No. 6—Need for Improvements to Current Commercially-Available Software Applications

Q6.1 Are any improvements needed for current commercially-available software applications to adequately meet existing standards and principles?

Dated at Rockville, Maryland, this 14th day of Oct. 2010.

For the Nuclear Regulatory Commission.

Christian Einberg,

Acting Deputy Director, Licensing and Inspection Support Directorate, Division of Materials Safety and State Agreements, Office of Federal and State Materials, and Environmental Management Programs.

[FR Doc. 2010–26391 Filed 10–19–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. STN 50–456, STN 50–457, STN 50–454, and STN 50–455; NRC–2010–0329]

Braidwood Station, Units 1 and 2 and Byron Station, Unit Nos. 1 and 2; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Exelon Generation Company, LLC (the licensee) to withdraw its March 26, 2009, application for proposed amendments to Facility Operating License Nos. NPF–72 and NPF–77 for Braidwood Station, Units 1 and 2, respectively, located in Will County, Illinois, and to Facility Operating License Nos. NPF–37 and NPF–66 for Byron Station, Unit Nos. 1 and 2, respectively, located in Ogle County, Illinois.

The proposed amendment would have revised the fire protection program to eliminate the requirement for the backup manual carbon dioxide fire suppression system in the upper cable spreading rooms.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on May 19, 2009 (74 FR 23445). However, by letter dated September 20, 2010, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated March 26, 2009, as supplemented by letters dated September 10, 2009, March 15, and May 27, 2010, and the licensee's letter dated September 20, 2010, which withdrew the application for license amendment. 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. Publicly available records will be accessible electronically from the Agencywide Documents 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 1–800–397–4209, or 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 13th day of October 2010.

For the Nuclear Regulatory Commission.

Marshall J. David,

Senior Project Manager, Plant Licensing Branch III–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–26394 Filed 10–19–10; 8:45 am]

BILLING CODE 7590–01–P

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL

Amended Columbia River Basin Fish and Wildlife Program

AGENCY: Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power and Conservation Council), an interstate compact agency organized under the authority of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. 839 *et seq.* (Northwest Power Act).

ACTION: Notice of final action adopting the management plan elements of the Bitterroot River Subbasin Plan into the Council's *Columbia River Basin Fish and Wildlife Program.*

SUMMARY: Pursuant to Section 4(h) of the Northwest Power Act, the Council has amended its *Columbia River Basin Fish and Wildlife Program* to add the Bitterroot River Subbasin Plan. The program as amended may be found on the Council's Web site at *http://www.nwcouncil.org/fw/program* and then, for the subbasin plan elements and relevant decision documents in particular, at *http://www.nwcouncil.org/fw/subbasinplanning/Default.htm.* Further information and an explanation of this amendment process may be found in the documents on that page or by contacting the Northwest Power and Conservation Council at (503) 222–5161 or toll free (800) 452–5161.

Stephen L. Crow,

Executive Director.

[FR Doc. 2010–26372 Filed 10–19–10; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–CSR, SEC File No. 270–512, OMB Control No. 3235–0570.

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") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

Form N–CSR (17 CFR 249.331 and 274.128) is a combined reporting form used by management investment companies to file certified shareholder reports under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) ("Investment Company Act") and under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act"). Form N–CSR is to be used for reports under Section 30(b)(2) of the Investment Company Act and Section 13(a) or 15(d) of the Exchange Act, filed pursuant to rule 30b2–1(a) under the Investment Company Act (17 CFR 270.30b2–1(a)). Reports on Form N–CSR are to be filed with the Commission not later than 10 days after the transmission to stockholders of any report that is required to be transmitted to stockholders under rule 30e–1 under the Investment Company Act (17 CFR 270.30e–1).

The Commission estimates that there are 6,640 reports filed on Form N–CSR annually and that the average number of portfolios referenced in each filing is 3.75. The Commission further estimates that the hour burden for preparing and filing a report on Form N–CSR is 7.62 hours per portfolio. Given that filings on Form N–CSR are filed semi-annually, filings on Form N–CSR require 15.24 hours per portfolio each year. The total annual hour burden for Form N–CSR, therefore, is estimated to be 154,686 hours.

The current total annual cost burden to respondents for outside professionals associated with the collection of data relating to Form N–CSR is currently $1,119,001 and the new total annual cost burden to respondents is estimated to be $1,556,401, representing an increase of $437,400.

The information collection requirements imposed by Form N–CSR are mandatory. Responses to the collection of information will not be kept confidential. 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.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to: Shagufta Ahmed at *Shagufta_Ahmed@omb.eop.gov;* and (ii) Jeffrey Heslop, Acting Director/CIO, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312, or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: October 13, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26343 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form 5 OMB Control No. 3235–0362 SEC File No. 270–323.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Under Section 16(a) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78a *et seq.*) every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which registered pursuant to Section 12 of the Exchange Act, or who is a director or an officer of the issuer of such security (collectively "reporting persons"), must file statements setting forth their security holdings in the issuer with the Commission. Form 5 (17 CFR 249.105) is an annual statement of beneficial ownership of securities. The information disclosure provided on Form 5 is mandatory. All information is provided to the public for review. Approximately 9,000 reporting persons file Form 5 annually and we estimate that it takes approximately one hour to prepare the form for a total of 9,000 annual burden hours.

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.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to: *Shagufta_Ahmed@omb.eop.gov* and (ii) Jeffrey Heslop, Acting Director/CIO, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6423 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 13, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26342 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 425, OMB Control No. 3235–0521, SEC File No. 270–462.

Notice is hereby given, that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for approval.

Rule 425 (17 CFR 230.425) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) requires the filing of certain prospectuses and communications under Rule 135 (17 CFR 230.135) and Rule 165 (17 CFR 230.165) in connection with business combination transactions. The purpose of the rule is to permit more oral and written communications with shareholders about tender offers, mergers and other business combination transactions on a more timely basis, so long as the written communications are filed on the date of first use. Approximately 1,680 issuers file communications under Rule 425 at an estimated 0.25 hours per response for a total of 420 annual burden hours.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden imposed by 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 Jeffrey Heslop, Acting Director/CIO, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: October 6, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26344 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63106; File No. SR–OPRA–2010–01]

Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Proposed Amendment To Identify the Securities Industry Automation Corporation as OPRA's Independent System Capacity Advisor

October 14, 2010.

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act") [1] and Rule 608 thereunder,[2] notice is hereby given that on September 29, 2010, the Options Price Reporting Authority ("OPRA") to the Securities and Exchange Commission ("Commission") an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan").[3] The proposed amendment would reflect the fact that OPRA has selected the Securities Industry Automation Corporation ("SIAC") to act as OPRA's "Independent System Capacity Advisor" or "ISCA" commencing on October 1, 2010. The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

I. Description and Purpose of the Plan Amendment

In 2003, OPRA revised the manner in which it engages in capacity planning and allocates capacity among the exchanges ("Exchanges") that are parties to the OPRA National Market System Plan (the "OPRA Plan" or "Plan").[4] As

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder (formerly Rule 11Aa3–2). *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com.*

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The eight participants to the OPRA Plan are BATS Exchange, Inc., Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, NASDAQW OMX BX, Inc., NASDAQ OMX PHLX, Inc., NASDAQ Stock Market LLC, NYSE Amex, Inc., and NYSE Arca, Inc.

[4] *See* Release No. 34–48822 (November 21, 2003), approving File No. SR–OPRA–2003–01. OPRA reorganized as a limited liability company effective as of January 1, 2010, and the current OPRA Plan is entitled "Limited Liability Company Agreement of Options Price Reporting Authority, LLC." *See* Release No. 34–61367 (January 10, 2010), approving File No. SR–OPRA–2009–01, for a description of the current OPRA Plan. The current OPRA Plan is available on OPRA's Web site at *http://www.opradata.com.*

part of that revision, OPRA amended the Plan to provide for an "Independent System Capacity Advisor" or "ISCA." In essence, the function of the ISCA is to receive, on a confidential basis, capacity projections from each of the Exchanges and to use those projections to determine whether and when to modify the system used by OPRA to process, consolidate and distribute options Last Sale Reports and Quotation Information and related information pursuant to the Plan, and how the cost of such modifications is to be allocated among the Exchanges.[5] OPRA undertook in its Plan as amended in 2003 to file with the Commission, for effectiveness upon filing, the identity of the person or organization that it selected to act as ISCA.[6] In 2003, OPRA selected The Options Clearing Corporation ("OCC") to act as the ISCA, and OCC agreed to act in that capacity.

OPRA and OCC have now agreed that OCC will cease to act as the ISCA effective October 1, 2010. OPRA has selected SIAC to act as ISCA commencing on October 1, 2010, and SIAC has agreed to act in that capacity commencing on that date. SIAC is well known to OPRA since it has for many years acted as OPRA's "Processor" and has, in that capacity, provided the data processing services needed to develop, operate and maintain the OPRA System.

As part of the revision of the OPRA Plan in 2003, OPRA adopted "Capacity Guidelines" set forth in an Attachment to, and incorporated in, the Plan. The Capacity Guidelines provide guidance to the ISCA in the performance of its functions. The Capacity Guidelines include a requirement that the ISCA maintain internal safeguards and procedures that are, among other things, "sufficient to assure that confidential information provided to the ISCA by the parties [*i.e.,* the Exchanges] is not shared with any of the other parties except in the form of aggregate capacity requests or other aggregate information that does not identify the individual capacity requests of any of the parties, and to further assure that such information will not be used by the ISCA in any of its other business activities in a manner that may result in its being made available to any of the other parties or that is otherwise inconsistent with the confidentiality of such information."[7] The Capacity Guidelines require that "Prior to the time it first exercises its authority under the Plan, the ISCA shall have furnished a written description of these internal safeguards and procedures to the Commission."[8] OPRA has worked with SIAC to develop appropriate internal safeguards and procedures that are substantially similar to the safeguards and procedures maintained by OCC, and has asked SIAC to furnish a written description of its safeguards and procedures to the Commission prior to October 1, 2010.

The text of the proposed amendment to the OPRA Plan is available at OPRA, the Commission's Public Reference Room, *http://opradata.com,* and on the Commission's Web site at *http://www.sec.gov.*

II. Implementation of the OPRA Plan Amendment

Pursuant to subparagraphs to (ii) and (iii) of paragraph (b)(3) of Rule 608 under the Act,[9] OPRA designated this amendment to be put into effect upon filing with the Commission.

The Commission may summarily abrogate the amendment within sixty days of its filing and require refiling and approval of the amendment by Commission order pursuant to Rule 608(b)(2) under the Act[10] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed OPRA Plan amendment is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–OPRA–2010–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–OPRA–2010–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment 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 OPRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–OPRA–2010–01 and should be submitted on or before November 10, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26340 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

[5] Release No. 34–48822 contains a more extensive description of the functions performed by the ISCA.

[6] This undertaking is in the definition of "Independent System Capacity Advisor" in Section 1.1 of the OPRA Plan as currently in effect: "The identity of the person, persons or organization selected to act as ISCA in accordance with the foregoing shall be filed with the Commission as an amendment to OPRA's national market system plan pursuant to Rule 11Aa3–2 under the Exchange Act, eligible to be put into effect upon filing in accordance with paragraph (c)(3) of that Rule." Rule 11Aa3–2 is now Rule 608, and paragraph (c)(3) of Rule 11Aa3–2 is now paragraph (b)(3) of Rule 608.

[7] *See* the final paragraph of Guideline 1 in the Capacity Guidelines.

[8] *See* the final paragraph of Guideline 1 in the Capacity Guidelines.

[9] 17 CFR 242.608(b)(3)(ii).

[10] 17 CFR 242.608(b)(2).

[11] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63103; File No. 4–566]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among American Stock Exchange LLC, BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE Arca, Inc., NYSE Regulation, Inc., NASDAQ OMX BX, Inc., and NASDAQ OMX PHLX LLC Relating to the Surveillance, Investigation, and Enforcement of Insider Trading Rules

October 14, 2010.

Notice is hereby given that the Securities and Exchange Commission ("Commission") has issued an Order, pursuant to Section 17(d) of the Securities Exchange Act of 1934 ("Act"),[1] approving and declaring effective an amendment to the plan for allocating regulatory responsibility ("Plan") filed pursuant to Rule 17d–2 of the Act,[2] by the American Stock Exchange LLC ("Amex"), BATS Exchange, Inc. ("BATS"), BATS Y-Exchange, Inc. ("BYX"), Chicago Board Options Exchange, Incorporated ("CBOE"), Chicago Stock Exchange, Inc. ("CHX"), EDGA Exchange, Inc. ("EDGA"), EDGX Exchange, Inc. ("EDGX"), the Financial Industry Regulatory Authority, Inc. ("FINRA"), International Securities Exchange, LLC ("ISE"), The NASDAQ Stock Market LLC ("Nasdaq"), National Stock Exchange, Inc. ("NSX"), New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("NYSE Arca"), NYSE Regulation, Inc. (acting pursuant to authority delegated to it by NYSE) ("NYSE Regulation"), NASDAQ OMX BX, Inc. ("BX"), and NASDAQ OMX PHLX, Inc. ("Phlx") (collectively, "Participating Organizations" or "parties").

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization ("SRO") registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[4] or Section 19(g)(2)[5] of the Act. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO ("common members"). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority ("DEA") to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Plan

On September 12, 2008, the Commission declared effective the Participating Organizations' Plan for allocating regulatory responsibilities pursuant to Rule 17d–2.[11] The Plan is designed to eliminate regulatory duplication by allocating regulatory responsibility over Common NYSE Members[12] or Common FINRA Members,[13] as applicable (collectively "Common Members"), for the surveillance, investigation, and enforcement of common insider trading rules ("Common Rules").[14] The Plan assigns regulatory responsibility over Common NYSE Members to NYSE Regulation for surveillance, investigation, and enforcement of insider trading by broker-dealers, and their associated persons, with respect to NYSE-listed stocks and NYSE Arca-listed stocks, irrespective of the marketplace(s) maintained by the Participating Organizations on which the relevant trading may occur. The

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] *See* Securities Exchange Act Release No. 58536 (September 12, 2008), 73 FR 54646 (September 22, 2008) (File No. 4–566).

[12] Common NYSE Members include members of the NYSE and at least one of the Participating Organizations.

[13] Common FINRA Members include members of FINRA and at least one of the Participating Organizations.

[14] Common rules are defined as: (i) Federal securities laws and rules promulgated by the Commission pertaining to insider trading, and (ii) the rules of the Participating Organizations that are related to insider trading. *See* Exhibit A to the Plan.

Plan assigns regulatory responsibility over Common FINRA Members to FINRA for surveillance, investigation, and enforcement of insider trading by broker-dealers, and their associated persons, with respect to NASDAQ-listed stocks and Amex-listed stocks, as well as any CHX solely-listed stock, irrespective of the marketplace(s) maintained by the Participating Organizations on which the relevant trading may occur.

III. Proposed Amendment to the Plan

On October 13, 2010, FINRA, the NYSE Regulation, and BYX submitted a proposed amendment to the Plan. The amended Plan contains three changes. First, the amended Plan adds BYX as a "Participating Organization." Second, the amended Plan removes ISE as a Participating Organization. ISE ceased operating as an equities market on July 19, 2010, and has provided written notice to all Participating Organizations of its intent to terminate its participation in the Agreement. Third, the amended Plan makes several technical corrections to update the names of certain Participating Organizations, including the Philadelphia Stock Exchange, Inc. to be NASDAQ OMX PHLX LLC; Boston Stock Exchange, Inc. to be NASDAQ OMX BX, Inc.; and American Stock Exchange LLC to be NYSE Amex LLC as well as updating contact information and the related rules of NASDAQ OMX BX.

The parties have followed the requisite procedure as set forth in Paragraph 27 to the Plan regarding the addition of new SROs to the Plan. The amended Plan replaces the previous agreement in its entirety. The text of the proposed amended 17d–2 plan is as follows (additions are in italic; deletions are [bracketed]):

* * * * *

Agreement for the Allocation of Regulatory Responsibility of Surveillance, Investigation and Enforcement for Insider Trading Pursuant to § 17(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(d), and Rule 17d–2 Thereunder

This agreement (the "Agreement") by and among [the American Stock Exchange LLC ("Amex"),] BATS Exchange, Inc. ("BATS"), *BATS Y-Exchange, Inc. ("BYX")* [Boston Stock Exchange, Inc.], Chicago Board Options Exchange, Inc. ("CBOE"),* Chicago Stock Exchange, Inc. ("CHX"), EDGA Exchange, Inc. ("EDGA"), EDGX Exchange, Inc. ("EDGX"), Financial Industry Regulatory Authority, Inc. ("FINRA"), [International Securities Exchange, LLC ("ISE"),+] *NASDAQ OMX, BX, Inc. ("BX"), NASDAQ OMX PHLX LLC ("PHLX"),* The NASDAQ Stock Market LLC ("NASDAQ"), National Stock Exchange, Inc. *("NSX"),* New York Stock Exchange, LLC ("NYSE"), *NYSE Amex LLC ("Amex"),* NYSE Arca, Inc. ("NYSE Arca"), *and* NYSE Regulation, Inc. (pursuant to delegated authority) ("NYSE Regulation")[, and Philadelphia Stock Exchange, Inc.] (together, the "Participating Organizations"), is made pursuant to § 17(d) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78q(d), and Securities and Exchange Commission ("SEC") Rule 17d–2, which allow for plans to allocate regulatory responsibility among self-regulatory organizations ("SROs"). Upon approval by the SEC, this Agreement shall amend and restate the agreement among the Participating Organizations (except [EDGA and EDGX]*BYX*) approved by the SEC on [October 17, 2008]*April 15, 2010.*

Whereas, NYSE delegates to NYSE Regulation the regulation of trading by members in its market, and NYSE Regulation is a subsidiary of NYSE, all references to NYSE Regulation in this Agreement shall be read as references to both entities;

Whereas, the Participating Organizations desire to: (a) Foster cooperation and coordination among the SROs; (b) remove impediments to, and foster the development of, a national market system; (c) strive to protect the interest of investors; and (d) eliminate duplication in their regulatory surveillance, investigation and enforcement of insider trading;

Whereas, the Participating Organizations are interested in allocating to NYSE Regulation[, Inc. ("NYSE Regulation")] regulatory responsibility for Common NYSE Members for surveillance, investigation and enforcement of Insider Trading (as defined below) in NYSE Listed Stocks (as defined below) irrespective of the marketplace(s) maintained by the Participating Organizations on which the relevant trading may occur in violation of Common Insider Trading Rules;

Whereas, the Participating Organizations are interested in allocating to FINRA regulatory responsibility for Common FINRA Members for surveillance, investigation and enforcement of Insider Trading in NASDAQ Listed Stocks, Amex Listed Stocks, and CHX Solely Listed Stocks irrespective of the marketplace(s) maintained by the Participating Organizations on which the relevant trading may occur in violation of Common Insider Trading Rules;

Whereas, the Participating Organizations will request regulatory allocation of these regulatory responsibilities by executing and filing with the SEC a plan for the above stated purposes (this Agreement, also known herein as the "Plan") pursuant to the provisions of § 17(d) of the Act, and SEC Rule 17d–2 thereunder, as described below; and

Whereas, the Participating Organizations will also enter into certain Regulatory Services Agreements (the "Insider Trading RSAs"), of even date herewith, to provide for the investigation and enforcement of suspected Insider Trading against broker-dealers, and their associated persons, that (i) are not Common NYSE Members (as defined below) in the case of Insider Trading in NYSE Listed Stocks, and (ii) are not Common FINRA Members (as defined below) in the case of Insider Trading in NASDAQ Listed Stocks, Amex Listed Stocks, and CHX Solely Listed Stocks.

Now, therefore, in consideration of the mutual covenants contained hereafter, and other valuable consideration to be mutually exchanged, the Participating Organizations hereby agree as follows:

1. *Definitions.* Unless otherwise defined in this Agreement, or the context otherwise requires, the terms used in this Agreement will have the same meaning they have under the Act, and the rules and regulations thereunder. As used in this Agreement, the following terms will have the following meanings:

a. "Rule" of an "exchange" or an "association" shall have the meaning defined in Section 3(a)(27) of the Act.

b. "Common NYSE Members" shall mean members of the NYSE and at least one of the Participating Organizations.

c. "Common FINRA Members" shall mean members of FINRA and at least one of the Participating Organizations.

d. "Common Insider Trading Rules" shall mean (i) the federal securities laws and rules thereunder promulgated by the SEC pertaining to insider trading, and (ii) the rules of the Participating Organizations that are related to insider trading, as provided on Exhibit A to this Agreement.

* CBOE's allocation of certain regulatory responsibilities to NYSE/FINRA under this Agreement is limited to the activities of the CBOE Stock Exchange, LLC, a facility of CBOE.

+ [ISE's allocation of certain regulatory responsibilities to NYSE/FINRA under this Agreement is limited to the activities of the ISE Stock Exchange, LLC, a facility of ISE.]

e. "Effective Date" shall have the meaning set forth in paragraph 28.

f. "Insider Trading" shall mean any conduct or action taken by a natural person or entity related in any way to the trading of securities by an insider or a related party based on or on the basis of material non-public information obtained during the performance of the insider's duties at the corporation, or otherwise misappropriated, that could be deemed a violation of the Common Insider Trading Rules.

g. "Intellectual Property" will mean any: (1) Processes, methodologies, procedures, or technology, whether or not patentable; (2) trademarks, copyrights, literary works or other works of authorship, service marks and trade secrets; or (3) software, systems, machine-readable texts and files and related documentation.

h. "Plan" shall mean this Agreement, which is submitted as a Plan for the allocation of regulatory responsibilities of surveillance for insider trading pursuant to § 17(d) of the Securities and Exchange Act of 1934, 15 U.S.C. 78q(d), and SEC Rule 17d–2.

i. "NYSE Listed Stock" shall mean an equity security that is listed on the NYSE, or NYSE Arca.

j. "NASDAQ Listed Stock" shall mean an equity security that is listed on the NASDAQ.

k. "Amex Listed Stock" shall mean an equity security that is listed on the Amex.

l. "CHX Solely Listed Stock" shall mean an equity security that is listed only in the Chicago Stock Exchange.

m. "Listing Market" shall mean Amex, Nasdaq, NYSE, or NYSE Arca, but not CHX.

2. Assumption of Regulatory Responsibilities.

a. *NYSE Regulation: Assumption of Regulatory Responsibilities.* On the Effective Date of the Plan, NYSE Regulation will assume regulatory responsibilities for surveillance, investigation and enforcement of Insider Trading by broker-dealers, and their associated persons, for Common NYSE Members with respect to NYSE Listed Stocks irrespective of the marketplace(s) maintained by the Participant Organizations on which the relevant trading may occur in violation of the Common Insider Trading Rules ("NYSE's Regulatory Responsibility").

b. *FINRA: Assumption of Regulatory Responsibilities.* On the Effective Date of the Plan, FINRA will assume regulatory responsibilities for surveillance, investigation and enforcement of Insider Trading by broker-dealers, and their associated persons, for Common FINRA Members with respect to NASDAQ and Amex Listed Stocks, as well as any CHX Solely Listed equity security, irrespective of the marketplace(s) maintained by the Participant Organizations on which the relevant trading may occur in violation of the Common Insider Trading Rules ("FINRA's Regulatory Responsibility").

c. *Change in Control.* In the event of a change of control of a Listing Market, the Listing Market will have the discretion to transfer the regulatory responsibility for its listed stocks from NYSE Regulation to FINRA or from FINRA to NYSE Regulation, provided the SRO assuming regulatory responsibility consents to such transfer.

3. Certification of Insider Trading Rules.

a. *Initial Certification.* By signing this Agreement, the Participating Organizations, other than NYSE Regulation and FINRA, hereby certify to NYSE Regulation and FINRA that their respective lists of Common Insider Trading Rules contained in Attachment A hereto are correct, and NYSE Regulation and FINRA hereby confirm that such rules are Common Insider Trading Rules as defined in this Agreement.

b. *Yearly Certification.* Each year following the commencement of operation of this Agreement, or more frequently if required by changes in the rules of the Participating Organizations, each Participating Organization shall submit a certified and updated list of Common Insider Trading Rules to NYSE Regulation and FINRA for review, which shall (i) add Participating Organization rules not included in the then-current list of Common Insider Trading Rules that qualify as Common Rules as defined in this Agreement; (ii) delete Participating Organization rules included in the current list of Common Insider Trading Rules that no longer qualify as Common Insider Trading Rules as defined in this Agreement; and (iii) confirm that the remaining rules on the current list of Common Insider Trading Rules continue to be Participating Organization rules that qualify as Common Insider Trading Rules as defined in this Agreement. NYSE Regulation and FINRA shall review each Participating Organization's annual certification and confirm whether NYSE Regulation and FINRA agree with the submitted certified and updated list of Common Insider Rules by each of the Participating Organizations.

4. *No Retention of Regulatory Responsibility.* The Participating Organizations do not contemplate the retention of any responsibilities with respect to the regulatory activities being assumed by NYSE Regulation and FINRA, respectively, under the terms of this Agreement. Nothing in this Agreement will be interpreted to prevent NYSE Regulation or FINRA from entering into Regulatory Services Agreement(s) to perform their Regulatory Responsibilities.

5. *Dually Listed Stocks.* Stocks that are listed on more than one Participating Organization shall be designated as a NYSE Listed Stock, a NASDAQ Listed Stock, or an Amex Listed Stock based on the applicable transaction reporting plan for the equity security as set forth in paragraph 1.b. of Exhibit B.

6. *Fees.* NYSE Regulation and FINRA shall charge Participating Organizations for performing their respective Regulatory Responsibilities, as set forth in the Schedule of Fees, attached as Exhibit B.

7. *Applicability of Certain Laws, Rules, Regulations or Orders.* Notwithstanding any provision hereof, this Agreement shall be subject to any statute, or any rule or order of the SEC. To the extent such statute, rule, or order is inconsistent with one or more provisions of this Agreement, the statute, rule, or order shall supersede the provision(s) hereof to the extent necessary to be properly effectuated and the provision(s) hereof in that respect shall be null and void.

8. *Exchange Committee; Reports.*

a. Exchange Committee. The Participating Organizations shall form a committee (the "Exchange Committee"), which shall act on behalf of all of Participating Organizations in receiving copies of the reports described below and in reviewing issues that arise under this Agreement. Each Participating Organization shall appoint a representative to the Exchange Committee. The Exchange Committee representatives shall report to their respective executive management bodies regarding status or issues under the Agreement. The Participating Organizations agree that the Exchange Committee will meet regularly up to four (4) times a year, with no more than one meeting per calendar quarter. At these meetings, the Exchange Committee will discuss the conduct of the Regulatory Responsibilities and identify issues or concerns with respect to this Agreement, including matters related to the calculation of the cost formula and accuracy of fees charged and provision of information related to the same. The SEC shall be permitted to attend the meetings as an observer.

b. Reports. NYSE Regulation and FINRA shall provide the reports set forth in Exhibit C hereto and any additional reports related to the Agreement reasonably requested by a majority vote of all representatives to the Exchange Committee at each Exchange Committee meeting, or more often as the Participating Organizations deem appropriate, but no more often than once every quarterly billing period.

9. *Customer Complaints.*

a. If a Participating Organization receives a copy of a customer complaint relating to Insider Trading or other activity or conduct that is within the NYSE's Regulatory Responsibilities as set forth in this Agreement, the Participating Organization shall promptly forward to NYSE Regulation, as applicable, a copy of such customer complaint.

b. If a Participating Organization receives a copy of a customer complaint relating to Insider Trading or other activity or conduct that is within FINRA's Regulatory Responsibilities as set forth in this Agreement, the Participating Organization shall promptly forward to FINRA, as applicable, a copy of such customer complaint.

10. *Parties to Make Personnel Available as Witnesses.* Each Participating Organization shall make its personnel available to NYSE Regulation or FINRA to serve as testimonial or non-testimonial witnesses as necessary to assist NYSE Regulation and FINRA in fulfilling the Regulatory Responsibilities allocated under this Agreement. FINRA and NYSE Regulation shall provide reasonable advance notice when practicable and shall work with a Participating Organization to accommodate reasonable scheduling conflicts within the context and demands as the entities with ultimate regulatory responsibility. The Participating Organization shall pay all reasonable travel and other expenses incurred by its employees to the extent that NYSE Regulation or FINRA require such employees to serve as witnesses, and provide information or other assistance pursuant to this Agreement.

11. *Market Data; Sharing of Work-Papers, Data and Related Information.*

a. Market Data. FINRA and NYSE Regulation shall obtain raw market data necessary to the performance of regulation under this Agreement from (a) the Consolidated Tape Association ("CTA") as the exclusive securities information processor ("SIP") for all NYSE-listed, AMEX-listed securities, and CHX solely listed securities and (b) the NASDAQ Unlisted Trading Privileges Plan as the exclusive SIP for NASDAQ-listed securities.

b. Sharing. A Participating Organization shall make available to each of NYSE Regulation and FINRA information necessary to assist NYSE Regulation or FINRA in fulfilling the regulatory responsibilities assumed under the terms of this Agreement. Such information shall include *any* information collected by an exchange or association in the course of performing its regulatory obligations under the Act, including information relating to an on-going disciplinary investigation or action against a member, the amount of a fine imposed on a member, financial information, or information regarding proprietary trading systems gained in the course of examining a member ("Regulatory Information"). This Regulatory Information shall be used by NYSE Regulation and FINRA solely for the purposes of fulfilling their respective regulatory responsibilities.

c. No Waiver of Privilege. The sharing of documents or information between the parties pursuant to this Agreement shall not be deemed a waiver as against third parties of regulatory or other privileges relating to the discovery of documents or information.

d. Intellectual Property.

(i) Existing Intellectual Property. Each of NYSE Regulation and FINRA, respectively, is and will remain the owner of all right, title and interest in and to the proprietary Intellectual Property it employs in the provision of regulation hereunder (including the SONAR and Stock Watch systems), and any derivative works thereof. To the extent certain elements of either of these parties' systems, or portions thereof, may be licensed or leased from third parties, all such third party elements shall remain the property of such third parties, as applicable. Likewise, any other Participating Organization is and will remain the owner of all right, title and interest in and to its own existing proprietary Intellectual Property.

(ii) Enhancements to Existing Intellectual Property or New Developments of NYSE Regulation or FINRA. In the event NYSE Regulation or FINRA (a) makes any changes, modifications or enhancements to its respective Intellectual Property for any reason, or (b) creates any newly developed Intellectual Property for any reason, including as a result of requested enhancements or new development by the Exchange Committee (collectively, the "New IP"), the Participating Organizations acknowledge and agree that each of NYSE Regulation and FINRA shall be deemed the owner of the New IP created by each of them, respectively (and any derivative works thereof), and shall retain all right, title and interest therein and thereto, and each other Participating Organization hereby irrevocably assigns, transfers and conveys to each of NYSE Regulation and FINRA, as applicable, without further consideration all of its right, title and interest in or to all such New IP (and any derivative works thereof).

(iii) NYSE Regulation and FINRA will not charge the Participating Organizations any fees for any New IP created and used by NYSE Regulation or FINRA, respectively; provided, however, that NYSE Regulation and FINRA will each be permitted to charge fees for software maintenance work performed on systems used in the discharge of their respective duties hereunder.

12. *Special or Cause Examinations.* Nothing in this Agreement shall restrict or in any way encumber the right of a party to conduct special or cause examinations of Common NYSE Members or Common FINRA Members as any party, in its sole discretion, shall deem appropriate or necessary.

13. *Dispute Resolution Under this Agreement.*

a. Negotiation. The Parties will attempt to resolve any disputes through good faith negotiation and discussion, escalating such discussion up through the appropriate management levels until reaching the executive management level. In the event a dispute cannot be settled through these means, the Parties shall refer the dispute to binding arbitration.

b. Binding Arbitration. All claims, disputes, controversies, and other matters in question between the Parties to this Agreement arising out of or relating to this Agreement or the breach thereof that cannot be resolved by the Parties will be resolved through binding arbitration. Unless otherwise agreed by the Parties, a dispute submitted to binding arbitration pursuant to this paragraph shall be resolved using the following procedures:

(i) The arbitration shall be conducted in the city of New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof; and

(ii) There shall be three arbitrators, and the chairperson of the arbitration panel shall be an attorney.

14. *Limitation of Liability.* As between the Participating Organizations, no Participating Organization, including its respective directors, governors, officers, employees and agents, will be liable to any other Participating Organization, or its directors, governors, officers, employees and agents, for any liability, loss or damage resulting from any

delays, inaccuracies, errors or omissions with respect to its performing or failing to perform regulatory responsibilities, obligations, or functions, except (a) as otherwise provided for under the Act, (b) in instances of a Participating Organization's gross negligence, willful misconduct or reckless disregard with respect to another Participating Organization, (c) in instances of a breach of confidentiality obligations owed to another Participating Organization, or (d) in the case of any Participating Organization paying fees hereunder, for any payments due. The Participating Organizations understand and agree that the regulatory responsibilities are being performed on a good faith and best effort basis and no warranties, express or implied, are made by any Participating Organization to any other Participating Organization with respect to any of the responsibilities to be performed hereunder. This paragraph is not intended to create liability of any Participating Organization to any third party.

15. *SEC Approval.*

a. The parties agree to file promptly this Agreement with the SEC for its review and approval. NYSE Regulation and FINRA shall jointly file this Agreement on behalf, and with the explicit consent, of all Participating Organizations.

b. If approved by the SEC, the Participating Organizations will notify their members of the general terms of the Agreement and of its impact on their members.

16. *Subsequent Parties; Limited Relationship.* This Agreement shall inure to the benefit of and shall be binding upon the Participating Organizations hereto and their respective legal representatives, successors, and assigns. Nothing in this Agreement, expressed or implied, is intended or shall: (a) confer on any person other than the Participating Organizations hereto, or their respective legal representatives, successors, and assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement, (b) constitute the Participating Organizations hereto partners or participants in a joint venture, or (c) appoint one Participating Organization the agent of the other.

17. *Assignment.* No Participating Organization may assign this Agreement without the prior written consent of all the other Participating Organizations, which consent shall not be unreasonably withheld, conditioned or delayed; provided, however, that any Participating Organization may assign the Agreement to a corporation controlling, controlled by or under common control with the Participating Organization without the prior written consent of any other party.

18. *Severability.* Any term or provision of this Agreement that is invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement or affecting the validity or enforceability of any of the terms or provisions of this Agreement in any other jurisdiction.

19. *Termination.*

a. Any Participating Organization may cancel its participation in the Agreement at any time, provided that it has given 180 days written notice to the other Participating Organizations (or in the case of a change of control in ownership of a Participating Organization, such other notice time period as that Participating Organization may choose), and provided that such termination has been approved by the SEC. The cancellation of its participation in this Agreement by any Participating Organization shall not terminate this Agreement as to the remaining Participating Organizations.

b. The Regulatory Responsibilities assumed under this Agreement by NYSE Regulation or FINRA (either, an "Invoicing Party") may be terminated by the Invoicing Party against any Participating Organization as follows. The Participating Organization will have thirty (30) days from receipt to satisfy the invoice. If the Participating Organization fails to satisfy the invoice within thirty (30) days of receipt ("Default"), the Invoicing Party will notify the Participating Organization of the Default. The Participating Organization will have thirty (30) days from receipt of the Default notice to satisfy the invoice.

c. The Invoicing Party will have the right to terminate the Regulatory Responsibilities assumed under this Agreement if a Participating Organization has Defaulted in its obligation to pay the invoice on more than three (3) occasions[.] in any rolling twenty-four (24) month period.

20. *Intermarket Surveillance Group ("ISG").* In order to participate in this Agreement, all Participating Organizations to this Agreement must be members of the ISG.

21. *General.* The Participating Organizations agree to perform all acts and execute all supplementary instruments or documents that may be reasonably necessary or desirable to carry out the provisions of this Agreement.

22. *Liaison and Notices.* All questions regarding the implementation of this Agreement shall be directed to the persons identified below, as applicable. All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon (i) actual receipt by the notified party or (ii) constructive receipt (as of date marked on the return receipt) if sent by certified or registered mail, return receipt requested, to the following addresses:

* * * * *

23. *Confidentiality.* The parties agree that documents or information shared shall be held in confidence, and used only for the purposes of carrying out their respective regulatory obligations under this Agreement. No party shall assert regulatory or other privileges as against the other with respect to Regulatory Information that is required to be shared pursuant to this Agreement, as defined by paragraph 11, above.

24. *Regulatory Responsibility.* Pursuant to Section 17(d)(1)(A) of the Act, and Rule 17d–2 thereunder, the Participating Organizations jointly and severally request the SEC, upon its approval of this Agreement, to relieve the Participating Organizations, jointly and severally, of any and all responsibilities with respect to the matters allocated to NYSE Regulation and FINRA pursuant to this Agreement for purposes of §§ 17(d) and 19(g) of the Act.

25. *Governing Law.* This Agreement shall be deemed to have been made in the State of New York, and shall be construed and enforced in accordance with the law of the State of New York, without reference to principles of conflicts of laws thereof. Each of the parties hereby consents to submit to the jurisdiction of the courts of the State of New York in connection with any action or proceeding relating to this Agreement.

26. *Survival of Provisions.* Provisions intended by their terms or context to survive and continue notwithstanding delivery of the regulatory services by NYSE Regulation or FINRA, as applicable, the payment of the Fees by the Participating Organizations, and any expiration of this Agreement shall survive and continue.

27. *Amendment.*

a. This Agreement may be amended to add a new Participating Organization, provided that such Participating Organization does not assume regulatory responsibility, solely by an amendment executed by NYSE Regulation, FINRA and such new

Participating Organization. All other Participating Organizations expressly consent to allow NYSE Regulation and FINRA to jointly add new Participating Organizations to the Agreement as provided above. NYSE Regulation and FINRA will promptly notify all Participating Organizations of any such amendments to add a new Participating Organization.

b. All other amendments must be made approved by each Participating Organization. All amendments, including adding a new Participating Organization, must be filed with and approved by the Commission before they become effective.

28. *Effective Date.* The Effective Date of this Agreement will be the date the SEC declares this Agreement to be effective pursuant to authority conferred by § 17(d) of the Act, and SEC Rule 17d–2 thereunder.

29. *Counterparts.* This Agreement may be executed in any number of counterparts, including facsimile, each of which will be deemed an original, but all of which taken together shall constitute one single agreement between the Parties.

Exhibit A: Common Insider Trading Rules

1. Securities Exchange Act of 1934 Section 10(b), and rules and regulations promulgated there under in connection with insider trading, including SEC Rule 10b–5 (as it pertains to insider trading), which states that:

Rule 10b–5—Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

a. To employ any device, scheme, or artifice to defraud,

b. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

c. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

2. Securities Exchange Act of 1934 Section 17(a), and rules and regulations promulgated there under in connection with insider trading, including SEC Rule 17a–3 (as it pertains to insider trading).

3. The following SRO Rules as they pertain to violations of insider trading:

FINRA [NASD] Rule [2110]*2010* (Standards of Commercial Honor and Principles of Trade)
FINRA [NASD] Rule [2120]*2020* (Use of Manipulative, Deceptive or Other Fraudulent Devices)
FINRA NASD Rule 3010 (Supervision)
FINRA NASD Rule 3110 (a) and (c) (Books and Records; Financial Condition)
NYSE Rule 401(a) (Business Conduct)
NYSE Rule 476(a) (Disciplinary Proceedings Involving Charges Against Members, Member Organizations, Allied Members, Approved Persons, Employees, or Others)
NYSE Rule 440 (Books and Records)
NYSE Rule 342 (Offices—Approval, Supervision and Control)
AMEX Cons. Art. II Sec. 3, Confidential Information
AMEX Cons. Art. V Sec. 4 Suspension or Expulsion (b), (h), (i), (j) and (r)
AMEX Cons. Art. XI Sec. 4 Controlled Corporations and Associations—Responsibility for Corporate Subsidiary; Duty to Produce Books
AMEX Rule 3 General Prohibitions and Duty to Report (d), (h), (j) and (l)
AMEX Rule 3–AEMI General Prohibitions and Duty to Report (d) and (h)
AMEX Rule 16 Business Conduct
AMEX Rule 320 Offices-Approval, Supervision and Control
AMEX Rule 324 Books and Records
NASDAQ Rule 2110 (Standards of Commercial Honor and Principles of Trade)
NASDAQ Rule 2120 (Use of Manipulative, Deceptive or Other Fraudulent Devices)
NASDAQ Rule 3010 (Supervision)
NASDAQ Rule 3110 (a) and (c) (Books and Records; Financial Condition)
CHX Article 8, Rule 3 (Fraudulent Acts)
CHX Article 9, Rule 2 (Just & Equitable Trade Principles)
CHX Article 11, Rule 2 (Maintenance of Books and Records)
CHX Article 6, Rule 5 (Supervision of Registered Persons and Branch and Resident Offices)
[ISE RULE 400 (Just and Equitable Principles of Trade)]
[ISE RULE 405 (Manipulation)]
[ISE RULE 408 (Prevention of Misuse of Material Nonpublic Information)]
CBOE RULE 4.1 (Practices inconsistent with just and equitable principles)
CBOE RULE 4.2 (adherence to law)
CBOE RULE 4.7 (Manipulation)
CBOE RULE 4.18 (Prevention of the misuse of material non public information)
PHLX RULE 707 (Conduct Inconsistent with Just and Equitable Principles of Trade)
PHLX RULE 748 (Supervision)
PHLX RULE 760 (Maintenance, Retention and Furnishing of Books, Records and Other Information)
PHLX RULE 761 (Supervisory Procedures Relating to ITSFEA and to Prevention of Misuse or Material Nonpublic Information)
PHLX RULE 782 (Manipulative Operations)
NYSE Arca Rule 6.3 (Prevention of the Misuse of Material, Nonpublic Information)
NYSE Arca Rule 6.2(b) Prohibited Acts (J&E)
NYSE Arca Rule 6.1 Adherence to Law
NYSE Arca Rule 6.18 Supervision
NYSE Arca Rule 9.1(c) Office Supervision
NYSE Arca Rule 9.2(b) Account Supervision
NYSE Arca Rule 9.2(c) Customer Records
NYSE Arca Rule 9.17 Books and Records
NSX Rule 3.1 Business Conduct of ETP Holders
NSX Rule 3.2. Violations Prohibited
NSX Rule 3.3. Use of Fraudulent Devices
NSX Rule 4.1 Requirements
NSX Rule 5.1. Written Procedures
NSX Rule 5.3 Records
NSX Rule 5.5 Chinese Wall Procedures
[BSE Chapter II, Sections 26–28 (Anti-Manipulative Provisions)]
[BSE Chapter II, Section 37 (ITSFEA Procedures)]
[BSE Chapter XXIV–C, Section 2 (Securities Accounts and Orders of Specialists)]
[BSE Chapter XXXVII, Section 11 (Limitations on Dealings)]
BX Rule 2110 (Standards of Commercial Honor and Principles of Trade)
BX Rule 2120 (Use of Manipulative, Deceptive or Other Fraudulent Devices)
BX Rule 3010 (Supervision)
BX Rule 3110 (a) and (c) (Books and Records; Financial Condition)
BATS Rule 3.1 Business Conduct of ETP Holders
BATS Rule 3.2. Violations Prohibited
BATS Rule 3.3. Use of Fraudulent Devices
BATS Rule 4.1 Requirements
BATS Rule 5.1. Written Procedures
BATS Rule 5.3 Records
BATS Rule 5.5 [Chinese Wall Procedures]*Prevention of the Misuse of Material, Non-Public Information*
BATS Rule 12.4 Manipulative Transactions
BYX Rule 3.1 Business Conduct of ETP Holders
BYX Rule 3.2. Violations Prohibited
BYX Rule 3.3. Use of Fraudulent Devices

BYX Rule 4.1 Requirements
BYX Rule 5.1. Written Procedures
BYX Rule 5.3 Records
BYX Rule 5.5 Prevention of the Misuse of Material, Non-Public Information
BYX Rule 12.4 Manipulative Transactions
EDGA 3.1 Business Conduct of Members
EDGA 3.2 Violations Prohibited
EDGA 3.3 Use of Fraudulent Devices
EDGA 4.1 Requirements
EDGA 5.1 Written Procedures
EDGA 5.3 Records
EDGA 5.5 Prevention of misuse of material, nonpublic information
EDGA 12.4 Manipulative Transactions
EDGX 3.1 Business Conduct of Members
EDGX 3.2 Violations Prohibited
EDGX 3.3 Use of Fraudulent Devices
EDGX 4.1 Requirements
EDGX 5.1 Written Procedures
EDGX 5.3 Records
EDGX 5.5 Prevention of misuse of material, nonpublic information
EDGX 12.4 Manipulative Transactions

Exhibit B: Fee Schedule

1. *Fees.* NYSE Regulation and, separately, FINRA shall charge each Participating Organization a Quarterly Fee in arrears for the performance of NYSE Regulation's and FINRA's respective regulatory responsibilities under the Plan (each, a "Quarterly Fee," and together, the "Fees").

a. *Quarterly Fees.*

(1) Quarterly Fees for each Participating Organization will be charged by NYSE Regulation and FINRA, respectively, according to the Participating Organization's "Percentage of Publicly Reported Trades" occurring over three-month billing periods. The "Percentage of Publicly Reported Trades" shall equal a Participating Organization's number of reported NYSE-listed trades (when billing originates from NYSE Regulation) and combined AMEX-listed, NASDAQ-listed, and CHX solely-listed trades (when billing originates from FINRA) during the relevant period (the "Numerator"), divided by the total number of either all NYSE-listed trades or all combined AMEX-listed, NASDAQ-listed, and CHX solelylisted trades, respectively, for the same period (the "Denominator"). For purposes of clarification, ADF and Trade Reporting Facility (TRF) activity will be included in the Denominator. Additionally, with regard to TRFs, TRF trade volume will be charged to FINRA. Consequently, for purposes of calculating the Quarterly Fees, the volume for each Participant Organization's TRF will be calculated separately (that is, TRF volume will be broken out from the Participating Organization's overall Percentage of Publicly Reported Trades) and the fees for such will be billed to FINRA in accordance with paragraph 1(a)(2), rather than to the applicable Participating Organization.

(2) The Quarterly Fees shall be determined by each of NYSE Regulation and FINRA, as applicable, in the following manner for each Participating Organization:

(a) Less than 1.0%: If the Participating Organization's Percentage of Publicly Reported Trades for NYSE-listed trades (in the case of NYSE Regulation) or for combined AMEX-listed, NASDAQ-listed, and CHX solelylisted trades (in the case of FINRA) for the relevant three-month billing period is less than 1.0%, the Quarterly Fee shall be $3,125, per quarter ("Static Fee");

(b) Less than 2.0% but No Less than 1.0%: If the Participating Organization's Percentage of Publicly Reported Trades for NYSE-listed trades (in the case of NYSE Regulation) or for combined AMEX-listed, NASDAQ-listed, and CHX solely-listed trades (in the case of FINRA) for the relevant three-month billing period is less than 2.0% but no less than 1.0%, the Quarterly Fee shall be $9,375, per quarter ("Static Fee");

(c) 2.0% or Greater: If the Participating Organization's Percentage of Publicly Reported Trades for NYSE-listed trades (in the case of NYSE Regulation) or for combined AMEX-listed, NASDAQ-listed, and CHX solely listed trades (in the case of FINRA) for the relevant three-month billing period is 2.0% or greater, the Quarterly Fee shall be the amount equal to the Participating Organization's Percentage of Publicly Reported Trades multiplied by NYSE Regulation's or FINRA's total charge ("Total Charge"), respectively, for its performance of Insider Trading regulatory responsibilities for the relevant three-month billing period.

(3) Increases in Static Fees. NYSE Regulation and FINRA will re-evaluate the Quarterly Fees on an annual basis during the annual budget process outlined in paragraph 1.c. below. During each annual re-evaluation, NYSE Regulation and FINRA will have the discretion to increase the Static Fees by a percentage no greater than the percentage increase in the Final Budget over the preceding year's Final Budget. Any changes to the Static Fees shall not require an amendment to this Agreement, but rather shall be memorialized through the Budget Process.

(4) Increases in Total Charges. Any change in the Total Charges (whether a Final Budget increase or any mid year change) shall not require an amendment to this Agreement, but rather shall be memorialized through the budget process.

b. *Source of Data.* For purposes of calculation of the Percentage of Publicly Reported Trades for each Participating Organization, NYSE Regulation and FINRA shall use (a) the Consolidated Tape Association ("CTA") as the exclusive securities information processor ("SIP") for all NYSE Listed Stocks, AMEX Listed Stocks, and CHXSolely Listed Stocks, and (b) the Unlisted Trading Privileges Plan as the exclusive SIP for NASDAQ-listed Stocks.

c. *Annual Budget Forecast.* NYSE Regulation and FINRA will notify the Participating Organizations of the forecasted costs of their respective insider trading programs for the following calendar year by close of business on October 15 of the then-current year (the "Forecasted Budget"). NYSE Regulation and FINRA shall use best efforts to provide as accurate a forecast as possible. NYSE Regulation and FINRA shall then provide a final submission of the costs following approval of such costs by their respective governing Boards (the "Final Budget"). Subject to paragraph 1(d) below, in the event of a difference between the Forecasted Budget and the Final Budget, the Final Budget will govern.

d. *Increases in Fees Over Twenty Percent.*

(1) In the event that any proposed increase to Fees by NYSE Regulation or by FINRA for a given calendar year (which increase may arise either during the annual budgetary forecasting process or through any mid-year increase) will result in a cumulative increase in such calendar year's Fees of more than twenty percent (20%) above the preceding calendar year's Final Budget (a "Major Increase"), then senior management of any Participating Organization (a) that is a Listing Market or (b) for which the Percentage of Publicly Reported Trades is then currently twenty percent (20%) or greater, shall have the right to call a meeting with the senior management of NYSE Regulation or FINRA, respectively, in order to discuss any disagreement over such proposed Major Increase. By way of example, if NYSE Regulation provides a Final Budget for 2009 that represents an 8% increase above the Final Budget for 2008, the terms of this paragraph 1.d.(1) shall not apply; if, however, in April of 2009, NYSE Regulation notifies the Exchange Committee of an increase in Fees that represents an additional 14% increase above the Final Budget for 2008, then

the increase shall be deemed a Major Increase, and the terms of this paragraph 1.d.(1) shall become applicable (*i.e.,* 8% + 14% = a cumulative increase of 22% above 2008 Final Budget).

(2) In the event that senior management members of the involved parties are unable to reach an agreement regarding the proposed Major Increase, then the matter shall be referred back to the Exchange Committee for final resolution. Prior to the matter being referred back to the Exchange Committee, nothing shall prohibit the parties from conferring with the SEC. Resolution shall be reached through a vote of no fewer than all Participating Organizations seated on the Exchange Committee, and a simple majority shall be required in order to reject the proposed Major Increase.

e. *Time Tracking.* NYSER and FINRA shall track the time spent by staff on insider trading responsibilities under this Agreement; however, time tracking will not be used to allocate costs.

2. *Invoicing and Payment.*

a. NYSE Regulation shall invoice each Participating Organization for the Quarterly Fee associated with the regulatory activities performed pursuant to this Agreement during the previous three-month billing period within forty-five (45) days of the end of such previous 3-month billing period. A Participating Organization shall have thirty (30) days from date of invoice to make payment to NYSE Regulation on such invoice. The invoice will reflect the Participating Organization's Percentage of Publicly Reported Trades for that billing period.

b. FINRA shall invoice each Participating Organization for the Quarterly Fee associated with the regulatory activities performed pursuant to this Agreement during the previous three-month billing period within forty-five (45) days of the end of such previous 3-month billing period. A Participating Organization shall have thirty (30) days from date of invoice to make payment to FINRA on such invoice. The invoice will reflect the Participating Organization's Percentage of Publicly Reported Trades for that billing period.

3. *Disputed Invoices; Interest.* In the event that a Participating Organization disputes an invoice or a portion of an invoice, the Participating Organization shall notify in writing either FINRA or NYSE Regulation (each, an "Invoicing Party"), as applicable, of the disputed item(s) within fifteen (15) days of receipt of the invoice. In its notification to the Invoicing Party of the disputed invoice, the Participating Organization shall identify the disputed item(s) and provide a brief explanation of why the Participating Organization disputes the charges. An Invoicing Party may charge a Participating Organization interest on any undisputed invoice or the undisputed portions of a disputed invoice that a Participating Organization fails to pay within thirty (30) days of its receipt of such invoice. Such interest shall be assessed monthly. Interest will mean one and one half percent per month, or the maximum allowable under applicable Law, whichever is less.

4. *Taxes.* In the event any governmental authority deems the regulatory activities allocated to NYSE Regulation or FINRA to be taxable activities similar to the provision of services in a commercial context, the other Participating Organizations agree that they shall bear full responsibility, on a joint and several basis, for the payment of any such taxes levied on NYSE Regulation or FINRA, or, if such taxes are paid by NYSE Regulation or FINRA directly to the governmental authority, the other Participating Organizations agree that they shall reimburse NYSE Regulation and/or FINRA, as applicable, for the amount of any such taxes paid.

5. *Audit Right; Recordkeeping.*

a. *Audit Right.*

(i) Audit of NYSE Regulation.

(a) Once every rolling twelve (12) month period, NYSE Regulation shall permit no more than one audit (to be performed by one or more Participating Organizations) of the Fees charged by NYSE Regulation to the Participating Organizations hereunder and a detailed cost analysis supporting such Fees (the "Audit"). The Participating Organization or Organizations that conduct this Audit will select a nationally recognized independent auditing firm (or may use its regular independent auditor, providing it is a nationally recognized auditing firm) ("Auditing Firm") to act on its, or their behalf, and will provide reasonable notice to other Participating Organizations of the Audit and invite the other Participating Organizations to participate in the Audit. NYSE Regulation will permit the Auditing Firm reasonable access during NYSE Regulation's normal business hours—with reasonable advance notice, to such financial records and supporting documentation as are necessary to permit review of the accuracy of the calculation of the Fees charged to the Participating Organizations. The Participating Organization, or Organizations, as applicable, other than NYSE Regulation, shall be responsible for the costs of performing any such audit.

(b) If, through an Audit, the Exchange Committee determines that NYSE Regulation has inaccurately calculated the Fees for any Participating Organization, the Exchange Committee will promptly notify NYSE Regulation in writing of the amount of such difference in the Fees, and, if applicable, NYSE Regulation shall issue a reimbursement of the overage amount to the relevant Participating Organization(s), less any amount owed by the Participating Organization under any outstanding, undisputed invoice(s). If such an Audit reveals that any Participating Organization paid less than what was required pursuant to the Agreement, then that Participating Organization shall promptly pay NYSE Regulation the difference between what the Participating Organization owed pursuant to the Agreement and what that Participating Organization originally paid NYSE Regulation. If NYSE Regulation disputes the results of an audit regarding the accuracy of the Fees, it will submit the dispute for resolution pursuant to the dispute resolution procedures in paragraph 13 hereof.

(c) In the event that through the review of any supporting documentation provided during the Audit, any one or more Participating Organizations desire to discuss with NYSE Regulation the supporting documentation and any questions arising therefrom with regard to the manner in which regulation was conducted, the Participating Organization(s) shall call a meeting with NYSE Regulation. NYSE Regulation shall in turn notify the Exchange Committee of this meeting in advance, and all Participating Organizations shall be welcome to attend (the "Fee Analysis Meeting"). The parties to this Agreement acknowledge and agree that while NYSE Regulation commits to discuss the supporting documentation at the Fee Analysis Meeting, NYSE Regulation shall not be subject, by virtue of the above Audit rights or any discussions during the Fee Analysis Meeting or otherwise, to any limitation whatsoever, other than the Increase in Fee provisions set forth in paragraph 1.d. of this Exhibit, on its discretion as to the manner and means by which it conducts its regulatory efforts in its role as the SRO primarily liable for regulatory decisions under this Agreement. To that end, no disagreement among the Participating Organizations as to the manner or means by which NYSE Regulation conducts its regulatory efforts hereunder shall be subject to the dispute resolution procedures hereunder, and no Participating Organization shall have the right to compel NYSE Regulation to alter the manner or means by which it conducts its regulatory efforts. Further, a Participating Organization shall not have the right to compel a rebate or reassessment of fees for services rendered, on the basis that the Participating Organization would have conducted regulatory efforts in a different manner than NYSE Regulation in its professional judgment chose to conduct its regulatory efforts.

ii. Audit of FINRA.

(a) Once every rolling twelve (12) month period, FINRA shall permit no more than one audit (to be performed by one or more Participating Organizations) of the Fees charged by FINRA to the Participating Organizations hereunder and a detailed cost analysis supporting such Fees (the "Audit"). The Participating Organization or Organizations that conduct this Audit will select a nationally recognized independent auditing firm (or may use its regular independent auditor, providing it is a nationally recognized auditing firm) ("Auditing Firm") to act on its, or their behalf, and will provide reasonable notice to other Participating Organizations of the Audit. FINRA will permit the Auditing Firm reasonable access during FINRA''s normal business hours, with reasonable advance notice, to such financial records and supporting documentation as are necessary to permit review of the accuracy of the calculation of the Fees charged to the Participating Organizations. The Participating Organization, or Organizations, as applicable, other than FINRA, shall be responsible for the costs of performing any such audit.

(b) If, through an Audit, the Exchange Committee determines that FINRA has inaccurately calculated the Fees for any Participating Organization, the Exchange Committee will promptly notify FINRA in writing of the amount of such difference in the Fees, and, if applicable, FINRA shall issue a reimbursement of the overage amount to the relevant Participating Organization(s), less any amount owed by the Participating Organization under any outstanding, undisputed invoice(s). If such an Audit reveals that any Participating Organization paid less than what was required pursuant to the Agreement, then that Participating Organization shall promptly pay FINRA the difference between what the Participating Organization owed pursuant to the Agreement and what that Participating Organization originally paid FINRA. If FINRA disputes the results of an audit regarding the accuracy of the Fees, it will submit the dispute for resolution pursuant to the dispute resolution procedures in paragraph 13 hereof.

(c) In the event that through the review of any supporting documentation provided during the Audit, any one or more Participating Organizations desire to discuss with FINRA the supporting documentation and any questions arising therefrom with regard to the manner in which regulation was conducted, the Participating Organization(s) shall call a meeting with FINRA. FINRA shall in turn notify the Exchange Committee of this meeting in advance, and all Participating Organizations shall be welcome to attend (the "Fee Analysis Meeting"). The parties to this Agreement acknowledge and agree that while FINRA commits to discuss the supporting documentation at the Fee Analysis Meeting, FINRA shall not be subject, by virtue of the above Audit rights or any discussions during the Fee Analysis Meeting or otherwise, to any limitation whatsoever, other than the Increase in Fee provisions set forth in paragraph 1.d. of this Exhibit, on its discretion as to the manner and means by which it conducts its regulatory efforts in its role as the SRO primarily liable for regulatory decisions under this Agreement. To that end, no disagreement among the Participating Organizations as to the manner or means by which FINRA conducts its regulatory efforts hereunder shall be subject to the dispute resolution procedures hereunder, and no Participating Organization shall have the right to compel FINRA to alter the manner or means by which it conducts its regulatory efforts. Further, a Participating Organization shall not have the right to compel a rebate or reassessment of fees for services rendered, on the basis that the Participating Organization would have conducted regulatory efforts in a different manner than FINRA in its professional judgment chose to conduct its regulatory efforts.

b. *Recordkeeping.* In anticipation of any audit that may be performed by the Exchange Committee under paragraph 5.a. above, NYSE and FINRA shall each keep accurate financial records and documentation relating to the Fees charged by each, respectively, under this Agreement.

Exhibit C: Reports

NYSE Regulation and FINRA shall provide the following information in reports to the Exchange Committee, which information covers activity occurring under this Agreement:

1. *Alert Summary Statistics:* Total number of surveillance system alerts generated by quarter along with associated number of reviews and investigations. In addition, this paragraph shall also reflect the number of reviews and investigations originated from a source other than an alert. A separate table would be presented for Amex Listed, Nasdaq Listed, and CHX Solely Listed equity trading activity.

2008	Surveillance alerts	Investigations
1st Quarter		
2nd Quarter		
3rd Quarter		
4th Quarter		
2008 Total		

2. *Aging of Open Matters:* Would reflect the aging for all currently open matters for the quarterly period being reported. A separate table would be presented for Amex Listed, Nasdaq Listed, and CHX Solely Listed equity trading activity.

Example:

	Surveillance alerts	Investigations
0–6 months	....	
6–9 months	....	
9–12 months	....	
12+ months	....	
Total	....	

3. *Timeliness of Completed Matters:* Would reflect the total age of those matters that were completed or closed during the quarterly period being reported. NYSE and FINRA will provide total referrals to the SEC.

Example:

	Surveillance alerts	Investigations
0–6 months	....	
6–9 months	....	
9–12 months	....	
12+months	....	
Total	....	

4. *Disposition of Closed Matters:* Would reflect the disposition of those matters that were completed or closed during the quarterly period being reported. A separate table would be presented for Amex Listed, Nasdaq Listed, and CHX Solely Listed equity trading activity.

Example:

	Surveillance YTD	Investigations YTD
No Further Review	....	
Letter of Caution/Admonition/Fine	....	
Referred to Legal/Enforcement	....	
Referred to SEC/SRO	....	
Merged	....	
Other	....	
Total	....	

5. *Pending Reviews:* In addition to the above reports, the Chief Regulatory Officer (CRO) (or his or her designee) of any Participating Organization that is also a listing market (including CHX) may inquire about pending reviews involving stocks listed on that Participating Organization's market. NYSE Regulation and FINRA, respectively, will respond to such inquiries from a CRO; provided, however, that (a) the CRO must hold any information provided by NYSE Regulation and FINRA in confidence and (b) NYSE Regulation and FINRA will not be compelled to provide information in contradiction of any mandate, directive or order from the SEC, US Attorney's Office, the Office of any State Attorney General or court of competent jurisdiction.

* * * * *

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–566 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–566. 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 plan that are filed with the Commission, and all written communications relating to the proposed plan between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 the plan also will be available for inspection and copying at the principal offices of Amex, BATS, BYX, BX, CBOE, CHX, EDGA, EDGX, FINRA, ISE, NASDAQ, NSX, NYSE, NYSE Arca, NYSE Regulation, and Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–566 and should be submitted on or before November 10, 2010.

V. Discussion

The Commission finds that the Plan, as proposed to be amended, is consistent with the factors set forth in Section 17(d) of the Act [15] and Rule 17d–2[16] thereunder in that it is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. The Commission continues to believe that the Plan, as proposed to be amended, should reduce unnecessary regulatory duplication by allocating regulatory responsibility for the surveillance, investigation, and enforcement of Common Rules over Common NYSE Members, with respect to NYSE-listed stocks and NYSE Arca listed stocks, to NYSE and over Common FINRA Members, with respect to NASDAQ-listed stocks, Amex-listed stocks, and any CHX solely-listed stock, to FINRA. Accordingly, the proposed amendment to the Plan promotes efficiency by consolidating these regulatory functions in a single SRO based on the listing market for a stock, with regard to Common NYSE Members and Common FINRA Members.

Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan, effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. The purpose of the amendment is to add BYX as an SRO participant to the Plan. By declaring effective the amended Plan today, BYX can be included in the Plan prior to beginning operations as a national securities exchange and the amended Plan can become effective and be implemented without undue delay. In addition, the Commission believes it is appropriate to remove references to ISE from the Plan as ISE is no longer a Participating Organization. Finally, the Commission believes that the technical corrections to update the names of certain Participating Organizations is appropriate and consistent with the Act. In addition, the Commission notes that the prior version of this Plan was published for comment, and the Commission did not receive any comments thereon.[17] Finally, the Commission does not believe that the amendment to the Plan raises any new regulatory issues that the Commission has not previously considered.

[15] 15 U.S.C. 78q(d).

[16] 17 CFR 240.17d–2

[17] *See supra* note 11.

VI. Conclusion

This order gives effect to the amended Plan submitted to the Commission that is contained in File No. 4–566.

It is therefore ordered, pursuant to Section 17(d) of the Act,[18] that the Plan, as amended, is hereby approved and declared effective.

It is further ordered that the Participating Organizations are relieved of those regulatory responsibilities allocated to NYSE and FINRA under the amended Plan to the extent of such allocation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26338 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

[18] 15 U.S.C. 78q(d).

[19] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63102; File No. 4–613]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities Between the Financial Industry Regulatory Authority, Inc. and BATS–Y Exchange, Inc.

October 14, 2010.

On September 3, 2010, BATS–Y Exchange, Inc. (“BYX”) and the Financial Industry Regulatory Authority, Inc. (“FINRA”) (together with BYX, the “Parties”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 17(d) of the Securities Exchange Act of 1934 (“Act”),[1] and Rule 17d–2 thereunder,[2] a plan for the allocation of regulatory responsibilities, dated September 3, 2010 (“17d–2 Plan” or the “Plan”). The Plan was published for comment on September 23, 2010.[3] The Commission received no comments on the Plan. This order approves and declares effective the Plan.

I. Introduction

Section 19(g)(1) of the Act,[4] among other things, requires every self-regulatory organization (“SRO”) registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO’s own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act.[5] Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (“common members”). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act [6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (“DEA”) to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member’s DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO’s obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] *See* Securities Exchange Act Release No. 62935 (September 17, 2010), 75 FR 57998.

[4] 15 U.S.C. 78s(g)(1).

[5] 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for appropriate notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors; to foster cooperation and coordination among the SROs; to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system; and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. Proposed Plan

The proposed 17d–2 Plan is intended to reduce regulatory duplication for firms that are common members of both BYX and FINRA.[11] Pursuant to the proposed 17d–2 Plan, FINRA would assume certain examination and enforcement responsibilities for common members with respect to certain applicable laws, rules, and regulations.

The text of the Plan delineates the proposed regulatory responsibilities with respect to the Parties. Included in the proposed Plan is an exhibit (the "BATS–Y Exchange Rules Certification for 17d–2 Agreement with FINRA," referred to herein as the "Certification") that lists every BYX rule, and select federal securities laws, rules, and regulations, for which FINRA would bear responsibility under the Plan for overseeing and enforcing with respect to BYX members that are also members of FINRA and the associated persons therewith ("Dual Members").

Specifically, under the 17d–2 Plan, FINRA would assume examination and enforcement responsibility relating to compliance by Dual Members with the rules of BYX that are substantially similar to the applicable rules of FINRA,[12] as well as any provisions of the federal securities laws and the rules and regulations thereunder delineated in the Certification ("Common Rules"). Common Rules would not include the application of any BYX rule or FINRA rule, or any rule or regulation under the Act, to the extent that it pertains to violations of insider trading activities, because such matters are covered by a separate multiparty agreement under Rule 17d–2.[13] In the event that a Dual Member is the subject of an investigation relating to a transaction on BYX, the plan acknowledges that BYX may, in its discretion, exercise concurrent jurisdiction and responsibility for such matter.[14]

Under the Plan, BYX would retain full responsibility for surveillance and enforcement with respect to trading activities or practices involving BYX's own marketplace, including, without limitation, registration pursuant to its applicable rules of associated persons (*i.e.,* registration rules that are not Common Rules); its duties as a DEA pursuant to Rule 17d–1 under the Act; and any BYX rules that are not Common Rules, except for BYX rules for any broker-dealer subsidiary of BYX's parent company, BATS Global Markets, Inc.[15] Apparent violations of any BYX rules by any broker-dealer subsidiary of BATS Global Markets will be processed by, and enforcement proceedings in respect thereto will be conducted by, FINRA.[16]

III. Discussion

The Commission finds that the proposed Plan is consistent with the factors set forth in Section 17(d) of the Act[17] and Rule 17d–2(c) thereunder[18] in that the proposed Plan is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. In particular, the Commission believes that the proposed Plan should reduce unnecessary regulatory duplication by allocating to FINRA certain examination and enforcement responsibilities for Dual Members that would otherwise be performed by both BYX and FINRA. Accordingly, the proposed Plan promotes efficiency by reducing costs to Dual Members. Furthermore, because BYX and FINRA will coordinate their regulatory functions in accordance with the Plan, the Plan should promote investor protection.

The Commission notes that when it granted the application of BYX for registration as a national securities exchange, the Commission conditioned the operation of the BYX exchange on the satisfaction of several requirements.[19] One of those requirements was the effectiveness of an agreement pursuant to Rule 17d–2 between FINRA and BYX that allocates to FINRA regulatory responsibility for certain specified matters.[20] The proposed 17d–2 Plan represents BYX's effort to satisfy that prerequisite.

The Commission notes that, under the Plan, BYX and FINRA have allocated regulatory responsibility for those BYX rules, set forth on the Certification, that are substantially similar to the applicable FINRA rules in that examination for compliance with such provisions and rules would not require FINRA to develop one or more new examination standards, modules, procedures, or criteria in order to analyze the application of the rule, or a Dual Member's activity, conduct, or output in relation to such rule. In addition, under the Plan, FINRA would assume regulatory responsibility for certain provisions of the Federal securities laws and the rules and regulations thereunder that are set forth in the Certification. The Common Rules covered by the Plan are specifically listed in the Certification, as may be amended by the Parties from time to time.

Under the Plan, BYX would retain full responsibility for surveillance and enforcement with respect to trading activities or practices involving BYX's own marketplace, including, without limitation, registration pursuant to its applicable rules of associated persons (*i.e.,* registration rules that are not Common Rules); its duties as a DEA pursuant to Rule 17d–1 under the Act; and any BYX rules that are not Common Rules, except for BYX rules for any broker-dealer subsidiary of BATS Global

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] The proposed 17d–2 Plan refers to these common members as "Dual Members." *See* Paragraph 1(c) of the proposed 17d–2 Plan.

[12] *See* paragraph 1(b) of the proposed 17d–2 Plan (defining Common Rules). *See also* paragraph 1(f) of the proposed 17d–2 Plan (defining Regulatory Responsibilities). Paragraph 2 of the Plan provides that annually, or more frequently as required by changes in either BYX rules or FINRA rules, the parties shall review and update, if necessary, the list of Common Rules. Further, paragraph 3 of the Plan provides that BYX shall furnish FINRA with a list of Dual Members, and shall update the list no less frequently than once each calendar quarter.

[13] *See* Securities Exchange Act Release No. 58350 (August 13, 2008), 73 FR 48247 (August 18, 2008) (File No. 4–566) (notice of filing of proposed plan). *See also* Securities Exchange Act Release No. 58536 (September 12, 2008), 73 FR 54646 (September 22, 2008) (File No. 4–566) (order approving and declaring effective the plan). The Certification identifies several Common Rules that may also be addressed in the context of regulating insider trading activities pursuant to the proposed separate multiparty agreement.

[14] *See* paragraph 6 of the proposed 17d–2 Plan.

[15] *See* paragraph 2 of the proposed 17d–2 Plan.

[16] *See* paragraph 6 of the proposed 17d–2 Plan.

[17] 15 U.S.C. 78q(d).

[18] 17 CFR 240.17d–2(c).

[19] *See* Securities Exchange Act Release No. 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10–198).

[20] *See* Securities Exchange Act Release No. 62716 (August 13, 2010), 75 FR 51295, 51300 (August 19, 2010) (File No. 10–198).

Markets, Inc.[21] Apparent violations of any BYX rules by any broker-dealer subsidiary of BATS Global Markets, Inc. will be processed by, and enforcement proceedings in respect thereto will be conducted by, FINRA.[22] The effect of these provisions is that regulatory oversight and enforcement responsibilities for any broker-dealer subsidiary of BATS Global Markets, Inc., which is the parent company of BYX, will be vested with FINRA. These provisions should help avoid any potential conflicts of interest that could arise if BYX was primarily responsible for regulating any affiliated broker-dealer.

According to the Plan, BYX will review the Certification at least annually, or more frequently if required by changes in either the rules of BYX or FINRA, and, if necessary, submit to FINRA an updated list of Common Rules to add BYX rules not included on the then-current list of Common Rules that are substantially similar to FINRA rules; delete BYX rules included in the then-current list of Common Rules that are no longer substantially similar to FINRA rules; and confirm that the remaining rules on the list of Common Rules continue to be BYX rules that are substantially similar to FINRA rules.[23] FINRA will then confirm in writing whether the rules listed in any updated list are Common Rules as defined in the Plan. Under the Plan, BYX will also provide FINRA with a current list of Dual Members and shall update the list no less frequently than once each quarter.[24]

The Commission is hereby declaring effective a plan that, among other things, allocates regulatory responsibility to FINRA for the oversight and enforcement of all BYX rules that are substantially similar to the rules of FINRA for Dual Members of BYX and FINRA. Therefore, modifications to the Certification need not be filed with the Commission as an amendment to the Plan, provided that the Parties are only adding to, deleting from, or confirming changes to BYX rules in the Certification in conformance with the definition of Common Rules provided in the Plan. However, should the Parties decide to add a BYX rule to the Certification that is not substantially similar to a FINRA rule; delete a BYX rule from the Certification that is substantially similar to a FINRA rule; or leave on the Certification a BYX rule that is no longer substantially similar to a FINRA rule, then such a change would constitute an amendment to the Plan, which must be filed with the Commission pursuant to Rule 17d–2 under the Act and noticed for public comment.[25]

The Plan also permits BYX and FINRA to terminate the Plan, subject to notice.[26] The Commission notes, however, that while the Plan permits the Parties to terminate the Plan, the Parties cannot by themselves reallocate the regulatory responsibilities set forth in the Plan, since Rule 17d–2 under the Act requires that any allocation or re-allocation of regulatory responsibilities be filed with the Commission.[27]

IV. Conclusion

This Order gives effect to the Plan filed with the Commission in File No. 4–613. The Parties shall notify all members affected by the Plan of their rights and obligations under the Plan.

It is therefore ordered, pursuant to Section 17(d) of the Act, that the Plan in File No. 4–613, between FINRA and BYX, filed pursuant to Rule 17d–2 under the Act, is approved and declared effective.

It is therefore ordered that BYX is relieved of those responsibilities allocated to FINRA under the Plan in File No. 4–613.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26337 Filed 10–19–10; 8:45 am]

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[21] *See* paragraph 2 of the proposed 17d–2 Plan.

[22] *See* paragraph 6 of the proposed 17d–2 Plan.

[23] *See* paragraph 2 of the proposed 17d–2 Plan.

[24] *See* paragraph 3 of the proposed 17d–2 Plan.

[25] The Commission also notes that the addition to or deletion from the Certification of any federal securities laws, rules, and regulations for which FINRA would bear responsibility under the Plan for examining, and enforcing compliance by, Dual Members, also would constitute an amendment to the Plan.

[26] *See* paragraph 12 of the proposed 17d–2 Plan.

[27] The Commission notes that paragraph 12 of the Plan reflects the fact that FINRA's responsibilities under the Plan will continue in effect until the Commission approves any termination of the Plan.

[28] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63097; File No. SR–BYX–2010–002]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing of Proposed Rule Change To Amend BATS Y-Exchange Rules To Conform to the Current Rules of BATS Exchange

October 13, 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 October 4, 2010, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend BYX Rules 11.9, 11.13, 11.17, and 11.18 in order to bring BYX Rules up to date with recent changes that have been made to the rules of the Exchange's affiliate, BATS Exchange, Inc. ("BATS Exchange"). The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend BYX Rules 11.9, 11.13, 11.17, and 11.18 in order to bring BYX Rules up to date with the changes that were made to the rules of BATS Exchange while BYX's Form 1 Application to register as a national security exchange was pending approval.

Background:

BYX plans to commence operations as a national securities exchange registered under Section 6 of the Act [5] on October 15, 2010. As described more fully in BYX's Form 1 application,[6] the Exchange is an affiliate of BATS Exchange: both are wholly owned subsidiaries of BATS Global Markets, Inc. ("BGM"). BYX Rules, in their current form, were filed as part of Amendment No. 1 to its Form 1 on July 1, 2010 and, at that time, were nearly identical to BATS Exchange Rules. In the time between when BYX was preparing to file Amendment No. 1 to its Form 1 and the filing of this proposed rule change, BATS Exchange has made several changes to its rule book. Despite the limited time frame since the Commission approved BYX to operate as a national stock exchange, BYX and BATS Exchange already have many common members and the Exchange anticipates that the number of common members will only continue to grow. In order to prevent confusion among common members, to ensure consistent operation of both BYX and BATS Exchange, and to bring the Exchange's Rules in line with industry standards, the Exchange proposes to amend BYX Rules as described below.

Match Trade Prevention:

The Exchange proposes to make a minor change to its Member Match Trade Prevention, or MMTP, functionality, described in BYX Rule 11.9(f) and to rename the functionality as Match Trade Prevention. Specifically, the Exchange is proposing to allow Users to opt-out of the default behavior of the MMTP Decrement and Cancel ("MDC") modifier to automatically cancel two orders in their entirety when the resting order contains an MMTP modifier rather than MDC and is larger than the incoming order. Also, as mentioned above, the Exchange also proposes to rename the functionality as Match Trade Prevention ("MTP"). These changes would make BYX Rule 11.9(f) consistent with BATS Exchange Rule 11.9(f) and are identical to changes made by BATS Exchange when modifying its MMTP rules.[7]

Routing Strategies:

The Exchange also proposes to amend Rule 11.13(a), which describes its order routing processes, to modify the existing general description of Exchange routing functionality, to describe available routing options in greater detail, and to add certain new routing options. Specifically, the Exchange is proposing various modifications to its general routing standards, which modifications, the Exchange believes, will help clarify the rule, including adding a reference to the "RECYCLE Option" in its rule. Additionally, the Exchange is proposing to amend the Rule to include a definition of "System routing table," in order to reflect the fact that the Exchange, like other trading venues, maintains different routing tables for different routing options and modifies them on a regular basis to reflect assessments about the destination markets. Finally, the Exchange proposes to add descriptions of the following routing options: CYCLE, Parallel D, Parallel 2D, Parallel T, DRT, and Destination Specific Orders. These changes would make BYX Rule 11.13 consistent with BATS Exchange Rule 11.13 and are substantively identical to changes made by BATS Exchange when modifying its execution and routing rules.[8]

Clearly Erroneous Executions:

The Exchange also proposes to amend its Rule 11.17, entitled Clearly Erroneous Executions, to provide for uniform treatment: (1) Of clearly erroneous execution reviews in Multi-Stock Events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange. The Exchange also proposes additional changes to Rule 11.17 that reduce the ability of the Exchange to deviate from the objective standards set forth in the Rule. These changes would make BYX Rule 11.17 consistent with BATS Exchange Rule 11.17 and are identical to changes made by BATS Exchange when modifying its clearly erroneous executions rules.[9]

Individual Stock Trading Pause:

The Exchange also proposes to amend its Rule 11.18, which describes BYX's procedures for trading halts due to extraordinary market volatility, on a pilot basis so that the Exchange may, from time to time, pause trading in an individual stock when the primary listing market for such stock issues a trading pause in any of the securities covered by the pilot. The Exchange is proposing the rule change in order to recognize what is now a uniform market-wide trading pause standards for individual securities in the S&P 500® Index, the Russell 1000® Index and specified Exchange Trade Products that experience rapid price movement. These changes would make BYX Rule 11.18 consistent with BATS Exchange Rule 11.18 and are identical to changes made by BATS Exchange when modifying its trading halt rule.[10]

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[11] In particular, the proposed changes are consistent with Section 6(b)(5) of the Act,[12] because they would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. Specifically, the Exchange believes that although BYX Rules may, in certain instances, intentionally differ from BATS Exchange rules, the proposed changes will promote uniformity with BATS Exchange with respect to rules that are intended to be identical but were difficult to modify until BYX's Form 1 application had been approved. The Exchange believes that it will reduce the potential for confusion by its members that are also members of BATS Exchange if it commences operations with only those differences between BYX and BATS Exchange rules that are intentional. Furthermore, certain of the

[5] 15 U.S.C. 78f.

[6] *See* Securities Exchange Act Release No. 34–62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (order approving application of BATS Y–Exchange, Inc. for registration as a national securities exchange).

[7] Securities Exchange Act Release No. 62102 (May 13, 2010), 75 FR 28670 (May 21, 2010) (SR–BATS–2010–11).

[8] Securities Exchange Act Release No. 61883 (April 9, 2010), 75 FR 20418 (April 19, 2010) (SR–BATS–2010–007).

[9] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BATS–2010–016).

[10] Securities Exchange Act Release No. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (SR–BATS–2010–018).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

proposed changes will align the Exchange's rules with rules of other market centers that were recently amended to address the type of sudden price declines that the market experienced on the afternoon of May 6, 2010.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14]

The Exchange has requested that the Commission waive the 30-day operative delay to permit the Exchange to commence operations as a national securities exchange with rules substantively identical to the equity trading rules of BATS Exchange. The Commission finds that waiver of the operative delay is consistent with the protection of investors and the public interest because such waiver will align the Exchange's rules with recently amended rules of BATS Exchange. Therefore, the Commission designates the proposal operative upon commencement of Exchange operation, which the Exchange anticipates will be October 15, 2010.[15]

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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 proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–BYX–2010–002 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–BYX–2010–002. 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,[16] 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 changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BYX–2010–002 and should be submitted on or before November 10, 2010.

[16] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26335 Filed 10–19–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63101; File No. SR–NASDAQ–2010–130]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Fees for the Clearly Erroneous Module

October 14, 2010.

Pursuant to Section 19(b)(1) of the Securities exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 7, 2010, The NASDAQ Stock Market LLC ("NASDAQ"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

NASDAQ proposes to establish fees for the Clearly Erroneous Module. The text of the proposed rule change is below. Proposed new language is underlined.

7024. *Clearly Erroneous Module*

[Reserved]

The Clearly Erroneous Module, which provides real-time clearly erroneous surveillance alerts and reports, is available to subscribers for a fee of $400 per MPID, per month for the first 15 MPIDs subscribed, and for a fee of $100 per MPID, per month for each MPID subscribed in excess of 15.

* * * * *

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ proposes to offer the Clearly Erroneous Module, which is currently available as part of a Regulation Reconnaissance subscription, as a stand-alone service with a tiered fee structure. The Clearly Erroneous Module provides subscribers with trade alerts of potentially erroneous trades on NASDAQ, the ability to electronically submit clearly erroneous reports with NASDAQ MarketWatch and to anonymously negotiate erroneous trades with contra-parties, real-time erroneous filing status, and access to the subscriber's historical clearly erroneous data. Access to the Clearly Erroneous Module will be available as an add-on to the NASDAQ Workstation and Weblink ACT 2.0 or the Clearly Erroneous Viewer.

The Clearly Erroneous Module and the Reg NMS Module are the core functions of the Regulation Reconnaissance service.[3] The Regulation Reconnaissance service is offered to subscribers at a cost of $1,000 per MPID, per month.[4] Certain member firms that possess many MPIDs have informed NASDAQ that the current price structure for subscription to the Clearly Erroneous Module through the Regulation Reconnaissance service is cost prohibitive as it does not provide a tiered fee schedule based on the number of MPIDs subscribed. These member firms require multiple MPIDs due to the nature of their businesses and have a need to monitor clearly erroneous compliance for each MPID. In addition, certain member firms may not desire the full functionality of Regulation Reconnaissance, yet currently must pay for a full subscription. To make the service more cost effective for all member firms, including those that possess a large number of MPIDs, NASDAQ is proposing to offer the Clearly Erroneous Module as a stand-alone service for a fee of $400 per MPID per month for any member firm that subscribes 15 or fewer MPIDs and for a fee of $100 per MPID per month for each MPID subscribed in excess of 15.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(5) of the Act,[6] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Clearly Erroneous Module is designed to assist firms with monitoring their clearly erroneous compliance and, as such, is an important tool that members may use to help maintain the regulatory integrity of the markets. NASDAQ believes that offering the module as a stand-alone service at a reduced fee will encourage wider use of this regulatory tool that is otherwise cost-prohibitive to member firms, particularly those that possess a large number of MPIDs.

NASDAQ also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act[7] 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 the NASDAQ operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. NASDAQ is offering the Clearly Erroneous Module at a rate lower than the Regulation Reconnaissance service, which includes both the Clearly Erroneous Module and the Reg NMS Module. As such, member firms are provided an option to pay for only the service they desire at a discounted rate. Use of Clearly Erroneous Module is voluntary, and member firms will continue to have access to the Clearly Erroneous Module through a Regulation Reconnaissance subscription if they so choose.

NASDAQ believes that offering the Clearly Erroneous Module at a further discounted rate applicable to each MPID subscribed in excess of 15 is consistent with Section 6(b)(4) of the Act.[8] As noted, use of the Clearly Erroneous Module is voluntary and the subscription fees will be imposed on all purchasers equally based on the number of MPIDs subscribed. In this regard, the proposed reduced per MPID fee is available to any member that subscribes more than 15 MPIDs, with the reduced fee applying only to each MPID in excess of 15. The Clearly Erroneous Module it [sic] is a useful regulatory tool that, because it is bundled with Regulation Reconnaissance, is cost prohibitive to member firms that possess many MPIDs due to the nature of their businesses. As such, offering the service at a discounted rate to members that subscribe many MPIDs will allow these members to receive the benefit of the service that, under a non-tiered fee structure, only firms with fewer MPIDs could justify. Further, NASDAQ receives greater incremental benefits, both tangible and intangible, from providing multiple subscriptions to its members notwithstanding the reduced fee. NASDAQ notes that it currently provides other services with a tiered fee structure based on the on the number of users or subscribers.[9]

The proposed fees will cover the costs associated with separately offering the service, responding to customer requests, configuring NASDAQ's systems, programming to user specifications, and administering the service, among other things, and may provide NASDAQ with a profit to the extent costs are covered. NASDAQ believes that the proposed fee structure strikes a balance between covering these costs, and making this useful regulatory tool cost effective for all member firms.

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.

[3] For a description of the Regulation Reconnaissance service, *see http://www.nasdaqtrader.com/TraderP.aspx?id=RegRecon.*

[4] *See* Rule 7041(a).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(4).

[8] *Id.*

[9] For example, NASDAQ's InterACT service is offered for subscription fee of $300 per month, per user, for the first three users, and $100 per month, per user, for each additional user, with a maximum fee of $1,500 per month, per member firm. *See* Rule 7049.

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.[10] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NASDAQ–2010–130 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NASDAQ–2010–130. 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 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 NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NASDAQ–2010–130 and should be submitted on or before November 10, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26336 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(a)(ii).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63113; File No. 4–616]

Self-Regulatory Organizations; Order Approving Minor Rule Violation Plan for BATS Y–Exchange, Inc.

October 15, 2010.

On September 10, 2010, BATS Y–Exchange, Inc. ("BATS Y–Exchange" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") a proposed minor rule violation plan ("MRVP") pursuant to Section 19(d)(1) of the Securities Exchange Act of 1934 (the "Act") [1] and Rule 19d–1(c)(2) thereunder.[2] The proposed MRVP was published for public comment on September 23, 2010.[3] The Commission received no comments on the proposal. This order approves BATS Y–Exchange's proposed MRVP.

BATS Y–Exchange's MRVP specifies those uncontested minor rule violations with sanctions not exceeding $2,500 which would not be subject to the provisions of Rule 19d–1(c)(1) of the Act [4] requiring that a self-regulatory organization promptly file notice with the Commission of any final disciplinary action taken with respect to any person or organization.[5] In accordance with Rule 19d–1(c)(2) under the Act, the Exchange proposed to designate certain specified rule violations as minor rule violations, and requested that it be relieved of the reporting requirements regarding such violations, provided it gives notice of such violations to the Commission on a quarterly basis. BATS Y–Exchange included in its proposed MRVP the policies and procedures currently included in BATS Y–Exchange Rule 8.15 ("Imposition of Fines for Minor Violation(s) of Rules") and the rule violations included in BATS Y–Exchange Rule 8.15.01.[6]

Pursuant to the Exchange's proposed MRVP, under Rule 8.15, the Exchange may impose a fine (not to exceed $2,500) on a member or an associated person of a member, or a registered or non-registered employee of a member with respect to any rule listed in Rule 8.15.01. The Exchange shall serve the person against whom a fine is imposed with a written statement setting forth the rule or rules violated, the act or omission constituting each such violation, the fine imposed, and the date by which such determination becomes final or by which such determination

[1] 15 U.S.C. 78s(d)(1).

[2] 17 CFR 240.19d–1(c)(2).

[3] *See* Securities Exchange Act Release No. 62924 (September 16, 2010), 75 FR 58011. The notice was published under File No. 10–198 used for BATS Y–Exchange's Form 1 application, however the order will be published under File No. 4–616.

[4] 17 CFR 240.19d–1(c)(1).

[5] The Commission adopted amendments to paragraph (c) of Rule 19d–1 to allow self-regulatory organizations ("SROs") to submit for Commission approval plans for the abbreviated reporting of minor disciplinary infractions. *See* Securities Exchange Act Release No. 21013 (June 1, 1984), 49 FR 23828 (June 8, 1984). Any disciplinary action taken by an SRO against any person for violation of a rule of the SRO which has been designated as a minor rule violation pursuant to such a plan filed with the Commission shall not be considered "final" for purposes of Section 19(d)(1) of the Act if the sanction imposed consists of a fine not exceeding $2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his administrative remedies.

[6] On August 13, 2010, the Exchange's application for registration as a national securities exchange, including the rules governing the BATS Y–Exchange, was approved. *See* Securities Exchange Act Release No. 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10–198). In the approval order, the Commission noted that BATS Y–Exchange Rule 8.15 provides for the imposition of fines for minor rule violations pursuant to a minor rule violation plan. Accordingly, the Commission noted that as a condition to the operation of BATS Y–Exchange, the Exchange must file a minor rule violation plan with the Commission. BATS Y–Exchange represented that modifications may be made to Rule 8.15.01 in the future. BATS Y–Exchange proposed that, when amendments to Rule 8.15.01 are made pursuant to a rule filing submitted pursuant to Rule 19b–4 under the Act, such filing would automatically be deemed a request by BATS Y–Exchange for Commission approval of a modification to its MRVP.

must be contested. If the person against whom the fine is imposed pays the fine, such payment shall be deemed to be a waiver of such person's right to a disciplinary proceeding and any review of the matter under Exchange rules. Any person against whom a fine is imposed may contest the Exchange's determination by filing with the Exchange a written response, at which point the matter shall become a disciplinary proceeding.

Upon approval of the plan, the Exchange will provide the Commission a quarterly report of actions taken on minor rule violations under the plan. The quarterly report will include the Exchange's internal file number for the case, the name of the individual and/or organization, the nature of the violation, the specific rule provision violated, the sanction imposed, the number of times the rule violation has occurred, and the date of disposition.[7]

The Commission finds that the proposed MRVP is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[8] which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and national market system, and, in general, to protect investors and the public interest. The Commission also believes that the proposal is consistent with Sections 6(b)(1) and 6(b)(6) of the Act[9] which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of the Commission and Exchange rules. In addition, because the MRVP offers procedural rights to a person sanctioned under Rule 8.15, the Commission believes that Rule 8.15 provides a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d)(1) of the Act.[10]

Finally, the Commission finds that the proposal is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act,[11] because the MRVP strengthens BATS Y–Exchange's ability to carry out its oversight and enforcement responsibilities as an SRO in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation.

In approving this proposal, the Commission in no way minimizes the importance of compliance with Exchange rules and all other rules subject to the imposition of sanctions under Rule 8.15. The Commission believes that the violation of an SRO's rules, as well as Commission rules, is a serious matter. However, Rule 8.15 provides a reasonable means of addressing violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that BATS Y–Exchange will continue to conduct surveillance with due diligence and make determinations based on its findings, on a case-by-case basis, whether a sanction under the MRVP is appropriate, or whether a violation requires formal disciplinary action.

It is therefore ordered, pursuant to Rule 19d–1(c)(2) under the Act,[12] that the proposed MRVP for BATS Y–Exchange, File No. 4–616, be, and hereby is, approved and declared effective.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26359 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

[7] BATS Y–Exchange attached a sample form of the quarterly report with its submission to the Commission.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(1) and 78f(b)(6).

[10] 15 U.S.C. 78f(b)(7) and 78f(d)(1).

[11] 17 CFR 240.19d–1(c)(2).

[12] *Id.*

[13] 17 CFR 200.30–3(a)(44).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63105; File No. SR–BX–2010–059]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Create a Listing Market on the Exchange

October 14, 2010.

On August 20, 2010, NASDAQ OMX BX, Inc. ("Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act"),[2] and Rule 19b–4 thereunder,[3] a proposed rule change to create a listing market, which will be called "BX." The proposed rule change was published for comment in the **Federal Register** on September 8, 2010.[4] The Commission received two comment letters on this proposal.[5]

Section 19(b)(2) of the Act[6] provides that within forty-five days of the publication of notice of the filing of a proposed rule change, or within such longer period up to ninety days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is October 23, 2010. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change, which would create a new listing market on the Exchange, and to consider the comment letters that have been submitted in connection with this proposed rule change.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[7] designates December 7, 2010, as the date by which the Commission should either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26358 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 62818 (September 1, 2010), 75 FR 54665.

[5] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from William F. Galvin, Secretary of the Commonwealth, Commonwealth of Massachusetts, dated September 28, 2010; and Letter to Elizabeth M. Murphy, Secretary, Commission, from Michael R. Trocchio, Bingham McCutchen LLP, on behalf of Pink OTC Markets Inc., dated October 3, 2010.

[6] 15 U.S.C. 78s(b)(2).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63104; File No. SR–ISE–2010–91]

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving Proposed Rule Change To Adopt a Pilot Program To List Additional Expiration Months for Each Class of Options Opened for Trading on the Exchange

October 14, 2010.

I. Introduction

On August 25, 2010, the International Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt a pilot program to list additional expiration months for each class of options opened for trading on the Exchange. The proposed rule change was published for comment in the **Federal Register** on September 2, 2010.[3] The Commission received no comments on the proposal. This order approves the proposal.

II. Description of the Proposal

Pursuant to ISE Rule 504(e), the Exchange currently opens series with four expiration months for each class of options open for trading on the Exchange: The first two being the two nearest months, regardless of the quarterly cycle on which that class trades; the third and fourth being the next two months of the quarterly cycle previously designated by the Exchange for that specific class.

The Exchange believes that there is market demand for series with a greater number of expiration months. The Exchange therefore proposes to adopt a pilot program pursuant to which it will list series with up to an additional two expiration months, for a total of six expiration months for each class of options open for trading on the Exchange. The proposal will become effective on a pilot basis for twelve months commencing on the next full month after approval is received to establish the pilot program. Under the proposal, series with the additional months listed pursuant to the pilot program will result in four consecutive expiration months plus two months from the quarterly cycle. The Exchange seeks to limit the pilot to the 20 most actively traded options classes.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[4] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[5] in that the proposal has been designed to promote just and equitable principles of trade, and to protect investors and the public interest.

The Commission believes that allowing the Exchange to list and trade series with up to two additional expiration months, under the terms described in the Exchange's proposal, should provide investors with additional means of managing their risk exposures and carrying out their investment objectives. The Commission notes that the pilot program limits the series that may be opened pursuant to the pilot program to the 20 most actively traded options classes. The Commission believes this restriction should allow the Exchange to offer a wider array of investment opportunities, while minimizing the impact on quotation message traffic. The Commission also notes that the proposal requires the Exchange to closely monitor the trading and quotation volume associated with the additional options series created under the pilot program and the effect of these additional series on the capacity of the Exchange's, OPRA's, and vendors' systems.[6]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–ISE–2010–91) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–26339 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62772 (August 26, 2010), 75 FR 53991 ("Notice").

[4] The Commission has considered the proposed rule change's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f(b)(5).

[6] If the Exchange were to propose an extension, expansion, or permanent approval of the pilot program, the Exchange would be required to submit a report on the pilot program to the Commission at least 60 days prior to the pilot program expiration date. *See* Notice, *supra* note 3, at 53991–92.

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63108; File No. S7–29–10]

Study Required by Section 989G(b) of the Dodd-Frank Act Regarding Compliance With Section 404(b) of the Sarbanes-Oxley Act

AGENCY: Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: The Securities and Exchange Commission is requesting public comment related to a study of how the Commission could reduce the burden of complying with Section 404(b) of the Sarbanes-Oxley Act of 2002 for companies whose public float is between $75 million and $250 million, while maintaining investor protections for such companies, and whether any methods of reducing the compliance burden or a complete exemption for such companies from the auditor attestation requirement in Section 404(b) would encourage companies to list on exchanges in the United States in their initial public offerings. This study is required by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: Comments should be received on or before December 6, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–29–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–29–10. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov*). Comments are also 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Offenbacher, Senior Associate Chief Accountant, or Jason Plourde, Professional Accounting Fellow, Office of the Chief Accountant, at (202) 551–5300, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

Discussion

Under Section 989G(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act),[1] the Commission is required to conduct a study to determine how the Commission could reduce the burden of complying with Section 404(b) of the Sarbanes-Oxley Act of 2002 (Section 404(b)) [2] for companies whose market capitalization is between $75 million and $250 million, while maintaining investor protections for such companies. Section 989G(b) of the Dodd-Frank Act also provides that the study must consider whether any methods of reducing the compliance burden or a complete exemption for such companies from Section 404(b) compliance would encourage companies to list on exchanges in the United States in their initial public offerings.

The Dodd-Frank Act does not define "market capitalization" and it is not defined in Commission rules. For purposes of the study, we believe that public float is an appropriate measure of market capitalization. Public float, which is the aggregate worldwide market value of an issuer's voting and non-voting common equity held by its non-affiliates, is the measure used in Commission rules for determining "accelerated filer" and "large accelerated filer" status.[3] The Commission has used public float historically in its actions to phase issuers into Section 404 compliance,[4] and Section 404(c) of the Sarbanes-Oxley Act of 2002, as amended by Section 989G(a) of the Dodd-Frank Act, provides that Section 404(b) shall not apply with respect to issuers that are neither an "accelerated filer" nor a "large accelerated filer" pursuant to Commission rules, which are generally issuers with a public float below $75 million. We therefore believe it would be consistent to use public float between $75 million and $250 million to describe the group of issuers that are the subject of the study. For the remainder of the release, we generally will refer to issuers with a public float between $75 million and $250 million as the "subject issuers."

In addition, Section 404(b) only addresses the auditor attestation requirement with respect to a company's internal control over financial reporting. The required study will not evaluate the compliance burden of Section 404(a) of the Sarbanes-Oxley Act of 2002, which addresses management's responsibility for reporting on the effectiveness of internal control over financial reporting.

The Commission is required to submit a report of this study to Congress no later than nine months after the date of enactment of the Dodd-Frank Act. All interested parties are invited to submit their views, in writing, on any of the following topics in which they are interested:

(1) Quantitative and qualitative information about the trends of internal and external costs of having an external auditor attest to management's assessment under Section 404(b) for issuers with a public float between $75 million and $250 million from the first year of required compliance to the present;

(2) Current cost of auditor attestation under Section 404(b) in relation to overall cost of compliance with all of Section 404 (*i.e.* including management's assessment required by Section 404(a)) and changes to this relative cost over time;

(3) Characteristics of internal controls, management's evaluation process and corporate governance of subject issuers that distinguish them from other issuers;

(4) Unique audit planning and performance characteristics, if any, associated with subject issuers;

(5) Incremental effort for preparers and auditors to comply with the auditor attestation requirement of Section 404(b) for an integrated audit beyond the efforts that would already be incurred to comply with the requirements for a financial statement only audit, including the requirement to evaluate internal controls in connection with such an audit, for subject issuers;

(6) Whether and how initiatives of the Commission, such as the Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934,[5] have reduced the burden of complying with Section 404(b) for subject issuers;

(7) Whether and how any aspects of Public Company Accounting Oversight Board (PCAOB) Auditing Standard No. 5,[6] such as its focus on risk and materiality, scalability, tailoring of testing to risk, and extent of permitted use of the work of others, have reduced costs of compliance with Section 404(b) versus PCAOB Auditing Standard No. 2 for subject issuers;

(8) Whether and how other initiatives of the PCAOB, such as its staff guidance for auditors of smaller public companies,[7] have reduced the burden of complying with Section 404(b) for subject issuers;

(9) Whether and how initiatives of the Committee of Sponsoring Organizations of the Treadway Commission (COSO), such as the June 2006 guidance for smaller public companies on internal control over financial reporting,[8] and the January 2009 Guidance on Monitoring Internal Control Systems,[9] have reduced the burden of complying with Section 404(b) for subject issuers;

(10) Whether and how initiatives of any other organization have reduced the burden of complying with Section 404(b) for subject issuers;

(11) The possibility that guidance or rules issued by the Commission, PCAOB or others could further reduce the burden of complying with the auditor attestation requirement of Section 404(b), while maintaining investor protection, for subject issuers, and any specific recommendations concerning any such guidance or rules;

(12) The impact on investor protection, investor confidence, and the cost of capital arising from the establishment and ongoing compliance with Section 404(b) by subject issuers, including in the context of initial public offerings;

(13) The degree to which investor protection, investor confidence, and the cost of capital would increase or decrease, if any, as a function of each specific recommendation by which the Commission, the PCAOB, or others might reduce the burden of complying

[1] Public Law 111–203 (July 21, 2010).

[2] 15 U.S.C. 7201 *et seq.*

[3] *See* Exchange Act Rule 12b–2 [17 CFR 240.12b–2].

[4] *See, e.g.,* Release No. 33–9072 (Oct. 13, 2009) [74 FR 53628]; and Release 33–8934 (June 26, 2008) [73 FR 38094].

[5] *See* Release No. 33–8810 (June 20, 2007) [72 FR 35324].

[6] *See* Order Approving Proposed Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements, a Related Independence Rule, and Conforming Amendments, Release No. 34–56152 (July 27, 2007) [72 FR 42141].

[7] *See* "Staff Views—An Audit of Internal Control that is Integrated with an Audit of the Financial Statements: Guidance for Auditors of Smaller Public Companies" (Jan. 23, 2009), *available at http://www.pcaobus.org.*

[8] For further information, *see http://www.coso.org/ICFR-GuidanceforSPCs.htm.*

[9] For further information, *see http://www.coso.org/GuidanceonMonitoring.htm.*

with Section 404(b) for subject issuers, while maintaining investor protection;

(14) The impact of costs of complying with the auditor attestation requirement of Section 404(b) on company decisions to list on exchanges in the United States versus foreign exchanges in initial public offerings for subject issuers after the offering;

(15) The impact of costs of complying with Section 404(b) on company and investor decisions to engage in initial public offerings versus other financing alternatives for issuers whose public float is expected to be between $75 million and $250 million after the offering;

(16) Potential effect on the number of companies listing initial public offerings in the United States of a complete exemption from the internal control audit requirements for subject issuers, and the potential effect on listings for each specific recommendation for reducing the compliance burden of such requirements on subject issuers;

(17) Any qualitative differences between subject issuers that might list securities on a U.S. exchange in connection with their initial public offerings if the existing internal control audit requirement of Section 404(b) remains in effect and subject issuers that might list securities on a U.S. exchange in connection with their initial public offerings if subject issuers are completely exempt from the internal control audit requirements of Section 404(b), and any such qualitative differences that may arise from each specific recommendation for reducing the compliance burden of such requirements on subject issuers;

(18) The potential effect of a complete exemption from Section 404(b) for subject issuers on matters such as: Raising capital; engaging in mergers, acquisitions and similar corporate transactions; and attracting and retaining qualified independent directors;

(19) Whether and how the use of the auditor's attestation report on internal control over financial reporting for subject issuers differs from the use of the auditor's attestation report on internal control over financial reporting for issuers whose public float is greater than $250 million and the reason(s) for those differences;

(20) Quantitative and qualitative information about whether and how compliance with Section 404(b) has benefited investors and other users of financial statements of subject issuers;

(21) Whether and to what extent auditor attestation reports on internal control over financial reporting enhances confidence in management's assessment of the effectiveness of its internal control over financial reporting, improves the reliability of financial reporting and improves the prevention and detection of fraud and other misconduct for subject issuers;

(22) Any additional information for the Commission to consider to describe the study population and how the Commission could reduce the burden of complying with Section 404(b) on that population; and

(23) Any other information commenters would like the Commission to consider in regards to the study.

Dated: October 14, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–26349 Filed 10–19–10; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 7212]

60-Day Notice of Proposed Information Collection: Form DS–3097, Exchange Visitor Program Annual Report, and OMB Control Number 1405–0151

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Exchange Visitor Program Annual Report.
- *OMB Control Number:* 1405–0151.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Private Sector Exchange, ECA/EC.
- *Form Number:* Form DS–3097.
- *Respondents:* Designated J–1 program sponsors.
- *Estimated Number of Respondents:* 1,460.
- *Estimated Number of Responses:* 1,460 annually.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 2,920 hours.
- *Frequency:* Annually.
- *Obligation To Respond:* Mandatory.

DATES: The Department will accept comments from the public up to 60 days from October 20, 2010.

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

- Persons with access to the Internet may also view this notice and provide comments by going to the regulations.gov Web site at: *http://www.regulations.gov/index.cfm.*
- *E-mail: JExchanges@State.gov.*
- *Mail (paper, disk, or CD–ROM submissions):* U.S. Department of State, ECA/EC/D, SA–5, Floor 5, 2200 C Street, NW., Washington, DC 20522–0505, ATTN: **Federal Register** Notice Response.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Stanley S. Colvin, Deputy Assistant Secretary for Private Sector Exchange, ECA/EC/D, SA–5, Floor 5, Department of State, 2200 C Street, NW., Washington, DC 20522–0505, who may be reached on 202–632–2805 or at *JExchanges@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of Proposed Collection

Annual reports from designated program sponsors assist the Department in oversight and administration of the J–1 visa program. The reports provide statistical data on the number of exchange participants an organization sponsored per category of exchange. The reports also provide a summary of the activities in which exchange visitors were engaged and an evaluation of program effectiveness. Program sponsors include government agencies, academic institutions, and private sector not-for-profit and for-profit entities.

Methodology

Annual reports are completed through the Student and Exchange Visitor

Information System (SEVIS) and then printed and signed by a sponsor official, and sent to the Department by mail or fax. The Department is currently working with the Department of Homeland Security to expand SEVIS functions and enable the collection of electronic signatures. Annual reports will be submitted to the Department electronically as soon as the mechanism for doing so is approved and in place. DHS has announced a delay in implementation of SEVIS II. Please follow the indicated electronic link for complete details: *http://www.ice.gov/sevis/sevisii/sevisii_update_032010.htm.*

Dated: October 12, 2010.

Stanley S. Colvin,

Deputy Assistant Secretary for Private Sector Exchange, Bureau of Educational and Cultural Exchange, Department of State.

[FR Doc. 2010–26381 Filed 10–19–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Delegation of Authority No. 334]

Delegation by the Secretary of State to the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs To Notify Foreign Governments of Proposed Hazardous Waste Exports Under the Solid Waste Disposal Act

By virtue of the authority vested in me as Secretary of State, including Section 1 of the State Department Basic Authorities Act, as amended (22 U.S.C. 2651a), I hereby delegate to the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, to the extent authorized by law, the authority to approve notifications to foreign governments of proposed exports from the United States of hazardous waste, as provided under Section 3017 of the Solid Waste Disposal Act, 42 U.S.C. 6938.

Any act, executive order, regulation, or procedure subject to, or affected by, this delegation shall be deemed to be such act, executive order, regulation, or procedure as amended from time to time.

Notwithstanding this delegation of authority, the Secretary, the Deputy Secretary, or the Deputy Secretary of State for Management and Resources, and the Under Secretary for Democracy and Global Affairs may at any time exercise any authority or function delegated by this delegation of authority.

This delegation of authority shall be published in the **Federal Register**.

September 28, 2010.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2010–26380 Filed 10–19–10; 8:45 am]

BILLING CODE 4710–10–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR–2010–0028]

Initiation of Section 302 Investigation and Request for Public Comment: China—Acts, Policies and Practices Affecting Trade and Investment in Green Technology

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of initiation of investigation and request for public comment.

SUMMARY: The United States Trade Representative (“Trade Representative”) has initiated an investigation under section 302(a) of the Trade Act of 1974, as amended (“Trade Act”), with respect to acts, policies, and practices of the People’s Republic of China (China) affecting trade and investment in green technology. The Trade Representative has initiated the investigation in response to a petition filed on September 9, 2010, and the investigation will cover the acts, policies, and practices identified in the petition. The investigation will consider whether these acts, policies, and practices deny U.S. rights or benefits under the GATT 1994, under the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), and under China’s Protocol of Accession to the WTO. USTR invites written comments from the public on the matters covered in the investigation.

DATES: The Trade Representative initiated this investigation on October 15, 2010. Written comments are due on or before 5 p.m. on November 15, 2010. Any request for a public hearing must be made no later than 5 p.m. on November 1, 2010.

ADDRESSES: Non-confidential comments (as explained below) should be submitted electronically via the Internet at *www.regulations.gov*, docket number USTR–2010–0028. If you are unable to provide submissions by *www.regulations.gov*, please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission. If (as explained below) the comments contain confidential information, the person wishing to submit such comments should contact Sandy McKinzy at (202) 395–9483.

FOR FURTHER INFORMATION CONTACT: Eric Garfinkel, Chief Counsel for China Trade, (202) 395–3150, Terry McCartin, (202) 395–3900, Deputy Assistant USTR for China Affairs, (202) 395–3900, or Jean Kemp, Director, Steel Trade Policy, (202) 395–5656 for questions concerning the issues in the investigation; William Busis, Deputy Assistant USTR for Monitoring and Enforcement and Chair of the Section 301 Committee, (202) 395–3150, for questions concerning procedures under Section 301; or Gwendolyn Diggs, Staff Assistant to the Section 301 Committee, (202) 395–5830, for questions concerning procedures for filing submissions in response to this notice.

SUPPLEMENTARY INFORMATION:

A. USW Petition

On September 9, 2010, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO CLC filed a petition under Section 302 of the Trade Act addressed to China’s acts, policies, and practices affecting trade and investment in green technologies. The text of the petition has been posted on *http://www.ustr.gov,* under “Enforcement.”

The petition defines products of green technology “as products used to produce renewable energy or reduce the emissions associated with the production and use of energy. These are the products necessary to produce energy from wind, solar, biomass, geothermal, hydro, and nuclear resources, products to enable the production of energy from coal with fewer greenhouse gas emissions, and products that consume less energy or alternative sources of energy, such as energy-efficient vehicles and energy-efficient lighting.” The petition also covers “a wide range of upstream inputs to green technology products.”

The petition alleges that China “employs a wide range of policies to stimulate and protect its domestic producers of green technology, from wind and solar energy products to advanced batteries and energy-efficient vehicles,” enabling China to become the dominant global supplier of a number of green technologies. The petition alleges that China’s acts, policies, and practices in the area of green technology violate China’s WTO commitments under the GATT 1994, under the Subsidies and Countervailing Measures Agreement (“SCM Agreement”), and under China’s Protocol of Accession to the WTO.

These acts, policies, and practices are export restraints such as export duties and export quotas on rare earth minerals, tungsten, and antimony; allegedly prohibited subsidies that are contingent on export performance, or on the use of domestic over imported goods, affecting a variety of products, including wind turbines; discrimination against foreign companies and goods, including with respect to wind and solar power projects; technology transfer as a requirement for approval of foreign investments in China; and domestic subsidy programs that are allegedly causing serious prejudice to U.S. interests, including subsidies supporting renewable energy industries.

The petition alleges that the acts, policies, and, practices covered in the petition, in aggregate, have caused the annual U.S. trade deficit with China in green technology goods to increase by more than two billion dollars since China joined the WTO. The petition alleges that U.S. exports to China in the sector have grown only modestly, while U.S. imports from China in the sector are nearly five times higher than they were in 2001. As a result, the petition alleges, China is now the top contributor to the U.S. global trade deficit in the sector.

B. Initiation of Investigation

The Trade Representative has determined to initiate an investigation under section 302(a) of the Trade Act with respect to the acts, policies, and practices of China identified in the petition. The investigation will consider whether these acts, policies, and practices deny U.S. rights or benefits under the GATT 1994, under the SCM Agreement, and under China's Protocol of Accession to the WTO.

C. Delay of Request for Consultations

Section 303(a) of the Trade Act provides that on the date on which an investigation is initiated under section 302, the Trade Representative shall request consultations with the foreign country concerned regarding the issues involved in such investigation. Section 303(b) provides that the Trade Representative, after consulting with the petitioner, may delay for up to 90 days any request for consultations under section 303(a) for the purpose of verifying or improving the petition to ensure an adequate basis for consultation. Because the issues covered in the investigation involve U.S. rights under the WTO Agreement, any consultation request will be made under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and unless consultations result in a mutually acceptable resolution, the Trade Representative will request the establishment of a WTO panel under the DSU.

In light of the number and diversity of the acts, policies, and practices covered by the petition, and after consulting with the petitioner, the Trade Representative has decided to delay for up to 90 days the request for consultations with the Government of China for the purpose of verifying and improving the petition. During the period of delay provided for under section 303(b), the Trade Representative will seek information and advice from the petitioner and the appropriate committees established pursuant to section 135 of the Trade Act. The Trade Representative will take account of this information and advice, as well as the public comments submitted in response to this notice, in improving and verifying the petition during the delay period.

D. Public Comments

Interested persons are invited to submit written comments concerning the issues covered in this investigation, including with respect to: (i) The acts, policies, and practices of China that are the subject of this investigation; (ii) whether these acts, policies, and practices deny U.S. rights or benefits under the WTO Agreement; and (iii) the amount of burden or restriction on U.S. commerce caused by these acts, policies, and practices.

Interested persons may submit public comments electronically to *http://www.regulations.gov,* docket number USTR–2010–0028. If you are unable to provide submissions by *http://www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

Interested persons may request a public hearing on these matters. Any request for a public hearing should be made by no later than 5 p.m. on November 1, 2010. In the event a hearing is to be held, USTR will issue a notice specifying the date of the hearing and the procedures for submitting written testimony.

To submit comments via *http://www.regulations.gov,* enter docket number USTR–2010–0028 on the home page and click "Search." The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting "Notice" under "Document Type." Click on the reference to this notice, and then click "Submit Comment." The *http://www.regulations.gov* site provides the option of submitting comments by filling in a "Type Comment & Upload File" field, or by attaching a document. Given the detailed nature of the comments sought by USTR, interested persons are requested to provide their comments in an attached document. If a document is attached, it is sufficient to type "See attached" in the "Type Comment & Upload File" field.

A submitter requesting that information contained in a comment be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked "BUSINESS CONFIDENTIAL" at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the business confidential information must be submitted to *http://www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

USTR may determine that information or advice contained in a comment submitted, other than business confidential information, is nonetheless confidential. If the submitter believes that information or advice may qualify as such, the submitter—

1. Must clearly so designate the information or advice;

2. Must clearly mark the material as "SUBMITTED IN CONFIDENCE" at the top and bottom of the cover page and each succeeding page; and

3. Must provide a non-confidential summary of the information or advice.

Any comment containing confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *http://www.regulations.gov* or by fax. The non-confidential summary will be placed in the docket and open to public inspection.

Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15 or information determined by USTR to be confidential. Comments open to public inspection may be viewed on *http://*

www.regulations.gov, under Docket No. USTR–2010–0028.

William Busis,

Chair, Section 301 Committee.

[FR Doc. 2010–26401 Filed 10–19–10; 8:45 am]

BILLING CODE 3190–W1–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Comments on Negotiating Objectives With Respect to Malaysia's Participation in the Proposed Trans-Pacific Partnership Trade Agreement

AGENCY: Office of the United States Trade Representative (USTR)

ACTION: Request for comments on negotiating objectives with respect to Malaysia's participation in the ongoing negotiations of a Trans-Pacific Partnership (TPP) trade agreement, and notice of public hearing.

SUMMARY: The United States intends to commence negotiations with Malaysia as part of the ongoing negotiations of a TPP trade agreement. Including Malaysia in the TPP negotiations furthers the objective of achieving a high-standard, broad-based Asia-Pacific regional agreement. USTR is seeking public comments on all elements related to Malaysia's participation in the TPP negotiations in order to develop U.S. negotiating positions.

DATES: Persons wishing to testify orally at the hearing must provide written notification of their intention, as well as their testimony, by November 10, 2010. A hearing will be held in Washington, DC, on November 19, 2010. Written comments are due by noon, November 22, 2010.

ADDRESSES: *Submissions via on-line: http://www.regulations.gov.* For alternatives to on-line submissions please contact Gloria Blue, Executive Secretary, Trade Policy Staff Committee (TPSC), at (202) 395–3475.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning written comments, please contact Gloria Blue at the above number. Questions regarding the environmental review of the TPP trade agreement should be directed to David Brooks, Environment and Natural Resources Section, USTR, at (202) 395–7320. All other questions regarding the TPP trade agreement should be directed to David Bisbee, Deputy Assistant USTR for Southeast Asia and the Pacific, at (202) 395–6813.

SUPPLEMENTARY INFORMATION:

1. Background

On October 5, 2010, after having consulted with relevant Congressional committees and reached consensus on Malaysia's participation with the other TPP negotiating partners (Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore and Vietnam), the USTR informed Congress that the President intends to commence negotiations with Malaysia in the context of the ongoing negotiations of the TPP. The objective of this negotiation is to achieve a high-standard, 21st century agreement with a membership and coverage that provides economically significant market access opportunities for America's workers, farmers, ranchers, service providers, and small businesses. The addition of Malaysia to the initial group of TPP negotiating partners will contribute meaningfully to the achievement of these goals.

In addition, under the Trade Act of 1974, as amended (19 U.S.C. 2151, 2153), in the case of an agreement such as the proposed TPP trade agreement, the President must (i) afford interested persons an opportunity to present their views regarding any matter relevant to the proposed agreement, (ii) designate an agency or inter-agency committee to hold a public hearing regarding the proposed agreement, and (iii) seek the advice of the U.S. International Trade Commission (ITC) regarding the probable economic effects on U.S. industries and consumers of the removal of tariffs and non-tariff barriers on imports pursuant to the proposed agreement.

USTR intends to hold a public hearing on matters related to Malaysia's participation in the TPP negotiations on November 19, 2010. In addition, USTR has requested the ITC to provide advice to USTR on the probable economic effects of including Malaysia in a TPP agreement.

2. Public Comments

To assist USTR as it develops its negotiating objectives for the agreement, the TPSC Chair invites interested parties to submit written comments and/or oral testimony at a public hearing on matters relevant to Malaysia's participation in the TPP negotiations. Comments and testimony may address the reduction or elimination of tariffs or non-tariff barriers on any articles provided for in the Harmonized Tariff Schedule of the United States (HTSUS) that are products of Malaysia, any concession that should be sought by the United States, or any other matter relevant to the inclusion of Malaysia in the proposed TPP agreement. The TPSC Chair invites comments on all of these matters and, in particular, seeks comments addressed to:

(a) General and product-specific negotiating objectives for Malaysia in the context of this proposed regional agreement.

(b) Economic costs and benefits to U.S. producers and consumers of removal of tariffs and removal or reduction in non-tariff barriers on articles traded with Malaysia.

(c) Treatment of specific goods (described by HTSUS numbers) under the proposed regional agreement, including comments on—

(1) Product-specific import or export interests or barriers,

(2) experience with particular measures that should be addressed in the negotiations, and

(3) approach to tariff negotiations, including recommended staging and ways to address export priorities and import sensitivities related to Malaysia in the context of this regional agreement.

(d) Adequacy of existing customs measures to ensure that qualifying imported goods from TPP countries, including Malaysia, receive preferential treatment, and appropriate rules of origin for goods entering the United States under the proposed regional agreement.

(e) Existing sanitary and phytosanitary measures and technical barriers to trade imposed by Malaysia that should be addressed in the negotiations.

(f) Existing barriers to trade in services between the United States and Malaysia that should be addressed in the negotiations.

(g) Relevant electronic commerce issues that should be addressed in the negotiations.

(h) Relevant trade-related intellectual property rights issues that should be addressed in the negotiations.

(i) Relevant investment issues that should be addressed in the negotiations.

(j) Relevant competition-related matters that should be addressed in the negotiations.

(k) Relevant government procurement issues that should be addressed in the negotiations.

(l) Relevant environmental issues that should be addressed in the negotiations.

(m) Relevant labor issues that should be addressed in the negotiations.

In addition to the matters described above, USTR is addressing new and emerging issues in this proposed regional agreement. Specifically, USTR is considering new approaches designed to promote innovation and competitiveness, encourage new technologies and emerging economic sectors, increase the participation of small- and medium-sized businesses in trade, and support the development of efficient production and supply chains that include U.S. firms in order to encourage firms to invest and produce in the United States. The TPSC Chair invites comments regarding how Malaysia's participation in the negotiations might affect these new approaches. The TPSC Chair also invites comments on the impact of Malaysia's participation in the negotiations on other trade-related priorities in this regional agreement, including environmental protection and conservation, transparency, workers rights and protections, development, and other issues.

USTR has already provided notice and requested comments on the scope for an environmental review of the proposed TPP trade agreement *(see* 75 FR 14470, March 25, 2010). As described above, the present notice invites comments on, among other topics, environmental issues to be addressed in the TPP negotiations to take into account Malaysia's participation in the negotiation. Further comments are also invited on the environmental review, including possible changes in the scope or other issues that should be addressed in the review. At a later date, USTR, through the TPSC, will publish notice of reviews regarding the impact of the proposed agreement on U.S. employment and labor markets. These reviews will take into account Malaysia's participation in the negotiations.

A hearing will be held on November 19, 2010, in Rooms 1, and 2, 1724 F Street, NW., Washington, DC. Persons wishing to testify at the hearing must provide written notification of their intention by November 10, 2010. The notification should include: (1) The name, address, and telephone number of the person presenting the testimony; and (2) a short (one or two paragraph) summary of the presentation, including the subject matter and, as applicable, the product(s) (with HTSUS numbers), service sector(s), or other subjects (such as investment, intellectual property and/or government procurement) to be discussed. A copy of the testimony must accompany the notification. Remarks at the hearing should be limited to no more than five minutes to allow for possible questions from the TPSC. Persons with mobility impairments who will need special assistance in gaining access to the hearing should contact the TPSC Executive Secretary.

Interested persons, including persons who participate in the hearing, may submit written comments by no later than noon, Monday, November 22, 2010.

3. Requirements for Submissions

Persons submitting comments must do so in English and must identify (on the first page of the submission) the "Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations."

In order to ensure the timely receipt and consideration of comments, USTR strongly encourages commenters to make on-line submissions, using the *http://www.regulations.gov* Web site. Comments should be submitted under the following docket: USTR–2010–0031. To find the docket, enter the docket number in the "Enter Keyword or ID" window at the *http://www.regulations.gov* home page and click "Search." The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting "Notices" under "Document Type" on the search-results page, and click on the link entitled "Submit a Comment." (For further information on using the www.regulations.gov Web site, please consult the resources provided on the Web site by clicking on the "Help" tab.)

The *http://www.regulations.gov* Web site provides the option of making submissions by filling in a comments field, or by attaching a document. USTR prefers submissions to be provided in an attached document. If a document is attached, it is sufficient to type "See attached" in the "Type comment & Upload File" field. USTR prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf). If the submission is in an application other than those two, please indicate the name of the application in the "Comments" field.

For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters "BC". Any page containing business confidential information must be clearly marked "BUSINESS CONFIDENTIAL" on the top of that page. Filers of submissions containing business confidential information must also submit a public version of their comments. The file name of the public version should begin with the character "P". The "BC" and "P" should be followed by the name of the person or entity submitting the comments or reply comments. Filers submitting comments containing no business confidential information should name their file using the character "P", followed by the name of the person or entity submitting the comments.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

USTR strongly urges submitters to file comments through regulations.gov, if at all possible. Any alternative arrangements must be made with Ms. Blue in advance of transmitting a comment. Ms. Blue should be contacted at (202) 395–3475. General information concerning USTR is available at *http://www.ustr.gov.*

Carmen Suro-Bredie,

Chair, Trade Policy Staff Committee.

[FR Doc. 2010–26332 Filed 10–19–10; 8:45 am]

BILLING CODE 3190–W1–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2009–0271]

Identification of Interstate Motor Vehicles: New York City, Cook County, and New Jersey Tax Identification Requirements; Petition for Determination

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; Grant of petition for determination.

SUMMARY: The FMCSA grants three petitions submitted by the American Trucking Associations (ATA) requesting determinations that the commercial motor vehicle (CMV) identification requirements imposed by the State of New Jersey, New York City, and Cook County, Illinois are preempted by Federal law. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) prohibits States and their political subdivisions from requiring motor carriers to display in or on CMVs any form of identification other than forms required by the Secretary of Transportation, with certain exceptions. FMCSA grants ATA's requests because the three credential display requirements do not qualify for the relevant statutory exception for State display of credentials and are preempted by Federal statute.

DATES: This decision is effective October 20, 2010.

FOR FURTHER INFORMATION CONTACT: Genevieve D. Sapir, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–7056; e-mail *Genevieve.Sapir@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

New Jersey's tax code requires all motor carriers hauling, transporting, or delivering fuel to display a Motor Fuel Transport License Plate and annual Transport License Certificate. This requirement applies to all motor carriers hauling, transporting, or delivering fuel in New Jersey regardless of their State of domicile or registration. New Jersey Statutes Annotated § 54:39–41 and § 54:39–53. New York City's Administrative Code, § 11–809, requires CMVs used principally in New York City or in connection with a business carried on within New York City to pay a tax and display a stamp. The requirement appears to apply whether or not the CMV is registered to an address in New York City. Cook County's Code of Ordinances requires motor vehicle owners residing within the unincorporated area of Cook County to: (a) Display a window sticker showing payment of fees; and (b) paint business vehicle identification information on their vehicles. Article XIV of chapter 74 of the Cook County Code of Ordinances is referred to as the "Cook County Wheel Tax on Motor Vehicles Ordinance."

Section 4306(a) of SAFETEA–LU, codified at 49 U.S.C. 14506(a), prohibits States from requiring motor carriers to display in or on CMVs any form of identification other than forms required by the Secretary of Transportation. Section 14506(b), however, establishes several exceptions to this prohibition:

(b) Exception.—Notwithstanding subsection (a), a State may continue to require display of credentials that are required—

(1) Under the International Registration Plan under section 31704 [of title 49, United States Code];

(2) Under the International Fuel Tax Agreement under section 31705 [of title 49, United States Code];

(3) Under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate;

(4) In connection with Federal requirements for hazardous materials transportation under section 5103 [of title 49, United States Code]; or

(5) In connection with the Federal vehicle inspection standards under section 31136 [of title 49, United States Code].

The exception relevant to ATA's petitions is § 14506(b)(3), which provides that "a State may continue to require display of credentials that are required * * * under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate." The Secretary's authority is delegated to FMCSA by 49 CFR 1.73(a)(7).

ATA's petitions seeking determinations, along with the applicable statutes, regulations, and ordinances, are available for inspection in the docket established for this notice.

Public Comments

On October 19, 2009, FMCSA published a notice in the **Federal Register**, "Identification of Interstate Motor Vehicles: New York City, Cook County and New Jersey Tax Identification Requirements; Petition for Determination" (74 FR 53578), requesting public comment on ATA's petitions. In formulating its decision, FMCSA considered all of the comments received in response to the Agency's notice.

FMCSA received 11 comments, of which 7 were from trade associations, 3 from motor carriers, and 1 from an individual. All commenters supported preemption.

ATA and the Distribution and LTL Carriers Association commented that the credential display requirements are related to revenue raising and that they do not fall under any of the § 14506(b) exceptions. Con-way Inc. commented that the credential display requirements are impediments to interstate commerce. United Parcel Service, Inc. (UPS) commented that, as an interstate carrier operating in many States, it finds credential display requirements to be burdensome. UPS further commented that, although the vehicles in its fleet may be in compliance with State or local tax, fee, or permit requirements, if its drivers cannot display the appropriate credential on demand, the company can nonetheless receive a citation. Martin Storage Co. also commented that the paperwork associated with State and local credential display requirements is burdensome. The Truckload Carriers Association and the Truck Renting and Leasing Association commented that the credential display requirements are not eligible for the § 14506(b)(3) exception because they are not related to vehicle registration. The National Private Truck Council observed that none of the affected jurisdictions submitted comments to justify the credential display requirements.

In addition, FMCSA received a letter from the Office of the State's Attorney of Cook County acknowledging that its credential display requirement is preempted. This letter is also available for review in the docket.

FMCSA Decision

New Jersey's tax credential display requirement is a State-mandated form of identification preempted by 49 U.S.C. 14506(a) and does not qualify for the exception at § 14506(b)(3). First, it is not an identification requirement related to motor vehicle license plates. Even though the credential itself is in the form of a license plate, its purpose does not relate to State licensing of vehicles. Rather, it appears to identify those motor carriers, registered in New Jersey or elsewhere, that have paid State taxes for hauling, transporting, or delivering motor fuel. Second, New Jersey failed to articulate any justification for FMCSA to exercise its delegated discretion to approve the display.

New York City's and Cook County's display requirements are also preempted by 49 U.S.C. 14506(a) because they are identification requirements mandated by political subdivisions of a State. However, the assessment of whether a § 14506(b) exception applies to these display requirements requires a slightly different analysis. The prohibition in § 14506(a) specifically applies to States, political subdivisions of States, interstate agencies and other political agencies of two or more States, whereas the exceptions in § 14506(b) apply to States without mention of political subdivisions or agencies. Consequently, the first question the Agency must answer is whether a § 14506(b) exception can apply to a political subdivision of a State.

Two possible interpretations exist. One is that Congress intended for States, political subdivisions of States, interstate agencies and other political agencies of two or more States to be subject to the general prohibition on display of identification requirements, but only intended for States (and not the other subdivisions and agencies) to be eligible for the exceptions in § 14506(b). The second is that Congress intended the States, as well as political subdivisions and agencies, to be eligible for the exceptions and that its omission of these other entities from § 14506(b) is not evidence of its intent to exclude them from being eligible for the exception. FMCSA believes that the latter is the correct interpretation.

In *City of Columbus* v. *Ours Garage & Wrecker Service,* 536 U.S. 424 (2002), the Supreme Court considered a provision with nearly identical language to § 14506 and determined that Congress' exclusion of political subdivisions in the exception was not a sufficiently clear and manifest indication of its intent to preempt local regulation. In reaching this conclusion, the Court made two points that guide our analysis and conclusions here. First, consistent with existing precedent, a political subdivision may exercise whatever portion of State power the State chooses to delegate under its own constitution and laws. *Id.* at 428. Second, if the exception were interpreted to apply only to States, political subdivisions would be preempted from enforcing laws legitimately enacted by the State pursuant to the exception. The Court found it unlikely that Congress would preserve State power to enact rules but bar routine enforcement through local instrumentalities. *Id.* at 435.

The Agency concludes that the exceptions in § 14506(b) can apply to New York City's and Cook County's credential display requirements, if they meet the statutory criteria. The only exception relevant to ATA's petition is found in § 14506(b)(3); however, no evidence supports the application of this exception to New York City's and Cook County's credential display requirements. These display requirements are unrelated to State vehicle licensing requirements, and neither jurisdiction articulated any justification for the Agency to exercise its delegated discretion to approve the display. In fact, the only jurisdiction to respond to the Agency, Cook County, conceded that its credential display requirements are preempted by Federal law.

In consideration of the above, FMCSA grants the petitions submitted by ATA. New York City, New Jersey, and Cook County are preempted from imposing and may no longer enforce their credential display requirements.

Issued on: October 4, 2010.

Anne S. Ferro,

Administrator.

[FR Doc. 2010–26202 Filed 10–19–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2010–45]

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 Part 43. 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 November 9, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2010–0544 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: Katherine Haley, Office of Rulemaking, ARM–203, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 493–5708, facsimile (202) 267–5075; e-mail *Katherine.L.Haley@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on October 15, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2010–0544.

Petitioner: Florida Fish and Wildlife Conservation Commission.

Sections of 14 CFR Affected: Part 43 and § 91.205(h).

Description of Relief Sought: Florida Fish and Wildlife Conservation Commission seeks relief for a period of up to 5 years to allow sufficient time for it to acquire the necessary funding and complete modifications to bring its aircraft into compliance with the requirements for use of Night Vision Goggles.

[FR Doc. 2010–26346 Filed 10–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

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 five entities whose property and interests in property have been blocked pending investigation pursuant to the Foreign Narcotics Kingpin Designation Act ("Kingpin Act") (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The blocking pending investigation by the Director of OFAC of the five entities identified in this notice pursuant to section 806(a)(2) of the Kingpin Act is effective on October 13, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available 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 the benefits of trade and transactions involving U.S. companies and individuals.

On October 13, 2010, the Director of OFAC blocked pending investigation five entities whose property and interests in property are blocked pursuant to section 806(a)(2) of the Foreign Narcotics Kingpin Designation Act.

The list of additional designees is as follows:

1. JR CONTROLADORA DE RESTAURANTES, S.A. DE C.V., Martin L. Guzman 259–3, Colonia Villa de Cortes, Delegacion Benito Juarez, Mexico City, Mexico; Folio Mercantil No. 325909 (Mexico); (ENTITY) [BPI–SDNTK]
2. TATES DESARROLLO, S.A. DE C.V., Mexico City, Mexico; Folio Mercantil No. 345497 (Mexico); (ENTITY) [BPI–SDNTK]
3. FLORBEL OPERADORA DE RESTAURANTES, S.A. DE C.V., Mexico City, Mexico; Folio Mercantil No. 310801 (Mexico); (ENTITY) [BPI–SDNTK]
4. LUZAAIR, S.A. DE C.V., Mexico City, Mexico; Folio Mercantil No. 354246 (Mexico); (ENTITY) [BPI–SDNTK]
5. LORENA DEL MAR, S.A. DE C.V., Mexico City, Mexico; Folio Mercantil No. 324168 (Mexico); (ENTITY) [BPI–SDNTK]

Dated: October 13, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–26330 Filed 10–19–10; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

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 12 entities and 17 individuals 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 the 12 entities and 17 individuals identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on October 13, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

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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 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 October 13, 2010, the Director of OFAC designated 12 entities and 17 individuals whose property and interests in property are blocked pursuant to section 805(b) of the Foreign Narcotics Kingpin Designation Act.

The list of designees is as follows:

Entities

1. GENETICA GANADERA RANCHO ALEJANDRA S.P.R. DE R. L. DE C.V., Calle Alvarado No. 143, Local 5–J, Zona Centro, Ojos Negros, Domicilio Conocido, Ensenada, Baja California Norte, Mexico; Carretera Ensenada, San Felipe, Baja California Norte, Mexico; (ENTITY) [SDNTK].
2. GENETICA IMPORT–EXPORT S.P.R. DE R.L. DE C.V., Calle Alvarado No. 143, Local 5–J, Zona Centro, Ojos Negros, Domicilio Conocido, Ensenada, Baja California Norte, Mexico; Carretera Ensenada, San Felipe, Baja California Norte, Mexico; Avenida Iturbide No. 648–3, Ensenada, Baja California Norte, Mexico; Segunda No. 1576, Colonia Obrera, Ensenada, Baja California Norte, Mexico; R.F.C. GIE–030325–Q53 (Mexico); (ENTITY) [SDNTK].
3. CLUB DEPORTIVO OJOS NEGROS A.C., Conocido Poblado de Ojos Negros, Baja California Norte, Mexico; R.F.C. CDO–980604–4V7 (Mexico); (ENTITY) [SDNTK].
4. MANTENIMIENTO, AERONAUTICA, TRANSPORTE, Y SERVICIOS AEREOS S.A. DE C.V (a.k.a. M.A.T.S.A. S.A. DE C.V.); Calle 2, Hangar 10, Lot 19, Aeropuerto Internacional de Toluca, Toluca, Mexico, Mexico; R.F.C. MAT–021004–B99 (Mexico); (ENTITY) [SDNTK].
5. CAPACITACION AERONAUTICA PROFESIONAL S.C., La Avendia Vicente Guerrero No. 749, Colonia Prados Cuernavaca, Cuernavaca, Morelos, Mexico; R.F.C. EVC–040524–CH8 (Mexico); (ENTITY) [SDNTK].
6. AERO EXPRESS INTERCONTINENTAL S.A. DE C.V. (a.k.a. AEISA; a.k.a. INTEREXPRESS); Oriente 158 No. 390–E, Colonia Moctezuma, Segunda Seccion, Delegacion Venustiano Carranza, Mexico City, Distrito Federal, Mexico; Avenida Ruben Dario, Albrook Comercial Park, Deposito No. 20, Bella Vista, Distrito de Panama, Panama; R.F.C. AIN–000713–GR7 (Mexico); (ENTITY) [SDNTK].
7. GRUPO CRISTAL CORONA S.A. DE C.V., Avenida Insurgentes No. 23, Interior 506, Piso 5, Colonia San Rafael,

Delegacion Cuauhtemoc, Mexico City, Distrito Federal, Mexico; Avenida Fuentes de Piramides No. 1–604, Oficina 17, Tecamachalco, Naucalpan, Mexico, Mexico; R.F.C. GCC–030326–KUA (Mexico); (ENTITY) [SDNTK].

8. LA NUMERO UNO DE CUAUHTEMOC S.A. DE C.V. (a.k.a. CANTINA LA NUMERO UNO; a.k.a. "SALON DIANA"); Avenida Cuauhtemoc No. 150, Esq. Doctor Erazo, Colonia Doctores, Delegacion Cuauhtemoc, Mexico City, Distrito Federal, Mexico; R.F.C. NUC–940317–IN3 (Mexico); (ENTITY) [SDNTK].

9. CIRCUITO ELECTRONICO S.A. DE C.V., Tijuana, Baja California Norte, Mexico; (ENTITY) [SDNTK].

10. COPY RED S.A. DE C.V., Tijuana, Baja California Norte, Mexico; (ENTITY) [SDNTK].

11. GRUPO HORTA ZAVALA S.A. DE C.V., Boulevard Aguacaliente No. 4558–1602, Aviacion, Carranza y Pablo Sidar, Tijuana, Baja California Norte, Mexico; R.F.C. GHZ–051111–8B3 (Mexico); (ENTITY) [SDNTK].

12. COMERCIALIZADORA GONRA, Carrera 8A No. 38–53, Cali, Colombia; Matricula Mercantil No 560835–2 (Colombia); (ENTITY) [SDNTK].

Individuals

1. FLORES CACHO, Alejandro (a.k.a. CACHO FLORES, Alejandro; a.k.a. BOLANOS CACHO, Alejandro; a.k.a. ROBLES VALDEZ, Abel; a.k.a. "Guillermo LABASTIDA"; a.k.a. "Alejandro LABASTIDA"); Ojos Negros, Baja California Norte, Mexico; Carretera Acapulco, KM 8.5, Pie de la Cuesta, Acapulco, Guerrero, Mexico; Calle de Rio Nilo No. 20, Colonia Valle Dorado, Ensenada, Baja California Norte, Mexico; Montivideo No. 804, Lindavista, Mexico City, Distrito Federal, Mexico; Circuito de la Industria No. 94, Colonia Parque Ind. Lerma, Lerma, Mexico, Mexico; Avenida del Taller No. 23, Ret. 17, Colonia Jardin Balbuena, Delegacion Venustiano Carranza, Mexico City, Distrito Federal, Mexico; Calle Jaime Torres Bodet No. 207–A, Int. 201, Colonia Santa Marta La Rivera, Delegacion Cuauhtemoc, Mexico City, Distrito Federal, Mexico; Homero No. 1343, Mexico City, Distrito Federal, Mexico; Avenida Herradona No. 1328, Interlomas, Mexico City, Distrito Federal, Mexico; Calle Cantiles 42 A, Mozimba 39460, Acapulco, Guerrero, Mexico; Calle Tulipanes No. 8, Colonia Lomas Cortes, Cuernavaca, Morelos, Mexico; Calle Rancho Tetela No. 957, Colonia Rancho Tetela, Cuernavaca, Morelos, Mexico; DOB 26 Mar 1963; Alt. DOB 26 Mar 1964; POB Mexico City, Distrito Federal, Mexico; Alt. POB Guadalajara, Jalisco, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. FOCA630326HMCLCL05 (Mexico); C.U.I.P. FOCA640326H14506669 (Mexico); R.F.C. FOCA–630326 (Mexico); R.F.C. FOCX–260363 (Mexico); R.F.C. FOCX–630326 (Mexico); R.F.C. FOCA–640326 (Mexico); Passport 01350202554 (Mexico); Electoral Registry No. FLCCAL64032609H300 (Mexico); (INDIVIDUAL) [SDNTK].

2. GARCIA SANCHEZ, Ricardo, c/o MANTENIMIENTO, AERONAUTICA, TRANSPORTE, Y SERVICIOS AEREOS S.A. DE C.V., Toluca, Mexico, Mexico; Huixquilucan, Mexico, Mexico; El Oro, Mexico, Mexico; Carranza 14, Toluca, Mexico, Mexico; DOB 05 Oct 1974; POB Mexico City, Distrito Federal, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. GASR741005HDFRNC06 (Mexico); Passport 99370022520 (Mexico); (INDIVIDUAL) [SDNTK].

3. JASSO ROCHA, Oscar Arturo (a.k.a. JASSO SERRATOS, Oscar Arturo); Mexico City, Distrito Federal, Mexico; DOB 07 Dec 1964; POB Mexico City, Distrito Federal, Mexico; Citizen Mexico; Nationality Mexico; Passport 98330071201 (Mexico); Driver's License No. 2308565 (Mexico); C.U.R.P. JASO641207HDFSRS05 (Mexico); (INDIVIDUAL) [SDNTK].

4. TORRES GOMEZ, Enrique (a.k.a. TORRES TORRES, Enrique); Sanchez Colin No. 34 102–B, Providencia Azcapotzalco, Delegacion Azcapotzalco, Mexico City, Distrito Federal, Mexico; Guadalajara, Jalisco, Mexico; DOB 14 Mar 1956; POB Veracruz, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. TOGE560314HVZRMN09 (Mexico); R.F.C. TOGE–560314 (Mexico); Passport 9844001514 (Mexico); (INDIVIDUAL) [SDNTK].

5. RODARTE GRIJALVA, Jose Luis, Calle Sierra del Pulpito No. 3206, Colonia Hacienda de Santa Fe, Chihuahua, Chihuahua, Mexico; Fraccionamiento Juarez, Chihuahua, Mexico; DOB 01 May 1960; POB Delicias, Chihuahua, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. ROGL600501HCHDRS06 (Mexico); R.F.C. ROGJ–600501 (Mexico); (INDIVIDUAL) [SDNTK].

6. COBO LEDESMA, Juan Carlos (a.k.a. COBO LEDEZMA, Juan Carlos); c/o GRUPO CRISTAL CORONA S.A. DE C.V., Mexico City, Distrito Federal, Mexico; Calle de Lomas Anahuac No. 147, Colonia Lomas Anahuac, Delegacion Huixquilucan, Mexico, Mexico; Avenida Hacienda del Ciervo No. 15, Edificio Palma Blanca, Depto. 1203, Fraccionamiento Hacienda Las Palmas, Huixquilucan, Mexico, Mexico; Cali, Valle del Cauca, Colombia; DOB 08 Jun 1967; POB Cali, Valle del Cauca, Colombia; Citizen Colombia; Nationality Colombia; Cedula No. 16745922 (Colombia); Driver's License No. NO4435810 (Mexico); (INDIVIDUAL) [SDNTK].

7. GONZALEZ MEDINA, Jaime Andres (a.k.a. MARTINEZ ALVAREZ, Carlos); c/o GRUPO CRISTAL CORONA S.A. DE C.V., Mexico City, Distrito Federal, Mexico; c/o COMERCIALIZADORA GONRA, Cali, Colombia; Avenida Lomas Anahuac No. 133, Edificio A., Depto. 602, Colonia Lomas Anahuac, Delegacion Huixquilucan, Mexico, Mexico; DOB 27 Apr 1975; POB Cali, Valle del Cauca, Colombia; Citizen Colombia; Nationality Colombia; Cedula No. 94428531 (Colombia); Passport 94428531 (Colombia); C.U.R.P. GOMJ750427HNENDM06 (Mexico); (INDIVIDUAL) [SDNTK].

8. URREA LENIS, Jair Fernando, c/o GRUPO CRISTAL CORONA S.A. DE C.V., Mexico City, Distrito Federal, Mexico; Avenida Lomas Anahuac No. 133, Edificio A., Depto. 602, Colonia Lomas Anahuac, Delegacion Huixquilucan, Mexico, Mexico; Ret. de La Horquilla, Lomas de Vista Hermosa, Delegacion Cuajimalpa, Mexico City, Distrito Federal, Mexico; Valencia, Venezuela; DOB 04 Jun 1976; Alt. DOB 04 Jun 1975; POB Cali, Valle del Cauca, Colombia; Citizen Colombia; Nationality Colombia; Cedula No. 94492728 (Colombia); Passport 94492728 (Colombia); (INDIVIDUAL) [SDNTK].

9. TORO DIAZ, Diana Lorena, c/o GRUPO CRISTAL CORONA S.A. DE C.V., Mexico City, Distrito Federal, Mexico; Calle Horacio No. 1325, Colonia Polanco, Mexico City, Distrito Federal, Mexico; Calle la Martina No. 501, Colonia Polanco, Delegacion Miguel Hidalgo, Mexico City, Distrito Federal, Mexico; Avenida Hacienda de Las Palmas No. 23–2 Norte, Hacienda de Las Palmas Huixquilucan, Huixquilucan de Degollado, Mexico, Mexico; Rio Amazones No. 89–1, Cuauhtemoc, Mexico City, Distrito Federal, Mexico; Calle Rio Rhin No. 64, Colonia Juarez, Delegacion Cuauhtemoc, Mexico City, Distrito Federal, Mexico; Calle Diaz Ordaz No. 86, Colonia Acapatzingo, Municipio de Cuernavaca, Morelos, Mexico; Privada Ruiz Cortines No. 6, Municipio de Atizapan de Zaragoza, Mexico, Mexico; DOB 27 Mar 1982; POB Cali, Valle del Cauca; Citizen Colombia; Alt. Citizen Mexico; Nationality Colombia; Alt. Nationality Mexico; Cedula No. 38560572 (Colombia); Passport 38560572 (Colombia); C.U.R.P. TODD820327MNERZN04 (Mexico); R.F.C. TODD–820327 (Mexico); (INDIVIDUAL) [SDNTK].

10. DUARTE TORRES, Rafael (a.k.a. DUARTE TORRES, Orlando); Lomas de Anahuac No. 86, Mexico City, Distrito Federal, Mexico; Calle Manzana V, Coyoacan, Mexico City, Distrito Federal, Mexico; DOB 26 Aug 1964; POB Mexico; Citizen Mexico; Nationality Mexico; (INDIVIDUAL) [SDNTK].

11. RUIZ DE CHAVEZ MARTINEZ, Arturo, La Quemada No. 427, Colonia Navarte, Mexico City, Distrito Federal, Mexico; DOB 27 Jul 1961; POB Mexico City, Distrito Federal, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. RUMA610727HDFZRR07 (Mexico); (INDIVIDUAL) [SDNTK].

12. MASSA CAMACHO, Eduardo, Mexico; DOB 07 Aug 1959; POB Mexico City, Distrito Federal, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. MACE590807HDFSMD05 (Mexico); (INDIVIDUAL) [SDNTK].

13. FLORES CACHO, Javier, c/o LA NUMERO UNO DE CUAUHTEMOC S.A. DE C.V., Mexico City, Distrito Federal, Mexico; Avenida del Taller No. 23, Ret. 17, Colonia Jardin Balbuena, Delegacion Venustiano Carranza, Mexico City, Distrito Federal, Mexico; Martin Luis Guzman No. 259, Colonia Villa de Cortez, Mexico City, Distrito Federal, Mexico; DOB 30 Aug 1969; POB Mexico City, Distrito Federal, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. FOCJ690830HDFLCV03 (Mexico); R.F.C. FOCJ–690830 (Mexico); (INDIVIDUAL) [SDNTK].

14. OLVERA ESTRADA, Rodolfo, c/o GENETICA GANADERA RANCHO ALEJANDRA S.P.R. DE R.L. DE C.V., Ensenada, Baja California Norte, Mexico; c/o GENETICA IMPORT–EXPORT S.P.R. DE R.L. DE C.V., Ensenada, Baja California Norte, Mexico; c/o CLUB DEPORTIVO OJOS NEGROS A.C., Conocido Poblado de Ojos Negros, Baja California Norte, Mexico; Avenida Juan Castro y Calle Cuarta, Poblado Ojos Negros, Ensenada, Baja California Norte, Mexico; DOB 17 Feb 1962; POB Real del Castillo, Ensenada, Baja California Norte; Citizen Mexico; Nationality Mexico; C.U.R.P. OEER620217HBCLSD08 (Mexico); (INDIVIDUAL) [SDNTK].

15. OLVERA ESTRADA, Arturo, c/o GENETICA GANADERA RANCHO ALEJANDRA S.P.R. DE R.L. DE C.V., Ensenada, Baja California Norte, Mexico; c/o GENETICA IMPORT–EXPORT S.P.R. DE R.L. DE C.V., Ensenada, Baja California Norte, Mexico; c/o CLUB DEPORTIVO OJOS NEGROS A.C., Conocido Poblado de Ojos Negros, Baja California Norte, Mexico; Calle Cuarta, Poblado Ojos Negros, Ensenada, Baja California Norte, Mexico; DOB 03 Sep 1951; POB San Antonio Ameca, Jalisco, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. OEEA510903HJCLSR03 (Mexico); (INDIVIDUAL) [SDNTK].

16. WIDOBLO HERNANDEZ, Jose, c/o AERO EXPRESS INTERCONTINENTAL S.A. DE C.V., Mexico City, Distrito Federal, Mexico; Oriente 166 No. 235, Colonia Moctezuma, Mexico City, Distrito Federal, Mexico; DOB 10 Apr 1952; POB Mexico City, Distrito Federal, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. WIHJ520410HDFDRS02 (Mexico); Passport 99400004049 (Mexico); (INDIVIDUAL) [SDNTK].

17. AMAYA ALEMAN, Onecimo Antonio, c/o AERO EXPRESS INTERCONTINENTAL S.A. DE C.V., Mexico City, Distrito Federal, Mexico; c/o CIRCUITO ELECTRONICO S.A. DE C.V., Tijuana, Baja California Norte, Mexico; c/o COPY RED S.A. DE C.V., Tijuana, Baja California Norte, Mexico; Calle Astronomos No. 2214, Colonia Indeco Universidad, Fraccionamiento Otay Universidad, Tijuana, Baja California Norte, Mexico; DOB 25 Feb 1965; POB Aramberri, Nuevo Leon, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. AAAO650225HNLMLN03 (Mexico); R.F.C. AAAO–650225 (Mexico); Passport 01190032480 (Mexico); Driver's License No. 210057967 (Mexico); (INDIVIDUAL) [SDNTK].

Dated: October 13, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–26331 Filed 10–19–10; 8:45 am]

BILLING CODE 4810–AL–P

Federal Register

Wednesday,

October 20, 2010

Part II

National Credit Union Administration

12 CFR Parts 702, 703, 704, et al.

Corporate Credit Unions; Final Rule

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 702, 703, 704, 709, and 747

RIN 3133–AD58

Corporate Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is issuing final amendments to its rule governing corporate credit unions. The major revisions involve corporate credit union capital, investments, asset-liability management, governance, and credit union service organization (CUSO) activities. The amendments establish a new capital scheme, including risk-based capital requirements; impose new prompt corrective action requirements; place various new limits on corporate investments; impose new asset-liability management controls; amend some corporate governance provisions; and limit a corporate CUSO to categories of services preapproved by NCUA. In addition, this rulemaking contains conforming amendments to rules governing Prompt Corrective Action (for natural person credit unions); Investments and Deposit Activities (for federal credit unions); Administrative Actions, Adjudicative Hearings, Rules of Practice and Procedure, and Investigations; and Involuntary Liquidation of Federal Credit Unions and Adjudication of Creditor Claims Involving Federally Insured Credit Unions. These amendments will strengthen individual corporates and the corporate credit union system as a whole.

DATES: This rule is effective January 18, 2011, except that the amendments to 12 CFR 702.105(a), 703.14(b), 704.2, 704.3, 704.4, and subpart M of 12 CFR part 747, are effective October 20, 2011.

FOR FURTHER INFORMATION CONTACT: David Shetler, Deputy Director, Office of Corporate Credit Unions, at telephone (703) 518–6640, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314; Ross Kendall, Staff Attorney, Office of General Counsel, at the address above or telephone (703) 518–6540; or Paul Peterson, Associate General Counsel, at the address above or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background

In January 2009, NCUA solicited public comment on whether comprehensive changes to the structure of the corporate credit union (corporate) system were warranted. 74 FR 6004 (Feb. 4, 2009). This corporate Advanced Notice of Proposed Rulemaking (ANPR) sought comment on how best to define and structure the role of corporates in the credit union system, whether to modify the level of required capital for corporates, whether to modify or limit the range of permissible investments for corporates, whether to impose new standards and limits on asset-liability management (ALM) and credit risk, and whether to make modifications in the area of corporate governance. NCUA received some 445 comments in response to the ANPR. NCUA reviewed these public comments closely and considered them carefully.

On November 19, 2009, the NCUA Board issued a Notice of Proposed Rulemaking (NPR) containing extensive, specific proposed revisions to NCUA's rule governing corporate credit unions (corporates) and related rule provisions. 74 FR 65210 (Dec. 9, 2009). The proposed revisions covered corporate capital, prompt corrective action (PCA), investments, ALM, CUSOs, and governance. Briefly summarized, the major provisions in the proposal would have:

- Imposed new minimum capital ratios, new risk based capital calculations, and new elements of capital, all in general accordance with the Basel I capital requirements imposed by the banking regulators on banks.
- Required that retained earnings (RE) constitute a certain portion of corporate capital, and that corporates build retained earnings over time.
- Eliminated the current prohibition on conditioning membership, the receipt of services, or the pricing of services upon the purchase of paid-in capital.
- Added new PCA provisions similar to those currently applicable to banks.
- Prohibited investments in collateralized debt obligations (CDOs) and net interest margin (NIM) securities.
- Toughened the capital requirements for expanded investment authority, and restricted the credit ratings for investments purchased by such corporates to a minimum of "A−."
- Required that a corporate examine every available Nationally Recognized Statistical Rating Organization (NRSRO) rating for a particular security and only employ the lowest of those ratings, and that at least 90 percent of a corporate's investments be rated by at least two NRSROs.
- Tightened the existing single obligor concentration limit and imposed new sector concentration limits.
- Placed limits on subordinated positions in structured securities.
- Imposed new limits on the maximum difference between the estimated average life of the asset cash flows and the average life of the liability cash.
- Restricted the weighted average life (WAL) of a corporate's cash-flowing assets to two years.
- Limited a corporate's aggregate borrowing to the lesser of 10 times capital or 50 percent of shares and capital; and further restrict secured borrowing to maximum maturities of 30 days and only for liquidity purposes.
- Prohibited a corporate from accepting investments or loans from any one entity that exceed ten percent of the corporate's assets.
- Required that a corporate CUSO only engage in categories of services preapproved by NCUA, including, initially, brokerage and investment advisory services.
- Required that a corporate CUSO agree with the corporate by contract to permit NCUA access to the CUSO's books, records, personnel, equipment, and facilities.
- Required that all corporate board members hold either a CEO, CFO, or COO position at a member credit union or other member entity.
- Generally limited corporate board members to no more than six years of service.
- Required that a majority of a corporate's board members be representatives of natural person credit unions (NPCUs).
- Required that each corporate annually disclose to its members the compensation of each senior executive officer and director.
- Required a merging federally-chartered corporate affirmatively disclose to both NCUA and its members any material, merger-related increase in compensation for any senior executive or director.
- Prohibited parties affiliated with a corporate from receiving 1) indemnification in connection with administrative or civil proceedings instituted by NCUA or a state regulatory authority where the party is ultimately found liable and 2) golden parachute payments.

The preamble to the NPR included an extensive discussion of the crisis in the corporates giving rise to the need for regulatory reform, followed by a discussion of the nature of, and justification for, each proposed revision. *Id.* at 65211–65255.

The public comment period for the NPR closed on March 9, 2010. NCUA received 815 public, written comments letters totaling more than 2,600 pages of comments. In addition, NCUA held several town halls and webinars during the comment period during which NCUA both answered questions about the proposed rulemaking and listened to oral comments about the proposal.

Most commenters liked some portions of the proposed rule and disliked other portions. The most common comment on the overall rulemaking was support for the proposed stronger capital requirements; increased limits on single obligors; concentration limits on certain investment sectors; and prohibitions on certain high risk securities—but also serious reservations about other portions of the proposal, including certain ALM, investment, CUSO, and corporate governance provisions.

Of those commenters who expressed a general opinion on the overall rulemaking, many, including some trade groups and various larger NPCUs (*i.e.,* over $1.2 billion in assets), generally support the rule. Many more commenters, however, generally oppose the proposed rule, among them many small and medium-sized NPCUs ranging up to over $1 billion in assets. Many of the commenters in opposition believed that the various investment and ALM restrictions in the proposed rule would cause major changes in corporate operations; that these changes would threaten the ability of corporates to provide liquidity and other valuable services to NPCUs; and that these changes might force NPCUs to turn to banks (their competitors) for services—considered by the commenters as a more expensive and less reliable alternative to today's corporate system. The comments that pertain to specific, proposed revisions are discussed in more detail in the section-by-section analysis below.

The NCUA Board has now determined to issue final revisions based on the proposal and the comments received. Generally, these revisions will become effective 90 days following the publication in the **Federal Register**, but the effective date for many of the revisions will be delayed beyond 90 days.

The remainder of this preamble contains four sections: A summary of the significant revisions in the final rule, a section-by-section analysis of all the revisions, an analysis of how the final investment, credit risk, and asset liability provisions might affect a corporate's ability to achieve its capital requirements, and a discussion of the regulatory procedures affecting this rulemaking.

II. Summary of Significant, Final Revisions

A. Overview

Ultimately, the primary purposes of this extensive rulemaking were twofold. First, NCUA wanted to design a corporate rule that would prevent the catastrophic losses that occurred in the corporate system beginning in 2007 from ever recurring. Second, NCUA wanted to allow for the survival of some form of a well-run corporate system that could provide necessary services, including payments systems services, to its members, and build and attract sufficient capital.

The Board believes this final rule accomplishes these two purposes.

First, and as discussed in more detail below, the 2007 losses resulted almost entirely from private label residential mortgage backed securities (RMBS), with many of the worst performing of these securities being subordinated RMBS. The final rule prohibits corporates from purchasing either private label RMBS, or subordinated-type securities, going forward. In the most specific sense, then, the rule will make it *impossible* for corporates to repeat what happened in 2007. Of course, the next financial crisis may not be a credit or mortgage crisis, so the final rule includes a series of other investment, credit risk, ALM, liquidity, and capital measures that together should greatly reduce the systemic risk posed by the corporates regardless of the source of the next crisis.

Second, the Board believes that a well-run corporate should be able to operate within the confines of the new rule and construct a business model, and an investment portfolio, that permits it to attract capital and grow retained earnings going forward. Again, this is discussed and demonstrated in some detail in Section IV. of the preamble below.

Affected Sections of NCUA's Rules and Regulations

The final revisions affect part 704, *Corporate Credit Unions,* and several other sections of NCUA's regulations. The following chart lists the affected sections. It also summarizes the applicability dates for each section and, in some cases, the applicability dates for particular paragraphs or individual definitions.

Current rule provision	Amended?	Delayed applicability date? (*e.g.,* "+12 months" means delayed 12 months following date of publication of final rule in **Federal Register**)
704.1 *Scope*	No	Not applicable (N/A).
704.2 *Definitions*	Yes. Removed and replaced twice. Second replacement introduces capital and PCA definitions.	First replacement of 704.2. +90 days. Second replacement of 704.2. +12 months. *Adjusted core capital.* —deduct PCC or NCA at another corporate. +12 months —deduct certain excess PCC. +72 months to +120 months —deduct PCC in excess of retained earnings. +120 months *Permanent leverage ratio.* +36 months
704.3 *Corporate credit union capital.*	Yes	Current 704.3 replaced. +12 months. 704.3(a)(3): If RE ratio less than 0.45, must submit REAP. +36 months. 704.3(f)(4): Corporate with unconverted MCAs must notify MCA holders of account status. +14 months.
704.4 *Board responsibilities*	Yes. The current *Board responsibilities* is redesignated as 704.13. New 704.4 *Prompt corrective action* (PCA) added.	Current 704.4 replaced with PCA section. +12 months.
704.5 *Investments*	Yes	+90 days.
704.6 *Credit risk management*	Yes	+90 days.
704.7 *Lending*	No	N/A.

Current rule provision	Amended?	Delayed applicability date? (*e.g.,* "+12 months" means delayed 12 months following date of publication of final rule in **Federal Register**)
704.8 *Asset and liability management.*	Yes	Generally, +90 days. 704.8(k): Prohibition on a corporate receiving more than 15 percent of business from one member or credit union. +30 months.
704.9 *Liquidity management*	Yes	+90 days.
704.10 *Investment action plan*	No	N/A.
704.11 *Corporate CUSOs*	Yes	Generally, +90 days. 704.11(e)(1): Requirement for NCUA approval of corporate CUSO activities. +180 days. 704.11(e)(2): Requirement that corporate divest from CUSO engaged in unapproved activities. +12 months.
704.12 *Permissible services*	No	N/A.
704.13 [Reserved]	Yes	The current 704.4 *Board responsibilities* redesignated as 704.13. +90 days.
704.14 *Representation*	Yes	Generally, +90 days. 704.14(a)(2): Requirement that only CEO, CFO, or COO may seek election to corporate board. +120 days. 704.14(a)(9): Requirement that at least a majority of each corporate's directors be representatives of NPCUs. +36 months.
704.15 *Audit requirements*	No	N/A.
704.16 *Contract/written agreements.*	No	N/A.
704.17 *State-chartered corporate credit unions.*	No	N/A.
704.18 *Fidelity bond coverage*	No	N/A.
704.19 *Wholesale corporate credit unions.*	Yes	Current 704.19 removed, and new 704.19, *Disclosure of executive and director compensation,* added. +90 days.
704.20 None.	Yes	New 704.20, *Golden parachute and indemnification payments,* added. +90 days.
Appendix A *Model forms*	Yes	Amended and renamed *Capital Prioritization and Model Forms.* +90 days. Appdx A, Part I: Corporates may determine that newly contributed capital has priority over existing capital. +90 days.
Appendix B *Expanded Authorities and Requirements.*	Yes	Generally, +90 days. Part I(e): Substitute "leverage ratio" for "capital ratio." +12 months.
Appendix C None.	Yes	New Appendix C, *Risk-Based Capital Credit Risk-Weight Categories,* added. +12 months.
702.105	Yes	Conforming amendment (to substitute new capital terms). +12 months.
703.14(b)	Yes	Conforming amendment (to substitute new capital terms). +12 months.
709.5(b)	Yes	Conforming amendment (to substitute new capital terms). +90 days.
Part 747, subpart M	Yes	Add new subpart M on due process for PCA actions. +12 months.

Third Party Evaluation of Proposed Rulemaking

NCUA commissioned an outside consultant, Kamakura, Inc., to provide NCUA with an assessment of the proposed corporate rule. Kamakura issued its final report, entitled *Impact Analysis—Proposed Modification of 12 Code of Federal Regulations Part 704—National Credit Union Administration* (the "Kamakura Report"), on July 12, 2010. Interested parties can download a copy of the Kamakura Report from NCUA's Web site at *http://www.ncua.gov.* As discussed throughout the following preamble, NCUA carefully considered the Kamakura Report when finalizing the investment and ALM provisions of this rulemaking.

Legacy Assets

The ability of some corporates to comply with the provisions of this final rule depends on managing certain "legacy assets" on their balance sheet. These legacy assets are securities, generally private label RMBS, that continue to carry significant credit risk and market values far below their intrinsic values.

NCUA has been working for some time on a plan to isolate such legacy assets in those corporates where the exposure represents the greatest risk to the insurance fund. In general, these cases represent corporate credit unions where expected future credit losses exceed the corporate's total capital, and recapitalization would not occur without agency assistance. NCUA has, as promised, released its plans for dealing with those corporates' legacy assets. Information about the plans can be obtained from NCUA's Web site at *http://www.ncua.gov.*

Some corporates have lesser positions in RMBS assets where NCUA does not expect the associated credit losses to exceed the corporate's total capital. They may also have other assets with long WALs, positions that are concentrated beyond the prescribed diversification limits, or other portfolios that otherwise inhibit compliance with new rule. NCUA expects these institutions to develop business plans and take action to become compliant with the rule. Generally, NCUA will want these corporates to sell these legacy assets as soon as possible so as to come into compliance with the corporate rule. If the corporate decides an alternative approach to selling the legacy assets is sound and supportable, the corporate will have to submit a draft investment action plan to NCUA for its approval under § 704.10 and other provisions of the corporate rule, such as § 704.8(j)(2)(i). For example, NCUA will consider approval of an action plan that includes retention of these legacy assets while they amortize if the corporate can document that the expected future credit losses on these assets are significantly less than the losses the corporate would take if the investments were sold at current market prices. Depending on the circumstances of the corporate, an NCUA-approved action plan might permit the corporate to operate temporarily outside the WAL limitations and other applicable investment, credit risk, or ALM limitations in the corporate rule. In addition, NCUA might grant these corporates a waiver of time to build the retained earnings required by this regulation—but only to the extent of documented losses flowing from legacy assets identified in an approved action plan. 12 CFR 704.1(b).

Effect of the Dodd-Frank Act on the Use of Credit Ratings

Just recently, on July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA). The DFA, which contains 848 pages divided into 16 separate Titles, has multiple impacts on NCUA, its regulations, and its enforcement authority. The Board is carefully considering the implications of the DFA and the actions NCUA is required to take under the DFA.

Section 939A of the DFA is likely to affect NCUA's regulations, including the corporate credit union regulation. Both NCUA's current and revised corporate rules include references to NRSRO credit ratings. As stated in section 939A, NCUA has one year to review all its regulations and modify them to remove such references and "substitute in such regulations such standard of credit-worthiness as [the Board] shall determine to be appropriate." Until the Board completes that review and modification, however, corporates will be expected to comply with all the provisions of the corporate rule that make reference to NRSRO ratings.

Section 704.2 contains a definition of *small business related securities,* and that definition refers to the definition of the same term in Section 3(a)(53) of the Securities Exchange Act of 1934 (SEA). The Dodd Frank Act, however, changed the SEA definition, and the Board determined that it wanted to continue to use the older definition. Accordingly, this final rule revises the § 704.2 definition of *small business related securities* to remove the reference to the SEA definition.

Section 939(e)(2) the DFA, however, eliminates the reference to NRSRO ratings in Section 3(a)(53), and substitutes a reference to "meets standards of credit-worthiness established by the [Securities and Exchange] Commission (SEC)." Again, until such time as either the SEC or NCUA can provide some content to the latter phrase, NCUA believes that the definition of small business related security in § 704.2 should remain unchanged.

B. Capital

Summary of Current Capital Provisions

Currently, corporates have only one mandatory minimum capital requirement: they must maintain total capital (*i.e.,* retained earnings (RE), paid-in capital, and membership capital accounts) in an amount equal to or greater than 4 percent of their moving daily average net assets.[1] Failure by a corporate to meet this minimum capital ratio triggers the requirement to file a capital restoration plan with NCUA and may cause NCUA to issue a capital restoration directive and take other administrative action.

The current rule allows a corporate to issue Paid in Capital (PIC) to both members and nonmembers, while Membership Capital Accounts (MCAs) may only be issued to members. The current rule also prohibits a corporate from conditioning membership, the receipt of services, or the pricing of services upon the purchase of PIC.

Summary of Proposed Capital Revisions (November 2009)

The proposal contains a capital scheme based on the Basel I capital regimes of the other banking regulators. The proposal renames PIC as Perpetual Contributed Capital (PCC), and makes certain changes to the MCA requirements and labels those MCAs as Nonperpetual Capital Accounts (NCAs). The proposal then seeks to replace the one existing total capital ratio with three minimum capital ratios, including two Risk Based Capital (RBC) ratios. These RBC ratio calculations involve credit risk-weighting the corporate's assets and off balance sheets activities to produce a moving daily average net *risk-weighted* assets (MDANRA).

The three new proposed ratios are described in the following chart:

Ratio	Numerator[2]	Denominator	Minimum level (adequate cap.) (percent)	Minimum level (well cap.) (percent)
Leverage Ratio	RE + PCC	MDANA	4	5
Tier-One RBC Ratio	RE + PCC	MDANRA	4	6
Total RBC Ratio	RE + PCC + NCAs	MDANRA	8	10

The proposal also requires that, in the leverage ratio and Tier 1 RBC ratio, the corporate may only count PCC to the extent that it does not exceed the corporate's RE. That results in the corporate needing 200 basis points (BP) of RE to reach a 4 percent leverage ratio and so be adequately capitalized, and 250 BP to be well-capitalized. This RE requirement, and the various other proposed capital measures, are phased-in over a ten-year time period, as discussed below.

Summary of Proposed Phase-In of Capital Provisions

The proposal contains a multi-step, multi-year phase-in of the new capital requirements:

- *Year one.* None of the new capital requirements would apply during the first year following publication of the final rule. During this period the current total capital ratio would remain in effect, as well as the revised capital order, and associated waivers, issued by the NCUA Board on April 29, 2010.[3]
- *Years two and three.* The two new risk based capital ratios would come into effect on the first anniversary of the publication of the final rule. Corporates

[1] Corporates have other capital-related requirements, such as a core capital ratio and a retained earnings ratio, but failure to meet these requirements only triggers future earnings retention requirements and does not trigger a capital restoration plan requirement or other particular supervisory actions.

[2] These numerator formulas are simplifications. The proposal actually contains certain adjustments to each capital calculation, and those proposed adjustments that received comments are discussed below.

[3] The Net Economic Value (NEV) limitations that exist in the current rule have not changed under this final rule. 12 CFR 704.8(d). Thus, these NEV limits continue to be in effect and no implementation delay for these NEV limits is warranted.

would be required to meet a minimum 4 percent Tier 1 RBC ratio and a minimum 8 percent Total RBC ratio. In addition, corporates would be required to satisfy an interim leverage ratio, defined almost identically to the existing total capital ratio. Because NCUA should have resolved the legacy assets at this point, *and* most corporates will have very low-risk weighted assets, neither of the two RBC ratios will likely dictate the amount of capital corporates need at this point. Instead, actual minimum capital requirement will likely be dictated by the interim leverage ratio, meaning a corporate will need 200 BP in PCC/RE and another 200 BP in NCAs.

- *Years four through six.* At the third anniversary of the publication of the final rule, the 4 percent minimum leverage ratio goes into effect. In addition, any corporate that does not have at least 45 BP of RE on the third anniversary must file a retained earnings action plan (REAP) with the NCUA illustrating how it is going to achieve the upcoming RE requirements at the sixth and tenth anniversaries of the final rule.
- *Years seven through ten.* At the sixth anniversary of the publication of the final rule, a corporate must have at least 100 BP of RE to be considered adequately capitalized.
- *Year eleven and after.* At the tenth anniversary of the publication of the final rule, a corporate must have at least 200 BP of RE to be considered adequately capitalized.

Overview of Significant Capital Revisions in This Final Rule

Most of the public comments on the capital provisions, including comments received from corporate credit unions, were supportive of the new proposed Basel I capital requirements, including the use of risk-based capital measures. Some of these commenters specifically supported the use of Basel I standards over Basel II, stating that Basel I was adequate and less complex.

The Board agrees with these commenters, and has generally adopted, with some modifications, the minimum capital ratios, risk based capital calculations, and new elements of capital, as set forth in the proposed rule. As in the proposed, the final revisions will require that RE constitute a certain portion of capital. For example, to be adequately capitalized, a corporate must have at least 100 BP of RE after six years, and 200 BP of RE after ten years. Other elements of the new capital provisions will also be phased in over time, beginning one year after publication of this final rulemaking. The final revisions eliminate the current prohibition on conditioning membership, services, or the pricing of services upon the purchase of paid-in capital. Details about each final revision are contained in the section-by-section analysis below.

Some commenters, including NPCUs, questioned whether corporates need *any* capital. Other commenters stated that NCUA should not require any contributed capital, and that corporates should be given sufficient time to "earn" their way to adequate capitalization.

The Board is concerned that NCUA's extraordinary actions to stabilize and protect the corporate system over the past few years have been misunderstood by some of these commenters. Because of NCUA's actions, including the Temporary Corporate Credit Union Share Guarantee Program (TCCUSGP) and the Temporary Corporate Credit Union Liquidity Guarantee Program (TCCULGP), many corporates have been able to operate as going concerns with artificially low levels of capital. Measures like the TCCUSGP and TCCULGP are, however, temporary measures. In the future, NCUA will wind down and terminate these measures, and corporates will have to function on their own. Further, corporates and their members cannot expect to ever again receive such extraordinary government support, either explicitly or implicitly, from NCUA or any other government entity.[4] In fact, it is NCUA's intention with the various revisions in this final rule to ensure that the corporates, going forward, never again present the sort of systemic risk to the entire credit union system that requires such extraordinary intervention. And this means that, without building adequate capital going forward, corporates *will not* be able to function.

Inadequate levels of capital introduce unacceptable moral hazards. When the owners of an entity have significant amounts of their own capital at stake, they have incentive to ensure that the entity is prudently operated and does not engage in overly risky activity, because the risk of loss is born by the capital owners. However, when the owners have little or no capital at stake, they have the incentive to overlook, or even encourage, risky behavior by the entities' management. We observed some of this risky behavior at certain corporates in the recent past—and this behavior was likely fueled by contributed capital levels that were too low for the risks undertaken, as well as the fact that some member owners of these corporates did not fully understand the nature and extent of their potential capital losses and so were not actively engaged in the oversight of their corporates. NCUA will not permit corporates to operate with low capital levels that encourage risky behavior. Accordingly, NCUA intends with this rulemaking to ensure corporates have adequate capital levels going forward to mitigate such moral hazard.[5]

In addition to introducing unacceptable moral hazards, low capital levels have negative, direct effects on an entity's ability to function. For example, potential creditors would not likely lend to any corporate that does not have capital sufficient to absorb losses, because the creditors will have legitimate fears that any operating losses in the corporate will keep the creditors from getting repaid. Likewise, potential third-party vendors would not do business with corporates that do not have capital available to absorb operating losses, because these vendors would be afraid that any losses would have negative effects on the corporate's ability to pay the vendors' invoices.[6]

In sum, going forward corporates must survive on their own and without continued government assistance—and that means corporates must have their own adequate capital.

In response to the other comments, NCUA is not requiring that any of a corporate's capital be contributed capital. NCUA will not, however, continue its extraordinary support of the corporate system over the time it would take to build sufficient capital just through RE growth alone. For example, to achieve a 4 percent capital ratio just through RE growth could take 20 years or longer. It is inappropriate for the NCUA, which is a government entity, to provide the necessary guarantees and other assistance that would enable a corporate to survive that long with such low levels of capital. And that means that, to survive as a going concern without continued government assistance, a corporate must solicit and achieve sufficient capital in the form of contributed capital. Any corporate that

[4] Except, of course, for the standard federal share insurance of up to $250,000, as mandated by the Federal Credit Union Act.

[5] The Board also believes that all NPCUs now understand the nature of any capital commitment to a corporate and the need to be involved in the direction and management of their corporates.

[6] As indicated above, after the TCCUSGP and the TCCULGP have served their purposes and been terminated NCUA will no longer provide corporates with extraordinary support. NCUA will disabuse the public, the members, any potential creditors of a corporate, and any potential vendors of a corporate, of the idea that NCUA will again intervene to protect insolvent corporates.

is unable to obtain the requisite levels of capital in a timely manner may have to be liquidated or merged.

Some commenters questioned the need for any minimum RE requirement. One corporate stated that, from a NCUSIF standpoint, contributed capital acts in the same capacity as RE. This commenter believes that the building of RE is typically a decision made by the organization's Board and so does not believe that the portion of capital that is RE should be designated within the regulation. Another corporate commenter, however, recognized the need for a minimum RE requirement.

As discussed at length in the preamble to the proposed rule, NCUA believes that, eventually, some part of a corporate's capital must consist of RE. This is the only form of corporate capital that, when depleted, does not result in losses that flow downstream to NPCUs. Without some RE, the corporates would be a continued source of instability to the credit union system as a whole.

A few commenters stated that NCUA needed to look at other sources besides credit unions to recapitalize the corporate system, without specifying which sources. The Board is unaware of any other logical sources of capital. Corporates are member-owned cooperatives established to serve their member NPCUs, so logically the primary source of a corporate's contributed capital should be its member-owner NPCUs. Still, corporates have always been free to sell paid-in capital to nonmembers, including non-credit union nonmembers, but to date have been either unwilling or unable to do so. The proposal, and these final revisions, permit corporates to sell all forms of contributed capital, including nonperpetual capital, to nonmembers at the corporate's discretion. To the extent, however, that some commenters might believe that NCUA or the federal government can donate capital to corporates, that is neither legally possible nor a good idea as a policy matter. As stated above, credit unions in general, and corporates in particular, cannot depend on continued government assistance to survive.

Some commenters thought the proposed capital requirements were overly complex. The NCUA Board disagrees. Corporates are complex financial entities and so require some detail and nuance in their regulation. The Board notes that the Basel I standards, and associated regulations, are no more complex than those capital standards imposed on banking entities with similarly complex operations and activities.

A few commenters that generally opposed the new capital standards stated that the NCUA's basic rationale for the proposed changes is that the permanence of capital and a risk-based capital standard would have mitigated the losses at Corporates in the past two years. This is not a correct statement. NCUA has long been considering amendments to improve corporate capital standards, even before the credit crisis of 2007. The new capital standards, as proposed and finalized here, are intended to help protect the corporates, their members, and the NCUSIF from future losses, whether or not those future losses are related to credit risk in the mortgage markets (as in 2007) or are caused by other factors.

A few commenters questioned why NCUA was imposing capital requirements on corporates that were similar to banking capital requirements while at the same time imposing ALM and investment requirements that were different from those imposed on banks. The Board believes that while many corporates engage in activities and take on risks similar to banks, and thus should have a capital regime similar to banks, the risks that corporates pose to NPCUs are *systemic* risks, and thus different than the risks posed by one bank to another bank. It is true that a few very large banks may present systemic risks to the banking system, but the Basel I standards contained in this rulemaking are different than the Basel II advanced standards that very large banks are subject to.

Several NPCU commenters were concerned that the likelihood of ongoing corporate consolidation, combined with factors in the proposal such as the lengthening of the MCA three year requirement to five years and the requisite NCUA approval for any return of PCC, all increased the possibility that an NPCU might find itself stuck with significant capital in a corporate to which that NPCU did not want to belong. Natural person credit unions will have to decide, going forward, what services they want from corporates. As part of that decision, they will have to decide if they are willing to contribute capital to one or more corporates. If they decide to contribute capital, they will have to take into account the possibility that the corporate may then consolidate or merge with another corporate. If that should happen, and the NPCU no longer desires services from the continuing corporate, the NPCU does have several options. First, it may ask the corporate to redeem the capital. If such redemption complies with NCUA's regulations, and NCUA approves the redemption, the corporate may redeem the capital. Second, the member NPCU can attempt to transfer (sell) the capital to another member. And, third, the member NPCU can attempt to transfer the capital to a nonmember.

A few commenters believe the proposed capital phase-in period is appropriate, and one NPCU labeled it as generous. Many commenters, however, believe that the proposal provides too short a time period for the phase-in of the proposed new capital requirements.

The Board believes that the final capital phase-in, which mirrors the proposed phase-in, is both appropriate and feasible. As discussed in the preamble to the proposed rule, the phase-in period balances the need for corporates to (1) quickly achieve sufficient capital, and wean themselves from government assistance, through solicitations of contributed capital and growth of RE, while (2) providing for an adequate opportunity to make that solicitation and achieve that growth.

The proposed rule was issued ten months ago, and corporates have had some time since then to consider the ramifications of the proposal. Further, none of the new capital provisions will be effective until the first anniversary of the publication of this final rulemaking in the **Federal Register.** This one year period gives corporates ample opportunity to analyze the elements of this final rule, perfect their business plans, convince their members of the validity of their business plans, and solicit contributed capital.[7] Corporates that are well-run should be able to make an effective solicitation so as to garner sufficient contributed capital by the first anniversary.

Under the final rule, the first specific RE target (*e.g.* 45 BP of accumulated RE) does not go into effect until the third anniversary of publication, and the first specific RE requirement (100 BP) does not go into effect until the sixth anniversary of publication. As discussed in the sections below on the asset liability management provisions of the final rule, the final investment and ALM provisions permit corporate credit unions a bit more leeway in the mismatch of their assets and liability cash flows than in the proposed rule, and the Board believes this should help corporate credit unions generate additional earnings on their assets. As also discussed below, NCUA has modeled various investment portfolios that corporates could purchase under provisions of the final corporate rule, and the Board has concluded that a well-run corporate can, in fact, generate

[7] Some corporates may not even need additional capital on the first anniversary.

45 BP of earnings in the first three years and 100 BP of earnings in the first six years as required by the capital phase-in.

Other, more specific comments on capital are discussed in the section-by-section analysis below.

C. Prompt Corrective Action (PCA)

Although prompt corrective action (PCA) applies to natural person credit unions (NPCUs) and to banking entities, PCA does not currently apply to corporates. The proposed rule contained a PCA regime similar to what the other banking regulators, and the Federal Deposit Insurance Act, impose on banks.

The final rule adopts the proposed PCA provisions substantially as proposed. Each corporate will be assigned to one of five capital categories: Well-capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized. The potential consequences of failing to meet capital standards include restrictions on activities, restrictions on investments and asset growth, restrictions on the payment of dividends, restrictions on executive compensation, requirements to elect new directors or dismiss management, and possible conservatorship. The final rule does include some due process enhancements beyond those contained in the proposed rule.

D. Corporate Investments, Credit Risk, and Asset-Liability Management (ALM)

Summary of Current Investment, Credit Risk, and ALM Provisions

The current Part 704 generally prohibits certain types of investments, including derivatives, stripped mortgage backed securities (MBS), mortgage servicing rights, and residual interests in asset backed securities (ABS). The rule specifies, for permissible investment types, that investments must be rated no lower than AA- by at least one NRSRO at time of purchase. Corporates that qualify for Part I expanded authority, however, have additional investment authority, including the purchase of investments rated down to A-. Corporates that qualify for Part II expanded authority may purchase investments rated down to BBB(flat). Corporates that qualify for Part III expanded authority may invest in certain foreign obligations; corporates that qualify for Part IV expanded authority may engage in derivatives transactions for certain specified purposes; and corporates with Part V expanded authority may engage in certain loan participations.

The current rule requires that corporates maintain an internal investment policy that includes "reasonable and supportable concentration limits" including limits by "investor type and sector." The current rule limits the aggregate of all investments in any single obligor to the greater of 50 percent of capital or $5 million, but includes no regulatory sector limits. The rule does not limit investments that are structured to be subordinate, in terms of potential credit losses, to other securities.

Summary of Significant Proposed Investment, Credit Risk, and ALM Provisions

NCUA developed the proposed changes to the investment, credit risk, and ALM provisions based on lessons learned from both the recent experience with corporate investment portfolios and their associated losses and comments received from the ANPR.

NCUA determined that three major risk conditions were the primary contributors to the current losses in the corporate system: (1) Excessive investment sector concentrations, particularly private label RMBS; (2) excessive average-life mismatches between assets and liabilities; and (3) excessive concentrations in subordinated securities, including mezzanine securities. The proposed revisions to the investment and asset-liability provisions of the corporate rule control these risk conditions in the aggregate through the use of limits, many of which are tied to a corporate credit union's capital. The proposal provided a framework that allowed for a level of risk-taking necessary to support the profitability of a corporate but which would also be continuously and adequately protected by the corporate's capital.

The proposed rule established new prohibitions for investments in collateralized debt obligations (CDOs) and net interest margin (NIM) securities.

The proposal also required that a corporate examine the NRSRO rating from every NRSRO that publicly rates a particular investment and only employ the lowest of those ratings and required that at least 90 percent of a corporate's investments be rated by at least two NRSROs. The proposal eliminated Part II expanded authority, thus making "A −" the lowest possible rating for an NRSRO-rated investment purchased by a corporate with expanded investment authority. To qualify for Parts I and II (*i.e.,* the current Parts I and III) expanded investment authority, the proposal required a corporate achieve and maintain higher capital levels, that is, a minimum six percent capital ratio.

The proposal generally reduced the single obligor limits from 50 percent of capital to 25 percent of capital, with slightly higher limits for investments in mutual funds and repurchase agreements. The proposal also imposed specific concentration limits by investment sector. Sectors included residential mortgage backed securities (RMBS), commercial mortgage backed securities (CMBS), student loan asset backed securities (ABS), automobile loan/lease asset backed securities, credit card asset backed securities, other asset backed securities, corporate debt obligations, municipal securities, and money market mutual funds, and an "all others" category to account for the development of new investment types. The proposed sector limits were, generally, (1) the lower of 500 percent of capital/25 percent of assets, or (2) the lower of 1000 percent of capital/50 percent of assets (for the less risky sectors).

The proposal excluded certain assets entirely from both the single obligor concentration limit in § 704.6(b) and the sector concentration limits in § 704.6(c). The excluded assets include fixed assets, loans, investments in CUSOs, investments issued by the United States or its agencies or its government sponsored enterprises, and investments fully guaranteed or insured as to principal and interest by the United States or its agencies. Investments in other federally-insured credit unions, deposits in other depository institutions, and investment repurchase agreements would also be excluded from the sector concentration limits but not the single obligor concentration limit. Investments in CUSOs, while excluded from both the § 704.6 concentration limits, would still be subject to the investment limits in the corporate CUSO rule, § 704.11(b).

The proposal limited subordinated positions in a structured security to the lesser of 100 percent of capital/5 percent of assets in any given sector class and the lesser of 400 percent of capital/20 percent of assets in the aggregate.

The proposal generally limited a corporate's Part III (renumbered from Part IV) derivatives activity to derivatives used for the purposes of reducing the corporate's overall risk.

Summary of Significant Investment, Credit Risk, and ALM Revisions From the Proposed to the Final Rule

Based on comments received and further review, the NCUA Board adopted most of the proposed provisions but also made some significant changes. The most significant changes in the final rule were the removal of the two ALM provisions designed to limit cash flow mismatches between assets and liabilities. In place of these tests, the final rule substitutes an alternative weighted average life extension test on the corporate's investments along with specific prohibitions on private label RMBS and subordinated securities.

The effect of these changes is to create the following, final set of investment, credit risk, and ALM hurdles through which a corporate must run any contemplated investment purchase:

- *NRSRO ratings screen.* The final rule uses NRSRO ratings as a screening tool. The final NRSRO screen is tougher than the current rule provides. For example, to get by the ratings screen the corporate has to look at all available NRSRO ratings (not just one rating), and the corporate has to take the lowest of all the ratings (*i.e.,* it can't cherry pick ratings). This ratings screen is *exclusionary,* not *inclusionary.* Even if a security gets by the ratings screen, there are still six additional hurdles (listed below) each security must pass before the corporate can buy the security.
- *Prohibition of certain highly complex and leveraged securities.* NCUA is adding to the list of outright prohibited securities in part 704 that are overly complex and/or leveraged. So a corporate cannot buy the security if it is:
  - A Collateralized debt obligation (CDO), or
  - A Net Interest Margin security (NIM), or
  - A Private label RMBS, or
  - A security subordinated to any other securities in the issuance.
- *Single obligor limit.* The final rule tightens the existing limit from 50% of capital to 25% of capital. So if the corporate wanted to buy, say, a highly rated student loan asset backed security (ABS) issued by "Mainstreet Bank," but the corporate has already reached the 25% of capital limit in investments issued by the same Mainstreet Bank trust, the corporate can't buy that additional ABS within the same trust.
- *Sector concentration limits.* Assuming the corporate still wants to buy that Mainstreet Bank ABS, and it has not reached its single obligor limit with Mainstreet Bank, the corporate must then apply the *sector limits* for these ABS. If the purchase of the Mainstreet Bank ABS would put the corporate over the private label student loan ABS sector limit (generally, the lower of 500% of capital or 25% of assets), the corporate can't buy the ABS.
- *Portfolio WAL not to exceed two years.* If the corporate got the Mainstreet Bank ABS past all those hurdles above, there are still more hurdles to overcome. The corporate cannot buy the ABS if it would put the weighted average life (WAL) of the corporate's loan and investment portfolio over two years in length.
- *Portfolio WAL (assuming prepayment slowdown of 50%) not to exceed 2.25 years.* The corporate must then test the Mainstreet Bank ABS for extension risk. The corporate cannot buy the ABS if it would put the weighted average life of the corporate's loan and investment portfolio, assuming the portfolio prepayment speeds slow by 50%, out over 2.25 years in length.
- *Interest rate risk shock test.* This IRR test is in the current rule, and the final rule does not change this test. Assuming that the Mainstreet Bank ABS is floating rate, and its liabilities reset rates in similar fashion, it would likely not be affected at all by this particular test. But if its liabilities did not reprice similarly to the ABS (*e.g.,* the floating rate ABS was funded by fixed rate liabilities), its addition to the portfolio could not cause the corporate's NEV to decline by more than 15 percent when the portfolio as a whole is shocked by 300 BP.[8]

These final revisions provide for a simpler rule that still accomplishes NCUA's goal of reducing or eliminating various risks while allowing for sufficient potential for growth in a corporate's RE.

Investment Action Plans for Prohibited Investments

Most of the new investment prohibitions and other credit and ALM requirements go into effect 90 days after publication of the final rule. Some corporates may hold investments that are in violation of one or more of these new prohibitions, and these investments will be subject to the investment action plan provisions of § 704.10. For example, if a corporate holds a subordinated security prohibited by the revised paragraph 704.5(h)(8), and determines not to sell that security, it must, within 30 calendar days of the effective date of the 704.5(h)(8) prohibition prepare and submit to the OCCU Director an investment action plan. 12 CFR 704.10(a). If the plan is not approved by the OCCU Director, the corporate must comply with the "Director's directed course of action." 12 CFR 704.10(c).

[8] Assuming the corporate was operating under Base level investment authority.

E. Liquidity

Summary of Current Rule

The current rule generally requires a corporate evaluate its liquidity needs and plan for appropriate liquidity. It also provides that a corporate credit union may borrow up to the *greater* of 10 times capital or 50 percent of capital and shares (excluding shares created by the use of member reverse repurchase agreements).

Summary of Significant Revisions

The proposal restricted a corporate's borrowing to the *lower* of 10 times capital or 50 percent of capital and shares (excluding shares created by the use of member reverse repurchase agreements). The proposal also added a sublimit for secured borrowings. The final rule adopts the proposal without changes.

F. Corporate Governance Provisions

Summary of Current Rule

The current Part 704 places limitations on board representation, including limits on the number of trade organization representatives. The current rule does not, however, place any experience or knowledge requirements on individual corporate directors; limit the representation of corporate managers and officials on the boards of other corporates; provide for term limits; require any disclosure of senior executive compensation to the members of a corporate; or place any limits on "golden parachute" severance packages for corporate senior executives.

Summary of Significant Governance Revisions

The final revisions require that all corporate board members hold either a CEO, CFO, or COO position at their member credit union or other member entity. The final rule will, for clarity, add the positions of Manager and Treasurer, as these are often the equivalent of CEO or CFO at smaller credit unions. The revisions also require that a majority of a corporate's board members be representatives of NPCU members. The proposal also included a six year term limit on board service, but this mandatory term limit has been removed from the final rule.

The final revisions require that each corporate annually prepare, and provide to its members, a document that discloses the compensation of certain employees. For corporates with 41 or more employees, the disclosure must include the top five compensated employees. For corporate with 31 to 40 employees, the disclosure must include the top four compensated employees. For corporates with 30 or fewer employees, the disclosure must include the top three compensated employees.

With respect to any corporate merger, the final revisions require a merging federally-chartered corporate affirmatively disclose to both NCUA and its members any material, merger-related increase in compensation (*i.e.,* an increase of more than 15 percent of annual compensation or $10,000, whichever is greater) for any senior executive or director. A state-chartered corporate must also make the merger-related disclosure, but only to NCUA unless state law requires otherwise.

The final revisions prohibit golden parachutes, that is, payments made to an institution affiliated party (IAP) that are contingent on the termination of that person's employment and received when the corporate making the payment is either troubled, undercapitalized, or insolvent. The revisions also generally prohibit a corporate, regardless of its financial condition, from paying or reimbursing an IAP's legal and other professional expenses incurred in administrative or civil proceedings instituted by NCUA or a state regulatory authority where the IAP is ultimately found liable.

G. Corporate CUSOs

Summary of Current Rule

The current corporate CUSO provisions do not specify the particular services that corporate CUSOs may offer, but does provide that the CUSO must "primarily serve credit unions" and "restrict its services to those related to the normal course of business of credit unions." The current rule requires the CUSO agree to allow the corporate's auditor, the corporate's board, and also NCUA access to the CUSO's "books, records, and any other pertinent documentation."

Summary of Significant CUSO Revisions

The final revisions will retain the existing 704.11 requirements, and further require that a corporate CUSO may only engage in categories of services preapproved by NCUA. Brokerage services and investment advisory services will be preapproved in the rule, and NCUA will approve additional categories of services on an *ad hoc* basis. Once approved, however, NCUA may only remove a category of service through a rulemaking. The final rule provides extra time for a CUSO to seek NCUA approval of a service category, and extra time for a corporate to extricate itself from a CUSO that is engaged in activities not preapproved by NCUA.

The final revisions further require a CUSO agree to permit the corporate and NCUA to access the books, records, personnel, equipment, and facilities of the CUSO.

H. Delay of Effective Dates

None of these final revisions will take effect until 90 days following publication of this final rulemaking in the **Federal Register.** This delay in the effective dates will generally provide the corporates, and their NPCU members, some time to analyze and adapt to the final rule and to observe how NCUA is moving forward on resolution of the legacy asset problem.

Some provisions of this final rule, including the capital and PCA provisions, will have delays in their effective dates that are much longer than 90 days. Those delays will be discussed below.

III. Section-by-Section Analysis

This section, which provides a section-by-section analysis of the final revisions, generally follows the organization of part 704, that is, starting with the proposed capital (§ 704.3) and PCA (§ 704.4) amendments, then investments (§ 704.5) and credit risk (§ 704.6), then asset and liability management (§ 704.8), then corporate board representation (§ 704.14), and then the new sections relating to disclosure of executive and director compensation (§ 704.19) and golden parachutes and indemnification (§ 704.20).

Many of the final revisions require new definitions that appear in § 704.2, and the discussion of these definitions generally appears with the discussion of the associated substantive change to the corporate rule. This rulemaking revises Appendices A and B, and adds a new Appendix C. Since Appendix B relates to investment authority, the revisions to that appendix are discussed as part of the discussion of § 704.5. Since Appendices A and C (on model forms and the risk-weighting of assets, respectively) relate to corporate capital, the changes to these appendices are discussed immediately following the discussion of § 704.3. The new subpart L to part 747 provides the due process associated with the new PCA provisions in § 704.4, and so is discussed following the § 704.4 discussion.

The revisions to capital terminology in part 704 also necessitate conforming amendments to parts 702, 703, and 709, as discussed below.

A. Part 702 Prompt Corrective Action

Part 702 sets forth PCA for NPCUs. The proposal contained a conforming amendment to paragraph 702.105(d) changing references to paid-in capital and membership capital to perpetual capital and nonperpetual capital accounts, respectively. The final 702.105(d) is adopted as proposed.

B. Part 703 Investments and Deposit Activities

Part 703 sets forth the permissible investment and deposit activities generally applicable to federal credit unions. The proposal contained a conforming amendment to paragraph 703.14(b) changing references to paid-in capital and membership capital to perpetual capital and nonperpetual capital accounts, respectively. The final 703.14(b) is adopted as proposed.

C. Part 704 Corporate Credit Unions

Section 704.2 Definitions

New and modified definitions in § 704.2 are discussed below in the section where the defined word or phrase appears.

Section 704.3 Capital

Section 704.3 establishes the capital requirements for corporates. The final 704.3 contains six paragraphs (a) through (f). Paragraph (a) covers the basic capital requirements. Paragraph (b) contains the requirements for nonperpetual capital accounts (NCAs) and paragraph (c) contains the requirements for perpetual contributed capital (PCC). Paragraph (d) contains the requirements and procedures for establishing different minimum capital requirements for a particular corporate. Paragraph (e) contains certain other reservations of authority to the NCUA Board. Paragraph (f) explains the treatment of certain former capital accounts under the old corporate rule (*i.e.,* membership capital accounts) that are not converted to the new forms of capital (*i.e.,* either NCAs or PCCs).

As discussed previously, this new 704.3 capital section will not become effective until October 20, 2011, and some elements of this section, and associated definitions, have applicability dates that are delayed beyond October 20, 2011.

704.3(a) Capital Requirements

The proposed 704.3(a), along with associated definitions in 704.2, established a new leverage ratio, new Tier 1 risk based capital ratio (T1RBC ratio), and a new total risk based capital ratio (Total RBC ratio). The proposal established minimum of 4 percent for the leverage ratio, 4 percent for the T1RBC ratio, and 8 percent for the Total RBC ratio. The proposal required a corporate develop goals, objectives, and strategies to ensure adequacy of capital. The proposal required that a corporate attempt to build RE to a level of 0.45 percent of its moving daily average net assets (DANA) within 36 months of publication of the final rule, and submit a RE accumulation plan (REAP) to NCUA if it fails to do so.

The final rule generally adopts 704.3(a), and the associated definitions, as proposed. Some commenters, however, sought clarification about certain provisions, as discussed below.

704.3(a)(1)(i) and 704.2 Definitions of Leverage Ratio

A few commenters expressed confusion about the effective date of the new leverage ratio, and whether that date was actually 12 months following publication of the final rule, or 36 months as stated in the preamble. In fact, the permanent leverage ratio will become effective 36 months after publication, but the rule does contain an interim leverage ratio to bridge the gap between the general effective date of the capital provision (*i.e.,* 12 months after publication) and the permanent leverage ratio.

The proposal, between 12 months and 36 months following publication of the final rule, requires a minimum 4 percent interim leverage ratio, which was defined as the adjusted total capital divided by moving DANA. The proposed definition of "total capital" included RE, PCC, and NCAs, while the proposed definition of "adjusted total capital" then excluded all NCAs in excess of the amount of PCCs. This result would have limited the use of NCAs to only 200 BP toward the 400 BP necessary to achieve the minimum leverage ratio.

Two corporate commenters suggested that corporates be allowed to use NCAs, without limit to satisfy their interim leverage ratio (that is, until the 36 month point). One stated that the current calculation of interim leverage ratio will result in NCAs not being an effective capital tool. This commenter believes that under the proposal as drafted corporates will immediately solicit PCC following publication of the final rule so as to be in compliance with the interim leverage ratio at the 12 month mark. This commenter suggests, instead, that NCUA redefine the numerator of leverage ratio from "adjusted total capital" to "total capital," thus allowing for unrestricted use of NCAs in the numerator until at least the third anniversary of publication of the final rule. This commenter states this will give NPCUs additional time to decide whether they want to stay in the corporate system and invest permanently in the corporates through PCCs, and will also improve the corporate's ability to grow RE in the first three years, as NCAs are less expensive than PCCs.

The Board agrees with these commenters. Accordingly, in the final rule the numerator of the interim leverage ratio includes all elements of capital and permits the use of any one element without limitation. Hence, a corporate could use just NCAs, if it desires, to satisfy the 4 percent interim leverage ratio requirement. Thirty six months after publication of the final rule, the proposal defined, and this final rule adopts, the permanent leverage ratio to be defined as adjusted core capital divided by moving DANA. Core capital, in turn, is limited to Tier 1 capital (*i.e.,* RE and PCCs). *Accordingly, NCAs will not count at all toward the permanent leverage ratio when it becomes effective after 36 months.* The final rule also adds clarifying statements at the end of each of the two definitions, that is "[T]his is the interim leverage ratio," and "[T]his is the permanent leverage ratio," so that those who read the definitions will understand that these are two distinct definitions.

704.2 Definition of "Core Capital"

The proposal defines core capital as the sum of the corporate credit union's RE, paid-in capital, and the RE of any acquired credit union, or of an integrated set of activities and assets, calculated at the point of acquisition, if the acquisition was a mutual combination. Upon the first anniversary of the publication of the final rule, the new Basel I capital provisions and ratios become effective. On that date, the proposal adjusts the definition of core capital to make a nomenclature change (*i.e.,* replace PIC with PCC) and to add to capital the minority interests in the equity accounts of CUSOs that are fully consolidated with the corporate.

704.2 Definition of "Adjusted Core Capital"

The permanent leverage ratio and the Tier 1 risk based capital ratio use *adjusted* core capital as the numerator. The proposal defined *adjusted core capital* as core capital modified by six different deductions.

The proposed deductions required when adjusting core capital include the amount of the corporate's investments in consolidated CUSOs. Some commenters objected to this deduction, arguing that such a deduction varies from the Basel I standards. The Board agrees that this proposed deduction, as worded in the proposed, did not accurately reflect the Basel I standard. The deduction should be for investments in CUSOs that are *not* consolidated with the corporate, as described in the Basel I Accord:

> It has been concluded that the following deductions should be made from the capital base for the purpose of calculating the risk-weighted capital ratio. The deductions will consist of: * * * investments in subsidiaries engaged in banking and financial activities which are not consolidated in national systems. The normal practice will be to consolidate subsidiaries for the purpose of assessing the capital adequacy of banking groups. Where this is not done, deduction is essential to prevent the multiple use of the same capital resources in different parts of the group. The deduction for such investments will be made against the total capital base. The assets representing the investments in subsidiary companies whose capital had been deducted from that of the parent would not be included in total assets for the purposes of computing the ratio.[9]

The Board has amended the final definition of *adjusted total capital* to required deduction of investments in unconsolidated CUSOs.

The proposed definition of adjusted core capital also requires that corporates should deduct from their own capital any capital they have contributed to other corporates. Specifically, the proposal stated:

> If the corporate credit union, on or after (the first anniversary of the final rule), contributes new capital or renews an existing capital contribution to another corporate credit union, deduct an amount equal to the aggregate of such new or renewed capital * * *.

Some NPCU commenters specifically agreed with this deduction, noting that cross-corporate capitalization can inflate capital levels and exposes NPCU members of the contributor corporate to the problems of another corporate.

One commenter asked for clarification about the meaning of "renew an existing capital contribution." The only capital placed in another corporate that is exempt from this required deduction is existing PIC that is converted directly to PCC on the first anniversary of the publication of the final rule or unconverted MCAs that are amortizing under the provisions of paragraph 704.3(f). All other PCC, and all NCAs,

[9] International Convergence of Capital Measurement and Capital Standards (July 1988, updated to April 1998), Section I(c), paragraph 24(ii) (emphasis added). *See also* 12 CFR part 3, Appendix A, § 2(c)(7)(i) (Office of the Comptroller of the Currency deductions from capital), and 12 CFR part 208, Appendix A, § II.B.(ii) (Federal Reserve Board deductions from capital).

must be deducted. The Board has amended the final version of the rule text to clarify that if the corporate credit union contributes any PCC, or maintains any NCAs, at another corporate credit union, it may deduct an amount equal to that PCC or NCA.

Another commenter said NCUA should consider an exception for de minimus member capital contributions between corporates. The Board considered this last comment, but does not believe a de minimus exception is necessary.

One commenter objected to this proposed deduction, stating that it seemed to indicate that NCUA would consider any capital deposits made by NPCUs into corporates to have a 100 percent risk weighting, if and when NPCUs might fall under a risk-weighted capital system, and this would further hinder corporate recapitalization. The Board does not believe that NPCU's should equate capitalization by NPCUs of retail corporates with cross-capitalization of corporates for purposes of PCA.

One commenter stated that the definition of core capital should include NCAs. The Board disagrees. Adding NCAs to the definition of core capital would undermine the permanent nature of core capital and the associated capital protection provided by the minimum leverage ratio.

704.2 Definition of "Supplementary Capital"

The proposed definition of supplementary capital included NCAs, a portion of the corporates allowance for loan and lease losses, and a portion of the unrealized gains on available for sale equity securities with readily determinable fair values. The term, which is synonymous with *Tier 2* capital, is used in the numerator of the total risk based capital ratio. One commenter suggested that all of the unrealized gains on equity securities should count as supplementary capital. The Board disagrees, as this approach would be inconsistent with the Basel I regulations of the other banking regulators.[10] The Board also notes that corporates are not likely to have much in the way of equity securities, as they are generally impermissible investments for corporates.

704.2 Definition of "Fair Value"

The final rule also refines the definition of *fair value* to be consistent with Financial Accounting Standard 157.

704.2 Definition and Use of "Moving Monthly Average Net Risk-Weighted Assets"

The proposal defined the denominator of both new risk based capital ratios as "Moving Daily Average Net Risk-Weighted Assets" (MDANRA). Some commenters questioned the burden of daily risk weighting to produce the MDANRA figure. The Board agrees that a daily calculation is not necessary and could be quite burdensome for some corporates. Accordingly, the final rule replaces the denominator of both risk based capital ratios with a new *moving monthly average net risk-weighted assets (MMANRA),* defined to mean the average of the net risk-weighted assets for the month being measured and the previous eleven (11) months. The definition also requires that MMANRA measurements be taken on the last day of each month.

704.2 Definition of "Retained Earnings"

The final rule amends the definition of retained earnings to create a cross reference to GAAP: "*Retained earnings* means retained earnings as defined under Generally Accepted Accounting Principles (GAAP)."

704.3(a)(3) RE Accumulation Target and REAP

Some commenters incorrectly characterized the proposal as establishing a "requirement" for 45 BP of RE after three years, and questioned the feasibility of reaching that target under the proposed ALM and investment restrictions (discussed elsewhere). In fact, the proposal does not require 45 BP after three years, but, rather, calls for the submission of a RE accumulation plan (REAP) if the 45 BP target is not met.

Many commenters, including both NPCUs and corporates, thought that the multi-step RE phase-in (*i.e.,* target of 45 BP after three years, and a requirement for 100 BP after six years, and then 200 BP after ten) was too difficult for corporates to achieve. Commenters thought this was too difficult because of the current interest rate environment; the fact that most corporate income comes from investments, and not loans; and the limitations imposed by the proposed ALM and investment requirements (discussed elsewhere). One of these commenters stated this RE timetable was likely to encourage aggressive strategies to accumulate RE or cause a corporate "to solicit high cost capital," and that corporates "must not be unnecessarily forced into a survival mode while rebuilding capital." Many of these same commenters suggested that these milestones be changed from three, six, and ten years to four, eight, and twelve years, respectively. One of these commenters asked that these milestones be changed to five, seven, and twelve years, respectively. One corporate commenter, however, did state its belief that these RE targets and requirements were achievable.

The Board disagrees with those commenters who believe the proposed time line is not achievable. The proposed timeline, which the Board has adopted in the final, provides the necessary balance between permitting a well-run corporate time to solicit capital and grow retained earnings, while ensuring that there is pressure on the corporate to achieve adequate capital levels.

Of the commenters who specifically thought requiring 100 BP of RE by year six was too aggressive, one asked that NCUA make public its third-party review of this requirement, along with the assumptions used during the review. As discussed above, NCUA has made public the Kamakura report, and has made changes in response to portions of the report. Overall, NCUA believes these changes will make it easier for a corporate to achieve the necessary RE growth, as discussed in more detail below.

One commenter stated that the proposal should require a state chartered corporate submit any REAP to both NCUA and the relevant state regulator, and that NCUA consult with the state regulator on the evaluations of the REAP. The NCUA Board agrees that it should consult with the relevant state regulator in these circumstances, and has amended the final regulation accordingly.

Except as described above, the Board adopts the final paragraph 704.3(a), and associated capital definitions in § 704.2, as proposed.

704.3(b) Requirements for Nonperpetual Capital Accounts (NCAs)

The proposal replaced membership capital accounts (MCAs) with nonperpetual capital accounts (NCAs). NCAs must be either term or notice accounts, with a minimum maturity or notice period of five years. Under the proposal, adjustable balance NCAs were not permitted.

Two commenters stated that five-year notice is more appropriate than three-year notice, since "this three year time period is short in relation to the term of some corporate assets." These commenters, however, believe that all

[10] *See, e.g.,*12 CFR part 208, Appendix A, § II.A.2.(e) (Federal Reserve supplementary capital elements).

contributed capital should be five-year notice and that there is no need for perpetual contributed capital. The Board believes it is important to have some element of perpetual capital in corporates. This is consistent with Basel I and with the fact that, going forward, corporates cannot expect any future extraordinary government intervention.

One NPCU stated that NCUA should continue to permit accounts that adjust with credit union balance sheets. This commenter stated that such adjustable accounts are "necessary for the system and in times of tight liquidity allows credit unions to have flexibility." The Board disagrees. Capital must have a sense of permanence. Capital accounts that adjust based on measures that can be manipulated by the member lack this permanence.

One commenter asked that, with regard to the new NCAs, the word "original" be placed in front of the phrase "minimum term." The Board agrees and has made this clarification.

Two commenters recommended that, for "nonmaturity" or "notice" NCAs, the withdrawal notice be changed from five years to three years if the NCAs have been in existence at the corporate for at least two years. The Board believes this change would be confusing to implement, would undermine the stability of NCAs, and would be inconsistent with the Basel standards. Accordingly, the Board is not adopting this recommendation.

A few commenters objected to the proposed change from three years to five and said MCA maturity should stay at three years; and one billion dollar NPCU stated that the proposed extension to five years could cause some credit unions to leave the corporate network. A few NPCUs stated that if NCUA wanted NPCUs to recapitalize corporates, it would shorten the term of MCAs instead of lengthening the term, and one of these NPCUs suggested a term of one to two years. The Board believes that the importance of having solid, perpetual capital, consistent with the international Basel I standards, outweighs these concerns.

Another commenter stated that credit unions will need the flexibility to withdraw or change to another corporate credit union that meets their needs without having to wait three to five years to withdraw a capital deposit. The Board disagrees. Capital by its very nature must be stable and not subject to easy withdrawal. As discussed above, potential creditors and vendors of a corporate will not do business with the corporate absent a strong capital regime that is available to absorb losses ahead of these third parties.

704.3(b)(6), (c)(5) Permitting the Transfer of Contributed Capital Accounts (NCA and PCC) to Third Parties

The proposal would permit members to freely transfer their NCAs (704.3(b)(6)) and PCCs (704.3(c)(5)) to third parties, regardless of membership status.

One NPCU commenter stated that free transferability of capital was good, as it helped enforce market discipline. A few commenters, however, stated that there should be limits on the ability of a member to unilaterally sell or transfer their contributed capital to any other member or a nonmember. These commenters believe that a corporate credit union's board must be empowered to preapprove any proposed transfer of capital funds (other than in a merger or liquidation). One of these commenters would restrict transfers to other entities in the field of membership, and another commenter stated that:

> It does not appear that the corporate credit union would have any ability to control the transfer of or the ultimate ownership of its capital shares. This lack of control could lead to the required registration of capital shares as public securities. Such a registration could be required despite the wishes of the corporate and the majority of its members. Registration would dramatically increase the cost and complexity of operating a corporate. In addition, the free transfer of capital shares could allow manipulation including enabling natural person credit unions to cut their capital exposure to a corporate by selling shares rather than by putting them on notice. Alternatively, a prospective member credit union could buy shares rather than contributing capital directly to a corporate. This regulation would hamper the objective of building committed corporate capital.

The Board agrees that there should be additional limits on the transferability of NCAs and PCCs to mitigate the possibility of securities laws violations. PCC and NCAs are generally subject to the securities laws because they meet the general definition of "security."[11] Securities issued by corporate credit unions are exempt from registration under the Securities Act of 1933 (SA),[12] and since it is unlikely that either members or corporates would engage in activities involving PCC or NCAs that would trigger the application of broker/dealer provisions of the Securities and Exchange Act of 1934 (SEA), the risk of securities law violations is minimal. Still, the anti-fraud provisions of SEA § 10(b) and SEC Rule 10b-5 would apply to any transfer, so that members should not withhold, or misstate, any available financial information about the corporates when making such a transfer and should also ensure that the potential transferees have some sophistication.[13]

Accordingly, the final rule requires a corporate member wishing to transfer PCC or NCAs to a non-credit union third party must ensure the potential transferee obtains appropriate financial information about the corporate. To ensure the proper flow of information, the rule provides that the member must notify the corporate at least 14 days before consummating the transaction, and the corporate must then provide both the member and the potential transferee all financial information about the corporate available to the members or the public, including any call report data submitted by the corporate to NCUA but not yet posted by NCUA.

The final rule also limits such transfer to nonnatural persons. This serves a consumer protection function and is also consistent with NCUA's rules on the sale of secondary capital at low income credit unions.

704.2 Definition of "Aavailable To Cover Losses That Exceed Retained Earnings"

NCAs must be "available to cover losses that exceed retained earnings and perpetual contributed capital."[14] The quoted phrase is defined in proposed 704.2, and the definition provided that "[t]o the extent that contributed capital funds are used to cover losses, the corporate credit union must not restore or replenish the affected capital accounts under any circumstances." Some commenters believe that this is a new requirement. In fact, it is not a new requirement, but simply a clarification of an existing requirement. The proposal also provided that contributed capital that is used to cover losses in a fiscal year previous to the year of liquidation has no claim against the liquidation estate. To avoid the ambiguity associated with different possible fiscal years, the final rule replaces "fiscal year" with "calendar year." The entire final definitions now read as set forth in the regulatory text of this rule.[15]

[11] *See, e.g.,* 15 U.S.C. 77b(a)(1), 15 U.S.C. 77c(a)(10).

[12] *See* 15 U.S.C. 77c(a)(5), and Securities and Exchange Commission (SEC) Release No. 33–6758, Regulation D Revisions, 53 FR 7866, note 10 (March 3, 1988).

[13] *See* 15 U.S.C. 78j(b).

[14] And PCCs must be "available to cover losses that exceed retained earnings." 12 CFR 704.2.

[15] The final revisions to the corporate rule contain two different versions of the definitions section (§ 704.2): A temporary version that goes into effect with the bulk of the revisions 90 days after

Continued

Except as discussed above, the Board adopts the final paragraph 704.3(b), and associated definitions in § 704.2, as proposed.

704.3(c) Requirements for Perpetual Contributed Capital (PCC)

The proposal renamed paid in capital (PIC) as perpetual contributed capital (PCC). Generally, the proposed terms and conditions for PCC tracked those of the existing PIC, with the following exceptions.

The existing rule permits a corporate to call PIC if the corporate would meet its minimum levels of capital and NEV ratios after redemption; the proposal requires NCUA's prior approval for any such redemption. The proposal permits the free transferability of PCC to certain nonmember third parties, under the same conditions as NCAs may be transferred (as discussed above). The proposal also eliminated the existing prohibition on conditioning membership, services, or prices for services on a member's ownership of PIC (now to be renamed PCC).

704.3(c)(3) Callability of PCC

Many commenters objected to the 704.3(c)(3) proposal that NCUA must preapprove a corporate's determination to call, or redeem, PCC. Some of these commenters believe NCUA preapproval is overreaching and unnecessary in light of other provisions in the proposed regulation. Some of these commenters stated that the corporate should be free to permit redemption of PCC, without NCUA preapproval, so long as the corporate would continue to meet its minimum capital requirements. Two commenters stated that this prohibition might discourage members from contributing PCC. One stated that over time RE will replace much of the PCC, and that should reduce NCUA's concerns with PCC redemption.

PCC will fulfill a central role in corporate capital structures for many years to come. The Board wishes to ensure that, before a corporate lets any PCC go through redemption, the corporate truly does meet its minimum capital and NEV levels, and is likely to maintain those levels into the foreseeable future. Accordingly, the final rule retains the proposed requirement for NCUA preapproval of any PCC redemption.

704.3(c)(6) Conditioning Membership, Services, and Prices of Services on Purchase of PCC

Many commenters recommended that NCUA not eliminate the current prohibition on a corporate conditioning membership, services, or prices for service on a credit union's ownership of PIC (PCC going forward). One of these commenters stated that granting the corporates the ability to condition payment services or other services on "membership" could force only those NPCUs who have no other alternative to place more capital at risk and out of their control. Another NPCU commenter stated that it learned from the Capital Corporate collapse in the 1990s and has avoided buying capital shares, and does not want to be forced to contribute capital going forward.

Many other commenters, however, including many NPCU commenters, supported the full elimination of this prohibition. Most of these commenters believe this sort of decision on requiring capital contributions is appropriately left to the board and management of the corporate credit union. One commenter stated that lifting this prohibition was necessary to protect against free riders, noting that because of this prohibition the current distribution of losses among members of corporate was unfair.

A few NPCU commenters even thought a corporate should require member capital to receive services. Some of these commenters thought that the requirement should be linked to the amount of the NPCU's deposits at the corporate, and others to an NPCU's asset size, and some stated that larger NPCUs should not be permitted to subscribe to lesser amounts of capital as a percentage of asset size.

In the Board's view, corporates are designed to service NPCUs, and NPCUs own the corporates and the associated risks and rewards of such ownership. If NPCUs believe that corporates provide some valuable or essential service, then NPCUs will need to capitalize the corporates. Accordingly, the Board believes it is appropriate that a corporate be given the option of conditioning its membership, services, or the prices for services, on the purchase of PCC. This authority helps the corporate protect itself from free riders, that is, those NPCUs and other entities that want the benefits of the corporate without taking on any risks. The Board does not believe that NCUA should, by rule, require some minimum amount of capital contribution, but does believe that the corporate's board should have the authority to do so.

Several commenters stated, however, that if this prohibition is eliminated, the regulation should make clear that corporates cannot change their policies so as to threaten *immediate* termination of essential services absent immediate PCC contributions. Many of these commenters suggested that an NPCU that refuses to meet a new demand for contributed capital be given at least 12 months to find another service provider.

The Board appreciates the concern of these commenters. Corporate members should be given adequate time to look for alternatives should they find any particular, proposed conditions on membership, services, or the prices for services too onerous. The Board believes, however, that six months to find an alternative service provider should be appropriate. Accordingly, the final paragraph 704.3(c)(6) provides that a corporate must give a member at least six months written notice of (i) the requirement to purchase PCC, including specific amounts; and (ii) the effects of a failure to purchase the requisite PCC on the pricing of services or on the member's access to membership or services.

One NPCU commenter stated that if corporates are permitted to require capital contributions as a condition of membership or services, the NCUSIF should insure the capital contribution. Another NPCU commenter stated that capital should be "portable," meaning that if an NPCU wishes to move to another corporate because they may not be satisfied with the services being offered, then the NPCU should be free to shift its existing capital to the new corporate without any conditions or time constraints. Again, these commenters misunderstand the fundamental nature of capital. Capital is a buffer to ensure that creditors and vendors of a corporate will not be first in line to absorb operating losses. If NCUA insured the capital, that would be transferring the risk from the member-owner to the entire universe of insured credit unions, and that is not appropriate. Further, if NCUA permitted capital to be "portable," it would undermine this primary role of capital as assuring potential creditors and vendors of the corporate of the continued availability of that capital to absorb operating losses.

704.2 Definition of Tier 2 Capital Includes Certain PCC

Paragraphs (5) and (6) of the proposed definition of *adjusted core capital* excludes certain PCC that exceeds certain levels of RE. The purposes of

publication in the **Federal Register**, and a permanent version that goes into effect one year after publication on the effective date of the capital and PCA provisions. The definition of *Available to cover losses that exceed retained earnings* set forth following amendatory instruction 7 of this rule is the permanent version of the definition. The temporary version following amendatory instruction 6 of this rule refers to PIC and MCAs, not PCC and NCAs.

these exclusions is to force corporates to build up their RE for inclusion in adjusted core capital and inclusion in the corresponding leverage ratio and Tier 1 risk based capital ratios. The effect of these provisions, however, was to also exclude the excess PCC from all capital calculations, including Tier 2 capital ratios.

Some commenters stated that all PCC should continue to count as capital. They ask that some other method be used to encourage RE growth but, if not, then in the alternative that excess PCC should continue to count as at least Tier 2 capital (*i.e.,* and count toward the total RBC ratio). These commenters understood that the proposal intends to push corporates toward building RE growth, but they argue that any existing excess PCC still protects the corporate from losses. Two commenters stated that to the extent PCC does not count as capital it should be returned to the members.

The Board agrees that excess PCC should continue to count as Tier 2 capital. Accordingly, in the final rule the Board amends the definition of Tier 2 capital to include "any perpetual capital deducted from adjusted core capital."

704.2 Definition of Equity Investments

The proposal uses the term *equity investments* as a deduction for purposes of calculating adjusted core capital, and defines the term in 704.2 to include only investments in real property and equity securities. One commenter pointed out that equity investments can also take the form of investments in partnerships or limited liability companies. Accordingly, the final rule adds those investments to the definition.

Accordingly, and except as described above, the Board adopts the final paragraph 704.3(c), and associated definitions in § 704.2, as proposed.

704.3(d) Individual Minimum Capital Requirements

Proposed paragraph 704.3(d) gave NCUA the authority to require higher minimum capital requirements of individual corporate credit unions. The proposal provided the corporate with notice and an opportunity to respond in writing before imposition of the new capital requirements.

Many commenters opposed this paragraph as giving too much discretionary power to NCUA and NCUA examiners. Some of these commenters mistakenly believe that the proposal delegates this authority to the OCCU Director or some other "individual." In fact, the proposal provides this authority to the "NCUA," meaning the "NCUA Board" (unless further delegated by the Board). The Board believes that this provision gives the Board powers it needs to ensure the health of the corporate system and the credit union system as a whole. The Board does agree that some additional due process may be appropriate, as discussed below.

704.3(d)(4) Standards for Determination of New Minimum Capital Requirement

Some commenters objected to the language in proposed 704.3(d)(3) stating that "levels for an individual corporate cannot be determined solely through the application of a rigid mathematical formula or wholly objective criteria. The decision is necessarily based in part on subjective judgment grounded in agency experience." These commenters thought this language was too subjective, and that it departed from the models of the other banking regulators that NCUA was purporting to follow. In fact, this statement is true. Further, the same language does appear in the regulations of the other banking regulators. *See, e.g.,* 12 CFR 3.11 (OCC Regulation). Accordingly, the final rule retains this language.

704.3(d)(4) Procedures for Imposing New Minimum Capital Requirement

The proposal does provide the corporate due process, that is, notice and an opportunity to respond in writing. The proposal generally provides that a corporate will have 30 days to respond to the notice, but that NCUA may shorten this period for good cause, and two commenters stated that the corporate should have at least a minimum time of 15 days to respond. One of these commenters stated that such powers should be exercised only by the NCUA Board, and not be delegable. Another commenter stated that, for state chartered corporates, the regulation should require the NCUA Board obtain the concurrence of the state regulator before exercising this authority.

The Board agrees that additional due process may be warranted in some cases. Accordingly, the final rule includes a new paragraph 704.3(d)(4)(vi) that permits a corporate to request an informal hearing. The corporate must make the request in writing, and NCUA must receive the request no later than 10 days following the initial notice of NCUA's intent to establish a different minimum capital requirement. Upon receipt of the request for hearing, NCUA will conduct an informal hearing and render a decision using the procedures described in paragraphs (d), (e), and (f) of Section 747.3003.

Some of these commenters also objected to the statement that the NCUA decision on this matter represents "final agency action." However, this statement is true as there is no administrative appeal from NCUA's decision in this matter. Accordingly, the final rule retains this language.

Except as described above, the Board adopts the final 704.3(d) as proposed.

704.3(e) Reservation of Authority

The proposed paragraph 704.3(e) provided for various reservations of authority to NCUA.

Proposed paragraph 704.3(e)(2) gave NCUA the authority to require a corporate to use period end assets, instead of moving DANA, for purposes of calculating capital ratios. One corporate commenter objected to this proposed authority, stating that month-end assets can be more than 10 percent higher than DANA for the month. This commenter suggested NCUA adopt an objective standard for the use of this authority, such as where month-end assets are at least 125 percent of DANA for three consecutive months. Another commenter stated that corporates should be given the option of using average or period end assets, as NPCUs are permitted to do under the PCA regime. The Board disagrees, and refuses to put such limits on its authority to require the use of period-end assets in appropriate cases.

Proposed paragraph 704.3(e)(3) gave NCUA authority to discount a particular asset or capital component of a particular corporate from the computation of capital. Some commenters opposed this as giving too much power to NCUA, the OCCU Director, and NCUA examiners. One commenter stated that no corporate should be treated differently from others just because of the examiner. The provision, however, only empowers the NCUA Board, not the OCCU Director or NCUA examiners (unless the Board delegates its authority).

A few commenters correctly noted that the proposal does not provide for any particular due process before NCUA acts. Another commenter believes that there should be some stated time for the corporate to correct the deficiency that gave rise to the unsatisfactory rating.

The Board agrees that there should be some due process associated with its reservations of authority under paragraph 704.3(e), and the final rule adds a new paragraph 704.3(e)(5) setting forth such due process. Before taking any action under paragraph (e), NCUA will provide the corporate with written notice of the intended action and the reasons for such action. The corporate will have seven days to provide NCUA with a written response, and NCUA will consider the response before taking the action. Upon the timely request of the corporate credit union, and for good cause, NCUA may extend the seven-day response period.

704.3(f) Former Capital Accounts

Many commenters suggested that three-year MCAs that are not converted to five-year NCAs be permitted to count as capital, and some stated that they should count on a two-year declining basis. These commenters argued that MCAs were available for some loss protection until such time as they were converted or returned and so should count in some way toward the corporate's capital requirements. One commenter asked whether NCUA would permit the corporate to return to its members three-year MCAs that were not converted to five-year NCAs.

The Board agrees that some corporate members may refuse to convert their existing three-year MCAs to the new five-year NCA or to perpetual PCC prior to the effective date of the new capital rules (*i.e.,* the first anniversary of the publication of the final rule in the **Federal Register**). The Board also agrees that the entire balance of these accounts is available to absorb losses until the account is closed, and that these unconverted MCAs should count, at least partially, as Tier 2 capital. Accordingly, the final rule adds a new paragraph 704.3(f) that provides, effective on the first anniversary of publication of the final rule, unconverted MCAs will be treated as follows:

- *For "adjustable balance" MCAs,* the corporate will immediately put those accounts on notice of withdrawal (if they are not already on notice). The corporate will continue to adjust the balances of the MCA account in accordance with the original terms of the account until the entire notice period has run and then return the remaining balance, less any losses, to the member. Until the expiration of the notice period, the entire adjusted balance will be available to cover losses that exceed RE and certain contributed capital. The corporate may count the unconverted MCAs as Tier 2 capital on an amortizing basis, using the amortization method described in proposed 704.3(b)(3).[16] Corporates will also be required, on the first anniversary of the publication of the final rule, to provide members who hold unconverted MCAs a one-time disclosure about the status of their MCA accounts.
- *For three-year term MCAs,* the corporate will return the MCAs at the expiration of the three-year term. Again, until the expiration of three-year term, the entire account balance will be available to cover losses that exceed RE and certain other contributed capital. The corporate may count the unconverted MCAs as Tier 2 capital on an amortizing basis, using the amortization method described in proposed 704.3(b)(3). Corporates will also be required, on the first anniversary of the publication of the final rule, to provide members who hold unconverted MCAs a one-time disclosure about the status of their MCA accounts.

Part 704, Appendix A—Capital Prioritization and Model Forms

The current Appendix A to part 704, entitled *Model Forms,* contains forms that members provide the corporate on an annual basis acknowledging the terms and conditions of the members' PIC and MCA accounts. The proposal renamed Appendix A as *Capital Prioritization and Model Forms.*

The proposed Appendix A had two parts. Part I, which is new, provided the corporate's board of directors an option to give entities that contribute new capital to the corporate priority—in terms of availability to absorb losses and payout in liquidation—over existing capital contributions. New capital in this context was defined as any capital contributed more than 60 days following the publication of the final rule. The purpose of this provision is to provide a tool to the corporate for facilitating capital growth. Part II contained amended model disclosure forms that cover MCAs, PIC, NCAs, and PCCs. The forms included variable disclosures depending on whether the corporate exercises the option described in Part I.

NCUA received very few comments on Appendix A, but the final rule does include two minor changes from the proposed.

Consistent with the proposed clarifying amendments to § 709.5, Model Form A in Appendix A of the proposal included disclosure language that depleted capital has no claim against the liquidation estate for claims filed beyond the fiscal year of depletion. For clarity and to reduce the potential ambiguity associated with "fiscal year," the final rule substitutes "calendar year" for "fiscal year." The final rule also contains a similar revision to the payout priority paragraphs 709.5(b)(7) (for NCAs) and (b)(9) (for PCC holders).

Also, since the effective date of the final rule will generally be ninety days following the date of publication, the final rule modifies the definition of new contributed capital for purposes of Part I, changing if from capital contributed more than 60 days following publication to capital contributed more than 90 days following publication.

Accordingly, and other than as described above, the final rule adopts Appendix A as proposed.

Part 704, Appendix B relates closely to the investment (§ 704.5), credit risk (§ 704.6) and asset-liability (§ 704.8) provisions of the corporate rule, and is discussed below in connection with those provisions.

Part 704, Appendix C—Risk Weighting of Assets for Risk Based Capital Calculations

The current corporate rule has no risk weighted capital ratios or provisions. The proposal included two new minimum capital ratios defined in terms of risk-weighted assets and activities. Proposed Appendix C contained the detailed instructions for assigning risk weights, including:

- Assets that appear on the corporate's balance sheet will, generally, be risk-weighted at zero percent, 20 percent, 50 percent, or 100 percent, with less risky assets (*e.g.,* treasury bills) given lower percentages, and more risky assets (*e.g.,* loans) given higher percentages.
- Activities that involve risk but that may not appear on a corporate's balance sheet (*e.g.,* an interest rate swap, or a guaranteed line of credit not yet drawn upon) are assigned a conversion factor and then risk weighted as if the underlying assets were, in fact, on the corporate's balance sheet. Recourse obligations (*e.g.,* a recourse obligation on a transferred loan) and direct credit substitutes (*e.g.,* a mortgage backed security that is subordinated to other securities in the same issuance) are generally treated as if the entire amount of the supported asset is on the credit union's balance sheet. Residual interests (*e.g.,* retained, subordinated interests in a loan or loan participation transfer, or a retained credit enhancing interest-only strip) have different, more severe risk weighting calculations.

[16] This amortization method reduces the amount that counts towards capital to zero when one year is remaining on the notice period or term. This amortization method also assumes that the adjustment is determined based on a relatively permanent measure, such as the member's assets, and not on some impermanent measure, such as the member shares at the corporate.

• A corporate may employ a ratings-based risk weighting option for certain investments, (*i.e.,* a recourse obligation, a direct credit substitute, a residual interest, or an asset- or mortgage-backed security extended in connection with a securitization) that have NRSRO ratings. When there is more than one available NRSRO rating, the corporate must use the lowest rating.

Appendix C, Paragraph I(a) Scope

The final rule amends paragraph I(a)(4) to emphasize that this Appendix does not provide authority for corporates to invest in or purchase any particular type of asset or to engage in any particular type of activity. In other words, a corporate credit must have other identifiable authority for any investment it makes or activity it engages in. So, for example, this Appendix describes risk weightings for subordinated securities, even though the final § 704.5 prohibits corporates from investing in subordinated securities and so a corporate credit union cannot invest in subordinated securities. This risk-weighting provision is retained because it is possible that a corporate could come into possession of a security that is impermissible for direct investment (*e.g.,* through enforcement of a lien on a defaulted loan), or that such securities that are impermissible now might become permissible in the future, and Appendix C will not have to be amended to deal with those situations.

Appendix C, Paragraph II(a) Risk Weighting of On-Balance Sheet Assets

A few commenters sought clarity on the risk weighting for ABS and MBS. Asset backed securities are risk weighted in the "all others" risk weighting category (*i.e.,* 100 percent risk weighting) unless rated using the ratings based approach. For private label MBS that are backed by non-qualifying mortgage loans, or a combination of non-qualifying and qualifying mortgage loans, these MBS are also risk-weighted at 100 percent, again unless rated using the ratings based approach. Only MBS backed entirely by qualifying mortgages may use the 50 percent risk weighting permitted by paragraph II(a)(3)(iii).

Appendix C, Paragraph II(b) Risk-Weighting of Off-Balance Sheet Items

Paragraph II(b)(6) Off-Balance Sheet Derivative Contracts; Interest Rate and Foreign Exchange Rate Contracts (Group F).—

One commenter stated that NCUA should consider excluding off-balance sheet items from the risk-based assets calculation. This commenter stated that an alternative may be to allow a corporate to establish a distinct capital pool for off-balance sheet items to prevent any confusion about the items having the same risk as on-balance sheet assets of the corporate. The Board believes the rule as proposed is clear enough on the treatment of on-balance sheet and off-balance sheet items.

One commenter noted that the proposal assigns derivative risk weights for interest rate swaps and foreign currency swaps, but not for other types of derivatives, and corporates may, if authorized by NCUA under the Expanded Authorities, engage in other forms of derivative transactions. The commenter sought clarification of this issue. The Board agrees that clarification is necessary, and so the final rule includes an "all others" catch-all category of derivative risk weighting. As with interest rate swaps and foreign currency swaps, the credit equivalent amount for these other derivatives is generally determined by summing the current credit exposure and the potential future credit exposure. Appendix C, Paragraph II(b)(6)(ii). The current credit exposure is calculated the same way for all derivatives, including other derivatives. Appendix C, Paragraph II(b)(6)(ii)(A). The potential future credit exposure is determined by multiplying the notional principal times a credit conversion factor. Appendix C, Paragraph II(b)(6)(ii)(B). The size of this credit conversion factor depends on the remaining maturity of the derivative. For the catch-all derivatives category, the conversion factors in the final rule are ten percent (remaining maturity of one year or less), 12 percent (remaining maturity of over one year but less than five years), and 15 percent (remaining maturity over five years). This treatment of these other derivatives is similar to that used by the Federal Reserve and the other banking regulators. *See* 12 CFR part 208, Appendix A, Paragraph III.*E.*2.e. (Capital Regulation of the Board of Governors of the Federal Reserve).

After the credit equivalent amount is determined for any derivative, including the catch-all category, a risk weighting is applied to the credit equivalent amount depending on the nature of the counterparty. Appendix C, Paragraph II(b)(6)(iv)(A). The maximum risk weight, however, for the credit equivalent amount of any derivative contract is 50 percent.

One commenter sought clarification on the effects of collateral posted by derivative counterparties on the risk weighting of those derivatives. Appendix C only recognizes certain forms of collateral for the purposes of risk-weighting: cash, treasuries, U.S. Government agency securities, securities issued by the central governments of OECD countries, and securities issued by multilateral lending institutions or regional development banks in which the United States is a member.[17] The portion of the derivative's credit equivalent amount equal to the fair market value of this collateral is generally risk-weighted at 20 percent. *See* Appendix C, Paragraphs II(a)(2)(ii), (vii), (xiii), and (xv).

Another commenter asked whether derivatives used for hedging the credit risk of other assets in the corporate's portfolio would have a reduced, or zero, risk weighting. The answer is no. Whether or not a derivative is used for hedging is not relevant to its risk weighting for purposes of these Basel I capital ratio calculations.

Appendix C, Paragraph II(c) Risk Weighting of Recourse Obligations, Direct Credit Substitutes, and Certain Other Positions

Paragraph II(c)(3) Ratings Based Approach (RBA)

One commenter asked for clarification on the discretion of corporates to choose between a ratings-based, and non-ratings based, approach to risk weighting for those investments that carry an NRSRO rating and could be risk-weighted using the RBA. The proposed rule language could be interpreted as permitting corporates the freedom to choose their ratings approach if both the general risk weighting and RBA risk weighting might apply, and, perhaps, to apply differing approaches to differing securities on the same call report. To ensure consistency, the Board has added a new paragraph II(c)(3)(iii) to the final rule to require a corporate that uses RBA risk weighting for one or more securities on a particular call report use the RBA approach for all eligible securities on that call report. This requirement is consistent with how the other banking regulators have addressed this issue, at least informally. *See, e.g.,* 73 FR 43993 (July 29, 2008) ("Regardless of the method a banking organization chooses [on a call report], it would have to use that approach consistently for all corporate exposures."). The Board also notes that, currently, RBA is not permissible under Basel I for corporate debt obligations, even short-term debt

[17] Other forms of collateral, or risk-weighting percentages, may be used for risk-weighting if the derivatives counterparty is a qualified securities firm. *See* Appendix C, Sections II(a)(1)(viii) and II(a)(2)(viii).

obligations.[18] Without the RBA option, corporate debt will generally be risk weighted at 100 percent. The Board has determined a lower risk weight may be appropriate for highly-rated, short term corporate debt (*i.e.,* an original or remaining final maturity of 120 days or less), as proposed by the other banking agencies in their Basel II regulations.[19]

Short term rating category	Risk-weight percentage
Highest Investment Grade	20
Second-Highest Investment Grade	50
Third-Highest Investment Grade	100
Below investment grade	150
No applicable external ratings	100

Accordingly, paragraph II(c)(3)(ii)(A)(*1*) is amended in the final rule to permit corporates the optional use of the RBA for short term corporate debt.

Section 704.4 Prompt Corrective Action (PCA)

The proposed PCA provisions are similar to those currently applicable to banks. Under the proposal, each corporate would be assigned to one of five capital categories: well-capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized. The potential consequences of failing to meet capital standards include restrictions on activities, restrictions on investments and asset growth, restrictions on the payment of dividends, restrictions on executive compensation, requirements to elect new directors or dismiss management, and possible conservatorship. The proposed due process for credit unions and their employees associated with the new PCA provisions was set out in a new subpart to part 747 of NCUA's rules.

Many commenters thought generally that the imposition of PCA standards for corporates was a good idea and long overdue. A few commenters stated that the PCA powers given to NCUA under the proposal were appropriate, because as long as the possibility exists for reckless behavior at corporate credit unions, the agency needs the power to intervene. One NPCU commenter said that it at first thought the proposal gave NCUA too much power and was overreaching, but then upon further reflection changed its mind given what has happened and NCUA's central role to oversee the corporate system. One corporate commenter specifically stated that the minimum four percent (leverage and Tier 1 risk based capital ratios) and eight percent (total risk based capital ratio) were appropriate for adequate PCA capitalization.

Many commenters, however, thought that the proposed PCA provisions gave NCUA too much discretionary power and room for arbitrary decisions. Some commenters saw a general need for more clarity and certainty in the due process and appellate rights associated with PCA actions. The Board has addressed these concerns with some changes to the final rule as discussed below.

704.4(a) Purpose

This proposed paragraph set forth the purpose of prompt corrective action. One sentence, related to the coordination with the state authorities for state-chartered corporates on discretionary supervisory activities, was amended and moved in the final rule to paragraph 704.4(f). The amendment is discussed below.

704.4(b) Scope

This proposed paragraph sets forth the scope of the PCA section.

704.4(b)(2) Prohibition on Advertising of PCA Category Without Prior NCUA Approval

The proposal required that no corporate may state in any advertisement or promotional material its PCA category unless NCUA specifically permits such statement or the law requires it. Many NPCU commenters stated that corporates should be required to disclose their capital category as the proposed prohibition denies transparency to the corporate's member/owners and makes it difficult for them to do their due diligence.

The Board is sympathetic to the concerns of the commenters. The members of a corporate need some transparency on the corporate's activities. The members are ultimately responsible for what the corporate does or does not do, and the members usually have both capital and uninsured shares at risk in the corporate. NCUA understands this, and will be taking additional actions in the future, such as improved call reporting requirements, to increase such transparency, at least with regard to the balance sheet. In fact, likely 99 percent of the time, a member will be able to determine a corporate's PCA status from the call report since NCUA will be requiring that a corporate report its capital levels, including its Leverage, T1RBC, and Total RBC ratios, on the call report. If members need additional financial information beyond the call report, they can request the corporate provide them the information voluntarily, or even involuntarily in response to a member petition filed under the member inspection process. 12 CFR 701.3. And, of course, the members have the ultimate power over their corporate board, since the members elect—and can refuse to reelect—board directors who are not responsive to the members.

NCUA wants to clarify one aspect of the members' rights to financial information from their corporates. Exam reports, and other documents prepared by NCUA, or prepared specifically by the corporate at NCUA's request or in response to an NCUA request, belong to NCUA and not to the corporate.[20] The corporate will not be able to release this information to anyone, including the corporate's members, without obtaining NCUA's prior approval.

One commenter agreed with the proposed prohibition on publicizing PCA category, but thought it needed to be clarified since certain PCA terms, such as "adequately capitalized" and "well capitalized," are common expressions and could be used unintentionally. The Board understands that such phrases might be used unintentionally, but believes it important that corporates strive as much as possible not to discuss their capital adequacy in the public media.

704.4(c) Notice of Capital Category

The proposal set forth the effective date of a PCA capital category, and when the corporate must give notice to NCUA of a change in capital category, and vice versa.

704.4(c)(2)(ii) Notice of Capital Category

This paragraph provides for NCUA notice to the corporate of a change in capital category. One NPCU commenter complained that this provision appears to give NCUA the authority to subjectively reclassify a corporate capital classification based on administrative review, and the commenter objected to this. The Board notes that this provision does not give NCUA substantive authority to change a PCA category. Such authority arises from other provisions, such as 704.3(d)(2) and 704.4(d)(3). These

[18] In the proposal, the RBA is only permitted for a position that is a "recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security * * * ."

[19] [Reserved]

[20] State regulators will likely have similar controls over their interactions with their state chartered corporates.

provisions each have their own associated due process.

704.4(d) Capital Measures and Capital Category Definitions

The proposal set forth the various PCA capital categories and the minimum capital ratios for each category.

704.4(d)(3) Authority of NCUA, After Due Process, To Downgrade a Corporate One PCA Capital Category for an Unsafe or Unsound Condition or Practice

Some commenters opposed the proposed downgrade authority in 704.4(d)(3) as giving too much power to NCUA examiners and the OCCU Director. In fact, under the proposal this authority would reside in the NCUA Board (subject to delegation), not the OCCU Director or examiners.

One commenter who opposed this provision stated that probably within the past five years every corporate would have been downgraded because it had at least one Corporate Risk Information System (CRIS) rating of three or lower.[21] Another NPCU commenter expressed concern that NCUA might use this power to downgrade a corporate to force an involuntary merger, resulting in a transfer of the NPCU member, and his capital accounts, to another corporate which the NPCU may not want to support. Two commenters stated that the rule needed to provide a corporate with the opportunity, and time, to correct the deficiencies leading to the adverse CRIS rating before a PCA downgrade. Two of these commenters noted that during the exam process corporates are given a time frame to correct deficiencies.

The Board believes the discretionary authority vested in it by proposed 704.4(d)(3) to downgrade a corporate is appropriate. The Board notes that it would not normally authorize a downgrade of a corporate based solely on a negative CRIS rating until the corporate had had a reasonable opportunity to correct the deficiencies underlying the CRIS rating.

The Board also notes that it is highly likely that there will be some corporate combinations in the coming years. While most of these mergers would be voluntary, some might be involuntary. NPCUs should take this fact into account when deciding which corporate they will use for services and how much capital they are willing to contribute to that corporate.

[21] The proposal, however, does not require NCUA enforce a PCA downgrade because of a low CRIS rating—it only empowers the NCUA Board to take such action.

704.4(d)(4) Modification of Minimum PCA Percentages

Proposed 704.4(d)(4) permits the NCUA, for good cause, to modify any of the minimum PCA percentages for a particular corporate as provided for in 704.3(d). A few commenters objected to this provision because they thought this proposal transfers power from the NCUA Board to the OCCU Director. Again, this authority is simply a cross reference to the authority in 704.3(d). There is no delegation to the OCCU Director, and 704.3(d) provides the affected corporate with due process.

704.4(e) Capital Restoration Plans

The proposal described when a corporate must file a plan with the NCUA, the contents of the plan, the consequences for failure to file a plan, and NCUA's processing and approval of the plan.

704.4(e)(5) Disapproval of Capital Plan

Proposed 704.4(e)(5) provides that if an undercapitalized corporate does not submit a capital restoration plan acceptable to NCUA the corporate will be downgraded to significantly undercapitalized.

Two commenters protested that this allows the Director of the OCCU to treat a corporate that is undercapitalized the same as if it was significantly undercapitalized, and allows the Director to do so for an undue length of time. The Board disagrees. The PCA provisions encourage a corporate to file a timely and realistic capital restoration plan. If a corporate fails to do that, the Board must have the authority to take appropriate action to protect the corporate, its members, and the NCUSIF. In addition, the proposal makes no delegation to the OCCU Director.

704.4(f) Mandatory and Discretionary Supervisory Actions

This proposed paragraph sets forth various mandatory and discretionary PCA actions depending on a corporate's PCA category. One commenter thought that the PCA supervisory actions that come into play depending on the corporate's PCA capital categories, and which are variously labeled within the proposal as *mandatory* or *discretionary* at the given capital category, should never be *mandatory.* Instead, they should all be *discretionary* with NCUA. The Board disagrees. The Board wants corporates to know, with certainty, that certain PCA effects will happen if a corporate falls into a particular PCA category.

A few commenters asked that, for discretionary PCA actions against state chartered corporates, if NCUA determines such an action is appropriate, NCUA give the appropriate state supervisory authority (SSA) an opportunity to take the action separately from, or jointly with, NCUA. As pointed out by the commenters, this approach is consistent with NCUA's PCA rules for NPCUs located in paragraph 702.205(c) of part 702. Accordingly, the final rule amends paragraph 704.4(f)(2) to permit the appropriate SSA an opportunity to take discretionary PCA actions independently from, or jointly with, NCUA.

704.4(g) Directives to Take Prompt Corrective Action

The proposed paragraph requires advance notice of pending directives to significantly and critically undercapitalized corporates. There were no significant comments on this paragraph.

704.4(h) Procedures for Reclassifying a Corporate Credit Union Based on Criteria Other Than Capital

The proposed paragraph requires advance notice of intent to reclassify and makes reference to the associated due process provision. There were no significant comments on this paragraph.

704.4(i) Order to Dismiss a Director or Senior Executive Officer

The proposed paragraph provides that affected individuals are entitled to a copy of the order or directive provided to the corporate, along with notice of the right to seek reinstatement. The paragraph also makes reference to the associated due process. There were no significant comments on this paragraph.

704.4(j) Enforcement of Directives

The proposal cross references § 747.3005 as the source of the process for enforcing PCA directives. There were no comments on this paragraph.

704.4(k) Remedial Actions Towards Undercapitalized, Significantly Undercapitalized, and Critically Undercapitalized Corporate Credit Unions

The proposal prescribes certain remedial actions for corporates in these PCA categories.

704.4(k)(1) Prohibition on Undercapitalized Credit Union Paying Dividends on Capital Accounts

Proposed 704.4(k)(1) prohibited a corporate credit union from making any capital distribution, including payment of dividends on perpetual and nonperpetual capital accounts, if, after making the distribution, the credit union would be undercapitalized.

A few commenters supported this prohibition. Many commenters, however, were opposed to this prohibition, generally saying that this undermined the attractiveness of capital accounts and would discourage recapitalization of the corporate credit union system, and that the decision on payment of dividends should be left to the corporate's board of directors. One commenter stated that this prohibition could perpetuate the undercapitalized condition. Several of these commenters stated that this prohibition should be limited to significantly or critically undercapitalized corporates. Several others said that this prohibition should be tied to some sort of minimum RE ratio, not the fact that the corporate may be undercapitalized.

The Board disagrees with the commenters that oppose the prohibition. When a corporate is undercapitalized, the payment of dividends on existing capital depletes the corporate's RE and worsens the corporate's capital position, increasing the odds of the corporate's failure. The Board disagrees with those commenters that believe that a corporate must be *significantly undercapitalized* before it is in true capital trouble. The *undercapitalized* PCA category indicates serious capital problems that the corporate must address, and anything that undermines capital retention and growth in the *undercapitalized* PCA category must be controlled. The Board notes that this prohibition on the payment of dividends at undercapitalized corporates is also consistent with the Basel capital regulations of the other banking regulators.

The Board does believe that the NCUA's authority to waive the prohibition as stated in the proposal is unnecessary (due to 704.1(b)), and perhaps even harmful, as this internal waiver language suggests that the NCUA might grant such dividend waivers as a matter of routine. Accordingly, the final rule eliminates the NCUA waiver authority from the text of 704.4(k)(1).

704.4(k)(2)(v) Discretionary Safeguards

This proposed paragraph stated that NCUA may, with respect to any undercapitalized corporate credit union, take one or more of the actions described in paragraph (k)(3)(ii) (*e.g.,* for significantly undercapitalized corporates) if the NCUA determined those actions are necessary to carry out the purpose of the PCA section.

Many commenters thought this proposed paragraph went too far. Several of these commenters mischaracterized this authority as residing with the OCCU Director when, in fact, under the proposal this authority would reside in the NCUA Board (subject to delegation). Some commenters stated that under this provision, the NCUA could fire any employee and or remove any board at any existing corporate today, and will be able to do so for years to come as long as the corporates remain undercapitalized. One commenter called this provision outrageous, and two others questioned its constitutionality. Another commenter said these powers should be reserved only for corporates categorized as either significantly or critically undercapitalized.

The Board agrees with this last commenter, and has eliminated this proposed paragraph from the final rule.

704.4(k)(6)(ii)(C) Restricting the Activities of Critically Undercapitalized Corporates

Proposed paragraph 704.4(k)(6)(ii)(C) prohibits a critically undercapitalized corporate from amending its charter or bylaws without the prior approval of the NCUA, except as necessary to carry out any other requirement of law, regulation, or order.

A few commenters stated that this usurped the authority of state regulators over state charters. The Board disagrees. A corporate that is critically undercapitalized represents a significant risk to the NCUSIF. Accordingly, the NCUA must have control over any significant activities that corporate might undertake, including, but not limited to, charter changes that affect the control or governance of the corporate.

Proposed paragraph 704.4(k)(6)(ii)(F) prohibited a corporate from paying interest on new or renewed liabilities at a rate that would increase the corporate credit union's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the corporate credit union's normal market areas. One commenter stated that corporates under PCA should not be restricted to dividend rates in the region the institution is located since some corporates have national fields of membership.

The Board notes that most corporates, even with national FOMs, have a concentration of members within a particular area of the country. In the case of a corporate which has no such identifiable concentration, the market area of the corporate would be the entire nation. Accordingly, the Board sees no need to amend the paragraph as proposed.

704.8(j)(2)(ii) Proposed PCA Downgrade for Failure To Correct NEV Test Failures

The proposed paragraph 704.8(j)(2) in the asset liability section, would require PCA category downgrades for failure to correct NEV test failures. One commenter recommended that PCA compliance and regulatory remedies be eliminated for the NEV type testing, stating that there was no precedent for the application of PCA beyond the three "routine capital measures." The Board strongly disagrees. Corporates must comply with the corporate rule's NEV requirements. And, if a corporate fails to comply, NCUA must have the supervisory tools to deal with such noncompliance. The PCA downgrade provisions in 704.8(j)(2)(ii) provide the NCUA with the necessary tools.

One commenter suggested that there should be a phase-in period for the new PCA requirements, but this commenter did not indicate whether the desired phase-in was over and above the 12 months currently envisioned under the proposal. The final rule retains the one-year phase-in of the PCA provisions as proposed.

Except as discussed above, the Board adopts the final § 704.4 as proposed.

The proposal also included a new subpart M to Part 747, setting forth the procedures and due process available in connection with the PCA provisions of § 704.4. The proposal adopts subpart M as proposed.

704.5 Investments

704.5(a) Through 704.5(g)

The proposal did not contain any amendments to these seven paragraphs, and they remain as in the current rule.

704.5(h) Prohibitions

The proposed paragraph 704.5(h) added prohibitions on corporate credit unions investing in collateralized debt obligations (CDOs) and net interest margin securities (NIMs).

Many commenters supported the prohibition on CDOs and NIMs, and the final rule retains these prohibitions. Many commenters also stated a desire for additional restrictions on corporate investments. These additional restrictions ranged from limiting corporate credit unions to investing only in government securities to additional prohibitions on securities, including residential mortgage-backed securities (RMBS) and subordinated securities that caused the credit union industry so much of a loss. NCUA hired

Kamakura Corporation (Kamakura) to assist in analyzing the proposed rule, and Kamakura also recommended prohibiting investments in subordinated securities and placing further limits on private label RMBS.[22]

The Board agrees with these commenters and, accordingly, has added a new paragraph (h)(7) to the final rule to prohibit corporates from investing in private label RMBS. Private label RMBS are not guaranteed by the United States Government, its agencies, or its sponsored enterprises. The RMBS' underlying assets, residential mortgage loans, are also more sensitive to macro-economic factors than other investments available to corporate credit unions. In fact, of the current combined losses at Western Corporate Federal Credit Union (WesCorp) and U.S. Central Federal Credit Union (U.S. Central), over 95 percent were related to private label RMBS. NPCUs also invest directly in residential mortgages, and by prohibiting corporates from purchasing private label RMBS, the pro-cyclical nature of corporate and NPCU balance sheets is also diminished. Given the lack of a guarantee, the sensitivity of mortgages to macro-economic factors, the concentration of mortgages on the balance sheets of natural person credit unions, and the recent history of corporate investments, the NCUA Board believes a prohibition on private label RMBS is warranted.

704.2 Definition of Private Label Security

The final rule defines *private label security* as "a security that is not issued or guaranteed by the U.S. government, its agencies, or its government-sponsored enterprises (GSEs)."

704.2 Definition of Residential Mortgage-Backed Security

One commenter noted that while the proposed rule defined the terms "residential property" and "residential mortgage backed security," the proposed definition of RMBS did not include the use of the phrase "residential property." The Board agrees that, for precision, the RMBS definition should refer to "residential property," and the final rule now defines RMBS as "a mortgage-backed security collateralized primarily by mortgage loans on residential properties." Also, as a point of clarification, this 704.2 definition of RMBS includes not only securities primarily backed by first lien residential mortgages, but also securities primarily backed by other-than-first-lien residential mortgages, such as home equity loans.

704.5(h)(8) Prohibiting Subordinated Securities

The Board has also added a new paragraph 704.5(h)(8) to the final rule prohibiting investment in subordinated securities. Subordinated securities present greater credit risk, liquidity risk, and price volatility than more senior securities. Losses on subordinated securities may at times reach 100 percent of principal, even when a more senior security in the same issuance may only lose pennies on the dollar. In fact, over 48 percent of the current combined losses incurred by WesCorp and U.S. Central are attributable to subordinated securities, mostly subordinated RMBS.

704.2 Definition of Subordinated Security

The proposal defined *subordinated security* in § 704.2 as "[a] security that has a junior claim on the underlying collateral or assets to other securities in the same issuance. If a security is junior only to money market fund eligible securities in the same issuance, the former security is not subordinated for purposes of this definition." The final rule retains this definition, but adds the words "at the time of purchase" because a subordinated security can lose its subordination as the more senior tranches are paid down. The final rule also moves the existing prohibition on purchasing stripped MBS from paragraph (h)(7) to (h)(9).

The relationship between the other investment, credit risk, and ALM prohibitions, and these two 704.5(h) prohibitions on private label RMBS and subordinated securities, is discussed in more detail below.

Accordingly, and except as described above, the Board adopts the final § 704.5, and associated definitions, as proposed.

704.6 Credit Risk Management

The proposed § 704.6 included tighter single obligor limits and new sector concentration limits. The proposal also required that all corporate investments, other than in another corporate or CUSO, have a minimum credit rating from all publicly available NRSROs of no lower than AA− for long-term ratings and A–1 for short-term ratings. Additionally, 90 percent of corporate investments must have at least two NRSRO ratings.

Several commenters thought the proposed tightening of the existing single obligor limits, and establishing of new sector limits, was a positive change, and some asked for even tighter restrictions. On the other hand, several commenters thought the proposed limits were too tight and may increase risk and limit the corporates' ability to manage their businesses and balance sheets efficiently. The Board agrees that some of the proposed limits should be tightened and others relaxed, as discussed below.

704.6(a) Policies

The proposal did not contain any amendments to this paragraph.

704.6(b) Exemptions

The proposed paragraph 704.6(b) exempted certain assets from both the sector concentration limits and the single obligor concentration limit, including fixed assets, loans, investments in CUSOs, investments issued by the United States or its agencies or its government sponsored enterprises, and investments fully guaranteed or insured as to principal and interest by the United States or its agencies.

Several commenters believed settlement funds should also be exempt. These commenters were concerned that the tight single obligor limit would force corporates to find many additional settlement counterparties given the proposed tighter limit of 25 percent of capital per obligor. The commenters were particularly concerned about seasonal patterns that cause settlement activity to fluctuate throughout the year and could potentially cause violations of the single obligor limits.

The Board agrees with these concerns, and has added settlement funds in federally insured depository institutions to the list of exempt investments in the final 704.6(b). The Board has also added a definition of settlement funds to the final § 704.2 to read as set forth in the regulatory text of this rule.

Corporates must take care to properly classify settlement funds and not include non-settlement short-term investments in this category. Generally, the characteristics of settlement funds are: (1) Funds are used for immediate-value transactions (transactions that must be paid for immediately to be processed or have a particular value at the time of processing); (2) Funds are used to settle transactions from institutions such as clearing houses, banks, payment processors, and other credit unions; and (3) Funds are used for same-day settlement accounts, or in the case of automated clearing house transactions within a few days. The amount of money a corporate classifies as "settlement funds" at a third party for purposes of exclusion from the 704.6

[22] Kamakura Report, p. 10.

single obligor limit should also be no more than the third party requires under the terms of its settlement policies.

The proposed 704.6(b) had a complete exemption for agency MBS, but the Board has instead determined not to exempt such MBS. Rather, the Board intends to permit investment in MBS, including agency MBS, subject to concentration limits described below. Accordingly, the final rule amends the 704.6(b) exemption for "investments that are issued or fully guaranteed as to principal and interest by the U.S. government or its agencies or its sponsored enterprises" by adding the words "other than mortgage backed-securities" at the end. Also, the reference to subordinated securities is eliminated from the final rule since such securities will be prohibited.

704.6(c) Issuer Concentration Limits

The proposed 704.6(c) tightens the single obligor limits to 25 percent of capital, subject to certain enumerated exceptions.

In addition to the enumerated exceptions, many commenters felt short-term investments, such as federal funds, should have either a relaxed single obligor limit, or be exempt from the single obligor limit, due to the lower risk associated with these transactions. The Board agrees. Investments of shorter maturity present less credit risk, all else being equal. Still, it is not appropriate to exempt these short term investments from some limit, as these obligations (including federal funds) do have some credit risk. Accordingly, the Board adds a new paragraph (c)(2)(i) to the final rule limiting investments in one obligor to 50 percent of capital where the remaining maturity of all obligations with that obligor are less than 30 days.

In general, the obligor in a securitization situation will be the Qualified Special Purpose Entity (QSPE) trust that issues the securities. Some commenters were concerned that there were very few potential obligors in the credit card ABS sector, particularly given the prevalence of "master" QSPE trusts, and so the single obligor limitation could keep corporates from making any significant investments in the credit card ABS sector. Accordingly, the final rule adds a new paragraph 704.6(c)(2)(ii) to the final rule relaxing the single obligor limitation for credit card master trusts to 50 percent of capital. The Board observes that credit card ABS, both as a sector and as individual securities, have withstood both systemic and issuer shocks since these ABS were first issued. Given the sector's relative safety and the limited number of potential counterparties, NCUA believes a 50 percent obligor limitation for these master trusts is appropriate.

704.2 Definition of Obligor

The final rule amends this definition to clarify that, for purposes of securities issued out of a trust, such as a Qualified Special Purpose Entity (QSPE) trust, the trust itself is the obligor.

704.6(d) Sector Concentration Limits

NCUA proposed, as part of its sector concentration limits, that private label RMBS be limited to the lower of 500 percent of capital or 50 percent of assets. Some commenters, and Kamakura, were concerned that these limits were not tight enough. Kamakura recommended tighter limits for both commercial mortgage-backed securities (CMBS) and private label RMBS and a combined limit for the MBS sectors due to the higher correlation of mortgages to macro-economic factors.[23] Kamakura recommended a sector limit of 15 percent of the portfolio each for both CMBS and private label RMBS, and a combined sector limit of 25 percent of the portfolio. As discussed earlier, the final rule prohibits private label residential MBS. The Board also agrees a tighter limit for the CMBS sector is appropriate. Additionally, the Board believes an overall restriction on the amount of MBS, including agency MBS, is appropriate due to the additive nature of the corporates' concentration exposure when considered along with NPCU mortgage exposure.

Accordingly, the Board amended the final paragraph (d)(1)(i) to limit all MBS, inclusive of commercial mortgage-backed securities, to the lower of 1000 percent of capital or 50 percent of assets. Additionally, the final rule revises paragraph (d)(1)(ii) to tighten the limit on CMBS to the lower of 300 percent of capital or 15 percent of assets.

Paragraphs (d)(1) and (d)(2) establish sector concentration limits for specified investment types, and paragraph (d)(3) establishes a general, aggregate limit of 100 percent of capital or 5 percent of assets for any other investment type not described in (d)(1) or (d)(2). Some commenters were concerned that investments in federal funds might be included in the (d)(3) limit since fed funds were not specifically enumerated in the other sectors and were not generally exempt under 704.6(b). The Board recognizes that corporate credit unions need flexibility to engage in short-term investments and agrees that federal funds transactions with federally insured depository institutions should be explicitly excluded from the sector concentration limits in a manner similar to deposits in those institutions. Accordingly, the final rule amends paragraph (d)(4) to explicitly exclude federal funds investments in other federally insured depository institutions from sector concentration limits.

704.6(e) Corporate Debt Obligation Subsector Limits

The proposed paragraph 704.6(e) set out concentration limits for subordinated securities. Since the final 704.5(h) outright prohibits subordinated securities, the proposed text is no longer necessary and has been deleted from the final rule and replaced with a different provision, as discussed below.

The proposed 704.6(d)(1)(viii) limited corporate debt obligations to the lower of 1000 percent of capital or 50 percent of assets. Some commenters, including some trade associations, thought these limits were not restrictive enough. Some of these commenters recommended that NCUA further restrict concentrations in corporate debt by industry. The NCUA Board agrees. The final rule replaces the proposed 704.6(e) with a new 704.6(e) establishing subsector limits for corporate debt obligations. The final rule limits corporate debt to the lower of 200 percent of capital or 10 percent of assets for each of the 20 North American Industry Classification System (NAICS) industry sectors. The 20 NAICS sectors are listed in the following table:

Code	Industry classification	Code	Industry classification
11	Agriculture, Forestry, Fishing and Hunting	53	Real Estate and Rental and Leasing.
21	Mining, Quarrying, and Oil and Gas Extraction	54	Professional, Scientific, and Technical Services.
22	Utilities	55	Management of Companies and Enterprises.
23	Construction	56	Administrative and Support and Waste Management and Remediation Services.

[23] Kamakura Report, p. 10.

Code	Industry classification	Code	Industry classification
31–33	Manufacturing	61	Educational Services.
42	Wholesale Trade	62	Health Care and Social Assistance.
44–45	Retail Trade	71	Arts, Entertainment, and Recreation.
48–49	Transportation and Warehousing	72	Accommodation and Food Services.
51	Information	81	Other Services (except Public Administration).
52	Finance and Insurance	92	Public Administration.

These subsector limits will ensure more diversification in corporate debt obligations and reduce correlation risk due to excessive concentrations in any single subsector, particularly the finance subsector.

704.6(f) Credit Ratings

As discussed above, the proposed paragraph 704.6(f) required that corporates consult all publicly available NRSRO ratings and use those ratings to screen potential investments.

Several commenters and Kamakura expressed concerns regarding reliance on credit ratings provided by NRSROs. Kamakura recommended corporates not look to NRSRO ratings and instead implement a macro economic analysis approach to evaluating credit risk and conduct their own internal analysis on the probability of default of any given securities.[24] The current 704.6(a), which NCUA did not amend in this rulemaking, requires that a corporate adopt a credit risk policy and evaluate the credit risk of individual securities. Still, the Board disagrees with the idea that NRSRO ratings have no value and that they should be entirely ignored when conducting credit analysis on a particular security. NRSRO ratings are useful tools when used, as in the proposed 704.6(f), only to *exclude,* not *include,* securities as potential corporate investments. Corporates must do additional credit analysis on each security that passes the initial NRSRO ratings screen, and each security that passes the NRSRO screen must comply with each and every one of the other investment, credit risk, and ALM provisions of this final rule.

704.6(g) Reporting and Documentation

The proposal did not contain any amendments to this paragraph. Accordingly, and except as described above, the Board adopts the final § 704.6 as proposed.

704.8 Asset and Liability Management (ALM)

The proposed § 704.8 contained several new ALM provisions, including a modification to the provision on early withdrawal penalties, two cash flow mismatches limits, a new 2-year limit on the WAL of a corporate's assets, and a requirement to measure net interest income. Some commenters were in favor of the revisions in the proposed rule. Many commenters, however, objected to different provisions within the proposed rule, generally complaining about the complexity and efficacy of the multi-level testing in proposed paragraphs 704.8(e), (f), and (g). As discussed below, the Board has made several changes from the proposed § 704.8 to the final.

704.8(a) Policies

Proposed paragraph 704.8(a)(6) contained a conforming change to reference the two proposed cash flow mismatch sensitivity tests. Because, as discussed below, these tests are not adopted in the final rule, the conforming amendment has been removed from paragraph (a)(6).

704.8(b) Asset and Liability Management Committee (ALCO)

The proposal did not contain any amendments to this paragraph.

704.8(c) Penalty for Early Withdrawals

The proposal limited a corporate's ability to pay a market-based redemption price to no more than its book value, thus eliminating the corporate's ability to pay a premium on early withdrawals. Hundreds of commenters objected to this prohibition, arguing that the proposed prohibition on premiums would make corporates less competitive with their certificates, and thus reduce corporate liquidity on the front-end. The NCUA Board agrees now that prohibiting a premium is not likely to protect the corporate's liquidity, and could interfere with the corporate's competiveness, and so the Board determined not to adopt the final 704.8(c) as proposed. Instead, paragraph 704.8(c) will remain as in the current rule. Some comments also indicated that all corporates are not applying the current rule correctly. For example, the Board noted a corporate may base its market-based penalty on the asset values the certificate is matched against, and so the redemption value would decline as the value of the underlying assets decline. This methodology violates the current regulation's requirement that penalties be based on the cost of replacing the lost funds.

The following example illustrates the application of the rule in a premium situation.

Assume a corporate is offering 2-year certificates at a 2-percent coupon, and 1-year certificates at a 1.5-percent coupon, and that the corporate then issues a 2-year certificate to "NPCU A." One year later, assume NPCU A wishes to redeem the certificate and that interest rates have dropped, so that the corporate is now issuing 1-year certificates at 1 percent. That would make the replacement cost of the original certificate approximately 100 basis points (BP) (assuming the corporate can immediately issue a new certificate), but the dividend rate on the original certificate is more than that, at 200 BP. So the net savings for the corporate because of the early redemption is 100 BP. NCUA would then expect the corporate, at a minimum, to redeem this certificate at a premium of nearly 100 BP, but subtract some penalty spread to account for the uncertainty, and expense, in actually issuing a replacement certificate. Using this methodology and a penalty spread of, say, 25 BP, the 2-year certificate will be redeemed at an approximate price of 100.75. The market-based penalty, then, would technically be 25 BP, which reduced the 100 BP premium to 75 BP.

704.8(d) Interest Rate Sensitivity Analysis

The proposal did not contain any specific amendments to this paragraph. However, the final rule clarifies that for interest rate risk (IRR) tests conducted "at least quarterly," at least one of the tests must be conducted on the last day of the calendar quarter. Traditionally, the last day of the quarter has been used by the corporates, and this clarification ensures consistency in measurement periods. Additionally, if "at least monthly" testing is required because NEV ratio falls below three percent, the last day of the month must also be one of the testing dates.

[24] Kamakura report, pp. 8–10.

(Proposed) 704.8(e) Cash Flow Mismatch Sensitivity Analysis

See discussion in next paragraph.

(Proposed) 704.8(f) Cash Flow Mismatch Sensitivity Analysis With 50 Percent Slowdown in Prepayment Speeds

The proposal established new limits on cash flow mismatch sensitivity tests. Although the proposed tests were structured in terms of the effect on NEV of an immediate 300 basis point increase in the yield demanded by investors, the effect of the proposal was to ensure that the gap between the average life of a corporate's assets and its liabilities would remain within a few months and so not present extensive liquidity and market risk to the corporate.

Many commenters thought the two proposed cash flow mismatch sensitivity tests were too restrictive. Other commenters thought these tests were too complicated. Some commenters did not understand the tests were measuring the risk associated with cash flow mismatches, and these commenters discussed spread widening based on historical averages for such widening. Kamakura recommended eliminating the paragraph (e) and (f) stress tests, stating that these tests pose a potential burden on corporate credit unions, greatly reduce the number of securities available for investment, and do not appear to identify securities with differences in credit performance meaningfully related to the performance of securities throughout the credit crisis.

The Board generally concurs with these commenters and Kamakura, and the two proposed cash flow mismatch tests have been removed from the final rule. The elimination of the these two tests will allow corporates to have a larger mismatch between asset and liability cash flows, which increases earnings potential but also increases credit and liquidity risk. To mitigate this increased risk, the NCUA Board has retained the proposed 2-year WAL on assets and added an asset WAL extension test as discussed below.

(Proposed) 704.8(g), (Final) 704.8(e) Net interest income modeling

In addition to this NEV testing, the proposal required every corporate conduct net interest income (NII) modeling. The Board did not receive any significant comments on this provision, other than ones stating that corporates already did this modeling as a matter of policy. The final rule amends the timing of the modeling to read "be performed at least quarterly, including once on the last day of the calendar quarter." As discussed above, this change ensures consistency in the modeling results. This paragraph is also renumbered as paragraph 704.8(e) in the final.

(Proposed) 704.8(h) (Final) 704.8(f) Weighted Average Asset Life

The proposal prohibited the weighted average life (WAL) of a corporate's loans and investment portfolio, excluding derivatives and equity investments (*e.g.,* investments with indefinite maturities such as PIC and CUSO investments), from exceeding two years.

The primary purpose of this restriction in the proposal was to ensure that a corporate did not artificially inflate the WAL of its liabilities so as to get around the asset—liability cash flow mismatch limits. Many commenters objected to the 2-year asset WAL restriction.

Some of these commenters were concerned that the 2-year WAL restriction would prevent corporates from providing long term liquidity loans to NPCUs. Loans over two years in maturity are not generally liquidity loans—they are loans used for term balance sheet funding to match off against longer-term loans or to fund portfolio growth. Since a corporate's primary role in lending is as a liquidity provider of short-term loans, NPCUs cannot rely on corporates to provide term lending in significant amounts. NPCUs have other viable options for longer-term funding such as the Federal Home Loan Bank system, which provides both fixed rate and variable rate lending.

With the elimination of the cash flow mismatch tests in proposed paragraphs 704.8(e) and 704.8(f), the NCUA Board believes it is very important to retain the proposed 2-year WAL restriction on the investment portfolio. This 2-year limit forces corporates to accommodate to the fact that corporates are, first and foremost, providers of payment systems, which, in turn, requires some matching of the investment portfolio to the short term payment liabilities to ensure liquidity for the payments system. Providing liquidity to NPCUs, particularly long-term liquidity, is of secondary importance to this payment systems function.[25] Still, the 2-year WAL restriction is a *portfolio-wide* restriction, and the WAL restriction will allow corporates to make limited amounts of term loans exceeding two years in maturity if those loans are matched by other corporate assets of less than two year maturities.

Some of the commenters thought the 2-year asset WAL would prevent a corporate from being able to earn sufficient spread to build retained earnings in a timely manner. As discussed in more detail below in connection with some hypothetical corporate portfolios, the Board does not believe this is true. In fact, as suggested in the Kamakura report, the proposed cash flow mismatch tests were in most cases the determining factor in limiting a corporate's ability to populate its investment portfolio with ABS and MBS that generated higher yields for the corporate. Under the proposed 704.8(e) cash flow mismatch test, and assuming a 4 percent NEV, a corporate's asset WAL could not exceed its liability WAL by more than about 3 months without violating proposed 704.8(e). That meant that if the WAL of the corporate's liabilities was about 8 months—which is about the current average for corporates—then the corporate's asset WAL could only be about 11 months. Since the final rule will not contain the proposed cash flow mismatch tests, this corporate can take its asset WAL all the way out from 11 months to 2 years, generating more earning power (assuming an upward sloping yield curve). NCUA expects the WAL of a corporates' liabilities to remain relatively short going forward as they focus on the payment systems function. Accordingly, the elimination of the cash flow mismatch tests will have an even greater positive impact on corporates' ability to maintain longer assets and generate earnings from such assets.[26]

The proposal required that a corporate assume, when calculating the WAL, that no issuer options will be exercised. For example, the corporate cannot assume that an issuer will execute a clean-up call. The final rule also requires that the corporate not assume that any market options will be exercised. This requirement addresses the failure of auction rate securities. During the credit crisis, auction rate securities, initially considered by some to have a maturity of approximately one month, extended out in some cases to 15 or 20 years when the auction failed.

The final rule also provides that if the WAL of a corporate credit union's investment portfolio exceeds two years on the testing date, this WAL must be measured more frequently. In that case the measurement must be taken at least monthly, including once on the last day

[25] Providing investments on a principal basis will be even less of a priority in the corporate business model going forward.

[26] Though a corporate is still bound by the IRR NEV constraints in paragraph 704.8(d).

of the month, until the WAL is once again below two years.

With the elimination of the cash flow mismatch tests in paragraphs 704.8(e) and 704.8(f), the proposed WAL limit has been renumbered in the final rule from 704.8(h) to 704.8(f).

704.2 Definition of Weighted Average Life

The current § 704.2 definition of *weighted average life* uses a calculation based on the average time for a return of a dollar of principal. Although stripped MBS are generally impermissible for corporates, it is possible that a corporate might hold some sort of stripped interest only (IO) security that has no principal return. Accordingly, the Board amends the final definition of *weighted average life* to include for IO securities a calculation based on the average time to the expected receipt of a dollar of interest.

(Final) 704.8(g) Weighted Average Life With 50 Percent Slowdown in Prepayment Speeds

As discussed above, the Board's decision to forgo the proposed cash flow sensitivity tests increases the importance of the proposed 2-year asset WAL in protecting the payment systems from excessive risk. In addition to the 2-year WAL restriction, and to protect against extension risk, the Board has added a new paragraph 704.8(g) to the final rule limiting asset WAL extension to 2.25 years assuming a 50 percent slowdown in prepayment speeds, regardless of asset type.

In the past, many market participants believed that lower interest rates would create faster prepayment speeds in residential MBS. During the recent credit crisis, however, prepayment speeds slowed substantially in many RMBS, even with lower interest rates. In some cases, a prepayment slowdown can produce radical increases in the WAL of a security (*e.g.,* in excess of one thousand percent), particularly in support tranches. Accordingly, this new 50 percent slowdown test limits the extension risk, and the related credit and liquidity risk, that a corporate can accept into its portfolio. This new 704.8(g) WAL test with prepayment slowdown is similar to the proposed 704.8(f) cash flow mismatch sensitivity test with prepayment slowdown that the Board is not adopting, except that this new 704.8(g) is simpler to calculate and not as restrictive as the proposed 704.8(f).

704.8(h) Government Issued and Guaranteed Securities

Many commenters thought securities that are issued or fully guaranteed as to principal and interest by the U.S. government or its agencies or its sponsored enterprises should be exempt from the cash flow mismatch and 2-year WAL restrictions. The most common argument was the absence of credit risk in these securities.

The Board is sympathetic to this concern, and so the final rule allows the WAL of securities that are issued by, or fully guaranteed as to principal and interest by, the U.S. government or its agencies or its sponsored enterprises to be multiplied by a factor of 0.50 when determining the WAL of a corporate's entire portfolio. So, for example, a 4-year WAL agency security will be treated as if it has a 2-year WAL for purposes of the WAL calculations in paragraph 704.8(f) and (g). The Board also considered exempting government securities from both the asset WAL tests, but concluded that such an exemption was not appropriate because these securities do have some market volatility.

The Board determined to use the 0.50 factor because it provides corporate credit unions with a material measure of relief from the WAL calculation without creating undue market risk. Small factors, such as 0.25, would not provide a significant benefit to the corporates, while larger factors, such as 0.75, raised concerns over market risk and the potential negative effects on NEV. During the global credit crisis, even agency RMBS spreads widened significantly between October 2008 and November 2008. During this period, spreads between the Bloomberg generic 5-year Fannie Mae Benchmark and the swap curve widened by 111 BP, introducing significant market risk on these securities. Other Bloomberg generic indices also widened significantly, with the longer term benchmarks widening even more. The Board believes the 0.50 factor provides the best balance between WAL relief and ensuring that corporate NEV positions are protected.

704.8(i) Effective and Spread Durations

The proposed paragraph 704.8(i) required a corporate measure at least once a quarter, the effective duration and spread durations of each of its assets and liabilities, where the values of these are affected by changes in interest rates or credit spreads. There was no significant comment on this provision. The Board determined to clarify the timing of the tests by inserting the phrase "including once on the last day of the calendar quarter." Otherwise, this paragraph was finalized as proposed.

704.8(j) Regulatory Violations

The proposed paragraph 704.8(j) required that a corporate take action to report, and cure, violations of § 704.8. The proposal also stated that if the corporate could not timely cure the violation, the corporate would suffer a PCA downgrade.

One commenter thought it inappropriate to tie the failure of ALM tests to PCA downgrades. The Board disagrees. A corporate must maintain its NEV levels, and protect those NEV levels from credit, extension, and liquidity risk. A PCA downgrade, and the associated PCA provisions in § 704.4, give the Board the necessary tools to deal with a corporate's failure to meet important regulatory requirements.

704.8(k) Overall Limit on Business Generated From Individual Credit Unions

The proposed paragraph 704.8(k) prohibited a corporate from accepting from a member or nonmember credit union or other entity any investment, including shares, loans, PCC, or NCAs if, following that investment, the aggregate of all investments from that member or entity in the corporate would exceed 10 percent of the corporate credit union's moving daily average net assets.

Hundreds of commenters opposed this limit on business from individual entities. Some commenters believed, for example, that this restriction would prevent a corporate from certain borrowings, such as liquidity borrowings from sources like the Federal Home Loan Banks. This was not the Board's intent. Accordingly, the final 704.8(k) applies the limit only to member and nonmember credit unions. The Board has also increased the limit in the final rule from 10 percent of a corporate credit union's moving daily average net assets to 15 percent. This increase in the limit is appropriate because of seasonal factors that affect the amounts of settlement funds a NPCU may have with a corporate. The Board believes, however, that increasing the limit beyond 15 percent is not appropriate and could lead to excessive concentrations of risk with one or two members. The final 704.8(k) will not become effective for 30 months following the date the final rule is published in the **Federal Register.**

Accordingly, and except as described above, the Board adopts the final § 704.8, and associated definitions, as proposed.

704.9 Liquidity Management

704.9(a) General

The proposed paragraph (a)(3) required a corporate maintain sufficient sources of cash and cash equivalents to support its payment system obligations. There was no significant comment on this proposal, and it is adopted into the final rule.

704.9(b) Borrowing Limits

The proposed paragraph 704.9(b) replaced the current borrowing limits of up to *the greater of* 10 times capital or 50 percent of shares (excluding shares created by the use of member reverse repurchase agreements) and capital, with a limit of the *lower* of 10 times capital or 50 percent of capital and shares on aggregate borrowing. The proposal also added a new sublimit on secured borrowing, as discussed below.

704.9(b)(1) Secured Borrowings

The proposal permitted a corporate to borrow on a secured basis, but, generally, only for liquidity purposes and only with a maximum maturity of 30 days. A corporate may also borrow on a secured basis for non-liquidity purposes, but only if the corporate is well-capitalized and only in an amount equal to the corporate's excess capital.

Several commenters felt current borrowing limits were sufficient while others felt their corporates should have no borrowing limits. These latter commenters argued the risks associated with borrowing would be captured by asset liability management modeling. Dozens of commenters also felt the 30 day limit on secured borrowings established by § 704.9(b)(1) was too restrictive and would reduce a corporate's ability to offer lending products and interest rate swaps to natural person credit unions. Many commenters stated any negative ramifications of borrowing in excess of 30 days would be constrained by other aspects of the proposed rule. Many commenters felt § 704.9(b)(1) should be eliminated all together.

The Board believes the proposed borrowing limits are prudent and sufficient to allow corporate credit unions to manage liquidity needs and to safeguard their payment systems. The Board also still believes that corporates should be limited in their ability to borrow on a secured basis for other than liquidity purposes. As demonstrated by recent events, secured borrowing can create additional risks for the corporate and the NCUSIF. Secured lenders require collateral to be valued at market and they impose an additional haircut (margin) to ensure the borrowing is fully and continuously collateralized. Market shocks can create short-term market values that are significantly below long-term intrinsic values and which can magnify potential losses if the creditor seized the collateral and sold it as permitted by the lending agreements.

Accordingly, the final rule retains restrictions on secured borrowing for non-liquidity purposes and retains the 30 day maximum term for secured borrowings made for liquidity purposes. These restrictions will not preclude a corporate from renewing liquidity-related borrowings on a rolling basis. These limits on aggregate borrowing and secured borrowing should help mitigate the consequences of future adverse market events for the corporates and the NCUSIF.

As with most of these final revisions, the effective date of the paragraph 704.9(b) revisions will be January 18, 2011. NCUA expects that corporates will not enter into any new borrowings before that date that will put them out of compliance with 704.9(b) on that date. Also, to the extent that a corporate has one or more borrowings on that date that are not in compliance with the requirements of 704.9(b), NCUA will expect the corporate to move aggressively to pay off those borrowings or to replace them with borrowings that comply with 704.9(b).

Accordingly, and except as described above, the Board adopts the final § 704.9 as proposed.

Appendix B to Part 704—Expanded Authorities and Requirements

The proposed rule revised the qualification criteria, and elements of, the Base-plus and Part I authority, and eliminated the current Part II authority, in Appendix B.

General

The final Appendix B includes language requiring state chartered corporates seeking expanded authority first obtain the approval of their SSAs before submitting an application to NCUA. This requirement is consistent with 12 CFR 704.1(b).

Base Plus

The final Base-Plus section removes the references to the proposed cash flow sensitivity tests in § 704.8(e)(1) and § 704.8(f)(1) since these two proposed tests do not appear in the final rule. Language has also been added to clarify that for monthly NEV testing, the last day of the month must also be one of the testing dates.

Part I

To qualify for Part I authority, the proposal added a requirement that a corporate achieve and maintain a leverage ratio of at least 6 percent, meaning that its Tier 1 capital, divided by its moving DANA, must equal or exceed 6 percent. The proposal also limited the aggregate amount of investments purchased under Part I authorities to the lower of 500 percent of capital or 25 percent of a corporate credit union's assets. NCUA did not receive any significant comment on these proposals, and they are retained in the final Part I. The final Part I removes the references to the proposed cash flow sensitivity tests in § 704.8(e)(1) and § 704.8(f)(1) since these two proposed tests do not appear in the final rule.

Part II

The proposal removed the current Part II, which generally permitted investments down to BBB, and renumbered the existing Part III, on foreign investments, as Part II.

NCUA did not receive any significant comment on the removal of the current Part II, and it is removed and replaced in the final rule with the Part on foreign investments.

The proposed Part II on foreign investments established credit exposure limits for any single foreign obligor not to exceed 50 percent of capital. The NCUA Board intended this limit to be consistent with the single obligor limits established by the proposed and final § 704.6(c). Accordingly, the final paragraph (a)(4) of Part II is amended to limit exposure to a single foreign obligor to the greater of 25 percent of capital or $5 million.

Part III

The proposal renumbered the current Part IV, which permits limited investments in derivative transactions, to Part III.

Paragraph (a) Permissible Purposes for Derivatives

The proposal modified the current authority in paragraph (a) to ensure that corporates do not use derivatives to take on additional risk. Proposed paragraph (a) permits the use of derivatives only to create structured products, mitigate interest rate and credit risk on its own balance sheet, or to hedge the balance sheet of its members. NCUA received no significant comment on this proposal, and the final paragraph (a) is adopted as proposed.

Paragraph (b) Credit Ratings of Derivatives Counterparties

The proposed paragraph (b)(1)(i) limited corporates to derivative counterparties rated no lower than the minimum permissible rating for comparable permissible term investments. Some commenters were concerned with the lack of AA- rated counterparties for corporates without Part I Expanded Authority. These commenters argued this AA- rating restriction would keep corporates from finding an adequate number of qualifying derivative counterparties. Some commenters also cited the netting and collateral posting required in derivative transactions, noting these requirements mitigate the credit risk of a derivative transaction in comparison to a similarly rated investment transaction.

The Board concurs there are few potential derivatives counterparties rated AA- or higher. In fact, there are many more potential derivatives counterparties rated A or A-, and a corporate that wants to engage in derivatives activity needs access to counterparties rated A or A-. The Board believes the credit quality of derivative counterparties is not as important as the credit quality of investment issuers. The nature of derivative transactions the corporates generally make (*e.g.,* interest rate swaps) make them less risky than traditional investments, given the relatively low exposure levels and the mitigation of credit risk associated with bilateral netting agreements and collateral requirements.

Accordingly, the final paragraphs (b)(1)(i) and (ii) permit corporates that qualify for Part III derivatives authority to engage in derivatives transactions with domestic counterparties rated no lower than A-, and, if the corporate has Part II Expanded Authorities, with foreign counterparties rated no lower than permissible under that Part II. The final paragraph (b)(1)(iv) also requires the corporate comply with the Investment Action Plan provisions of § 704.10 if any rating relied upon to meet the requirements of paragraphs (b)(1)(i) or (ii) is downgraded below the minimum rating requirements.

In addition, the Board notes that OCCU publishes separately from Part 704 the specific criteria to qualify for any particular expanded authority. NCUA will publish the parameters for Part III qualification, which parameters will include compliance with industry best practices on bilateral netting of derivatives and the posting of collateral.

Part IV

The proposal renumbered the current Part V authority on participation lending as Part IV. The final rule reflects this renumbering.

Accordingly, and except as described above, the Board adopts the final Appendix B as proposed.

Section 704.11 Corporate Credit Union Service Organizations (CUSOs)

704.11(e) Permissible Activities

The current 704.11(e), entitled *prohibited activities,* prohibits a CUSO from acquiring control, directly or indirectly, of another depository financial institution or to invest in shares, stocks, or obligations of an insurance company, trade association, liquidity facility, or similar organization.

The proposal would move the current prohibition language in 704.11(e) to proposed paragraph 704.11(g)(4) and replace the current 704.11(e) with a new paragraph entitled *permissible activities.* The new proposed 704.11(e) would require that a corporate CUSO agree to limit its activities to brokerage activities, investment advisory services, or other categories of activities (including but not limited to service activities) as approved in writing by the NCUA and published on the NCUA Web site.

Several commenters generally agreed with the proposed regulation of CUSO activities and enhancement of CUSO transparency. Some of these commenters are concerned about the migration of activities from corporates to CUSOs and increased corporate exposure to CUSO risks.

Many commenters, however, objected to the proposal that NCUA preapprove and publish a listing of approved corporate CUSO activities. Some objected to such NCUA preapproval generally, while others felt that publishing the list separate and apart from the rule created too much ambiguity in the rule and would inhibit proper corporate planning. Those commenters that objected categorically to NCUA preapproval felt such a preapproval requirement would discourage corporate ownership of CUSOs, and that such ownership was important because corporates bring a level of expertise to CUSO management that NPCUs may not bring. One of these commenters stated that NCUA should continue the approach of delineating those activities that are prohibited, not those that are approved. Another commenter believes that NCUA should not place limits on corporate CUSOs at this time because the most recent corporate crisis was an investment issue not related to CUSOs.

The Board believes that NCUA must have some oversight over corporate CUSOs. These CUSOs affect not only the health of the corporates, but also the health of the credit union system as a whole, because many corporate CUSOs serve NPCUs directly. The Board is concerned that some activities might migrate from corporates to CUSOs as a result of this rulemaking, and NCUA needs to understand and preapprove the activities of these CUSOs and have access to these CUSOs. In addition, the Board reiterates that it is not regulating just in reaction to the immediate past crisis, but also attempting to anticipate future problems and construct a regulatory scheme that will help NCUA deal with those problems when they arise.

One commenter wanted to know why NCUA had only identified two activities (brokerage and investment advisory services) as preapproved in the rule text, and stated that only one of its four existing CUSOs would prequalify under these approved activities. This commenter stated that another activity, "item processing," which was very important to its members, had been moved from the corporate to a CUSO to separate the "operational risk" from the corporate, and this commenter wanted a lengthier list of preapproved activities in the rule, including item processing. Two commenters suggested NCUA should expand the list of preapproved activities in the regulation to include item processing, shared data processing, and "shared services." This commenter and others also stated that the rule should outline the process and criteria for approving each new category and explain the criteria. Other commenters asked that the approved list include business lending services, ALM services, card services, and the programs for the purchase of CDs from other depository institutions. One commenter stated that data processing should be preapproved. A few commenters stated that the corporate rule should include the same list of preapproved CUSO activities as currently exists for federal credit union CUSOs in part 712 of NCUA's rules. One said that, at a minimum, NCUA should incorporate into part 704 all the activities described in 712.5(a), (b), (e), (g), and (k).

The Board preapproved brokerage and investment advisor services because the Board believes providing those services are very appropriate corporate CUSO activities. The Board does not believe that all the preapproved categories of activities in § 712.5 for natural person federal credit union CUSOs are necessarily appropriate for corporate CUSOs, and so declines to incorporate § 712.5 language into 704.11(e). In fact, at this time, the Board will not be adding additional preapproved activities into the rule text of 704.11(e). Corporate CUSOs may submit descriptions of the activities they currently perform, or desire to perform, to NCUA beginning immediately on publication of this rule, and NCUA will begin the review and approval process for those activities. The Board wants to examine each activity, whether new to corporate CUSOs or a preexisting activity.

One commenter suggested that a corporate submit a business case when seeking approval for a service rather than limit, upfront, the kinds of activities permissible. This commenter noted that the credit union system needs to have the flexibility to grasp opportunities as they arise. Some commenters objected to the informal nature of the NCUA approval process and wanted additional definitions and information in the rule text.

In fact, the Board's intent with the proposed, informal approval process is to streamline that process and to ensure that appropriate activities are approved as quickly as possible. Once NCUA has approved and published an activity category, any corporate CUSO may engage in that activity without further approval. The Board intends this process to be flexible enough to accommodate opportunities as they arise, without creating too much risk to the credit union system. On the other hand, the Board understands that corporates and their CUSOs need certainty, and some sort of permanence to the category or approved activities. The Board does not want corporates or their CUSOs to be concerned that NCUA might use the informal process to remove or radically alter a category of approved activities after NCUA's publication of that approval. Accordingly, the final rule adds a new paragraph (e)(3) that provides NCUA will not remove a particular activity from the approved list, or make substantial changes to the content or description of that approved activity, except through the formal rulemaking process.

One commenter was concerned about potential service disruptions as existing CUSOs go about obtaining NCUA approval. Some commenters stated that corporates would need a transition period following publication of the final rule to determine if their current corporates were engaged in activities acceptable to NCUA, with one suggesting 180 days. Another commenter thought NCUA should publish a list of approved activities in advance of the final rule, and another stated that there should be a "fast track" approval process for existing CUSOs. One commenter suggested that there should also be a 12-month period for a corporate to divest from impermissible CUSOs.

The Board is sympathetic to these concerns about the transition to the preapproval system. Accordingly, the requirement in the final rule that NCUA preapprove CUSO activities will not become applicable until April 18, 2011, so as to provide time for application to NCUA and NCUA review. Further, the final rule will permit a corporate an additional 12 months to extricate itself from an impermissible CUSO, if the corporate can demonstrate that, on the date of publication of the final rule, (1) the CUSO was actively engaged in the activity, and (2) the activity met all the requirements of § 704.11 as that rule existed prior to effective date of final rule.

A few commenters stated that, for state chartered corporates, the states should determine what CUSO activities were appropriate. One commenter stated that NCUA should retain only the authority to "restrict an activity that is determined to present an undue material risk to the insurance fund."

It is the intent of the Board that NCUA will review corporate CUSO activities for their potential impact on the insurance fund. Unfortunately, the Board cannot know in advance every sort of activity that a CUSO might wish to engage in that might have a negative impact on the NCUSIF. Accordingly, the proposed preapproval process is necessary. This is particularly true given that corporate CUSO activities present greater systemic risk to the credit union system, and the NCUSIF, than natural person credit union CUSO activities.

Many commenters wanted to know if existing CUSOs, and existing activities, would be exempt from the approval process (*i.e.,* grandfathered). Several commenters stated that previously approved corporate CUSOs and CUSO activities should be added to NCUA's approved list of CUSO activities in the proposed rule text; two commenters stated that NCUA is "aware" of current CUSO activities, and so should preapprove those current CUSO activities in the regulation. Another NPCU stated that a corporate should simply notify NCUA of what CUSOs it had and what they were doing and should not have to seek any NCUA approval, and that NCUA could obtain all the information it needs about the CUSO from "public" sources.

The Board will not be grandfathering preexisting CUSO activities. NCUA has not previously approved *any* existing CUSO activities, and is not necessarily fully aware of all activities that corporate CUSOS currently undertake or intend to undertake. Many CUSOs are privately held, and public sources provide insufficient information about what these CUSOs are doing.

704.11(g) Written Agreement With CUSO

704.11(g)(5) Agreement to Provide NCUA Expanded Access

The proposal also amends NCUA's CUSO access authority, currently limited to the CUSO's "books, records, and any other pertinent documentation," to include access as well to a CUSO's "personnel, facilities, and equipment."

Several commenters objected to the proposed expansion of NCUA access to a corporate CUSO, most believing it was overly intrusive and disruptive. Some of these commenters who disliked the proposed NCUA access did acknowledge that corporates might shunt nonperforming assets or problematic activities off to CUSOs, or that some particular corporate CUSO activities might pose particular risk to corporates or NPCUs, and these commenters generally thought that perhaps NCUA should be able to obtain access to corporate CUSOs, but only for "material" risks. One of these commenters stated that "for example, CMBS and SimpliCD may pose the threat of *material* losses in contrast to a corporate's minority interest in MDC or CUDL." None of these commenters, however, specified how, or by whom, such materiality would be determined.

As these commenters acknowledge, the NCUA is concerned about the potential migration of activities and risk from the corporates to their CUSOs. If the NCUA believes it needs access to a particular CUSO, it cannot be placed in the position of arguing with the corporate, or the CUSO, about whether the perceived risk is "material." Accordingly, the Board declines to adopt that standard for CUSO access.

Some commenters expressed concern that the expanded NCUA access envisioned for corporate CUSOs might cause third party service providers to decline credit union investment for fear of being categorized as a CUSO. In response, the Board notes that service providers cannot generally accept direct credit union investment without becoming CUSOs, but that the CUSOs of natural person federal credit unions are permitted to invest in non-CUSO service providers under certain circumstances. See 12 CFR 712.5(r). If a corporate wants to invest a minimal amount in a third party service provider, but insulate the service provider from NCUA access and oversight, the corporate can request approval from NCUA to add such an investment activity above as an approved corporate CUSO activity. Before approving such a CUSO investment activity, however, the corporate or its CUSO would have to explain the arrangement, including the extent of the proposed investment by the CUSO in the service provider and why NCUA access to the particular service provider is not necessary to ensure protection of the NCUSIF.

Some commenters thought NCUA did not have the expertise to examine CUSO activities, or that regulation by state regulators, or that NCUA access to CUSOs through NPCU FCU owners, would be sufficient. In fact, NCUA doubts that it would ever become the primary regulator of a CUSO, or would conduct routine exams of any particular CUSO. The intent of the provision is to ensure that NCUA can get quick and complete access to a CUSO should the need arise.

Some commenters believe that access by NCUA would only be appropriate where the corporate has a "controlling interest," as opposed to a minority interest. The Board disagrees. Three or four corporates, or corporates and other credit unions, could form a CUSO where no one credit union had a controlling interest, and this CUSO could present the same risk to the credit union system as a CUSO that is controlled by one corporate.

One corporate commenter stated that the proposal "appears to give the NCUA expanded authority over a CUSO simply by virtue of a corporate credit union holding stock in a CUSO." This commenter did not see why a corporate CUSO should receive different NCUA supervision than a natural person credit union CUSO. This commenter does not understand that NCUA has long required, for both natural person FCU CUSOs and corporate CUSOs, that the CUSOs permit NCUA access to their books, records, and documentation. *See, e.g.,* 12 CFR 712.3(a)(3). Given the expanded rule that corporate CUSOs are likely to play in the future of the credit union system, the proposal ensures that NCUA has access commensurate with the systemic risk that corporate CUSOs may present.

Accordingly, and except as described above, the Board adopts the final § 704.11 as proposed.

Section 704.14 Representation

Proposed Revisions

The proposal required that all corporate board members hold either a CEO, CFO, or COO position at their member credit union or other member entity. The proposal also required that a majority of a corporate's board members be representatives of natural person credit union members and that individual board members, and the organizations they represent, be limited to no more than six consecutive years of board service. In addition, the proposal prohibited any person from sitting on the boards of two or more corporates at the same time, and would preclude a single organizational member from having more than one individual representative on the board of any given corporate. Some aspects of the proposal, such as the requirement that a majority of the corporate board be representatives of natural person credit unions, would be phased in over time. The provisions governing term limits would have taken effect at the time of the next election to the board, so that no currently sitting director would have to resign before his current term expired, regardless of the length of time he had been on the board.

General Comments on the Proposal

Some commenters asserted that NCUA's efforts to impose limits or standards in the area of board membership were excessive and beyond the scope of what was appropriate for the regulator. Many stated that attempts to regulate in this area usurped the rights of the membership to make their own decisions concerning their representatives and were inconsistent with the democratic principles that are fundamental to credit unions.

The NCUA has long been in the business of setting standards for credit union governance. The Federal Credit Union Act, for example, provides the Board with specific authority to promulgate standard FCU bylaws, as well as general authority to regulate both federal credit unions and federally insured credit unions, and to protect the NCUSIF. *See, e.g.,* 12 U.S.C. 1758. Corporate credit unions play a fundamental role in the credit union system, creating both significant systemic benefits and significant systemic risks, and the make-up of the board of directors has a significant impact on the risk to the NCUSIF. Accordingly, NCUA has, for many years, established governance parameters for corporates. While members retain the right to elect directors, for example, the NCUA has previously imposed governance requirements, such as standard federal corporate bylaws and rules pertaining to conflicts of interest and overlapping relationships between directors and trade associations that apply to all corporates. The proposed and final governance provisions are consistent, in form and content, with these principles.

Some commenters questioned whether the proposed limits and restrictions would have made any difference in avoiding the losses that corporates sustained during the recent market dislocation. Whether or not these new provisions might have affected the size or scope of the losses is not determinable. Still, the Board reiterates its belief that improving and strengthening corporate governance will help corporate credit unions to survive whatever market conditions they must face in the years ahead.

Another commenter, representing the views of state regulators, asserted that issues such as director qualifications and term limits for state chartered entities rightfully come under the province of state law, as administered by state regulators, and that NCUA has no business regulating for all corporates in these areas. In response, the Board reiterates that part 704 has historically been applicable to all corporates, including state chartered corporates, because of their systemic risk to the credit union system and the NCUSIF. The final rule contains several requirements and references to collaboration between NCUA and the relevant state regulator when working with state chartered corporates, and the Board intends the tradition of collaboration will continue.

Some commenters expressed concern that NCUA may elect to impose some or all of the proposed governance requirements on directors of natural person credit unions. The Board did issue a proposed rule in July, 2010, that would extend the golden parachute and indemnification provisions originally proposed for corporates to all insured credit unions. 75 FR 47236 (Aug. 5, 2010). The Board does not, however, presently anticipate that any of the other governance provisions in this rule, as proposed or finalized, will also be extended to natural person credit unions.

A discussion of the specific governance revisions adopted in the final rule follows.

704.14(a) Board Representation

704.14(a)(2) Boards Limited to CEOs, CFOs, or COOs

The proposed 704.14(a)(2) prospectively limited those who could seek reelection to sitting CEOs, CFOs, or COOs.

A large number of commenters opposed the requirement that service on the board of a corporate be limited to individuals currently holding the position of CEO, CFO, or COO of a member institution. Several commenters noted that many credit unions are run by individuals holding the title of manager or treasurer, and that the rule should be changed to accommodate such circumstances. Many commenters criticized this provision as being, simultaneously, overly restrictive and ineffective. These commenters stated that there may be many individuals with the willingness, capacity, and expertise sufficient to enable them to be very effective members of the board, but who may not hold one of these three titles. These commenters believe that accountants, attorneys, and capital market specialists, for example, may all have the type of background that could be of value to a corporate credit union. Some commenters also supported extending the qualifications to retirees. Commenters also noted that just having one of the three enumerated titles is no assurance that an individual will exhibit the requisite competence or commitment required to be a successful member of the board. Many commenters questioned whether any evidence exists to support the view that any of the problems currently afflicting the corporate sector can be attributed to boards being comprised of individuals lacking these titles; many also suggested that the imposition of this requirement would have done nothing to avert the problems that were encountered. Several noted, for example, that there was no shortage of persons holding these titles on the boards of the two corporates currently in the conservatorship of the NCUA.

Many commenters complained that, by imposing this restriction, the agency would be overstepping the boundary of appropriate regulatory oversight and treading on territory that is more properly left to the membership. These commenters believe that the democratic principles that have always characterized the member-owned, member-controlled credit union movement require that members be allowed to make their own decisions about whom to elect to the board. Many of these commenters suggested that a more appropriate approach for NCUA to take in this respect would be to impose a requirement that nominating committees establish guidelines concerning education and experience criteria that must be met by candidates for board positions. Alternatively, many commenters proposed that NCUA approach this issue by requiring corporates to implement mandatory training and continuing education programs for all directors, possibly through a new bylaw provision establishing such a requirement. Some suggested that NCUA simply impose an experience requirement, such as five years working in the credit union sector, as a prerequisite to eligibility to serve on a corporate board; one suggested imposing a minimum age for service on the board. Another commenter suggested imposing a requirement that directors may only come from member credit unions with a specified minimum level of investment in the corporate. Several commenters also urged NCUA to require corporates to adopt best practices for boards to follow in this context, including provisions dealing with attendance, training, self assessment and review.

A few commenters, typically representing smaller credit unions, believed that one probable outcome of this rule would be that smaller credit unions, which typically have relatively few employees, could be effectively excluded from representation on boards. In some cases, for example, the CEO (or Treasurer/Manager) may be one of only two or three full time employees. The credit union may be unable to spare the individual or allow him or her to devote the type of time commitments required of board membership. Consequently, according to these commenters, many such credit unions may go without representation at their corporate.

Other comments on director qualifications included the suggestion that NCUA allow directors of corporates to be paid for their service on the board. Several commenters also suggested that NCUA should allow up to 20 percent of the board to consist of outside directors, specifically to include individuals with capital market knowledge and experience, provided that NCUA also establish and impose appropriate safeguards to protect against conflicts of interest involving such individuals. One commenter suggested extending the qualification concept to include executive officers, by imposing a knowledge or experience requirement before individuals may take a position with responsibility for finance, investment, credit risk and enterprise risk areas of the corporate's business.

The Board acknowledges that, in the case of some natural person credit unions, the person fulfilling the role of chief executive actually holds the title of Treasurer/Manager. This title, which is perhaps more common among smaller credit unions, has traditionally been used as a more descriptive term for what the chief executive actually does on a day to day basis. In any event, the Board recognizes that the same rationale that deems a CEO as qualified to serve on the board of a corporate should apply equally to the case of persons holding the Treasurer/Manager title. Accordingly, the final rule has been expanded to include this position in the category of persons qualified to fulfill the role of corporate credit union director.

The Board has elected not to make additional changes to the proposed rule. Although the Board recognizes that some individuals who are not employed in one of the identified, qualifying positions may actually have the ability to serve on a corporate board, the Board nevertheless believes the listed positions (as noted above, expanded to include Treasurer/Managers) provide a good proxy for the most qualified, experienced and capable individuals in the credit union industry. These are, in other words, the very persons whose knowledge, skills and abilities are necessary to guide and direct corporates through to the next stage of their business.

The Board notes, in this respect, that corporate boards are free to retain the services of subject matter experts as consultants or advisors to the board, to the extent that such expertise in a particular field, such as capital markets or real estate, should be viewed as necessary. Corporates are also free to propose non-standard bylaw provisions that would require, for example, that incumbent directors must receive periodic training from qualified sources on issues of importance to the corporate's operations and business model, including such aspects as capital markets and investments, asset-liability management, accounting and regulatory compliance. As the Board noted in the preamble to the proposed rule, citing Corporate Credit Union Guidance Letter 2005–02, directors must have considerable knowledge and devote sufficient time to have an adequate understanding of a corporate's operations. If anything, these principles have greater urgency in 2010 than they had in 2005 when that Guidance Letter was first issued. The Board also rejects the notion of allocating some portion of director slots to outside directors, as this would be inconsistent with the democratic principles that have always been fundamental to the credit union industry.

704.14(a)(3) Term Limits

The proposed paragraph 704.14(a)(3) provided generally that no corporate board members could seek election if, at the end of the term to which elected that board member would have served more than six consecutive years.

The issue of a mandatory 6-year term limit for board members attracted, by far, the most comment within the sphere of comments directed toward the governance aspects of the proposal, with hundreds of commenters opposed to the proposed term limit. Many commenters opposed the notion of term limits altogether, arguing that members should not be constrained in their ability to select individuals of their own choosing to serve on the board. These commenters argued that NCUA would be exceeding its proper role by establishing an arbitrary barrier that would undermine freedom of choice of the membership. Virtually all of the persons who commented on the term limit proposal asserted that a 6-year period is too short. These commenters argued that a 6-year period would create significant disruption in the management and operation of corporates, at a time when significant challenges to their survival are foreseeable and when the full attention and concentration of the board will most be required. Many commenters expressed concern that the effect of the term limit provisions would be to severely disrupt the institutional knowledge available to the board. Several pointed out that six years is less than the duration of the typical business cycle. One commenter predicted that the turnover caused by the proposed term limit would create "havoc;" and many others cautioned against the likelihood of unintended consequences should the provision become final.

Some of these commenters may have misread the proposal, as it would not require any currently sitting director to resign his or her seat. Instead, it would apply to those seeking re-election. Most corporate boards should have staggered terms, such that only a percentage of the entire board is up for re-election each year. Nevertheless, the Board acknowledges the concern identified by some commenters who indicated that, at least initially, the average remaining tenure for current board members would probably be about three years under the proposal.

Some commenters argued that corporate boards are substantially different from NPCU boards and that a dramatically greater learning curve exists before a director can typically acquire the level of knowledge and expertise he or she needs to make a meaningful contribution to the work of the board. These commenters believe that a 6-year term limit would require experienced directors to exit the board just at the time they had become productive, leaving the corporate dangerously exposed to the oversight and management of an inexperienced board.

Other points argued by commenters in opposition to the 6-year term limit included that management officials of the corporate would become more vulnerable to pressure to implement short-sighted policies or programs to meet the direction of board members who will not be with the corporate long-term. Another point raised by several commenters representing or served by corporates in small or rural states is that the universe of candidates available for service on the board is relatively small, and that the turnover required by a 6-year term limit would create a hardship for those corporates to recruit and retain capable directors. Some commenters called for the grandfathering of service by existing board members completed before the final effective date of the rule; a few asserted that the rule should not be applied to cover the term of service of an individual appointed to fill an unexpired term, lest such individual be precluded from seeking two elected terms, which the rule would ostensibly permit.

Commenters opposed to the 6-year limit suggested a wide range of alternatives. Most commenters suggested that, if required at all, the term limit should be extended to 9 or 12 years, to allow for the development of appropriate experience on the board and to dampen the impact of sudden, massive turnover; some commenters proposed a 10-year or 15-year term limit, and one even advocated for 20 years. Another suggested allowing the lesser of four consecutive terms or nine years, while another suggested abandonment of term limits for directors but imposing a specific limit on the time a board member may hold a particular board office, such as chairman, etc.

The Board is persuaded by the arguments made by commenters to the effect that the imposition by rule of mandatory term limits for directors is inconsistent with the democratic principles on which credit unions are founded. Accordingly, the final rule deletes the proposed paragraph 704.14(a), with its associated mandatory term limit, and renumbers the remaining subparagraphs of 704.14(a). The Board notes that individual corporates may as a matter of policy determine that some sort of limitation on consecutive service by directors is appropriate. In such cases, the corporate is free to propose a non-standard bylaw imposing reasonable term limits. The corporate could also, for example, impose an internal requirement that board offices, such as board chairman, be rotated among directors in accordance with a prescribed schedule.

704.14(a)(4) Individual Service on More Than One Corporate Board

The proposed paragraph 704.14(a)(4) prohibited any individual from being elected or appointed to serve on the board if, after such election or appointment, the individual would be a director at more than one corporate credit union. The NCUA did not receive any significant comment on this proposal, and there is no change to it in the final (other than renumbering to (a)(3)).

704.14(a)(5) Multiple Member Representatives on Corporate Board

The proposed paragraph 704.14(a)(5) prohibited any individual from being elected or appointed to serve on a corporate board if, after such election or appointment, any member of the corporate credit union would have more than one representative on the board of the corporate. The NCUA did not receive any significant comment on this proposal, and there is no change to it in the final rule (other than renumbering to (a)(4)).

704.14(a)(10) Majority of Directors Must Be NPCU Representatives

The proposed paragraph 704.14(a)(10) required that at least a majority of directors of every corporate credit union, including the chair of the board, must serve on the board as representatives of natural person credit union members. This requirement would be effective 36 months after publication of the final rule in the **Federal Register**. The commenters addressing this proposal were generally supportive, and there is no change to it in the final (other than renumbering to (a)(9)).

Accordingly, and except as discussed above, the Board adopts the final § 704.14 as proposed.

(Current) Section 704.19 Wholesale Corporate Credit Unions

The proposal would eliminate the current § 704.19, which grants wholesale corporate credit unions a lesser RE reserve requirement than the requirement generally applicable to retail corporates.

No commenters objected to the elimination of this provision, and the final rule eliminates it.

(Proposed and Final) Section 704.19 Disclosure of Executive and Director Compensation

The proposal would have required that each corporate prepare, on an annual basis, a document that discloses the compensation, in dollars, of each senior executive officer and director. Compensation is broadly defined, and includes benefits, deferred payments, informal arrangements, and payments made to acquaintances and relatives. Any member of the corporate could obtain a copy of the disclosure upon request, and the corporate would also be required to distribute the information to its members at least once a year, in the annual report or by some other means of its choosing. The proposal would have permitted the corporate to include with the disclosure additional information if necessary to put the disclosure in context. With respect to any corporate merger, a merging federally-chartered corporate would be required to affirmatively disclose to both NCUA and its members any material, merger-related increase in compensation (*i.e.,* an increase of more than 15 percent of annualized compensation or $10,000, whichever is greater) for any senior executive or director. The proposal would have also required a state-chartered corporate to make the merger-related disclosure, but only to NCUA unless state law requires otherwise.

General Comments

Many commenters expressed concern with this aspect of the proposal.

Several expressed opposition based on privacy, arguing that an executive's compensation is no one's business except his or her own. Others took the view that the proposed disclosure requirements were punitive in nature and would not, had they been in place, have had any significant impact on helping corporates weather the recent market dislocation and economic crisis.

The Board disagrees that the disclosure requirements are in any way punitive or violative of legitimate privacy expectations. The rule is designed to assure that corporate credit union members are aware of the level of compensation paid to senior management officials. As the Board noted in the preamble to the proposed rule:

> The member-owners of a corporate credit union have a strong financial interest in the corporate. The typical corporate member has large investments in the corporate and much of this investment is at risk, either in the form of paid-in capital, membership capital, or uninsured shares. The corporate member has a powerful interest in ensuring this at-risk investment is properly managed and protected. That interest extends both to ensuring the corporate provides proper financial incentives to its managers to do a good job and also that the corporate is properly expending its funds—information categories that both include senior management compensation.

74 FR 65210, 65252 (December 9, 2009). The Board believes the members' interest in this information outweighs any privacy interests the senior managers may have in the information. The Board also believes these interests exist whether or not such information would have mitigated the corporate losses sustained during the last two years.

Many commenters predict that the disclosures will make recruitment and retention of qualified senior executives much more difficult, as potential candidates will opt for other positions not subject to potential disclosure. The Board disagrees, as discussed further below. Other commenters argued that adequate methods currently exist for members to gain access to compensation information, while several asserted that compensation information should only be accessible to the NCUA, which ought to use its own regulatory powers and oversight to assure that arrangements are not unreasonable. Some commenters asserted that information should be made available only on an aggregate basis, or should only be made available to members on request, rather than disseminated.

The Board is of the view that disclosure on an aggregate basis would not provide the level of warranted transparency. Further, the Board does not believe NCUA's role should be the arbiter of appropriate compensation in lieu of the members.

A few commenters evidently misread the disclosure requirement and complained that the disclosure should not be made to members of the public or to the media, which in fact the proposal does not require. Other commenters called for the rule to allow corporates to present the compensation information in their own preferred format, with contextual information, which is also permissible under the current proposal. One commenter asked for a definition of the term "compensation" for purposes of the required disclosure. The proposed rule, however, does contain a detailed definition of "compensation" in § 704.2.

704.19(a) Annual Disclosure

The proposal required that corporates must annually prepare and maintain a disclosure of the compensation, in dollar terms, of each senior executive officer and director.

Several commenters made the point that, as currently defined, the term "senior executive officer" would extend to individuals who may hold a title, such as vice president, but who are not truly senior level executives with program level or operational authority or responsibility. Commenters suggested that these are not the types of employees who ought to be subject to the disclosure requirements. Many commenters suggested that NCUA adjust the rule to limit it to the truly senior level executives, for example by limiting the disclosure obligation to the CEO and the executives who report directly to the CEO, or by limiting the disclosure to include only the top five officials in terms of compensation. Another suggestion was to simply establish a compensation threshold and extend the disclosure obligation to all earners receiving income above the threshold. Several suggested that NCUA follow the SEC rules on identifying which are the truly senior level officials for purposes of this disclosure obligation. Others suggested that NCUA should simply adopt and follow the approach applicable to those state chartered corporates that must file the IRS Form 990 compensation disclosures.

The Board agrees that the proposal was very broad. In many corporates, individuals may hold the title of vice president but not necessarily have program level or operational authority. Mandatory disclosure of compensation paid to such individuals would extend the concept of transparency beyond what the Board considers to be a reasonable level. Accordingly, the Board has modified the final paragraph 704.19(a) so that disclosure is required only of compensation paid to approximately the top ten percent of employees with, generally, a minimum of three employees who must disclose and a maximum of five. Specifically:

- Final paragraph (a)(1) requires corporates with 41 or more employees must disclose compensation paid to the top 5 most highly paid individuals.
- Final paragraph (a)(2) requires corporates with between 30 and 41 full time employees must disclose the compensation paid to the 4 most highly compensated employees.
- Final paragraph (a)(3) requires corporates with 30 or fewer full time employees must disclose compensation paid to the 3 most highly paid individuals.

In addition, final paragraph (a)(4) requires that compensation paid to the corporate's chief executive officer must also be disclosed, if the chief executive officer is not already included among the most highly compensated employees described in subparagraphs (a)(1) through (a)(3).

The Board also determined to remove the reference to directors from paragraph 704.19(a), as it is highly unlikely that a director, in his or her capacity as director, would be among the most highly compensated individuals at the corporate.

The Board believes this revised compensation disclosure provision strikes a reasonable compromise between the right of the corporate's members to know the level of compensation paid to its senior staff and the expectation of privacy that mid and junior level executives have concerning their personal affairs. Also, as discussed in the preamble to the proposed rule, the Board has concluded that the disclosures in the IRS Form 990 are an insufficient substitute for those required in this final rule.

The Board did not receive any other significant comment on the proposed provisions of § 704.19. Accordingly, and except as described above, the Board adopts the final § 704.19 as proposed.

Section 704.20 Limitations on Golden Parachute and Indemnification Payments

The proposal would have prohibited golden parachutes, that is, payments made to an institution affiliated party (IAP) that are contingent on the termination of that person's employment and received when the corporate making the payment is either troubled, undercapitalized, or insolvent. The proposal would have also generally prohibited a corporate, regardless of its financial condition, from paying or reimbursing an IAP's legal and other professional expenses incurred in administrative or civil proceedings instituted by NCUA or a state regulatory authority where the IAP is ultimately found liable. For federal corporates, the proposed indemnification limits would be in addition to the requirements of § 701.33.

General Comments

Most commenters that expressed concern about the proposal believed it might inhibit the ability of a corporate to recruit and retain qualified individuals willing to serve as board directors. Several commenters stated that, unlike their counterparts in the banking sector, these individuals serve without pay, on a voluntary basis. Some commenters expressed concern that many such individuals will be unwilling to serve as board members if they believe their own personal net worth is at risk and their corporate is unable to offer them protection against potentially unlimited personal claims.

The Board does not agree with these commenters. First, although most individuals who serve on the boards of corporates are technically uncompensated volunteers, they are, in fact, for the most part employees of NPCU members who are tagged to serve at the corporate by their NPCU and who do so as part of their responsibilities to the NPCU. So if the NPCU asks them to serve, they will. Second, the indemnification limitations in the proposal apply only to administrative enforcement actions brought by the NCUA or another appropriate regulator. Such actions, which often take the form of either a removal action or an attempt to prohibit an individual from serving on behalf of an insured depository institution in the future, do not typically threaten the targeted individual with "unlimited" personal liability. In addition, the Board notes that paragraph 704.20(a)(9) does allow for the purchase of director and officer liability insurance to protect the director. Finally, paragraph 704.20(e) of the proposal permits a corporate, if it makes a good faith determination that the affected director was acting in a manner he or she believed to be in the best interests of the institution, to make reasonable indemnification payments subject to the director's written agreement to reimburse the corporate should the director ultimately be found liable. As a technical clarification, the final rule replaces the word "institution" with the word "membership" in paragraph 704.20(e)(1)(i). *See* 75 FR 15574, 15575 (March 29, 2010) and 71 FR 77150, 77155 (Dec. 22, 2006). Accordingly, and except as described above, the Board adopts the final § 704.20 as proposed.

D. Part 709—Involuntary Liquidation of Federal Credit Unions and Adjudication of Creditor Claims Involving Federally Insured Credit Unions In Liquidation

The proposed rule revised the payout priority of 709.5(b)(7) to reference the capital priority option set forth in Appendix A. The final rule further amends the payout priority to clarify that no claim is available for capital accounts or instruments depleted in a year prior to the date of liquidation. This is consistent with the final amendments to Model Form A in Appendix A, which include disclosure language that depleted capital has no claim against the liquidation estate for claims filed beyond the fiscal year of depletion. For clarity, and to reduce the potential ambiguity associated with "fiscal year," the final rule also substitutes "calendar year" for "fiscal year." The final rule contains a similar amendment to § 709.5(b)(9).

Part 747—Administrative Actions, Adjudicative Hearings, Rules of Practice and Procedure, and Investigations

Subpart M—Issuance, Review and Enforcement of Orders Imposing Prompt Corrective Action on Corporate Credit Unions

The proposal would add a new subpart M to part 747, setting forth the procedures and due process available in connection with the PCA provisions of proposed § 704.4.

The Board received very little comment on proposed subpart M, and the final rule adopts subpart M as proposed.

IV. Analysis of the Final Investment, Credit Risk, and ALM Provisions

The final rule requires that corporates strive to achieve 100 BP of retained earnings (RE) in the first six years. Of course, some corporates already have some amount of RE, and so achieving this 100 BP after six years may not be a challenge for them. For those that currently have little or no RE, they must earn about 17 BP a year on average to meet the 6-year mark. This section illustrates how a corporate might structure its investment portfolio to satisfy the RE growth requirements while complying with the new investment, credit risk, and ALM provisions in the final rule.[27] The intent of this section is to demonstrate that there are multiple possible approaches to portfolio construction available to corporates under the rule. NCUA does not promulgate or endorse a preferred asset allocation or structure.

Several public commenters wrote about the ability of a corporate to achieve the necessary RE growth under the restrictions of the rule, and some of

[27] The final rule also requires a corporate get to 200 BP in 10 years. We expect that a corporate that can get to 100 BP in 6 years has a reasonable chance to get to 200 BP in 10, particularly since the RE itself will start generating earnings. Also, the following modeling assumes a clean sheet balance sheet, that is, that the corporate is able to sell those assets on its existing balance sheet that cause it to violate the final corporate rule or that carry the possibility of significant future credit losses. The Board realizes that some corporates may be unable to entirely clean their balance sheet of such legacy assets. As discussed above in the *Legacy assets* section, NCUA might grant these corporates waivers of some corporate rule requirements, including a waiver of the maximum allowable time to build the retained earnings required by this regulation. Any waiver involving the required retained earnings growth rate, however, will tied to the documented amount of losses flowing from legacy assets identified in an approved action plan. 12 CFR 704.1(b).

these commenters provided sample corporate investment portfolios. NCUA identified 12 different public comment letters with "model" investment portfolios, that is, investment portfolios recommended by the commenters as appropriate for corporates going forward. Among these 12 comment letters there were 3 unique, model portfolios. One unique portfolio was submitted by Southwest Corporate FCU and another by Magnus Enterprises.[28] A third portfolio was submitted by 10 different commenters. This latter portfolio was originally provided to NCUA by the Association of Corporate Credit Unions (ACCU).[29]

To analyze the efficacy of this final rule, this section first constructs a hypothetical corporate balance sheet that satisfies the restrictions of the final rule, and then demonstrates that this portfolio generates the necessary 17 BP of earnings growth per year. This section then includes a second hypothetical balance sheet, with a different asset allocation, that also generates sufficient RE. The section then examines the complete model balance sheets submitted by Southwest FCU, Magnus, and the ACCU. Each of these balance sheets uses a different asset allocation from both the NCUA hypothetical balance sheets and the other two model balance sheets. The analysis shows that each of these three unique balance sheets either does—or can easily be modified to—comply with the requirements of the final rule, and that each of these portfolios can generate more than enough RE inside the given balance sheet to meet the 17 BP annual RE growth requirement.

A. Hypothetical Balance Sheet #1

NCUA constructed a balance sheet with the following asset allocation, liability allocation, WAL, capital, and spread characteristics:[30]

HYPOTHETICAL BALANCE SHEET #1

Sector	Percent of balance sheet (percent)	Spread to LIBOR (basis points)	WAL (years)	WAL in 50% pre-payment slowdown (years)
Assets				
FFELP Student Loans	10	33	3	3.8
ABS—Autos	5	15	2	2.5
ABS—Credit Cards	10	25	3	3
Bonds—Corporate	20	82	3.5	3.5
Agency RMBS	15	45	[31] 4	7
Overnight Investments	40	0	0	0
Total	100	29.7	1.7	2.03
Equity and Liabilities				
Overnight Shares	36	−10		
Term Certificates	60	0		
Member Capital	4	0		
Total	100	−3.6		
Net Interest Income (basis points)		33.3		

Model Balance Sheet Compliance With the Final Corporate Rule

NCUA constructed the asset allocation so that it would comply with the restrictions of the final rule. Specifically:

- All NRSRO ratings are AA or better.
- There are no private label RMBS.
- Sector limits are observed.
- The structured securities are primarily floating rate, so the IRR NEV test of 704.8(d) is satisfied.[32]
- The portfolio has a WAL of 1.7 years, which is under the 2.0 year limit in 704.8(f). The final rule permits the actual WAL of Treasuries, Agency RMBS, and Agency GSEs to be reduced by a factor of 0.5 for purposes of the two WAL calculations. Accordingly, this agency RMBS WAL will be reduced to 2.0 years.
- Under the prepayment slowdown scenario, the WAL extends only to 2.03 years, well within the 2.25 year limit required by 704.8(g). Corporate bonds do not prepay, so the extension test does not affect them; and the agency RMBS WAL of 7.0 years will be reduced, when multiplied by the 0.5 factor, to 3.5 years.

More information about the assets, liabilities, and capital used in the balance sheet follows.

Assets Used in the Balance Sheet

NCUA has allocated investments across five distinct asset classes that are permissible corporate investments. For diversification purposes, no asset sector, other than overnight investments, exceeds 20 percent of the portfolio (although the final rule permits greater concentration in several of these sectors). NCUA determined that 40 percent of the current average corporate

[28] Both the Southwest and Magnus comment letters were dated February 17, 2010. These public comment letters, as with all public comment letters on proposed NCUA regulations, are available on NCUA's Web site at *http://www.ncua.gov*. Additionally, the Magnus comment letter first appeared on the blog *http://www.unrealizedlosses.blogspot*.com and was likely drafted by the author of that blog.

[29] The ACCU analysis was provided to NCUA in an email from then ACCU Executive Director Brad Miller to Director, OCCU, Scott Hunt, Subject: ACCU Part 704 Analysis, dated February 22, 2010. For an example of a public comment letter that employs this particular ACCU portfolio, see the public comment letter from the California and Nevada Credit Union Leagues, dated February 17, 2010.

[30] This balance sheet differs from the one described by NCUA in the proposed rule. Changes in the final rule, such as the prohibition on private label RMBS, would affect that earlier hypothetical balance sheet.

[31] The final rule permits the actual WAL of Treasuries, Agency RMBS, and Agency GSEs to be reduced by a factor of 0.5 for purposes of the two WAL calculations. Accordingly, this 4-year WAL will be reduced to 2.0 years, and on the extension test, the 7-year WAL will be reduced to 3.5 years.

[32] Given today's low rate environment, NEV volatility should not be significant even with the existence of interest rate caps.

credit union portfolio has maturities of less than 180 days, and NCUA used this for the overnight allocation percentage. Forty percent is also the median percentage allocation in the public commenter models.

The model uses current spreads over LIBOR, determined as of early August, 2010, for each asset class. NCUA used two primary sources of data for its spread numbers. The first source was Bank of America//Merrill Lynch's, *US Securitization Research, Securitization Weekly,* dated August 6, 2010. The second source was Wells Fargo Securities' Libor/Swap spreads for July 30, 2010. These sources were supplemented with actual market observations for a number of agency RMBS.[33] NCUA believes that these spread numbers represent typical spreads, although NCUA did find some particular CUSIPs of the same asset type, credit quality, and WAL that had better spreads.[34]

The FFELP student loan ABS spread data assumes a generic AAA-rated bond with a 3-year WAL. The auto ABS spread data assumes a generic AAA-rated bond backed by prime automobile loans with a 2-year WAL. Auto ABS backed by subprime automobile loans are also available in the market at wider spreads but these were not included in the portfolio. The credit card ABS spread data is for a generic AAA-rated bond with a 3-year WAL. The corporate bond portion of the portfolio assumes an equal allocation of generic AA-rated 2-year bonds paying 67 BP over LIBOR and generic AA-rated 5-year bonds paying 97 BP over LIBOR.

The WAL and WAL extension calculations above reflect the 0.5 reduction factor for the agency RMBS. The WAL life of the portfolio without the application of this factor would be 1.95 years and the WAL assuming a 50 percent slowdown in prepayments would be 2.40. This illustrates the benefit to the corporates of permitting longer WALs for U.S. Government and Agency securities.

Liabilities Used in the Balance Sheet

The overnight share allocation of 36 percent is based on the lowest observed month-end level of corporate overnight shares during the past 10 years. The average percentage of overnight shares for the five years leading up to the implementation of the corporate share guarantee was higher, ranging from 42 to 49 percent. The 36 percent figure is also comparable to the median of 42.5 percent in the models submitted by commenters. Many corporate credit unions use the federal funds effective rate for setting dividend rates on their overnight accounts; and NCUA used this benchmark to set the overnight rate at LIBOR—10.

The certificate allocation of 60 percent constitutes the remaining liabilities after setting overnight shares at 36 percent and contributed capital at 4 percent. The hypothetical balance sheet assumes certificates pay LIBOR flat, which is a reasonable spread over agency securities with similar maturities and is consistent with the assumptions in the models submitted by Southwest and the ACCU.

Contributed Capital Used in the Balance Sheet

The balance sheet model assumes contributed capital is priced at LIBOR flat. Some, but not all, commenter models priced contributed capital at spreads as high as 150 BP or 200 BP over LIBOR. Most capital instruments pay dividends based on the financial condition and performance of the underlying organization rather than a strict formula, and the same should be true for corporate credit unions. Accordingly, NCUA believes that members should accept a lower dividend payment on their PCC and NCAs until such time as their corporate is able to accumulate sufficient earnings to satisfy the RE requirements of the final rule.

There are various ways that a corporate could structure its PCC and NCA dividend provisions to facilitate a corporate's RE goals. One way would be for a corporate to offer capital instruments with a spread of 100 to 200 BP above LIBOR, but which also clearly notes that in any given year, should the corporate fall short of a particular earnings growth goal, the actual dividend paid may be reduced as low as zero (on a noncumulative basis) to make up for the earnings shortfall. To the extent that a member receives a reduced dividend in a given year, the member should consider this reduction as a form of fee for services received.

Model Balance Sheet's Ability To Generate Earnings

There are three major components to the determination of whether a corporate can generate earnings and the amount of such earnings. One component is *net interest income* (NII), which is generally calculated by taking the difference between the interest generated by the corporate's loans and investments and subtracting off the cost of the corporate's liabilities. The other two components are the *total non-interest income* (TNII)(which is primarily fee income) and the *operating expenses* (OE). A corporate's earnings, or *net operating income,* is then calculated using the following equation:

Net Operating Income (Earnings) = NII + TNII—OE

Although the income on a corporate's investment feeds into the NII and not into either the TNII or the OE, assumptions about the latter two terms are important in estimating the corporate's ultimate ability to generate earnings. Accordingly, before looking at a corporate's asset allocation and the NII it can produce, a discussion of TNII and OE is in order. For purposes of this document we define the difference between TNII and OE as *net operating expenses* (NOE), because it will generally be a negative number. Then:

Earnings = NII + NOE.

For the most recent 12 months ending in June, 2010, the average corporate TNII was 25 BP, and the average OE was 40 BP. NOE, then, was a negative 15 BP and, for the corporate to generate the necessary 17 BP in earnings, it must strive to generate 32 BP in NII.

NCUA believes that approximating NOE at negative 15 BP is a good starting point for any analysis. The expected earnings of this hypothetical balance sheet are demonstrated here:

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[33] For example, a Fannie Mae sequential pay floating rate CMO, CUSIP 31398RV51, with a 6.5 percent cap.

[34] Examples of particular securities follow.

ABS—Auto.

Example 1. CUSIP 34529LAD6, Issuer Ford Credit Auto Owner Trust, WAL 2Yr, 1st Settle Date 4/28/10, Coupon 1.32%, Maturity 8/14/10. On its settlement date 4/28/10, the price was 99.50 and the yield 1.5720. LIBOR 1Yr 1.2% (estimated). Spread over LIBOR: 37 BP Example 2. CUSIP 06052MAB1, Issuer Bank of America Auto Trust, WAL 1Yr, 1st Settle Date 6/24/10, Coupon 0.91%, Maturity 8/15/10. On its settlement date 6/24/10, the price was 98.50 and the yield was 2.4574, LIBOR 1Yr 1.2 (estimated). Spread over LIBOR: 125 BP

ABS—Credit Card.

Example 1. CUSIP 02582JFT2, Issuer American Express, WAL 2.9Yr, 1st Settle Date 6/9/09, Coupon 1.69094%, Maturity 5/15/14. On its settlement date 6/9/09, the price was 100 and the yield was 1.6415. USD SWAP 3Year 1.30 (estimated). Spread over LIBOR: 34 BP

Example 2. CUSIP 36159JCC3, Issuer GE Capital, WAL 3Yr, 1st Settle Date 6/24/10, Coupon 2.21%, Maturity 6/15/13. On its settlement date 6/24/10, price 99.22, yield 2.4950, USD SWAP 3Yr 1.30 (estimated). Spread Over LIBOR: 120 BP

ABS—Student Loan

Example 1. ISIN USU82908AA93, Issuer SLM Student Loan Trust, WAL 0.9yr, 1st Settle Date 7/22/10, Coupon 2.25%, Maturity 7/22/11. On its settlement date 7/22/10, price 100.10, yield 2.1540, LIBOR 1Y 1.20 (estimated). Spread over LIBOR: 95 BP

Example 2. CUSIP 78445MAA8, Issuer SLM Student Loan Trust, WAL 3.4Yr, 1st Settle Date 3/11/10, Coupon 3.2%, Maturity 3/11/2014. On its settlement date 3/11/10, price 99.85, yield 3.2692, USD SWAP 3Yr 1.30 (estimated). Spread over LIBOR: 196 BP.

All these securities are rated AA- or higher.

Hypothetical Balance Sheet #1	(Basis points)
Net Interest Income (NII) (from model)	33.3
TNII	25
OE	40
NOE	(15)
Net Income From Operations (Earnings)	18.3

Accordingly, the asset allocation in hypothetical balance sheet #1 should produce about 18.3 BP of earnings growth a year, more than the necessary 17 BP of annual earnings necessary to meet the 6-year RE target.

Methods To Improve Earnings

The Board believes that there are ways that any corporate, including the model corporate earning 18.3 BP a year above, can improve its RE growth. For example:

- A corporate might improve its NII by improved share pricing. Corporates have some measure of control of their dividend pricing structure, and they need to account for asset yields when making decisions on funding strategies.
- The current positively shaped yield curve should improve earnings as securities roll down the yield curve.
- After a corporate has built some retained earnings it can, if necessary, improve its RE ratio by shrinking its assets.

NCUA also believes that corporates have some pricing power over the fees they charge their members, and higher fees result in higher TNII. In addition, corporates can become more efficient, reducing their OE. Higher TNII and lower OE result in an improved NOE. Currently, the average corporate NOE is about negative 15 BP, but NCUA believes that well-run corporates can reduce this NOE number over time—making it easier to generate the necessary NII to support earnings growth at 17 BP annually.

Historical corporate trends indicate that corporate NOE is, in fact, declining:

	2005	2006	2007	2008	2009	2010*
TNII	0.26	0.25	0.21	0.22	0.26	0.24
OE	0.48	0.46	0.41	0.45	0.43	0.38
NOE	−0.22	−0.21	−0.19	−0.23	−0.17	−0.14

* Annualized.

As the above chart illustrates, corporates have seen continued improvement in NOE (from −0.22 to −0.14) over the past five years. The only exception to this trend was in 2008. In that year, the improvement in NOE reversed temporarily, most likely due to a one-time spike of 5 BP in employee compensation and benefits. Absent that one time expense, NOE would have been negative 18 BP, right in line with the historical trend.

NCUA recognizes that the TNII, OE, and NOE information quoted above is average information and not necessarily reflective of any particular corporate and its business model. The Board notes, for example, that for purposes of analyzing its forward-looking model portfolio, Southwest Corporate FCU used TNII of 37.3 BP and OE of 45.3 BP, both significantly higher than the current corporate averages.[35] Yet Southwest's NOE—the difference between its TNII and OE—was only negative 12 BP. This is right in line with the improving corporate trends demonstrated above.

B. Hypothetical Balance Sheet #2

There are other balance sheets that differ from Balance Sheet #1 that should generate sufficient earnings going forward. For example, by reducing the allocation to corporate bonds, and increasing the allocation to Agency RMBS and adding some commercial mortgage backed securities (CMBS), a corporate might hold a balance sheet like this:

HYPOTHETICAL BALANCE SHEET #2

Sector	Percent of balance sheet	Spread to LIBOR (basis points)	WAL (years)	WAL in 50% prepayment slowdown (years)
Assets				
FFELP Student Loans	5	33	3	3.8
ABS—Autos	7	15	2	2.5
ABS—Credit Cards	8	25	3	3
Bonds—Corporate	12	82	3.5	3.5
Agency RMBS	18	45	4	7
CMBS	10	130	5	5
Overnight Invest	40	0	0	0
Total	100	35.64	[36] 1.81	2.155
Liabilities				
Overnight Shares	36	−10		
Term Certificates	60	0		
Member Capital	4	0		
Total	100	−3.6		
Net Interest Income (NII)		39.24		

[35] Southwest FCU comment letter, p. 24.

[36] After applying the 0.5 reduction factor to the Agency RMBS permitted by paragraph 704.8(h). The factor is also applied to the prepayment slowdown WAL.

HYPOTHETICAL BALANCE SHEET #2—Continued

Sector	Percent of balance sheet	Spread to LIBOR (basis points)	WAL (years)	WAL in 50% prepayment slowdown (years)
TNII		25		
OE		40		
NOE		(15)		
Net Income From Operations (Earnings)		24.24		

Again, NCUA constructed this portfolio to be in compliance with the final rule, including the rule's requirements for asset credit quality, sector limits, the 2-year asset WAL limit, and the 2.25-year asset extension limit. Again, the spread sources used include Bank of America//Merrill Lynch's, *US Securitization Research, Securitization Weekly,* dated August 6, 2010; and Wells Fargo Securities' Libor/Swap spreads for July 30, 2010.

The other general assumptions about assets, liabilities, cost of capital, and TNII, OE, and NOE are also the same as in hypothetical #1. Since this Balance Sheet #2 earns more than Balance Sheet #1, the corporate could possibly pay its capital contributors more on their contributed capital. In fact, the corporate could pay up to LIBOR +150 on its contributed capital and still generate more than 17 BP of earnings each year.

C. Hypothetical Balance Sheet #3 (Southwest Corporate Federal Credit Union)

Southwest Corporate Federal Credit Union (Southwest) submitted the following model balance sheet as part of its comment letter:

HYPOTHETICAL BALANCE SHEET #3—SOUTHWEST MODEL (FROM ANNEX C)

[All data in this table supplied by Southwest]

Investments and loans	Percent of balance sheet	Spread to LIBOR	Maturity [37] (Years)
Investments			
Loans	7	40	2.0
ABS—Autos	20	35	2.0
ABS—Credit Cards	20	38	2.0
FFELP Student Loans	18	32	2.0
Agency	10	10	1.0
Overnight	25	−12	0.0
Total	100	21.2	1.40
Liabilities			
Overnight Shares	65	−18	0
Certificates	31	0	0.7
Member Capital	4	150	0.0
RUDE	0		0.0
Total	100	−5.7	0.22
Asset/Liability WAL mismatch (years)		1.18	
Net Interest Margin (bps)		26.9	
Net Fee Income (bps)		37.3	
Operating Expenses (bps)		45.3	
Net Income From Operations (bps)		18.9	

Southwest stated that its model balance sheet has about $7 billion in assets and is based on Southwest's recommendations and current business model.

Model Balance Sheet Compliance With the Final Corporate Rule

This model appears to comply with the investment, credit risk, and ALM provisions of the final rule.[38] Specifically:

- The asset allocation complies with the sector limits of 704.6(d).
- The WAL of the assets, at 1.40 years, is less than the 2.0 year limit in 704.8(f).[39]
- The portfolio contains no private-label RMBS, which are prohibited under the final rule 704.5(h).
- The portfolio complies with the new asset extension test, that is, the new

[37] NCUA believes that Southwest meant this to be WAL, not maturity. In any event, the WAL would be less than or equal to the maturity.

[37] NCUA believes that Southwest meant this to be WAL, not maturity. In any event, the WAL would be less than or equal to the maturity.

[38] NCUA assumes that the commenter constructed this portfolio in compliance with the NRSRO limits (AA-) and IRR NEV limits. These limits exist in the current corporate rule, and the final rule does not change the existing base limits.

[39] Southwest was concerned about the proposed cash flow mismatch sensitivity tests in the proposed rule, and its mismatch of 1.18 years would have violated one of those tests—but both of those tests have been removed from the final rule.

2.25 year limit in 704.8(g) on WAL of assets assuming a 50% prepayment slowdown. While Southwest did not discuss this new extension test—because it was not in the proposed rule—Southwest's balance sheet mix indicates the portfolio would meet this requirement. For example, the most likely securities to have any extension risk are those with student loans and mortgages. If upon prepayment slowdown the student loan ABS extends to 3 years (market indications are an extension to 2.6 years) and the agency securities (assuming agency MBS) extend to 4 years (a 1.5 year WAL security was observed to extend only to 2.7 years), the WAL of the portfolio is still only 1.96 years. Even then, the WAL for agency mortgages can be reduced by a factor of 0.5 under the final rule, 704.5(h). Applying the 0.5 factor to these securities, the WAL of the extended portfolio would drop to only 1.76 years, again well below the 2.25 year limit.

Model Balance Sheet's Ability To Generate Earnings

As recognized by Southwest in its comment letter, this balance sheet generates sufficient income to pass the retained earnings goals established by the new corporate regulation. Projected retained earnings are well above 17 BP a year. For example, after 3 years, Southwest projected the RE growth at 57 basis points, and after 6 years Southwest projected an RE of 113 basis points.

NCUA notes that this model generates sufficient earnings even when capital holders are paid at LIBOR +150. Earnings would be enhanced if the rate of return on capital was reduced, even temporarily.

Effect of Changes in the Spreads Over Time

Southwest expressed some concern that spreads, as they existed when it wrote to NCUA in February 2010, might tighten over time, thus reducing a corporate's ability to generate earnings. In Annex D of its letter, Southwest analyzed its model balance sheet under "historic" spread levels and concluded that its model asset allocation would not produce sufficient earnings at those historic levels.

NCUA agrees that spreads going forward will have an impact on a corporate's ability to generate earnings. It is impossible, however, to predict the future—spreads could tighten, widen, or even stay the same for a protracted period. And even if spreads change, it is uncertain as to the speed of change. In fact, no one can say if spreads will ever return to "historical" levels, or even what exactly those historical levels are. For example, Southwest's letter indicates it based its Annex D analysis on the past 9 years of historical data, and concluded that the spread over LIBOR for an Agency MBS was only 6 BP during this time period. Using a *longer* historical view of the past 20 years, however, Bloomberg data suggests the average 1-year Agency MBS spreads were much higher than 6 BP, with an average Agency MBS spread over this 20-year period of about 22 BP and a median of about 16 BP.

Corporates will have to adapt to changing spreads, including variances within asset classes. As suggested by Southwest FCU, its model asset allocation would have worked in February 2010, and NCUA believes the asset allocations in hypotheticals #1 and #2 above will work given today's spreads. The Board believes that corporates can adapt to changes in spreads, and the WAL limits in the final rule will provide corporates additional flexibility to shift allocations.

D. Hypothetical Balance Sheet #4—Magnus Enterprises Model

Magnus proposed a different investment model that grows RE at a successful rate:

HYPOTHETICAL BALANCE SHEET #4—MAGNUS MODEL

[All data in this table supplied by Magnus]

Investments and loans	Portfolio percentage	LIBOR/EDSF spread	Total WAL (years)
Assets			
Agency Mortgages	35	60	4
ABS—Autos	10	25	0.6
ABS—Credit Cards	10	30	1
FFELP Student Loans	15	25	0.5
Overnight Investments	30	−5	0.003
Total	100	28.75	1.6359
Liabilities			
Overnight Shares	30	−5	0.003
Certificates	70	−5	0.5
Total	100	−5	0.3509
Net Interest Income		33.75	

Model Balance Sheet Compliance With the Final Corporate Rule

Again, this Magnus Balance Sheet #4 appears to comply with the investment, credit risk, and ALM provisions of the final rule. The portfolio contains no private label RMBS and complies with the final sector limits. The WAL of the assets, at 1.63 years, is under the 2-year WAL limit. In fact, since the final rule permits agency securities to multiply their actual WAL by a factor of 0.5 before applying the 2-year WAL, the effective WAL of this portfolio is well under 1.63 years. The asset liability mismatch of 1.285 years is not relevant, as the proposed cash flow mismatch tests have been removed from the final rule. And NCUA also believes that these assets, if prepayments slowed by 50 percent, would not cause the portfolio WAL to exceed 2.25 years, thus satisfying the asset extension test of 704.8(g).

Model Balance Sheet's Ability To Generate Earnings

The Magnus balance sheet generates a net interest income of 33.75 BP.

Magnus' letter discusses corporate operating expenses. The author believes, as NCUA does, that corporates can and will become more efficient. He asserts an operating expense level of 30 BP is achievable after cost reductions and potential mergers in the coming years. For purposes of analyzing the Magnus model, however, NCUA used the current average, annual ratio of corporate operating expenses to daily average net assets of 40 BP.

Magnus believes that corporates have control over their cost of capital. Specifically, he says that:

> I am not troubled by the lack of cost of capital in [NCUA's proposed rule] margin analysis. Any new capital that comes into the corporates is going to come from NPCUs and they all understand that their capital investment isn't really a traditional investment that pays a high annual yield. Instead, it's an investment that may not pay dividends for 10 years or more * * *. Members who value the cooperative nature of their relationship with their corporate should be willing to forsake the dividend on PCC and NCA in the short run in order for the corporate to rebuild retained earnings.

Magnus letter, p. 4. NCUA agrees with this quoted language, particularly the last sentence. Accordingly, for purposes of analyzing the Magnus model, the analysis assumes that capital pays only LIBOR flat.

Magnus' model does not address net fee income. For purposes of analysis, NCUA made the same TNII assumptions (25 BP) as discussed previously. Accordingly, the Magnus investment portfolio, with its primary emphasis on Agency MBS, would produce an annual RE growth of about 19 BP, as follows:

Analysis of Magnus model	(Basis points)
Net Interest Income	33.75
TNII	25
OE	40
NOE	(15)
Net Income From Operations (Earnings)	18.75

This earnings growth exceeds the necessary 17 BP a year. Again, as discussed in connection with NCUA's hypothetical #1 above, there are multiple potential ways to further improve this RE growth. For example, the corporate could become more efficient, moving toward the 30 BP expense level discussed by Magnus; or the corporate could use its pricing power to increase its fee income or reduce its dividends.

E. Hypothetical Balance Sheet #5—ACCU Model

As mentioned above, a number of commenters adopted or referenced a model developed by the Association of Corporate Credit Unions (ACCU), given in the table below:

HYPOTHETICAL BALANCE SHEET #5—ACCU MODEL

[All data in this table supplied by ACCU]

Assets	Percent of balance sheet	Spread to LIBOR
Loans	10	50
ABS—Autos	20	37
ABS—Credit Cards	15	42
FFELP Student Loans	5	45
Structured Agency	15	34
Bank Floaters	5	29
Other Short-term	8	12
CMBS	7	100
Overnight	15	4
Total	100	36
Shares and Equity		
Overnight Shares	50	0
Certificates	46	0
Member Capital	4	200
Rude	0	0
Total	100	8
Net Interest Margin (basis points)	28	
Other Income	18	
Operating Expenses	32	
Net Income	14	

The ACCU asset allocation varies from both the Southwest and Magnus allocations. For example, the ACCU model includes wider variation in investment classes and, as with hypothetical #2 above, introduces some CMBS.

Model Balance Sheet Compliance With the Final Corporate Rule

Again, this balance sheet appears to comply with the investment, credit risk, and ALM provisions of the final rule. For example, the portfolio contains no private label RMBS, and it complies with the final sector limits.

ACCU did not provide direct information about the WAL of its assets. However, it did provide data from which the asset WAL can be reverse engineered. Specifically, ACCU also provided this chart:

NEV Shocks	Maximum
Rates +300 bp	−14.0%

NEV Shocks	Maximum
Credit +100 bp	−30.3%
+Paydowns −50%	−32.7%

If a credit shock of 100 BP produces an NEV decline of 30 percent from a starting NEV of 4 percent, that equates to a difference in the WALs of the assets and liabilities of about 1.2 years. Given that ACCU's liabilities are half overnight and half certificates, and the certificates likely have an aggregate WAL of a year or less (as do the certificates in both the Southwest and Magnus models), the aggregate liability WAL of the ACCU model is likely less than 0.8 years, which would make ACCU's asset WAL less than 2.0 years, satisfying the WAL restriction in the final rule.

As for the asset extension test, ACCU indicates that a 100 BP shock to its portfolio, assuming a 50 percent prepayment slowdown, produces an NEV decline of 32.7 percent. This equates to an asset extension of less than two months, and so the asset WAL, with the slowdown, would be less than 2.25 years. Accordingly, the ACCU model satisfies the extension test of 704.8(g).

Model Balance Sheet's Ability To Generate Earnings

ACCU's bottom line of 14 BP annually is 3 BP short of the annual RE growth needed under the final rule. Although the ACCU model assumes lower net fee income than the Southwest model, in the ACCU model this lower fee income is offset by a lower operating expense estimate.

There are multiple ways a corporate starting with the ACCU model can adjust its earnings capacity to achieve the 17 BP target. For example,

• The corporate can improve its efficiencies and product pricing, as discussed earlier.

• The corporate could change its sector weighting slightly. For example, if the corporate shifted 5 percent of its portfolio from Auto ABS to CMBS, the portfolio return would improve by over 3 BP annually using ACCU's spreads.

• ACCU assumed its cost of capital would be 200 BP over LIBOR. Again, NCUA believes that NPCUs that desire corporate services should be willing to provide capital at little or no cost, at least temporarily. If the cost of capital in ACCU's model was reduced to LIBOR flat, for example, that would increase its operating income by 8 BP annually and put the corporate well over its 17 BP annual earnings target.

Conclusion

There are multiple, different asset allocations available to corporates under the restrictions of the new rule that should provide corporates the necessary earnings flexibility to meet the new RE growth requirements.

V. Further Revisions to the Corporate Rule

As discussed above, NCUA issued its proposed revisions to the corporate rule back in November 2009, more than ten months ago. Since that time NCUA has received significant feedback. NCUA received formal feedback in the form of 815 public comment letters with over 2,600 pages of comments. NCUA also received much informal feedback, for example, from the credit union industry (through numerous town hall meetings and webinars), from other federal regulators, and from the Kamakura Corporation.

Much of that feedback has resulted in changes from the proposed rule to this final rule. Some of the feedback, though, went beyond the scope of the proposed rulemaking. Ideas—even very good ideas—that are beyond the scope of the proposed rule are not addressed in this final rulemaking. Instead, the NCUA has considered some of these ideas and plans in the near future to issue another proposal with further revisions to the corporate rule. The Board believes it important, though, as corporates and credit unions move now to adapt to this final rule, that they also have some information about what these pending proposals are.

Specifically, the Board will be proposing that:

1. Corporates be subject to internal control reporting requirements similar to those required under Section 36 of the FDI Act (for banks and thrifts) and the Sarbanes-Oxley Act of 2002 (for public companies). *See* 12 U.S.C. 1831m; Public Law 107–204; and 12 CFR part 363, *Annual Independent Audits and Reporting Requirements* (FDIC rulemaking integrating FDI Act Section 36 and certain Sarbanes-Oxley requirements).

2. At any given time, an NPCU would be limited to membership in one corporate of the NPCU's choice. An NPCU could belong to two corporates for a short period of time, but only when transitioning between those corporates.

3. The board of directors of a corporate must establish a risk management committee. The committee will include at least one independent risk management expert with sufficient experience in identifying, assessing, and managing risk exposures.

4. When the TCCUSF makes an assessment on FICUs, NCUA would ask all corporate members that are not FICUs ("non-FICUs") to make a voluntary contribution to the TCCUSF. Corporates will hold a membership vote to determine whether any non-FICU that fails to make the requested contribution should be expelled from the corporate.

5. Each vote by a corporate's boards of directors must be recorded in the minutes so that the vote of each individual director is apparent from the minutes.

6. Corporates would be permitted to charge their members reasonable one-time or periodic membership fees. The fees must generally be proportional to the member's asset size, and a member must be given at least six months notice of any new fee, or any material change to an existing fee.

In a sense, this final rulemaking is the first step in the remolding of the corporate rule, and the six proposals above are the second step. As much as practicable, NCUA intends to mesh the effective dates of these two rulemakings. As discussed above, the effective date for most of this final rule is January 18, 2011. Accordingly, the Board plans to move this second-step rulemaking along by issuing these six proposals at either the October 2010 or November 2010 Board meeting for a 30-day public comment period.

Also, although not involving any additional rulemaking, the Board plans to:

1. Consult with other federal financial regulators to create a data tracking system to enhance NCUA's ability to systemically conduct trend analyses to identify recurrent or network-wide issues, and

2. Upgrade NCUA's current guidance on corporate mergers into a formal corporate credit union merger manual.

NCUA intends to implement the data tracking system within nine months and publish the merger manual within six months.

VI. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under ten million dollars in assets). This final rule only applies to corporates, all but one of which has assets well in excess of $10 million. Accordingly, the NCUA Board certifies that this final rule will not have a significant economic impact on a substantial number of small credit unions, and, therefore, a regulatory flexibility analysis is not required.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d). For purposes of the PRA, a paperwork burden may take the form of a either a reporting or a recordkeeping requirement, both referred to as information collections. NCUA identified and described several information collection requirements in the proposed rule, including new requirements in the following broad areas: capital and PCA, investments, ALM, CUSO procedures, and corporate governance requirements. As required by the PRA, NCUA submitted a copy of the proposed regulation to the Office of Management and Budget (OMB) for its review and approval. Persons interested in submitting comments with respect to the information collection aspects of the proposed rule were invited to submit them to the OMB at the address noted in the preamble to the proposed rule.

While NCUA received a substantial number of comments on the proposed rule, commenters did not specifically address the agency's estimates of burden hours or costs, which estimates were set out specifically in the preamble as required by PRA. However, as discussed more fully in the preamble to this final rule, the Board has determined to make several changes in the final rule, and some of those changes affect the burden estimates for some aspects of the collection requirements. These changes, all of which have the effect of reducing the estimated burden, are discussed below.

ALM Requirements

The Board has determined to eliminate entirely the two cash flow mismatch tests that had been proposed (§§ 704.6(e) and (f) in the proposed rule). The final rule will retain as proposed the two-year weighted average limit and will now require a new, additional test with a 2.25 year weighted average life limit that assumes a 50 percent slowdown in prepayment speeds to limit extension risk. The new test must be done quarterly and will be required of and affect all corporates. As with the original proposal, corporates will be required to calculate and record the effective and spread durations for individual assets and liabilities to support the test results.

From an information collection standpoint, NCUA estimates that the net impact of this change will be a reduction by approximately 50 percent in the estimated burden hours associated with ALM requirements. Accordingly, the revised burden estimate for compliance with this revised requirement would be as follows:

27 corporates × 84 hours per year = 2268 hours.

Corporate Governance Requirements

The final rule changes the provisions relating to disclosure of compensation by reducing the number of senior executives whose compensation must be disclosed. Many commenters noted that the original proposal could have had the effect of requiring disclosure of compensation for many individuals, such as some persons holding the title of vice president, who are not, in fact, in positions with program or operational level responsibilities. The Board has changed the language from the proposal to now limit the total number of required executives subject to disclosure to the top ten percent of most highly paid individuals, to a maximum of five. For corporates with thirty or fewer employees, the top three highly paid executives must be disclosed. In all cases, the compensation paid to the CEO must be included in the disclosure if the CEO is not in the most highly paid ten percent. While the initial estimate of the burden for complying with this aspect of the governance provisions was not substantial, the Board believes the change will reduce the final burden by approximately 50 percent.

Accordingly, the revised burden estimate for compliance with this revised requirement would be as follows:

27 corporates × 5 hours = 135 hours.

Summary of Collection Burden (Revised)

With the revisions described above, NCUA estimates the total information collection burden represented by the final rule, calculated on an annual basis, as follows:

Capital restoration plans	20 corporates × 50 hours = 1,000 hours.
Retained earnings accumulation plans	3 corporates × 50 hours = 150 hours
Notice of intent to redeem contributed capital	10 corporates × 1 hour = 10 hours.
Notice of PCA category change	10 corporates × 1 hour = 10 hours.
Ratings procurement	27 corporates × 2 hours = 54 hours.
Investment action plans	10 corporates × 20 hours = 200 hours.
ALM testing	27 corporates × 84 hours = 2,268 hours.
CUSO approval requests	12 corporates × 2 hours = 24 hours.
Compensation disclosures	27 corporates × 5 hours = 135 hours.
Merger related disclosures	4 corporates × 5 hours = 20 hours.
Requests to make golden parachute and severance payments	4 corporates × 4 hours = 16 hours.
Total Additional Burden Hours	3,887 hours.

NCUA does not anticipate that the revisions discussed above will have any significant impact on the cost estimates set out in the proposed rule.

NCUA has submitted these burden revisions to the OMB. NCUA expects that OMB will review and approve the revisions, and publish its approval, in the near future.

C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order.

This final rule applies to all federally-insured corporates, including state charters. Nonfederally insured corporates must also agree by contract, as a condition of receiving shares or deposits from federally-insured credit unions, to adhere to the requirements of this part and submit to NCUA examinations. The executive order states that: "National action limiting the policymaking discretion of the states shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance." NCUA has plenary statutory authority to regulate corporate credit unions and federally insured credit unions. *See* 12

U.S.C. 1766(a) and 12 U.S.C. 1781 *et. seq.* Further, the risk of loss to federally-insured credit unions and the NCUSIF due to corporate activities are concerns of national scope.

The final rule does not impose additional costs or burdens on the states or have a significant effect on the states' ability to discharge traditional state government functions. NCUA has determined that the corporate rule as a whole, and this rulemaking, may have an occasional 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. However, the potential risk to the NCUSIF and the entire credit union system that would result without extending the entire corporate rule, including the revisions in this rulemaking, to all corporates is more significant than any such effects.

Accordingly, NCUA believes that the protection of corporates, the NCUSIF, and the entire system of federally-insured credit unions requires application of this final rule to all such corporates, and that this application is consistent with Executive Order 13132.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

E. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Act of 1996 (Pub. L. 104–121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by section 551 of the Administrative Procedure Act. 5 U.S.C. 551. The Office of Management and Budget has determined that this rule is not a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects

12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 703

Credit unions, Investments.

12 CFR Part 704

Credit unions, Corporate credit unions, Reporting and recordkeeping requirements.

12 CFR Part 709

Credit unions, Liquidations.

12 CFR Part 747

Credit unions, Administrative practices and procedures.

By the National Credit Union Administration Board on September 24, 2010.

Mary F. Rupp,

Secretary of the Board.

■ Accordingly, NCUA amends 12 CFR parts 702, 703, 704, 709, and 747 as follows:

PART 702—PROMPT CORRECTIVE ACTION

■ 1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

■ 2. Effective October 20, 2011, revise paragraph (d) of § 702.105 to read as follows:

§ 702.105 Weighted—average life of investments.

* * * * *

(d) *Capital in mixed-ownership Government corporations and corporate credit unions.* For capital stock in mixed-ownership Government corporations, as defined in 31 U.S.C. 9101(2), and perpetual and nonperpetual capital in corporate credit unions, as defined in 12 CFR 704.2, the weighted-average life is defined as greater than one (1) year, but less than or equal to three years;

* * * * *

PART 703—INVESTMENTS AND DEPOSIT ACTIVITIES

■ 3. The authority citation for part 703 continues to read as follows:

Authority: 12 U.S.C. 1757(7), 1757(8), 1757(15).

■ 4. Effective October 20, 2011, revise paragraph (b) of § 703.14 to read as follows:

§ 703.14 Permissible investments.

* * * * *

(b) *Corporate credit union shares or deposits.* A Federal credit union may purchase shares or deposits in a corporate credit union, except where the NCUA Board has notified it that the corporate credit union is not operating in compliance with part 704 of this chapter. A Federal credit union's aggregate amount of perpetual and nonperpetual capital, as defined in part 704 of this chapter, in one corporate credit union is limited to two percent of the federal credit union's assets measured at the time of investment or adjustment. A Federal credit union's aggregate amount of contributed capital in all corporate credit unions is limited to four percent of assets measured at the time of investment or adjustment.

* * * * *

PART 704—CORPORATE CREDIT UNIONS

■ 5. Revise the authority citation for part 704 to read as follows:

Authority: 12 U.S.C. 1762, 1766(a), 1772a, 1781, 1789, and 1795e.

■ 6. Effective January 18, 2011, revise § 704.2 to read as follows:

§ 704.2 Definitions.

As used in this part:

Adjusted trading means any method or transaction whereby a corporate credit union sells a security to a vendor at a price above its current market price and simultaneously purchases or commits to purchase from the vendor another security at a price above its current market price.

Asset-backed security (ABS) means a security that is primarily serviced by the cashflows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders. Mortgage-backed securities are a type of asset-backed security.

Available to cover losses that exceed retained earnings means that the funds are available to cover operating losses realized, in accordance with generally accepted accounting principles (GAAP), by the corporate credit union that exceed retained earnings net of equity acquired in a combination. Likewise, *available to cover losses that exceed retained earnings and perpetual contributed capital (PCC)* means that the funds are available to cover operating losses realized, in accordance with GAAP, by the corporate credit union that exceed retained earnings net of equity acquired in a combination and PCC. Any such losses must be distributed *pro rata* at the time the loss is realized first among the holders of paid-in capital (PIC), and when all PIC is exhausted, then *pro rata* among all MCAs, all subject to the optional prioritization described in Appendix A of this Part. To the extent that any contributed capital funds are used to cover losses, the corporate credit union must not restore or replenish the affected capital accounts under any circumstances. In addition, contributed capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

Capital means the sum of a corporate credit union's retained earnings, paid-in capital, and membership capital. For a corporate credit union that acquires another credit union in a mutual combination, capital includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

Capital ratio means the corporate credit union's capital divided by its moving daily average net assets.

Collateralized debt obligation (CDO) means a debt security collateralized by mortgage-backed securities, asset-backed securities, or corporate obligations in the form of loans or debt. Senior tranches of Re-REMIC's consisting of senior mortgage- and asset-backed securities are excluded from this definition.

Collateralized mortgage obligation (CMO) means a multi-class mortgage-backed security.

Commercial mortgage-backed security (CMBS) means a mortgage-backed security collateralized primarily by multi-family and commercial property loans.

Compensation means all salaries, fees, wages, bonuses, severance payments, current year contributions to employee benefit plans (for example, medical, dental, life insurance, and disability), current year contributions to deferred compensation plans and future severance payments, including payments in connection with a merger or similar combination (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under Section 401(a) of the IRS Code). Compensation also includes expense accounts and other allowances (for example, the value of the personal use of housing, automobiles or other assets owned by the corporate credit union; expense allowances or reimbursements that recipients must report as income on their separate income tax return; payments made under indemnification arrangements; and payments made for the benefit of friends or relatives). In calculating required compensation disclosures, reasonable estimates may be used if precise cost figures are not readily available.

Contributed capital means either paid-in capital or membership capital accounts.

Core capital means the sum of:

(1) Retained earnings;

(2) Paid-in capital; and

(3) The retained earnings of any acquired credit union, or of an integrated set of activities and assets, calculated at the point of acquisition, if the acquisition was a mutual combination.

Core capital ratio means the corporate credit union's core capital divided by its moving daily average net assets.

Corporate credit union means an organization that:

(1) Is chartered under Federal or state law as a credit union;

(2) Receives shares from and provides loan services to credit unions;

(3) Is operated primarily for the purpose of serving other credit unions;

(4) Is designated by NCUA as a corporate credit union;

(5) Limits natural person members to the minimum required by state or federal law to charter and operate the credit union; and

(6) Does not condition the eligibility of any credit union to become a member on that credit union's membership in any other organization.

Daily average net assets means the average of net assets calculated for each day during the period.

Derivatives means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, and any other instrument that poses similar counterparty credit risks.

Dollar roll means the purchase or sale of a mortgage-backed security to a counterparty with an agreement to resell or repurchase a substantially identical security at a future date and at a specified price.

Embedded option means a characteristic of certain assets and liabilities which gives the issuer of the instrument the ability to change the features such as final maturity, rate, principal amount and average life. Options include, but are not limited to, calls, caps, and prepayment options.

Equity investments means investments in real property, equity securities, and any other ownership interests, including, for example, investments in partnerships and limited liability companies.

Equity security means any security representing an ownership interest in an enterprise (for example, common, preferred, or other capital stock) or the right to acquire (for example, warrants and call options) or dispose of (for example, put options) an ownership interest in an enterprise at fixed or determinable prices. However, the term does not include convertible debt or preferred stock that by its terms either must be redeemed by the issuing enterprise or is redeemable at the option of the investor.

Exchangeable collateralized mortgage obligation means a class of a collateralized mortgage obligation (CMO) that, at the time of purchase, represents beneficial ownership interests in a combination of two or more underlying classes of the same CMO structure. The holder of an exchangeable CMO may pay a fee and take delivery of the underlying classes of the CMO.

Fair value means the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. If there is a principal market for the asset or liability, the fair value measurement is the price in that market (whether that price is directly observable or otherwise determined using a valuation technique), even if the price in a different market is potentially more advantageous at the measurement date. In the absence of a principal market, the fair value measurement occurs in the most advantageous market for the asset or liability. The fair value of the asset or liability shall be determined based on the assumptions that market participants would use in pricing the asset or liability. In developing those assumptions, the corporate need not identify specific market participants. Rather, the corporate should identify characteristics that distinguish market participants generally, considering factors specific to all of the following: the asset or liability; the principal (or most advantageous) market for the asset or liability; and market participants with whom the corporate would transact in that market. To increase consistency and comparability in fair value measurements and related disclosures, the fair value hierarchy prioritizes the inputs to valuation techniques used to measure fair value into three broad levels. The fair value hierarchy gives the highest priority to quoted prices (unadjusted) in active markets for identical assets or liabilities (Level 1) and the lowest priority to unobservable inputs (Level 3). Examples of valuation techniques include the present value of estimated future cash flows, option-pricing models, and option-adjusted spread models.

Federal funds transaction means a short-term or open-ended unsecured transfer of immediately available funds by one depository institution to another depository institution or entity.

Foreign bank means an institution which is organized under the laws of a country other than the United States, is engaged in the business of banking, and is recognized as a bank by the banking supervisory authority of the country in which it is organized.

Immediate family member means a spouse or other family member living in the same household.

Limited liquidity investment means a private placement or funding agreement.

Member reverse repurchase transaction means an integrated transaction in which a corporate credit union purchases a security from one of its member credit unions under agreement by that member credit union to repurchase the same security at a specified time in the future. The corporate credit union then sells that same security, on the same day, to a third party, under agreement to repurchase it on the same date on which the corporate credit union is obligated to return the security to its member credit union.

Membership capital means funds contributed by members that: are adjustable balance with a minimum withdrawal notice of 3 years or are term certificates with a minimum term of 3 years; are available to cover losses that exceed retained earnings and paid-in capital; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings.

Mortgage-backed security (MBS) means a security backed by first or second mortgages secured by real estate upon which is located a dwelling, mixed residential and commercial structure, residential manufactured home, or commercial structure.

Moving daily average net assets means the average of daily average net assets for the month being measured and the previous eleven (11) months.

Mutual combination means a transaction or event in which a corporate credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union.

Nationally Recognized Statistical Rating Organization (NRSRO) means any entity that has applied for, and been granted permission to be considered an NRSRO by the United States Securities and Exchange Commission.

NCUA means NCUA Board (Board), unless the particular action has been delegated by the Board.

Net assets means total assets less loans guaranteed by the NCUSIF and member reverse repurchase transactions. For its own account, a corporate credit union's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met.

Net economic value (NEV) means the fair value of assets minus the fair value of liabilities. All fair value calculations must include the value of forward settlements and embedded options. Paid-in capital, and the unamortized portion of membership capital, that is, the portion that qualifies as capital for purposes of any of the total capital ratio, is excluded from liabilities for purposes of this calculation. The NEV ratio is calculated by dividing NEV by the fair value of assets.

Net interest margin security means a security collateralized by residual interests in collateralized mortgage obligations, residual interests in real estate mortgage investment conduits, or residual interests in other asset-backed securities.

Obligor means the primary party obligated to repay an investment, *e.g.,* the issuer of a security, such as a Qualified Special Purpose Entity (QSPE) trust; the taker of a deposit; or the borrower of funds in a federal funds transaction. Obligor does not include an originator of receivables underlying an asset-backed security, the servicer of such receivables, or an insurer of an investment.

Official means any director or committee member.

Paid-in capital means accounts or other interests of a corporate credit union that: are perpetual, non-cumulative dividend accounts; are available to cover losses that exceed retained earnings; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings.

Pair-off transaction means a security purchase transaction that is closed out or sold at, or prior to, the settlement or expiration date.

Private label security means a security that is not issued or guaranteed by the U.S. government, its agencies, or its government-sponsored enterprises (GSEs).

Quoted market price means a recent sales price or a price based on current bid and asked quotations.

Repurchase transaction means a transaction in which a corporate credit union agrees to purchase a security from a counterparty and to resell the same or any identical security to that counterparty at a specified future date and at a specified price.

Residential mortgage-backed security (RMBS) means a mortgage-backed security collateralized primarily by mortgage loans on residential properties.

Residential properties means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence, or timeshare properties.

Residual interest means the ownership interest in remainder cash flows from a CMO or ABS transaction after payments due bondholders and trust administrative expenses have been satisfied.

Retained earnings means retained earnings as defined under Generally Accepted Accounting Principles (GAAP).

Retained earnings ratio means the corporate credit union's retained earnings divided by its moving daily average net assets. For a corporate credit union that acquires another credit union in a mutual combination, the numerator of the retained earnings ratio also includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

Section 107(8) institution means an institution described in Section 107(8) of the Federal Credit Union Act (12 U.S.C. 1757(8)).

Securities lending means lending a security to a counterparty, either directly or through an agent, and accepting collateral in return.

Senior executive officer mean a chief executive officer, any assistant chief executive officer (*e.g.,* any assistant president, any vice president or any assistant treasurer/manager), and the chief financial officer (controller). This term also includes employees of any entity hired to perform the functions described above.

Settlement date means the date originally agreed to by a corporate credit union and a counterparty for settlement of the purchase or sale of a security.

Short sale means the sale of a security not owned by the seller.

Small business related security means a security that is rated in 1 of the 4 highest rating categories by at least one Nationally Recognized Statistical Rating Organization (NRSRO), and represents an interest in one or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company. This definition does not include Small Business Administration securities permissible under § 107(7) of the Act.

State means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Stripped mortgage-backed security means a security that represents either the principal-only or interest-only portion of the cash flows of an underlying pool of mortgages.

Subordinated security means a security that, at the time of purchase, has a junior claim on the underlying collateral or assets to other securities in the same issuance. If a security is junior only to money market fund eligible securities in the same issuance, the former security is not subordinated for purposes of this definition.

Total assets means the sum of all a corporate credit union's assets as calculated under GAAP.

Total capital means the sum of a corporate credit union's core capital and its membership capital accounts.

Trade date means the date a corporate credit union originally agrees, whether orally or in writing, to enter into the purchase or sale of a security.

Trigger means an event in a securitization that will redirect cash-flows if predefined thresholds are breached. Examples of triggers are delinquency and cumulative loss triggers.

Weighted average life means the weighted-average time to the return of a dollar of principal, calculated by multiplying each portion of principal received by the time at which it is expected to be received (based on a reasonable and supportable estimate of that time) and then summing and dividing by the total amount of principal. The calculation of weighted average life for interest only securities means the weighted-average time to the return of a dollar of interest, calculated by multiplying each portion of interest received by the time at which it is expected to be received (based on a reasonable and supportable estimate of that time) and then summing and dividing by the total amount of interest to be received.

When-issued trading means the buying and selling of securities in the period between the announcement of an offering and the issuance and payment date of the securities.

■ 7. Effective October 20, 2011, revise § 704.2 to read as follows:

§ 704.2 Definitions.

As used in this part:

Adjusted core capital means core capital modified as follows:

(1) Deduct an amount equal to the amount of the corporate credit union's intangible assets that exceed one half percent of the corporate credit union's moving daily average net assets, but the NCUA, on its own initiative, upon petition by the applicable state regulator, or upon application from a corporate credit union, may direct that a particular corporate credit union add some or all of these excess intangibles back to the credit union's adjusted core capital;

(2) Deduct investments, both equity and debt, in unconsolidated credit union service organizations (CUSOs);

(3) If the corporate credit union, on or after October 20, 2011, contributes any perpetual contributed capital (PCC), or maintains any NCAs, at another corporate credit union, deduct an amount equal to this PCC or NCA;

(4) Beginning on October 20, 2016, and ending on October 20, 2020, deduct any amount of perpetual contributed capital (PCC) that causes PCC minus retained earnings, all divided by moving daily net average assets, to exceed two percent; and

(5) Beginning after October 20, 2020, deduct any amount of PCC that causes PCC to exceed retained earnings.

Adjusted trading means any method or transaction whereby a corporate credit union sells a security to a vendor at a price above its current market price and simultaneously purchases or commits to purchase from the vendor another security at a price above its current market price.

Applicable state regulator means the prudential state regulator of a state chartered corporate credit union.

Asset-backed commercial paper program (ABCP program) means a program that primarily issues commercial paper that has received a credit rating from an NRSRO and that is backed by assets or other exposures held in a bankruptcy-remote special purpose entity. The term *sponsor of an ABCP program* means a corporate credit union that:

(1) Establishes an ABCP program;

(2) Approves the sellers permitted to participate in an ABCP program;

(3) Approves the asset pools to be purchased by an ABCP program; or

(4) Administers the ABCP program by monitoring the assets, arranging for debt placement, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

Asset-backed security (ABS) means a security that is primarily serviced by the cashflows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders. Mortgage-backed securities are a type of asset-backed security.

Available to cover losses that exceed retained earnings means that the funds are available to cover operating losses realized, in accordance with generally accepted accounting principles (GAAP), by the corporate credit union that exceed retained earnings net of equity acquired in a combination. Likewise, *available to cover losses that exceed retained earnings and perpetual contributed capital (PCC)* means that the funds are available to cover operating losses realized, in accordance with GAAP, by the corporate credit union that exceed retained earnings net of equity acquired in a combination and PCC. Any such losses must be distributed *pro rata* at the time the loss is realized first among the holders of PCC, and when all PCC is exhausted, then *pro rata* among all nonperpetual capital accounts (NCAs) and unconverted membership capital accounts, all subject to the optional prioritization described in Appendix A of this Part. To the extent that any contributed capital funds are used to cover losses, the corporate credit union must not restore or replenish the affected capital accounts under any circumstances. In addition, contributed capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

Capital means the same as *total capital,* defined below.

Capital ratio means the corporate credit union's capital divided by its moving daily average net assets.

Collateralized debt obligation (CDO) means a debt security collateralized by mortgage-backed securities, asset-backed securities, or corporate obligations in the form of loans or debt. Senior tranches of Re-REMIC's consisting of senior mortgage- and asset-backed securities are excluded from this definition.

Collateralized mortgage obligation (CMO) means a multi-class mortgage-backed security.

Commercial mortgage-backed security (CMBS) means a mortgage-backed security collateralized primarily by multi-family and commercial property loans.

Compensation means all salaries, fees, wages, bonuses, severance payments, current year contributions to employee benefit plans (for example, medical, dental, life insurance, and disability), current year contributions to deferred compensation plans and future severance payments, including payments in connection with a merger or similar combination (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under Section 401(a) of the IRS Code). Compensation also includes expense accounts and other allowances (for example, the value of the personal use of housing, automobiles or other assets owned by the corporate credit union; expense allowances or reimbursements that recipients must report as income on their separate income tax return; payments made under indemnification arrangements; and payments made for the benefit of friends or relatives). In calculating required compensation disclosures, reasonable estimates may be used if precise cost figures are not readily available.

Consolidated Credit Union Service Organization (Consolidated CUSO) means any corporation, partnership, business trust, joint venture, association or similar organization in which a corporate credit union directly or indirectly holds an ownership interest (as permitted by § 704.11 of this Part) and the assets of which are consolidated with those of the corporate credit union for purposes of reporting under Generally Accepted Accounting Principles (GAAP). Generally, consolidated CUSOs are majority-owned CUSOs.

Contributed capital means either perpetual or nonperpetual capital.

Core capital means the sum of:

(1) Retained earnings;

(2) Perpetual contributed capital;

(3) The retained earnings of any acquired credit union, or of an integrated set of activities and assets, calculated at the point of acquisition, if the acquisition was a mutual combination; and

(4) Minority interests in the equity accounts of CUSOs that are fully consolidated. However, minority interests in consolidated ABCP programs sponsored by a corporate credit union are excluded from the credit unions' core capital or total capital base if the corporate credit union excludes the consolidated assets of such programs from risk-weighted assets pursuant to Appendix C of this Part.

Core capital ratio means the corporate credit union's core capital divided by its moving daily average net assets.

Corporate credit union means an organization that:

(1) Is chartered under Federal or state law as a credit union;

(2) Receives shares from and provides loan services to credit unions;

(3) Is operated primarily for the purpose of serving other credit unions;

(4) Is designated by NCUA as a corporate credit union;

(5) Limits natural person members to the minimum required by state or federal law to charter and operate the credit union; and

(6) Does not condition the eligibility of any credit union to become a member on that credit union's membership in any other organization.

Credit-enhancing interest-only strip. (1) Credit-enhancing interest-only strip means an on-balance sheet asset that, in form or in substance:

(i) Represents the contractual right to receive some or all of the interest due on transferred assets; and

(ii) Exposes the corporate credit union to credit risk directly or indirectly associated with the transferred assets that exceeds its *pro rata* share of the corporate credit union's claim on the assets whether through subordination provisions or other credit enhancement techniques.

(2) NCUA reserves the right to identify other cash flows or related interests as a credit-enhancing interest-only strip. In determining whether a particular interest cash flow functions as a credit-enhancing interest-only strip, NCUA will consider the economic substance of the transaction.

Daily average net assets means the average of net assets calculated for each day during the period.

Daily average net risk-weighted assets means the average of net risk-weighted assets calculated for each day during the period.

Derivatives means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, and any other instrument that poses similar counterparty credit risks.

Dollar roll means the purchase or sale of a mortgage-backed security to a counterparty with an agreement to resell or repurchase a substantially identical security at a future date and at a specified price.

Eligible ABCP liquidity facility means a legally binding commitment to provide liquidity support to asset-backed commercial paper by lending to, or purchasing assets from any structure, program or conduit in the event that funds are required to repay maturing asset-backed commercial paper and that meets the following criteria:

(1)(i) At the time of the draw, the liquidity facility must be subject to an asset quality test that precludes funding against assets that are 90 days or more past due or in default; and

(ii) If the assets that the liquidity facility is required to fund against are assets or exposures that have received a credit rating by an NRSRO at the time the inception of the facility, the facility can be used to fund only those assets or exposures that are rated investment grade by an NRSRO at the time of funding; or

(2) If the assets that are funded under the liquidity facility do not meet the criteria described in paragraph (1) of this definition, the assets must be guaranteed, conditionally or unconditionally, by the United States Government, its agencies, or the central government of an Organization for Economic Cooperation and Development (OECD) country.

Embedded option means a characteristic of certain assets and liabilities which gives the issuer of the instrument the ability to change the features such as final maturity, rate, principal amount and average life. Options include, but are not limited to, calls, caps, and prepayment options.

Equity investment means investments in real property, equity securities, and any other ownership interests, including, for example, investments in partnerships and limited liability companies.

Equity security means any security representing an ownership interest in an enterprise (for example, common, preferred, or other capital stock) or the right to acquire (for example, warrants and call options) or dispose of (for example, put options) an ownership interest in an enterprise at fixed or determinable prices. However, the term does not include convertible debt or preferred stock that by its terms either must be redeemed by the issuing enterprise or is redeemable at the option of the investor.

Exchangeable collateralized mortgage obligation means a class of a collateralized mortgage obligation (CMO) that, at the time of purchase, represents beneficial ownership interests in a combination of two or more underlying classes of the same CMO structure. The holder of an exchangeable CMO may pay a fee and take delivery of the underlying classes of the CMO.

Fair value means the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. If there is a principal market for the asset or liability, the fair value measurement is the price in that market (whether that price is directly observable or otherwise determined using a valuation technique), even if the price in a different market is potentially more advantageous at the measurement date. In the absence of a principal market, the fair value measurement occurs in the most advantageous market for the asset or liability. The fair value of the asset or liability shall be determined based on the assumptions that market participants would use in pricing the asset or liability. In developing those assumptions, the corporate need not identify specific market participants. Rather, the corporate should identify characteristics that distinguish market participants generally, considering factors specific to all of the following: the asset or liability; the principal (or most advantageous) market for the asset or liability; and market participants with whom the corporate would transact in that market. To increase consistency and comparability in fair value measurements and related disclosures, the fair value hierarchy prioritizes the inputs to valuation techniques used to measure fair value into three broad levels. The fair value hierarchy gives the highest priority to quoted prices (unadjusted) in active markets for identical assets or liabilities (Level 1) and the lowest priority to unobservable inputs (Level 3). Examples of valuation techniques include the present value of estimated future cash flows, option-pricing models, and option-adjusted spread models.

Federal funds transaction means a short-term or open-ended unsecured transfer of immediately available funds by one depository institution to another depository institution or entity.

Foreign bank means an institution which is organized under the laws of a country other than the United States, is engaged in the business of banking, and is recognized as a bank by the banking supervisory authority of the country in which it is organized.

Immediate family member means a spouse or other family member living in the same household.

Intangible assets means assets considered to be intangible assets under GAAP. These assets include, but are not limited to, core deposit premiums, purchased credit card relationships, favorable leaseholds, and servicing assets (mortgage and non-mortgage). Interest-only strips receivable are not intangible assets under this definition.

Leverage ratio means, before October 21, 2013, the ratio of total capital to moving daily average net assets. This is the interim leverage ratio.

Leverage ratio means, on or after October 21, 2013, the ratio of adjusted core capital to moving daily average net assets. This is the permanent leverage ratio.

Limited liquidity investment means a private placement or funding agreement.

Member reverse repurchase transaction means an integrated transaction in which a corporate credit union purchases a security from one of its member credit unions under agreement by that member credit union to repurchase the same security at a specified time in the future. The corporate credit union then sells that same security, on the same day, to a third party, under agreement to repurchase it on the same date on which the corporate credit union is obligated to return the security to its member credit union.

Mortgage-backed security (MBS) means a security backed by first or second mortgages secured by real estate upon which is located a dwelling, mixed residential and commercial structure, residential manufactured home, or commercial structure.

Moving daily average net assets means the average of daily average net assets for the month being measured and the previous eleven (11) months.

Moving monthly average net risk-weighted assets means the average of the net risk-weighted assets for the month being measured and the previous eleven (11) months. Measurements must be taken on the last day of each month.

Mutual combination means a transaction or event in which a corporate credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union.

Nationally Recognized Statistical Rating Organization (NRSRO) means any entity that has applied for, and been granted permission, to be considered an NRSRO by the United States Securities and Exchange Commission.

NCUA means NCUA Board (Board), unless the particular action has been delegated by the Board.

Net assets means total assets less loans guaranteed by the NCUSIF and member reverse repurchase transactions. For its own account, a corporate credit union's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met. Also, any amounts deducted from core capital in calculating adjusted core capital are also deducted from net assets.

Net economic value (NEV) means the fair value of assets minus the fair value of liabilities. All fair value calculations must include the value of forward settlements and embedded options. Perpetual contributed capital, and the unamortized portion of nonperpetual capital that is, the portion that qualifies as capital for purposes of any of the minimum capital ratios, is excluded from liabilities for purposes of this calculation. The NEV ratio is calculated by dividing NEV by the fair value of assets.

Net interest margin security means a security collateralized by residual interests in collateralized mortgage obligations, residual interests in real estate mortgage investment conduits, or residual interests in other asset-backed securities.

Net risk-weighted assets means risk-weighted assets less Central Liquidity Facility (CLF) stock subscriptions, CLF loans guaranteed by the NCUSIF, and member reverse repurchase transactions. For its own account, a corporate credit union's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met. Also, any amounts deducted from core capital in calculating adjusted core capital are also deducted from net risk-weighted assets.

Nonperpetual capital means funds contributed by members or nonmembers that: are term certificates with an original minimum term of five years or that have an indefinite term (*i.e.,* no maturity) with a minimum withdrawal notice of five years; are available to cover losses that exceed retained earnings and perpetual contributed capital; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings. In the event the corporate is liquidated, the holders of nonperpetual capital accounts (NCAs) will claim equally. These claims will be subordinate to all other claims (including NCUSIF claims), except that any claims by the holders of perpetual contributed capital (PCC) will be subordinate to the claims of holders of NCAs.

Obligor means the primary party obligated to repay an investment, *e.g.,* the issuer of a security, such as a Qualified Special Purpose Entity (QSPE) trust; the taker of a deposit; or the borrower of funds in a federal funds transaction. Obligor does not include an originator of receivables underlying an asset-backed security, the servicer of such receivables, or an insurer of an investment.

Official means any director or committee member.

Pair-off transaction means a security purchase transaction that is closed out or sold at, or prior to, the settlement or expiration date.

Perpetual contributed capital (PCC) means accounts or other interests of a corporate credit union that: are perpetual, non-cumulative dividend accounts; are available to cover losses that exceed retained earnings; are not insured by the NCUSIF or other share or deposit insurers; and cannot be pledged against borrowings. In the event the corporate is liquidated, any claims made by the holders of perpetual contributed capital will be subordinate to all other claims (including NCUSIF claims).

Private label security means a security that is not issued or guaranteed by the U.S. government, its agencies, or its government-sponsored enterprises (GSEs).

Quoted market price means a recent sales price or a price based on current bid and asked quotations.

Repurchase transaction means a transaction in which a corporate credit union agrees to purchase a security from a counterparty and to resell the same or any identical security to that counterparty at a specified future date and at a specified price.

Residential mortgage-backed security (RMBS) means a mortgage-backed security collateralized primarily by mortgage loans on residential properties.

Residential properties means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence, or timeshare properties.

Residual interest means the ownership interest in remainder cash flows from a CMO or ABS transaction after payments due bondholders and trust administrative expenses have been satisfied.

Retained earnings means retained earnings as defined under Generally Accepted Accounting Principles (GAAP).

Risk-weighted assets means a corporate credit union's risk-weighted assets as calculated in accordance with Appendix C of this part.

Section 107(8) institution means an institution described in Section 107(8) of the Federal Credit Union Act (12 U.S.C. 1757(8)).

Securities lending means lending a security to a counterparty, either directly or through an agent, and accepting collateral in return.

Securitization means the pooling and repackaging by a special purpose entity of assets or other credit exposures that can be sold to investors. Securitization includes transactions that create stratified credit risk positions whose performance is dependent upon an underlying pool of credit exposures, including loans and commitments.

Senior executive officer means a chief executive officer, any assistant chief executive officer (*e.g.,* any assistant president, any vice president or any assistant treasurer/manager), and the chief financial officer (controller). This term also includes employees of any entity hired to perform the functions described above.

Settlement date means the date originally agreed to by a corporate credit union and a counterparty for settlement of the purchase or sale of a security.

Short sale means the sale of a security not owned by the seller.

Small business related security means a security that is rated in 1 of the 4 highest rating categories by at least one nationally recognized statistical rating organization, and represents an interest in one or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company. This definition does not include Small Business Administration securities permissible under § 107(7) of the Act.

State means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Stripped mortgage-backed security means a security that represents either the principal-only or interest-only portion of the cash flows of an underlying pool of mortgages.

Subordinated security means a security that, at the time of purchase, has a junior claim on the underlying collateral or assets to other securities in the same issuance. If a security is junior only to money market fund eligible securities in the same issuance, the former security is not subordinated for purposes of this definition.

Supplementary Capital means the sum of the following items:

(1) Nonperpetual capital accounts, as amortized under § 704.3(b)(3);

(2) Allowance for loan and lease losses calculated under GAAP to a maximum of 1.25 percent of risk-weighted assets; and

(3) Forty-five percent of unrealized gains on available-for-sale equity securities with readily determinable fair values. Unrealized gains are unrealized holding gains, net of unrealized holding losses, calculated as the amount, if any, by which fair value exceeds historical cost. The NCUA may disallow such inclusion in the calculation of supplementary capital if the NCUA determines that the securities are not prudently valued.

Tier 1 capital means adjusted core capital. *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to the moving monthly average net risk-weighted assets.

Tier 2 capital means supplementary capital plus any perpetual contributed capital deducted from adjusted core capital.

Total assets means the sum of all a corporate credit union's assets as calculated under GAAP.

Total capital means the sum of a corporate credit union's adjusted core capital and its supplementary capital, less the corporate credit union's equity investments not otherwise deducted when calculating adjusted core capital.

Total risk-based capital ratio means the ratio of total capital to moving monthly average net risk-weighted assets.

Trade date means the date a corporate credit union originally agrees, whether orally or in writing, to enter into the purchase or sale of a security.

Trigger means an event in a securitization that will redirect cash-flows if predefined thresholds are breached. Examples of triggers are delinquency and cumulative loss triggers.

Weighted average life means the weighted-average time to the return of a dollar of principal, calculated by multiplying each portion of principal received by the time at which it is expected to be received (based on a reasonable and supportable estimate of that time) and then summing and dividing by the total amount of principal. The calculation of weighted average life for interest only securities means the weighted-average time to the return of a dollar of interest, calculated by multiplying each portion of interest received by the time at which it is expected to be received (based on a reasonable and supportable estimate of that time) and then summing and dividing by the total amount of interest to be received.

When-issued trading means the buying and selling of securities in the period between the announcement of an offering and the issuance and payment date of the securities.

■ 8. Effective October 20, 2011, revise § 704.3 to read as follows:

§ 704.3 Corporate credit union capital.

(a) *Capital requirements.* (1) A corporate credit union must maintain at all times:

(i) A leverage ratio of 4.0 percent or greater;

(ii) A Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) A total risk-based capital ratio of 8.0 percent or greater.

(2) To ensure it meets its capital requirements, a corporate credit union must develop and ensure implementation of written short- and long-term capital goals, objectives, and strategies which provide for the building of capital consistent with regulatory requirements, the maintenance of sufficient capital to support the risk exposures that may arise from current and projected activities, and the periodic review and reassessment of the capital position of the corporate credit union.

(3) Beginning with the first call report submitted on or after October 21, 2013, a corporate credit union must calculate and report to NCUA the ratio of its retained earnings to its moving daily average net assets. If this ratio is less than 0.45 percent, the corporate credit union must, within 30 days, submit a retained earnings accumulation plan to the NCUA for NCUA's approval. The plan must contain a detailed explanation of how the corporate credit union will accumulate earnings sufficient to meet all its future minimum leverage ratio requirements, including specific semiannual milestones for accumulating retained earnings. In the case of a state-chartered corporate credit union, the NCUA will consult with the appropriate state supervisory authority (SSA) before making a determination to approve or disapprove the plan, and will provide the SSA a copy of the completed plan. If the corporate credit union fails to submit a plan acceptable to NCUA, or fails to comply with any element of a plan approved by NCUA, the corporate will immediately be classified as significantly undercapitalized or, if already significantly undercapitalized, as critically undercapitalized for purposes of prompt corrective actions. The corporate credit union will be subject to all the associated actions under § 704.4.

(b) *Requirements for nonperpetual capital accounts (NCAs)*—(1) Form. NCA funds may be in the form of a term certificate or a no-maturity notice account.

(2) Disclosure. The terms and conditions of a nonperpetual capital account must be disclosed to the recorded owner of the account at the time the account is opened and at least annually thereafter.

(i) The initial NCA disclosure must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board; and

(ii) The annual disclosure notice must be signed by the chair of the corporate credit union. The chair must sign a statement that certifies that the notice has been sent to all entities with NCAs. The certification must be maintained in the corporate credit union's files and be available for examiner review.

(3) Five-year remaining maturity. When a no-maturity NCA has been placed on notice, or a term account has a remaining maturity of less than five years, the corporate will reduce the amount of the account that can be considered as nonperpetual capital by a constant monthly amortization that ensures the capital is fully amortized one year before the date of maturity or one year before the end of the notice period. The full balance of an NCA being amortized, not just the remaining non-amortized portion, is available to absorb losses in excess of the sum of retained earnings and perpetual contributed capital until the funds are released by the corporate credit union at the time of maturity or the conclusion of the notice period.

(4) Release. Nonperpetual capital may not be released due solely to the merger, charter conversion, or liquidation of the account holder. In the event of a merger, the capital account transfers to the continuing entity. In the event of a charter conversion, the capital account transfers to the new institution. In the event of liquidation, the corporate may release a member capital account to facilitate the payout of shares, but only with the prior written approval of the NCUA.

(5) Redemption. A corporate credit union may redeem NCAs prior to maturity or prior to the end of the notice period only with the prior approval of the NCUA and, for state chartered corporate credit unions, the approval of the appropriate state regulator.

(6) Sale. A member may transfer its interest in a nonperpetual capital account to another member or to a nonmember (other than a natural person). At least 14 days before consummating such a transfer, the member must notify the corporate credit union of the pending transfer. The corporate credit union must, within 10 days of such notice, provide the member and the potential transferee all financial information about the corporate credit union that is available to the public or that the corporate credit union has provided to its members, including any call report data submitted by the corporate credit union to NCUA but not yet posted on NCUA's Web site.

(7) Merger. In the event of a merger of a corporate credit union, nonperpetual capital will transfer to the continuing corporate credit union. The minimum five-year notice period for withdrawal of no-maturity capital remains in effect.

(c) *Requirements for perpetual contributed capital (PCC)*—(1) Disclosure. The terms and conditions of any perpetual contributed capital instrument must be disclosed to the recorded owner of the instrument at the time the instrument is created and must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board.

(2) Release. Perpetual contributed capital may not be released due solely to the merger, charter conversion or liquidation of a member credit union. In the event of a merger, the perpetual contributed capital transfers to the continuing credit union. In the event of a charter conversion, the perpetual contributed capital transfers to the new institution. In the event of liquidation, the perpetual contributed capital may be released to facilitate the payout of shares with NCUA's prior written approval.

(3) Callability. A corporate credit union may call perpetual contributed capital instruments only with the prior approval of the NCUA and, for state chartered corporate credit unions, the applicable state regulator. Perpetual contributed capital accounts are callable on a pro-rata basis across an issuance class.

(4) Perpetual contributed capital. A corporate credit union may issue perpetual contributed capital to both members and nonmembers.

(5) The holder of a PCC instrument may transfer its interests in the instrument to another member or to a nonmember (other than a natural person). At least 14 days before consummating such a transfer, the member must notify the corporate credit union of the pending transfer. The corporate credit union must, within 10 days of such notice, provide the member

and the potential transferee all financial information about the corporate credit union that is available to the public or that the corporate credit union has provided to its members, including any call report data submitted by the corporate credit union to NCUA but not yet posted on NCUA's Web site.

(6) A corporate credit union is permitted to condition membership, services, or prices for services on a member's ownership of PCC, provided the corporate credit union gives existing members at least six months written notice of:

(i) The requirement to purchase PCC, including specific amounts; and

(ii) The effects of a failure to purchase the requisite PCC on the pricing of services or on the member's access to membership or services.

(d) *Individual minimum capital requirements.*

(1) *General.* The rules and procedures specified in this paragraph apply to the establishment of an individual minimum capital requirement for a corporate credit union that varies from any of the risk-based capital requirement(s) or leverage ratio requirements that would otherwise apply to the corporate credit union under this part.

(2) *Appropriate considerations for establishing individual minimum capital requirements.* Minimum capital levels higher than the risk-based capital requirements or the leverage ratio requirement under this part may be appropriate for individual corporate credit unions. The NCUA may establish increased individual minimum capital requirements, including modification of the minimum capital requirements related to being either significantly and critically undercapitalized for purposes of § 704.4 of this part, upon a determination that the corporate credit union's capital is or may become inadequate in view of the credit union's circumstances. For example, higher capital levels may be appropriate when NCUA determines that:

(i) A corporate credit union is receiving special supervisory attention;

(ii) A corporate credit union has or is expected to have losses resulting in capital inadequacy;

(iii) A corporate credit union has a high degree of exposure to interest rate risk, prepayment risk, credit risk, concentration risk, certain risks arising from nontraditional activities or similar risks, or a high proportion of off-balance sheet risk including standby letters of credit;

(iv) A corporate credit union has poor liquidity or cash flow;

(v) A corporate credit union is growing, either internally or through acquisitions, at such a rate that supervisory problems are presented that are not dealt with adequately by other NCUA regulations or other guidance;

(vi) A corporate credit union may be adversely affected by the activities or condition of its CUSOs or other persons or entities with which it has significant business relationships, including concentrations of credit;

(vii) A corporate credit union with a portfolio reflecting weak credit quality or a significant likelihood of financial loss, or has loans or securities in nonperforming status or on which borrowers fail to comply with repayment terms;

(viii) A corporate credit union has inadequate underwriting policies, standards, or procedures for its loans and investments;

(ix) A corporate credit union has failed to properly plan for, or execute, necessary retained earnings growth, or

(ix) A corporate credit union has a record of operational losses that exceeds the average of other, similarly situated corporate credit unions; has management deficiencies, including failure to adequately monitor and control financial and operating risks, particularly the risks presented by concentrations of credit and nontraditional activities; or has a poor record of supervisory compliance.

(3) *Standards for determination of appropriate individual minimum capital requirements.* The appropriate minimum capital levels for an individual corporate credit union cannot be determined solely through the application of a rigid mathematical formula or wholly objective criteria. The decision is necessarily based, in part, on subjective judgment grounded in agency expertise. The factors to be considered in NCUA's determination will vary in each case and may include, for example:

(i) The conditions or circumstances leading to the determination that a higher minimum capital requirement is appropriate or necessary for the corporate credit union;

(ii) The exigency of those circumstances or potential problems;

(iii) The overall condition, management strength, and future prospects of the corporate credit union and, if applicable, its subsidiaries, affiliates, and business partners;

(iv) The corporate credit union's liquidity, capital and other indicators of financial stability, particularly as compared with those of similarly situated corporate credit unions; and

(v) The policies and practices of the corporate credit union's directors, officers, and senior management as well as the internal control and internal audit systems for implementation of such adopted policies and practices.

(4) Procedures—(i) In the case of a state chartered corporate credit union, NCUA will consult with the appropriate state regulator when considering imposing a new minimum capital requirement.

(ii) When the NCUA determines that a minimum capital requirement is necessary or appropriate for a particular corporate credit union, it will notify the corporate credit union in writing of its proposed individual minimum capital requirement; the schedule for compliance with the new requirement; and the specific causes for determining that the higher individual minimum capital requirement is necessary or appropriate for the corporate credit union. The NCUA shall forward the notifying letter to the appropriate state supervisory authority (SSA) if a state-chartered corporate credit union would be subject to an individual minimum capital requirement.

(iii) The corporate credit union's response must include any information that the credit union wants the NCUA to consider in deciding whether to establish or to amend an individual minimum capital requirement for the corporate credit union, what the individual capital requirement should be, and, if applicable, what compliance schedule is appropriate for achieving the required capital level. The responses of the corporate credit union and SSA must be in writing and must be delivered to the NCUA within 30 days after the date on which the notification was received. The NCUA may extend the time period for good cause, and the time period for response by the insured corporate credit union may be shortened for good cause:

(A) When, in the opinion of the NCUA, the condition of the corporate credit union so requires, and the NCUA informs the corporate credit union of the shortened response period in the notice;

(B) With the consent of the corporate credit union; or

(C) When the corporate credit union already has advised the NCUA that it cannot or will not achieve its applicable minimum capital requirement.

(iv) Failure by the corporate credit union to respond within 30 days, or such other time period as may be specified by the NCUA, may constitute a waiver of any objections to the proposed individual minimum capital requirement or to the schedule for complying with it, unless the NCUA has provided an extension of the response period for good cause.

(v) After expiration of the response period, the NCUA will decide whether or not the proposed individual minimum capital requirement should be established for the corporate credit union, or whether that proposed requirement should be adopted in modified form, based on a review of the corporate credit union's response and other relevant information. The NCUA's decision will address comments received within the response period from the corporate credit union and the appropriate state supervisory authority (SSA) (if a state-chartered corporate credit union is involved) and will state the level of capital required, the schedule for compliance with this requirement, and any specific remedial action the corporate credit union could take to eliminate the need for continued applicability of the individual minimum capital requirement. The NCUA will provide the corporate credit union and the appropriate SSA (if a state-chartered corporate credit union is involved) with a written decision on the individual minimum capital requirement, addressing the substantive comments made by the corporate credit union and setting forth the decision and the basis for that decision. Upon receipt of this decision by the corporate credit union, the individual minimum capital requirement becomes effective and binding upon the corporate credit union. This decision represents final agency action.

(vi) In lieu of the procedures established above, a corporate credit union may request an informal hearing. The corporate credit union must make the request for a hearing in writing, and NCUA must receive the request no later than 10 days following the date of the notice described in paragraph (d)(4)(ii) of this section. Upon receipt of the request for hearing, NCUA will conduct an informal hearing and render a decision using the procedures described in paragraphs (d), (e), and (f) of § 747.3003 of this chapter.

(5) *Failure to comply.* Failure to satisfy any individual minimum capital requirement, or to meet any required incremental additions to capital under a schedule for compliance with such an individual minimum capital requirement, will constitute a basis to take action as described in § 704.4.

(6) *Change in circumstances.* If, after a decision is made under paragraph (b)(3)(iv) of this section, there is a change in the circumstances affecting the corporate credit union's capital adequacy or its ability to reach its required minimum capital level by the specified date, the NCUA may amend the individual minimum capital requirement or the corporate credit union's schedule for such compliance. The NCUA may decline to consider a corporate credit union's request for such changes that are not based on a significant change in circumstances or that are repetitive or frivolous. Pending the NCUA's reexamination of the original decision, that original decision and any compliance schedule established in that decision will continue in full force and effect.

(e) *Reservation of authority.*

(1) *Transactions for purposes of evasion.* The NCUA may disregard any transaction entered into primarily for the purpose of reducing the minimum required amount of regulatory capital or otherwise evading the requirements of this section.

(2) *Period-end versus average figures.* The NCUA reserves the right to require a corporate credit union to compute its capital ratios on the basis of period-end assets rather than average assets when the NCUA determines this requirement is appropriate to carry out the purposes of this part.

(3) *Reservation of authority.* (i) Notwithstanding the definitions of core and supplementary capital in paragraph (d) of this section, the NCUA may find that a particular asset or core or supplementary capital component has characteristics or terms that diminish its contribution to a corporate credit union's ability to absorb losses, and the NCUA may require the discounting or deduction of such asset or component from the computation of core, supplementary, or total capital.

(ii) Notwithstanding Appendix C to this Part, the NCUA will look to the substance of a transaction and may find that the assigned risk-weight for any asset, or credit equivalent amount or credit conversion factor for any off-balance sheet item does not appropriately reflect the risks imposed on the corporate credit union. The NCUA may require the corporate credit union to apply another risk-weight, credit equivalent amount, or credit conversion factor that NCUA deems appropriate.

(iii) If Appendix C to this part does not specifically assign a risk-weight, credit equivalent amount, or credit conversion factor to a particular asset or activity of the corporate credit union, the NCUA may assign any risk-weight, credit equivalent amount, or credit conversion factor that it deems appropriate. In making this determination, NCUA will consider the risks associated with the asset or off-balance sheet item as well as other relevant factors.

(4) Where practicable, the NCUA will consult with the appropriate state regulator before taking any action under this paragraph (e) that involves a state chartered corporate credit union.

(5) Before taking any action under this paragraph (e), NCUA will provide the corporate credit union with written notice of the intended action and the reasons for such action. The corporate credit union will have seven days to provide the NCUA with a written response, and the NCUA will consider the response before taking the action. Upon the timely request of the corporate credit union, and for good cause, NCUA may extend the seven day response period.

(f) *Former capital accounts.* This paragraph addresses membership capital accounts (MCAs) that qualified as corporate capital prior to October 20, 2011 but which no longer satisfy the definitions of capital because the accounts have not been converted by the member to nonperpetual capital accounts (NCAs) or to perpetual contributed capital (PCC).

(1) For MCAs structured as adjustable balance accounts, the corporate will immediately place the account on notice of withdrawal if the member has not already done so. The corporate will continue to adjust the balance of the MCA account in accordance with the original terms of the account until the entire notice period has run and then return the remaining balance, less any losses, to the member. Until the expiration of the notice period the entire adjusted balance will be available to cover losses at the corporate credit union that exceed retained earnings and PCC (excluding, if a corporate credit union exercises the capital prioritization option under Part I of Appendix A to this Part, any PCC with priority under that option).

(2) For term MCAs, the corporate credit union will return the balance of the MCA account to the member at the expiration of the term. Until the expiration of term, the entire account balance will be available to cover losses that exceed retained earnings and PCC (excluding, if a corporate credit union exercises the capital prioritization option under part I of Appendix A to this part, any PCC with priority under that option).

(3) A corporate credit union may count a portion of unconverted MCAs as Tier 2 capital. Beginning on the date of issuance (for term MCAs) or the date of notice of withdrawal (for other MCAs), the corporate may count the entire account balance as Tier 2 capital, but

will then reduce the amount of the account that can be considered as Tier 2 capital by a constant monthly amortization that ensures the capital is fully amortized one year before the date of maturity or one year before the end of the notice period. For adjustable balance account MCAs where the adjustment is determined based on some impermanent measure, such as shares on deposit with the corporate, the corporate credit union may not treat any part of the account as capital.

(4) A corporate credit union must, on or before December 20, 2011, provide any members that hold unconverted MCAs a one-time written disclosure about the status of their MCA accounts as described in this paragraph (f).

§ 704.4 [Redesignated as § 704.13]

■ 9. Effective January 18, 2011, redesignate § 704.4 as § 704.13.

■ 10. Effective October 20, 2011, add a new § 704.4 to read as follows:

§ 704.4. Prompt corrective action.

(a) *Purpose.* The principal purpose of this section is to define, for corporate credit unions that are not adequately capitalized, the capital measures and capital levels that are used for determining appropriate supervisory actions. This section establishes procedures for submission and review of capital restoration plans and for issuance and review of capital directives, orders, and other supervisory directives.

(b) *Scope.* This section applies to corporate credit unions, including officers, directors, and employees.

(1) This section does not limit the authority of NCUA in any way to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. The NCUA may take action under this section independently of, in conjunction with, or in addition to any other enforcement action available to the NCUA, including issuance of cease and desist orders, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(2) Unless permitted by the NCUA or otherwise required by law, no corporate credit union may state in any advertisement or promotional material its capital category under this part or that the NCUA has assigned the corporate credit union to a particular category.

(3) Any group of credit unions applying for a new corporate credit union charter will submit, as part of the charter application, a detailed draft plan for soliciting contributed capital and building retained earnings. The draft plan will include specific levels of contributed capital and retained earnings and the anticipated timeframes for achieving those levels. The Board will review the draft plan and modify it as necessary. If the Board approves the plan, the Board will include any necessary waivers of this section or part.

(c) *Notice of capital category.* (1) Effective date of determination of capital category. A corporate credit union will be deemed to be within a given capital category as of the most recent date:

(i) A 5310 Financial Report is required to be filed with the NCUA;

(ii) A final NCUA report of examination is delivered to the corporate credit union; or

(iii) Written notice is provided by the NCUA to the corporate credit union that its capital category has changed as provided in paragraphs (c)(2) or (d)(3) of this section.

(2) Adjustments to reported capital levels and category—

(i) Notice of adjustment by corporate credit union. A corporate credit union must provide the NCUA with written notice that an adjustment to the corporate credit union's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the corporate credit union to be placed in a lower capital category from the category assigned to the corporate credit union for purposes of this section on the basis of the corporate credit union's most recent call report or report of examination.

(ii) Determination by the NCUA to change capital category. After receiving notice pursuant to paragraph (c)(1) of this section, or on its own initiative, the NCUA will determine whether to change the capital category of the corporate credit union and will notify the corporate credit union of the NCUA's determination.

(d) *Capital measures and capital category definitions.* (1) Capital measures. For purposes of this section, the relevant capital measures are:

(i) The total risk-based capital ratio;

(ii) The Tier 1 risk-based capital ratio; and

(iii) The leverage ratio.

(2) Capital categories. For purposes of this section, a corporate credit union is:

(i) Well capitalized if the corporate credit union:

(A) Has a total risk-based capital ratio of 10.0 percent or greater; and

(B) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(C) Has a leverage ratio of 5.0 percent or greater; and

(D) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by NCUA to meet and maintain a specific capital level for any capital measure.

(ii) Adequately capitalized if the corporate credit union:

(A) Has a total risk-based capital ratio of 8.0 percent or greater; and

(B) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(C) Has:

(*1*) A leverage ratio of 4.0 percent or greater; and

(*2*) Does not meet the definition of a well capitalized corporate credit union.

(iii) Undercapitalized if the corporate credit union:

(A) Has a total risk-based capital ratio that is less than 8.0 percent; or

(B) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(C) Has a leverage ratio that is less than 4.0 percent.

(iv) Significantly undercapitalized if the corporate credit union has:

(A) A total risk-based capital ratio that is less than 6.0 percent; or

(B) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(C) A leverage ratio that is less than 3.0 percent.

(v) Critically undercapitalized if the corporate credit union has:

(A) A total risk-based capital ratio that is less than 4.0 percent; or

(B) A Tier 1 risk-based capital ratio that is less than 2.0 percent; or

(C) A leverage ratio that is less than 2.0 percent.

(3) Reclassification based on supervisory criteria other than capital. Notwithstanding the elements of paragraph (d)(2) of this section, the NCUA may reclassify a well capitalized corporate credit union as adequately capitalized, and may require an adequately capitalized or undercapitalized corporate credit union to comply with certain mandatory or discretionary supervisory actions as if the corporate credit union were in the next lower capital category, in the following circumstances:

(i) Unsafe or unsound condition. The NCUA has determined, after notice and opportunity for hearing pursuant to paragraph (h)(1) of this section, that the corporate credit union is in an unsafe or unsound condition; or

(ii) Unsafe or unsound practice. The NCUA has determined, after notice and an opportunity for hearing pursuant to paragraph (h)(1) of this section, that the corporate credit union received a less-than-satisfactory rating (*i.e.,* three or lower) for any rating category (other than in a rating category specifically addressing capital adequacy) under the Corporate Risk Information System (CRIS) rating system and has not corrected the conditions that served as the basis for the less than satisfactory rating. Ratings under this paragraph (d)(3)(ii) refer to the most recent ratings (as determined either on-site or off-site by the most recent examination) of which the corporate credit union has been notified in writing.

(4) The NCUA may, for good cause, modify any of the percentages in paragraph (d)(2) of this section as described in § 704.3(d).

(e) *Capital restoration plans.* (1) Schedule for filing plan—

(i) In general. A corporate credit union must file a written capital restoration plan with the NCUA within 45 days of the date that the corporate credit union receives notice or is deemed to have notice that the corporate credit union is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the NCUA notifies the corporate credit union in writing that the plan is to be filed within a different period. An adequately capitalized corporate credit union that has been required pursuant to paragraph (d)(3) of this section to comply with supervisory actions as if the corporate credit union were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(ii) Additional capital restoration plans. Notwithstanding paragraph (e)(1)(i) of this section, a corporate credit union that has already submitted and is operating under a capital restoration plan approved under this section is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under paragraph (d)(3) of this section unless the NCUA notifies the corporate credit union that it must submit a new or revised capital plan. A corporate credit union that is notified that it must submit a new or revised capital restoration plan must file the plan in writing with the NCUA within 45 days of receiving such notice, unless the NCUA notifies the corporate credit union in writing that the plan is to be filed within a different period.

(2) Contents of plan. All financial data submitted in connection with a capital restoration plan must be prepared in accordance with the instructions provided on the call report, unless the NCUA instructs otherwise. The capital restoration plan must include all of the information required to be filed under paragraph (k)(2)(ii) of this section. A corporate credit union required to submit a capital restoration plan as the result of a reclassification of the corporate credit union pursuant to paragraph (d)(3) of this section must include a description of the steps the corporate credit union will take to correct the unsafe or unsound condition or practice.

(3) Failure to submit a capital restoration plan. A corporate credit union that is undercapitalized and that fails to submit a written capital restoration plan within the period provided in this section will, upon the expiration of that period, be subject to all of the provisions of this section applicable to significantly undercapitalized credit unions.

(4) Review of capital restoration plans. Within 60 days after receiving a capital restoration plan under this section, the NCUA will provide written notice to the corporate credit union of whether it has approved the plan. The NCUA may extend this time period.

(5) Disapproval of capital plan. If the NCUA does not approve a capital restoration plan, the corporate credit union must submit a revised capital restoration plan, when directed to do so, within the time specified by the NCUA. An undercapitalized corporate credit union is subject to the provisions applicable to significantly undercapitalized credit unions until it has submitted, and NCUA has approved, a capital restoration plan. If the NCUA directs that the corporate submit a revised plan, it must do so in time frame specified by the NCUA.

(6) Failure to implement a capital restoration plan. Any undercapitalized corporate credit union that fails in any material respect to implement a capital restoration plan will be subject to all of the provisions of this section applicable to significantly undercapitalized institutions.

(7) Amendment of capital plan. A corporate credit union that has filed an approved capital restoration plan may, after prior written notice to and approval by the NCUA, amend the plan to reflect a change in circumstance. Until such time as NCUA has approved a proposed amendment, the corporate credit union must implement the capital restoration plan as approved prior to the proposed amendment.

(f) *Mandatory and discretionary supervisory actions.* (1) Mandatory supervisory actions.—

(i) Provisions applicable to all corporate credit unions. All corporate credit unions are subject to the restrictions contained in paragraph (k)(1) of this section on capital distributions.

(ii) Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized corporate credit unions. Immediately upon receiving notice or being deemed to have notice, as provided in paragraph (c) or (e) of this section, that the corporate credit union is undercapitalized, significantly undercapitalized, or critically undercapitalized, the corporate credit union will be subject to the following provisions of paragraph (k) of this section:

(A) Restricting capital distributions (paragraph (k)(1));

(B) NCUA monitoring of the condition of the corporate credit union (paragraph (k)(2)(i));

(C) Requiring submission of a capital restoration plan (paragraph (k)(2)(ii));

(D) Restricting the growth of the corporate credit union's assets (paragraph (k)(2)(iii)); and

(E) Requiring prior approval of certain expansion proposals (paragraph (k)(2)(iv)).

(iii) Additional provisions applicable to significantly undercapitalized, and critically undercapitalized corporate credit unions. In addition to the mandatory requirements described in paragraph (f)(1) of this section, immediately upon receiving notice or being deemed to have notice that the corporate credit union is significantly undercapitalized, or critically undercapitalized, or that the corporate credit union is subject to the provisions applicable to corporate credit unions that are significantly undercapitalized because the credit union failed to submit or implement in any material respect an acceptable capital restoration plan, the corporate credit union will become subject to the provisions of paragraph (k)(3)(iii) of this section that restrict compensation paid to senior executive officers of the institution.

(iv) Additional provisions applicable to critically undercapitalized corporate credit unions. In addition to the provisions described in paragraphs (f)(1)(ii) and (f)(1)(iii) of this section, immediately upon receiving notice or being deemed to have notice that the corporate credit union is critically undercapitalized, the corporate credit union will become subject to these additional provisions of paragraph (k) of this section:

(A) Restricting the activities of the corporate credit union ((k)(5)(i)); and

(B) Restricting payments on subordinated debt of the corporate credit union ((k)(5)(ii)).

(2) Discretionary supervisory actions.

(i) All PCA actions listed in paragraph (k) of this section that are not discussed in paragraph (f)(1) of this section are discretionary.

(ii) All discretionary actions available to NCUA in the case of an undercapitalized corporate credit union are available to NCUA in the case of a significantly undercapitalized credit union. All discretionary actions available to NCUA in the case of an undercapitalized corporate credit union or a significantly undercapitalized corporate credit union are available to NCUA in the case of a critically undercapitalized corporate credit union.

(iii) In taking any discretionary PCA actions with a corporate credit union that is deemed to be undercapitalized, significantly undercapitalized or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; or an action in connection with an officer or director of such corporate credit union; the NCUA will follow the procedures for issuing directives under paragraphs (g) and (i) of this section.

(iv) NCUA will consult and seek to work cooperatively with the appropriate state supervisory authority (SSA) before taking any discretionary supervisory action with respect to a state-chartered corporate credit union; will provide notice of its decision to the SSA; and will allow the appropriate SSA an opportunity to take the proposed action independently or jointly with NCUA.

(g) *Directives to take prompt corrective action.* The NCUA will provide an undercapitalized, significantly undercapitalized, or critically undercapitalized corporate credit union prior written notice of the NCUA's intention to issue a directive requiring such corporate credit union to take actions or to follow proscriptions described in this part. Section 747.3002 of this chapter prescribes the notice content and associated process.

(h) *Procedures for reclassifying a corporate credit union based on criteria other than capital.* When the NCUA intends to reclassify a corporate credit union or subject it to the supervisory actions applicable to the next lower capitalization category based on an unsafe or unsound condition or practice, the NCUA will provide the credit union with prior written notice of such intent. Section 747.3003 of this chapter prescribes the notice content and associated process.

(i) *Order to dismiss a Director or senior executive officer.* When the NCUA issues and serves a directive on a corporate credit union requiring it to dismiss from office any director or senior executive officer under paragraphs (k)(3) of this section, the NCUA will also serve upon the person the corporate credit union is directed to dismiss (Respondent) a copy of the directive (or the relevant portions, where appropriate) and notice of the Respondent's right to seek reinstatement. Section 747.3004 of this chapter prescribes the content of the notice of right to seek reinstatement and the associated process.

(j) *Enforcement of directives.* Section 747.3005 of this chapter prescribes the process for enforcement of directives.

(k) *Remedial actions towards undercapitalized, significantly undercapitalized, and critically undercapitalized corporate credit unions.* (1) Provision applicable to all corporate credit unions. A corporate credit union is prohibited from making any capital distribution, including payment of dividends on perpetual and nonperpetual capital accounts, if, after making the distribution, the credit union would be undercapitalized.

(2) Provisions applicable to undercapitalized corporate credit unions.

(i) Monitoring required. The NCUA will—

(A) Closely monitor the condition of any undercapitalized corporate credit union;

(B) Closely monitor compliance with capital restoration plans, restrictions, and requirements imposed under this section; and

(C) Periodically review the plan, restrictions, and requirements applicable to any undercapitalized corporate credit union to determine whether the plan, restrictions, and requirements are achieving the purpose of this section.

(ii) Capital restoration plan required.

(A) Any undercapitalized corporate credit union must submit an acceptable capital restoration plan to the NCUA.

(B) The capital restoration plan will—

(*1*) Specify—

(*i*) The steps the corporate credit union will take to become adequately capitalized;

(*ii*) The levels of capital to be attained during each year in which the plan will be in effect;

(*iii*) How the corporate credit union will comply with the restrictions or requirements then in effect under this section; and

(*iv*) The types and levels of activities in which the corporate credit union will engage; and

(*2*) Contain such other information as the NCUA may require.

(C) The NCUA will not accept a capital restoration plan unless the NCUA determines that the plan—

(*1*) Complies with paragraph (k)(2)(ii)(B) of this section;

(*2*) Is based on realistic assumptions, and is likely to succeed in restoring the corporate credit union's capital; and

(*3*) Would not appreciably increase the risk (including credit risk, interest-rate risk, and other types of risk) to which the corporate credit union is exposed.

(iii) Asset growth restricted. An undercapitalized corporate credit union must not permit its daily average net assets during any calendar month to exceed its moving daily average net assets unless—

(A) The NCUA has accepted the corporate credit union's capital restoration plan; and

(B) Any increase in total assets is consistent with the plan.

(iv) Prior approval required for acquisitions, branching, and new lines of business. An undercapitalized corporate credit union must not, directly or indirectly, acquire any interest in any entity, establish or acquire any additional branch office, or engage in any new line of business unless the NCUA has accepted the corporate credit union's capital restoration plan, the corporate credit union is implementing the plan, and the NCUA determines that the proposed action is consistent with and will further the achievement of the plan.

(3) Provisions applicable to significantly undercapitalized corporate credit unions and undercapitalized corporate credit unions that fail to submit and implement capital restoration plans.

(i) In general. This paragraph applies with respect to any corporate credit union that—

(A) Is significantly undercapitalized; or

(B) Is undercapitalized and—

(*1*) Fails to submit an acceptable capital restoration plan within the time allowed by the NCUA under paragraph (e)(1) of this section; or

(*2*) Fails in any material respect to implement a plan accepted by the NCUA.

(ii) Specific actions authorized. The NCUA may take one or more of the following actions:

(A) Requiring recapitalization.

(*1*) Requiring the corporate credit union to seek and obtain additional contributed capital.

(*2*) Requiring the corporate credit union to increase its rate of earnings retention.

(*3*) Requiring the corporate credit union to combine, in whole or part, with another insured depository institution, if one or more grounds exist under this section or the Federal Credit Union Act for appointing a conservator or liquidating agent.

(B) Restricting any ongoing or future transactions with affiliates.

(C) Restricting interest rates paid.

(*1*) In general. Restricting the rates of dividends and interest that the corporate credit union pays on shares and deposits to the prevailing rates on shares and deposits of comparable amounts and maturities in the region where the institution is located, as determined by the NCUA.

(*2*) Retroactive restrictions prohibited. Paragraph (k)(3)(ii)(c) of this section does not authorize the NCUA to restrict interest rates paid on time deposits or shares made before (and not renewed or renegotiated after) the date the NCUA announced this restriction.

(D) Restricting asset growth. Restricting the corporate credit union's asset growth more stringently than in paragraph (k)(2)(iii) of this section, or requiring the corporate credit union to reduce its total assets.

(E) Restricting activities. Requiring the corporate credit union or any of its CUSOs to alter, reduce, or terminate any activity that the NCUA determines poses excessive risk to the corporate credit union.

(F) Improving management. Doing one or more of the following:

(*1*) New election of directors. Ordering a new election for the corporate credit union's board of directors.

(*2*) Dismissing directors or senior executive officers. Requiring the corporate credit union to dismiss from office any director or senior executive officer who had held office for more than 180 days immediately before the corporate credit union became undercapitalized.

(*3*) Employing qualified senior executive officers. Requiring the corporate credit union to employ qualified senior executive officers (who, if the NCUA so specifies, will be subject to approval by the NCUA).

(G) Requiring divestiture. Requiring the corporate credit union to divest itself of or liquidate any interest in any entity if the NCUA determines that the entity is in danger of becoming insolvent or otherwise poses a significant risk to the corporate credit union;

(H) Conserve or liquidate the corporate credit union if NCUA determines the credit union has no reasonable prospect of becoming adequately capitalized; and

(I) Requiring other action. Requiring the corporate credit union to take any other action that the NCUA determines will better carry out the purpose of this section than any of the actions described in this paragraph.

(iii) Senior executive officers' compensation restricted.

(A) In general. The corporate credit union is prohibited from doing any of the following without the prior written approval of the NCUA:

(*1*) Pay any bonus or profit-sharing to any senior executive officer.

(*2*) Provide compensation to any senior executive officer at a rate exceeding that officer's average rate of compensation (excluding bonuses and profit-sharing) during the 12 calendar months preceding the calendar month in which the corporate credit union became undercapitalized.

(B) Failing to submit plan. The NCUA will not grant approval with respect to a corporate credit union that has failed to submit an acceptable capital restoration plan.

(iv) Discretion to impose certain additional restrictions. The NCUA may impose one or more of the restrictions prescribed by regulation under paragraph (k)(5) of this section if the NCUA determines that those restrictions are necessary to carry out the purpose of this section.

(4) More stringent treatment based on other supervisory criteria.

(i) In general. If the NCUA determines, after notice and an opportunity for hearing as described in subpart M of part 747 of this chapter, that a corporate credit union is in an unsafe or unsound condition or deems the corporate credit union to be engaging in an unsafe or unsound practice, the NCUA may—

(A) If the corporate credit union is well capitalized, reclassify the corporate credit union as adequately capitalized;

(B) If the corporate credit union is adequately capitalized (but not well capitalized), require the corporate credit union to comply with one or more provisions of paragraphs (k)(1) and (k)(2) of this section, as if the corporate credit union were undercapitalized; or

(C) If the corporate credit union is undercapitalized, take any one or more actions authorized under paragraph (k)(3)(ii) of this section as if the corporate credit union were significantly undercapitalized.

(ii) Contents of plan. Any plan required under paragraph (k)(4)(i) of this section will specify the steps that the corporate credit union will take to correct the unsafe or unsound condition or practice. Capital restoration plans, however, will not be required under paragraph (k)(4)(i)(B) of this section.

(5) Provisions applicable to critically undercapitalized corporate credit unions.

(i) Activities restricted. Any critically undercapitalized corporate credit union must comply with restrictions prescribed by the NCUA under paragraph (k)(6) of this section.

(ii) Payments on contributed capital and subordinated debt prohibited. A critically undercapitalized corporate credit union must not, beginning no later than 60 days after becoming critically undercapitalized, make any payment of dividends on contributed capital or any payment of principal or interest on the corporate credit union's subordinated debt unless the NCUA determines that an exception would further the purpose of this section. Interest, although not payable, may continue to accrue under the terms of any subordinated debt to the extent otherwise permitted by law. Dividends on contributed capital do not, however, continue to accrue.

(iii) Conservatorship, liquidation, or other action. The NCUA may, at any time, conserve or liquidate any critically undercapitalized corporate credit union or require the credit union to combine, in whole or part, with another institution. NCUA will consider, not later than 90 days after a corporate credit union becomes critically undercapitalized, whether NCUA should liquidate, conserve, or combine the institution.

(6) Restricting activities of critically undercapitalized corporate credit unions. To carry out the purpose of this section, the NCUA will, by order—

(i) Restrict the activities of any critically undercapitalized corporate credit union; and

(ii) At a minimum, prohibit any such corporate credit union from doing any of the following without the NCUA's prior written approval:

(A) Entering into any material transaction other than in the usual course of business, including any investment, expansion, acquisition, sale of assets, or other similar action.

(B) Extending credit for any transaction NCUA determines to be highly leveraged.

(C) Amending the corporate credit union's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order.

(D) Making any material change in accounting methods.

(E) Paying compensation or bonuses NCUA determines to be excessive.

(F) Paying interest on new or renewed liabilities at a rate that would increase the corporate credit union's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the corporate credit union's normal market areas.

■ 11. Revise § 704.5 to read as follows:

§ 704.5. Investments.

(a) *Policies.* A corporate credit union must operate according to an investment policy that is consistent with its other risk management policies, including, but not limited to, those related to credit risk management, asset and liability management, and liquidity management. The policy must address, at a minimum:

(1) Appropriate tests and criteria for evaluating investments and investment transactions before purchase; and

(2) Reasonable and supportable concentration limits for limited liquidity investments in relation to capital.

(b) *General.* All investments must be U.S. dollar-denominated and subject to the credit policy restrictions set forth in § 704.6.

(c) *Authorized activities.* A corporate credit union may invest in:

(1) Securities, deposits, and obligations set forth in Sections 107(7), 107(8), and 107(15) of the Federal Credit Union Act, 12 U.S.C. 1757(7), 1757(8), and 1757(15), except as provided in this section;

(2) Deposits in, the sale of federal funds to, and debt obligations of corporate credit unions, Section 107(8) institutions, and state banks, trust companies, and mutual savings banks not domiciled in the state in which the corporate credit union does business;

(3) Corporate CUSOs, as defined in and subject to the limitations of § 704.11;

(4) Marketable debt obligations of corporations chartered in the United States. This authority does not apply to debt obligations that are convertible into the stock of the corporation; and

(5) Domestically-issued asset-backed securities.

(d) *Repurchase agreements.* A corporate credit union may enter into a repurchase agreement provided that:

(1) The corporate credit union, directly or through its agent, receives written confirmation of the transaction, and either takes physical possession or control of the repurchase securities or is recorded as owner of the repurchase securities through the Federal Reserve Book-Entry Securities Transfer System;

(2) The repurchase securities are legal investments for that corporate credit union;

(3) The corporate credit union, directly or through its agent, receives daily assessment of the market value of the repurchase securities and maintains adequate margin that reflects a risk assessment of the repurchase securities and the term of the transaction; and

(4) The corporate credit union has entered into signed contracts with all approved counterparties and agents, and ensures compliance with the contracts. Such contracts must address any supplemental terms and conditions necessary to meet the specific requirements of this part. Third party arrangements must be supported by tri-party contracts in which the repurchase securities are priced and reported daily and the tri-party agent ensures compliance; and

(e) *Securities Lending.* A corporate credit union may enter into a securities lending transaction provided that:

(1) The corporate credit union, directly or through its agent, receives written confirmation of the loan, obtains a first priority security interest in the collateral by taking physical possession or control of the collateral, or is recorded as owner of the collateral through the Federal Reserve Book-Entry Securities Transfer System;

(2) The collateral is a legal investment for that corporate credit union;

(3) The corporate credit union, directly or through its agent, receives daily assessment of the market value of collateral and maintains adequate margin that reflects a risk assessment of the collateral and terms of the loan; and

(4) The corporate credit union has entered into signed contracts with all agents and, directly or through its agent, has executed a written loan and security agreement with the borrower. The corporate or its agent ensures compliance with the agreements.

(f) *Investment companies.* A corporate credit union may invest in an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a), or a collective investment fund maintained by a national bank under 12 CFR 9.18 or a mutual savings bank under 12 CFR 550.260, provided that the company or fund prospectus restricts the investment portfolio to investments and investment transactions that are permissible for that corporate credit union.

(g) *Investment settlement.* A corporate credit union may only contract for the purchase or sale of an investment if the transaction is settled on a delivery versus payment basis within 60 days for mortgage-backed securities, within 30 days for new issues (other than mortgage-backed securities), and within three days for all other securities.

(h) *Prohibitions.* A corporate credit union is prohibited from:

(1) Purchasing or selling derivatives, except for embedded options not required under GAAP to be accounted for separately from the host contract or forward sales commitments on loans to be purchased by the corporate credit union;

(2) Engaging in trading securities unless accounted for on a trade date basis;

(3) Engaging in adjusted trading or short sales;

(4) Purchasing mortgage servicing rights, small business related securities, residual interests in collateralized mortgage obligations, residual interests in real estate mortgage investment conduits, or residual interests in asset-backed securities;

(5) Purchasing net interest margin securities;

(6) Purchasing collateralized debt obligations;

(7) Purchasing private label residential mortgage-backed securities;

(8) Purchasing subordinated securities; and

(9) Purchasing stripped mortgage-backed securities (SMBS), or securities that represent interests in SMBS, except as described in subparagraphs (i) and (iii) below.

(i) A corporate credit union may invest in exchangeable collateralized mortgage obligations (exchangeable CMOs) representing beneficial ownership interests in one or more interest-only classes of a CMO (IO CMOs) or principal-only classes of a CMO (PO CMOs), but only if:

(A) At the time of purchase, the ratio of the market price to the remaining principal balance is between .8 and 1.2, meaning that the discount or premium of the market price to par must be less than 20 points;

(B) The offering circular or other official information available at the time of purchase indicates that the notional principal on each underlying IO CMO should decline at the same rate as the principal on one or more of the underlying non-IO CMOs, and that the principal on each underlying PO CMO should decline at the same rate as the principal, or notional principal, on one or more of the underlying non-PO CMOs; and

(C) The credit union investment staff has the expertise dealing with exchangeable CMOs to apply the conditions in paragraphs (h)(5)(i)(A) and (B) of this section.

(ii) A corporate credit union that invests in an exchangeable CMO may exercise the exchange option only if all of the underlying CMOs are permissible investments for that credit union.

(iii) A corporate credit union may accept an exchangeable CMO representing beneficial ownership interests in one or more IO CMOs or PO CMOs as an asset associated with an investment repurchase transaction or as collateral in a securities lending transaction. When the exchangeable CMO is associated with one of these two transactions, it need not conform to the conditions in paragraphs (h)(5)(i)(A) or (B) of this section.

(i) *Conflicts of interest.* A corporate credit union's officials, employees, and immediate family members of such individuals, may not receive pecuniary consideration in connection with the making of an investment or deposit by the corporate credit union. Employee compensation is exempt from this prohibition. All transactions not specifically prohibited by this paragraph must be conducted at arm's length and in the interest of the corporate credit union.

(j) *Grandfathering.* A corporate credit union's authority to hold an investment is governed by the regulation in effect at the time of purchase. However, all grandfathered investments are subject to the requirements of §§ 704.8 and 704.9.

■ 12. Revise § 704.6 to read as follows:

§ 704.6. Credit risk management.

(a) *Policies.* A corporate credit union must operate according to a credit risk management policy that is commensurate with the investment risks and activities it undertakes. The policy must address at a minimum:

(1) The approval process associated with credit limits;

(2) Due diligence analysis requirements;

(3) Maximum credit limits with each obligor and transaction counterparty, set as a percentage of capital. In addition to addressing deposits and securities, limits with transaction counterparties must address aggregate exposures of all transactions including, but not limited to, repurchase agreements, securities lending, and forward settlement of purchases or sales of investments; and

(4) Concentrations of credit risk (*e.g.,* originator of receivables, servicer of receivables, insurer, industry type, sector type, geographic, collateral type, and tranche priority).

(b) *Exemption.* The limitations and requirements of this section do not apply to certain assets, whether or not considered investments under this part, including fixed assets, individual loans and loan participation interests, investments in CUSOs, investments that are issued or fully guaranteed as to principal and interest by the U.S. government or its agencies or its sponsored enterprises (other than mortgage backed-securities), investments that are fully insured or guaranteed (including accumulated dividends and interest) by the NCUSIF or the Federal Deposit Insurance Corporation, and settlement funds in federally insured depository institutions.

(c) *Issuer concentration limits*—(1) General rule. The aggregate of all investments in any single obligor is limited to 25 percent of capital or $5 million, whichever is greater.

(2) Exceptions.

(i) Investments in one obligor where the remaining maturity of all obligations is less than 30 days are limited to 50 percent of capital;

(ii) Investments in credit card master trust asset-backed securities are limited to 50 percent of capital in any single obligor;

(iii) Aggregate investments in repurchase and securities lending agreements with any one counterparty are limited to 200 percent of capital;

(iv) Investments in non-money market registered investment companies are limited to of 50 percent of capital in any single obligor;

(v) Investments in money market registered investment companies are limited to 100 percent of capital in any single obligor; and

(vi) Investments in corporate CUSOs are subject to the limitations of § 704.11.

(3) For purposes of measurement, each new credit transaction must be evaluated in terms of the corporate credit union's capital at the time of the transaction. An investment that fails a requirement of this section because of a subsequent reduction in capital will be deemed non-conforming. A corporate credit union is required to exercise reasonable efforts to bring nonconforming investments into conformity within 90 calendar days. Investments that remain nonconforming for 90 calendar days will be deemed to fail a requirement of this section and the corporate credit union will have to comply with § 704.10.

(d) *Sector concentration limits.* (1) A corporate credit union must establish sector limits that do not exceed the following maximums:

(i) Mortgage-backed securities (Inclusive of commercial mortgage-backed securities)—the lower of 1000 percent of capital or 50 percent of assets;

(ii) Commercial mortgage-backed securities—the lower of 300 percent of capital or 15 percent of assets;

(iii) FFELP student loan asset-backed securities—the lower of 1000 percent of capital or 50 percent of assets;

(iv) Private student loan asset-backed securities—the lower of 500 percent of capital or 25 percent of assets;

(v) Auto loan/lease asset-backed securities—the lower of 500 percent of capital or 25 percent of assets;

(vi) Credit card asset-backed securities—the lower of 500 percent of capital or 25 percent of assets;

(vii) Other asset-backed securities not listed in paragraphs (ii) through (vi)—the lower of 500 percent of capital or 25 percent of assets;

(viii) Corporate debt obligations—the lower of 1000 percent of capital or 50 percent of assets; and

(ix) Municipal securities—the lower of 1000 percent of capital or 50 percent of assets.

(2) Registered investment companies—A corporate credit union must limit its investment in registered investment companies to the lower of 1000 percent of capital or 50 percent of assets. In addition to applying the limit in this paragraph (d)(2), a corporate credit union must also include the underlying assets in each registered investment company in the relevant sectors described in paragraph (d)(1) of this section when calculating those sector limits.

(3) A corporate credit union will limit its aggregate holdings in any investments not described in paragraphs (d)(1) or (d)(2) of this section to the lower of 100 percent of capital or 5 percent of assets. The NCUA may approve a higher percentage in appropriate cases.

(4) Investments in other federally insured credit unions, deposits and federal funds investments in other federally insured depository institutions, and investment repurchase agreements are excluded from the concentration limits in paragraphs (d)(1), (d)(2), and (d)(3) of this section.

(e) *Corporate debt obligation subsector limits.* In addition to the limitations in paragraph (d)(1)(viii) of this section, a corporate credit union must not exceed the lower of 200 percent of capital or 10 percent of assets in any single North American Industry Classification System (NAICS) industry sector. If the corporation does not have a readily ascertainable NAICS classification, a corporate credit union will use its reasonable judgment in assigning such a classification. NCUA may direct, however, that the corporate change the classification.

(f) *Credit ratings.*—(1) All investments, other than in another depository institution, must have an applicable credit rating from at least one NRSRO. At a minimum, 90 percent of all such investments, by book value, must have a rating by at least two NRSROs. Corporate credit unions may use either public or nonpublic NRSRO ratings to satisfy this requirement.

(2) At the time of purchase, investments with long-term ratings must be rated no lower than AA– (or equivalent) by every NRSRO that provides a publicly available long-term rating on that investment, and investments with short-term ratings must be rated no lower than A–1 (or equivalent) by every NRSRO that provides a publicly available short-term rating on that investment. If the corporate credit union obtains a nonpublic NRSRO rating, that rating must also be no lower than AA–, or A–1, for long-term and short-term ratings, respectively.

(3) All rating(s) relied upon to meet the requirements of this part must be identified at the time of purchase and must be monitored for as long as the corporate owns the investment. Corporate credit unions must identify and monitor any new post-purchase NRSRO ratings on investments they hold.

(4) Investments are subject to the requirements of § 704.10 if:

(i) An NRSRO that rates the investment downgrades that rating, after purchase, below the minimum rating requirements of this part; or

(ii) The investment is part of an asset class or group of investments that exceeds the sector or obligor concentration limits of this section.

(g) *Reporting and documentation.* (1) At least annually, a written evaluation of each credit limit with each obligor or transaction counterparty must be prepared and formally approved by the board or an appropriate committee. At least monthly, the board or an appropriate committee must receive an investment watch list of existing and/or potential credit problems and summary credit exposure reports, which demonstrate compliance with the corporate credit union's risk management policies.

(2) At a minimum, the corporate credit union must maintain:

(i) A justification for each approved credit limit;

(ii) Disclosure documents, if any, for all instruments held in portfolio. Documents for an instrument that has been sold must be retained until completion of the next NCUA examination; and

(iii) The latest available financial reports, industry analyses, internal and external analyst evaluations, and rating agency information sufficient to support each approved credit limit.

■ 13. Revise § 704.8 to read as follows:

§ 704.8. Asset and liability management.

(a) *Policies.* A corporate credit union must operate according to a written asset and liability management policy which addresses, at a minimum:

(1) The purpose and objectives of the corporate credit union's asset and liability activities;

(2) The maximum allowable percentage decline in net economic value (NEV), compared to base case NEV;

(3) The minimum allowable NEV ratio;

(4) Policy limits and specific test parameters for the NEV sensitivity analysis requirements set forth in paragraphs (d), (e), and (f) of this section;

(5) The modeling of indexes that serve as references in financial instrument coupon formulas; and

(6) The tests that will be used, prior to purchase, to estimate the impact of investments on the percentage decline in NEV compared to base case NEV. The most recent NEV analysis, as determined under paragraph (d)(1)(i) of this section may be used as a basis of estimation.

(b) *Asset and liability management committee (ALCO).* A corporate credit union's ALCO must have at least one member who is also a member of the board of directors. The ALCO must review asset and liability management reports on at least a monthly basis. These reports must address compliance with Federal Credit Union Act, NCUA Rules and Regulations (12 CFR chapter VII), and all related risk management policies.

(c) *Penalty for early withdrawals.* A corporate credit union that permits early certificate/share withdrawals must assess market-based penalties sufficient to cover the estimated replacement cost of the certificate redeemed. This means the minimum penalty must be reasonably related to the rate that the corporate credit union would be required to offer to attract funds for a similar term with similar characteristics.

(d) *Interest rate sensitivity analysis.* (1) A corporate credit union must:

(i) Evaluate the risk in its balance sheet by measuring, at least quarterly, including once on the last day of the calendar quarter, the impact of an instantaneous, permanent, and parallel shock in the yield curve of plus and minus 100, 200, and 300 BP on its NEV and NEV ratio. If the base case NEV ratio falls below 3 percent at the last testing date, these tests must be calculated at least monthly, including once on the last day of the month, until the base case NEV ratio again exceeds 3 percent;

(ii) Limit its risk exposure to levels that do not result in a base case NEV ratio or any NEV ratio resulting from the tests set forth in paragraph (d)(1)(i) of this section below 2 percent; and

(iii) Limit its risk exposures to levels that do not result in a decline in NEV of more than 15 percent.

(2) A corporate credit union must assess annually if it should conduct periodic additional tests to address market factors that may materially impact that corporate credit union's NEV. These factors should include, but are not limited to, the following:

(i) Changes in the shape of the Treasury yield curve;

(ii) Adjustments to prepayment projections used for amortizing securities to consider the impact of significantly faster/slower prepayment speeds; and

(iii) Adjustments to volatility assumptions to consider the impact that changing volatilities have on embedded option values.

(e) *Net interest income modeling.* A corporate credit union must perform net interest income (NII) modeling to project earnings in multiple interest rate environments for a period of no less than 2 years. NII modeling must, at minimum, be performed at least quarterly, including once on the last day of the calendar quarter.

(f) *Weighted average asset life.* The weighted average life (WAL) of a corporate credit union's loan and investment portfolio, excluding derivative contracts and equity investments, may not exceed 2 years. A corporate credit union must test its assets at least quarterly, including once on the last day of the calendar quarter, for compliance with this WAL limitation. When calculating its WAL, a corporate credit union must assume that no issuer or market options will be exercised. If the WAL of a corporate credit union's assets exceeds 2 years on the testing date, this test must be calculated at least monthly, including once on the last day of the month, until the WAL is below 2 years.

(g) *Weighted average asset life with 50 percent slowdown in prepayment speeds.* The weighted average life (WAL) of a corporate credit union's loan and investment portfolio, excluding derivative contracts and equity investments, may not exceed 2.25 years when prepayment speeds are reduced by 50 percent. A corporate credit union must test its investments at least quarterly, including once on the last day of the calendar quarter, for compliance with this WAL limitation. When calculating its WAL, a corporate credit union must assume that no issuer or market options will be exercised. If the WAL of a corporate credit union's assets exceeds 2.25 years, this test must be calculated at least monthly, including once on the last day of the month, until the WAL with the 50 slowdown in prepayment speeds is below 2.25 years.

(h) *Government issued or guaranteed securities.* The WAL of investments that are issued or fully guaranteed as to principal and interest by the U.S. government, its agencies or sponsored enterprises, including investments that are fully insured or guaranteed (including accumulated dividends and interest) by the NCUSIF or the Federal Deposit Insurance Corporation, will be multiplied by a factor of 0.50 for purposes of the WAL tests of paragraphs (f) and (g) of this section.

(i) *Effective and spread durations.* A corporate credit union must measure at least once a quarter, including once on the last day of the calendar quarter, the effective duration and spread durations of each of its assets and liabilities, where the values of these are affected by changes in interest rates or credit spreads.

(j) *Regulatory violations.* (1)(i) If a corporate credit union's decline in NEV, base case NEV ratio or any NEV ratio resulting from the test set forth in paragraph (d) of this section violates the limits established in that paragraph, or the corporate credit union is unable to satisfy the tests in paragraphs (f) or (g) of this section; and

(ii) The corporate cannot adjust its balance sheet so as to satisfy the requirements of paragraphs (d), (f), or (g) of this section within 10 calendar days after detecting the violation, then:

(iii) The operating management of the corporate credit union must immediately report this information to its board of directors, supervisory committee, and the NCUA.

(2) If any violation described in paragraph (j)(1)(i) persists for 30 or more calendar days, the corporate credit union:

(i) Must immediately submit a detailed, written action plan to the NCUA that sets forth the time needed and means by which it intends to correct the violation and, if the NCUA determines that the plan is unacceptable, the corporate credit union must immediately restructure its balance sheet to bring the exposure back within compliance or adhere to an alternative course of action determined by the NCUA; and

(ii) If presently categorized as adequately capitalized or well capitalized for PCA purposes, immediately be recategorized as undercapitalized until the violation is corrected, and

(iii) If presently less than adequately capitalized, immediately be downgraded one additional capital category.

(k) *Overall limit on business generated from individual credit unions.* On or after April 22, 2013, a corporate credit union is prohibited from accepting from any member, or any nonmember credit union, any investment, including shares, loans, PCC, or NCAs if, following that investment, the aggregate of all investments from that entity in the corporate would exceed 15 percent of the corporate credit union's moving daily average net assets.

■ 14. Revise § 704.9 to read as follows:

§ 704.9. Liquidity management.

(a) *General.* In the management of liquidity, a corporate credit union must:

(1) Evaluate the potential liquidity needs of its membership in a variety of economic scenarios;

(2) Regularly monitor and demonstrate accessibility to sources of internal and external liquidity;

(3) Keep a sufficient amount of cash and cash equivalents on hand to support its payment system obligations;

(4) Demonstrate that the accounting classification of investment securities is consistent with its ability to meet potential liquidity demands; and

(5) Develop a contingency funding plan that addresses alternative funding strategies in successively deteriorating liquidity scenarios. The plan must:

(i) List all sources of liquidity, by category and amount, that are available to service an immediate outflow of funds in various liquidity scenarios;

(ii) Analyze the impact that potential changes in fair value will have on the disposition of assets in a variety of interest rate scenarios; and

(iii) Be reviewed by the board or an appropriate committee no less frequently than annually or as market or business conditions dictate.

(b) *Borrowing limits.* A corporate credit union may borrow up to the lower of 10 times capital or 50 percent of capital and shares (excluding shares created by the use of member reverse repurchase agreements).

(1) *Secured borrowings.* A corporate credit union may borrow on a secured basis for liquidity purposes, but the maturity of the borrowing may not exceed 30 days. Only a credit union with core capital in excess of five percent of its moving DANA may borrow on a secured basis for nonliquidity purposes, and the outstanding amount of secured borrowing for nonliquidity purposes may not exceed an amount equal to the difference between core capital and five percent of moving DANA.

(2) *Exclusions.* CLF borrowings and borrowed funds created by the use of member reverse repurchase agreements are excluded from this limit.

■ 15. Revise § 704.11 to read as follows:

§ 704.11 Corporate Credit Union Service Organizations (Corporate CUSOs).

(a) A corporate CUSO is an entity that:

(1) Is at least partly owned by a corporate credit union;

(2) Primarily serves credit unions;

(3) Restricts its services to those related to the normal course of business of credit unions as specified in paragraph (e) of this section; and

(4) Is structured as a corporation, limited liability company, or limited partnership under state law.

(b) *Investment and loan limitations.* (1) The aggregate of all investments in member and non-member corporate CUSOs must not exceed 15 percent of a corporate credit union's capital.

(2) The aggregate of all investments in and loans to member and nonmember corporate CUSOs must not exceed 30 percent of a corporate credit union's capital. A corporate credit union may lend to member and nonmember corporate CUSOs an additional 15 percent of capital if the loan is collateralized by assets in which the corporate has a perfected security interest under state law.

(3) If the limitations in paragraphs (b)(1) and (b)(2) of this section are reached or exceeded because of the profitability of the CUSO and the related GAAP valuation of the investment under the equity method without an additional cash outlay by the corporate, divestiture is not required. A corporate credit union may continue to invest up to the regulatory limit without regard to the increase in the GAAP valuation resulting from the corporate CUSO's profitability.

(c) *Due diligence.* A corporate credit union must comply with the due diligence requirements of §§ 723.5 and 723.6(f) through (j) of this chapter for all loans to corporate CUSOs. This requirement does not apply to loans excluded under § 723.1(b).

(d) *Separate entity.* (1) A corporate CUSO must be operated as an entity separate from a corporate credit union.

(2) A corporate credit union investing in or lending to a corporate CUSO must obtain a written legal opinion that concludes the corporate CUSO is organized and operated in a manner that the corporate credit union will not reasonably be held liable for the

obligations of the corporate CUSO. This opinion must address factors that have led courts to "pierce the corporate veil," such as inadequate capitalization, lack of corporate identity, common boards of directors and employees, control of one entity over another, and lack of separate books and records.

(e). *Permissible activities.* (1) Beginning on April 18, 2011, a corporate CUSO must agree to limit its activities to:

(i) Brokerage services,

(ii) Investment advisory services, and

(iii) Other categories of activities as approved in writing by NCUA and published on NCUA's Web site.

(2) A corporate credit union must divest from any CUSO that is engaged in activities not approved by NCUA under paragraph (e)(1) of this section. A corporate credit union may take until October 20, 2011 to divest itself from a CUSO engaging in one or more unapproved activities, but only if the CUSO was engaging in those activities before October 20, 2010 and the corporate credit union can establish that those activities satisfied the requirements of this section as it existed before October 20, 2010.

(3) Once NCUA has approved an activity and published that activity on its Web site as provided for in paragraph (e)(1)(iii) of this section, NCUA will not remove that particular activity the approved list, or make substantial changes to the content or description of that approved activity, except through the formal rulemaking process.

(f) An official of a corporate credit union which has invested in or loaned to a corporate CUSO may not receive, either directly or indirectly, any salary, commission, investment income, or other income, compensation, or consideration from the corporate CUSO. This prohibition also extends to immediate family members of officials.

(g) Prior to making an investment in or loan to a corporate CUSO, a corporate credit union must obtain a written agreement that the CUSO:

(1) Will follow GAAP;

(2) Will provide financial statements to the corporate credit union at least quarterly;

(3) Will obtain an annual CPA opinion audit and provide a copy to the corporate credit union. A wholly owned or majority owned CUSO is not required to obtain a separate annual audit if it is included in the corporate credit union's annual consolidated audit;

(4) Will not acquire control, directly or indirectly, of another depository financial institution or to invest in shares, stocks, or obligations of an insurance company, trade association, liquidity facility, or similar organization;

(5) Will allow the auditor, board of directors, and NCUA complete access to its personnel, facilities, equipment, books, records, and any other documentation that the auditor, directors, or NCUA deem pertinent; and

(6) Will comply with all the requirements of this section.

(h) Corporate credit union authority to invest in or loan to a CUSO is limited to that provided in this section. A corporate credit union is not authorized to invest in or loan to a CUSO under part 712 of this chapter.

■ 16. Revise paragraph (a) of § 704.14 to read as follows:

§ 704.14. Representation.

(a) *Board representation.* The board will be determined as stipulated in its bylaws governing election procedures, provided that:

(1) At least a majority of directors, including the chair of the board, must serve on the board as representatives of member credit unions;

(2) On or after February 17, 2011, only individuals who currently hold the position of chief executive officer, chief financial officer, chief operating officer, or treasurer/manager at a member may seek election or re-election to the board;

(3) No individual may be elected or appointed to serve on the board if, after such election or appointment, the individual would be a director at more than one corporate credit union;

(4) No individual may be elected or appointed to serve on the board if, after such election or appointment, any member of the corporate credit union would have more than one representative on the board of the corporate;

(5) The chair of the board may not serve simultaneously as an officer, director, or employee of a credit union trade association;

(6) A majority of directors may not serve simultaneously as officers, directors, or employees of the same credit union trade association or its affiliates (not including chapters or other subunits of a state trade association);

(7) For purposes of meeting the requirements of paragraphs (a)(5) and (a)(6) of this section, an individual may not serve as a director or chair of the board if that individual holds a subordinate employment relationship to another employee who serves as an officer, director, or employee of a credit union trade association;

(8) In the case of a corporate credit union whose membership is composed of more than 25 percent non credit unions, the majority of directors serving as representatives of member credit unions, including the chair, must be elected only by member credit unions, and

(9) After October 21, 2013, at least a majority of directors of every corporate credit union, including the chair of the board, must serve on the board as representatives of natural person credit union members.

* * * * *

■ 17. Revise § 704.19 to read as follows:

§ 704.19 Disclosure of executive and director compensation.

(a) Annual disclosure. Corporate credit unions must annually prepare and maintain a disclosure of the compensation, in dollar terms, paid to its most highly compensated employees, in accordance with the following schedule:

(1) For corporate credit unions with forty-one or more full time employees, disclosure is required of the compensation paid to the five most highly compensated employees;

(2) For corporate credit unions with between thirty and forty-one full time employees, disclosure is required of the compensation paid to the four most highly compensated employees;

(3) For corporate credit unions with thirty or fewer full time employees, disclosure is required of the compensation paid to the three most highly compensated employees; and

(4) In all cases, compensation paid to the corporate credit union's chief executive officer must also be disclosed, if the chief executive officer is not already included among the most highly compensated employees described in paragraphs (a)(1) through (a)(3) of this section.

(b) *Availability of disclosure.* Any member may obtain a copy of the most current disclosure, and all disclosures for the previous three years, on request made in person or in writing. The corporate credit union must provide the disclosure(s), at no cost to the member, within five business days of receiving the request. In addition, the corporate must distribute the most current disclosure to all its members at least once a year, either in the annual report or in some other manner of the corporate's choosing.

(c) *Supplemental information.* In providing the disclosure required by this section, a corporate credit union may also provide supplementary information to put the disclosure in context, for example, salary surveys, a discussion of compensation in relation to other credit union expenses, or compensation information from similarly sized credit unions or financial institutions.

(d) *Special rule for mergers.* With respect to any merger involving a corporate credit union that would result in a material increase in compensation, *i.e.,* an increase of more than 15 percent or $10,000, whichever is greater, for any senior executive officer or director of the merging corporate, the corporate must:

(1) Describe the compensation arrangement in the merger plan documents submitted to NCUA for approval of the merger, pursuant to § 708b of this part; and

(2) In the case of any federally chartered corporate credit union, describe the compensation arrangement in the materials provided to the membership of the merging credit union before the member vote on approving the merger.

■ 18. Add a new § 704.20 to read as follows:

§ 704.20. Limitations on golden parachute and indemnification payments.

(a) *Definitions.* The following definitions apply for this section:

(1) *Board* means the National Credit Union Administration Board.

(2) *Benefit plan* means any plan, contract, agreement or other arrangement which is an "employee welfare benefit plan" as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term does not include any plan intended to be subject to paragraphs (a)(4)(iv)(C) and (E) of this section.

(3) *Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

(i) An institution-affiliated party (IAP) voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to the IAP at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the corporate credit union either:

(A) Recognizes compensation expense and accrues a liability for the benefit payments according to Generally Accepted Accounting Principles (GAAP); or

(B) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(ii) A corporate credit union establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (a)(3)(i) of this section:

(A) Primarily for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by Sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 USC 415, 401(a)(17), 402(g)); or

(B) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (4)(ii)(E) of this section and permissible golden parachute payments described in § 704.20(d); and

(iii) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (a)(3)(i) and (ii) of this section, the following requirements will apply:

(A) The plan was in effect at least one year prior to any of the events described in paragraph (a)(4)(ii) of this section;

(B) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (a)(4)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

(C) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(D) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(E) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (a)(4)(ii) of this section;

(F) The corporate credit union has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the corporate credit union's creditors in the case of insolvency; and

(G) Payments pursuant to such plans must not be in excess of the accrued liability computed in accordance with GAAP.

(4) *Golden parachute payment* means any payment (or any agreement to make any payment) in the nature of compensation by any corporate credit union for the benefit of any current or former IAP pursuant to an obligation of such corporate credit union that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such IAP's primary employment or affiliation with the corporate credit union; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the corporate that is making the payment; or

(B) The appointment of any conservator or liquidating agent for such corporate credit union; or

(C) A determination by the Board or the appropriate state supervisory authority (in the case of a state-chartered corporate credit union) respectively, that the corporate credit union is in a troubled condition; or

(D) The corporate credit union is undercapitalized, as defined in § 704.4; or

(E) The corporate credit union is subject to a proceeding to terminate or suspend its share account insurance; and

(iii) Is payable to an IAP whose employment by or affiliation with the corporate is terminated at a time when the corporate credit union by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (a)(4)(ii)(A) through (E) of this section, or in contemplation of any of these conditions.

(iv) *Exceptions.* The term *golden parachute payment* does not include:

(A) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under Section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401); or

(B) Any payment made pursuant to a benefit plan as that term is defined in paragraph (a)(2) of this section; or

(C) Any payment made pursuant to a bona fide deferred compensation plan or arrangement as defined in paragraph (a)(3) of this section; or

(D) Any payment made by reason of death or by reason of termination caused by the disability of an IAP; or

(E) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; *provided, however,* that no employee will receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Board will consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement must not have been adopted or modified to increase the amount or scope of severance benefits at a time when the corporate credit union was in a condition specified in paragraph (a)(4)(ii) of this section or in contemplation of such a condition without the prior written consent of the Board; or

(F) Any severance or similar payment which is required to be made pursuant to a state statute which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(G) Any other payment which the Board determines to be permissible in accordance with § 704.20(d).

(5) *Institution-affiliated party* (IAP) means any individual meeting the criteria specified in section 206(r) of the Act (12 U.S.C. 1786(r)).

(6) *Liability or legal expense* means:

(i) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(ii) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(iii) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(7) *Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of a corporate credit union who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

(8) *Payment* means:

(i) Any direct or indirect transfer of any funds or any asset;

(ii) Any forgiveness of any debt or other obligation;

(iii) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; or

(iv) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(A) The determination, after such date, of the liability for the payment of such amount; or

(B) The liquidation, after such date, of the amount of such payment.

(9) *Prohibited indemnification payment* means any payment (or any agreement or arrangement to make any payment) by any corporate credit union for the benefit of any person who is or was an IAP of such corporate credit union, to pay or reimburse such person for any civil money penalty, judgment or other liability or legal expense resulting from any administrative or civil action instituted by the Board or any appropriate state regulatory authority that results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the corporate credit union; or

(iii) Is required to cease and desist from or take any affirmative action described in Section 206 of the Act with respect to such corporate credit union.

(iv) *Exceptions.* The term *prohibited indemnification payment* does not include any reasonable payment by a corporate credit union that:

(A) Is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond must not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by NCUA or the appropriate state supervisory authority (in the case of a state chartered corporate), but may pay any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the corporate credit union or its liquidating agent; or

(B) Represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain laws or regulations or has not engaged in certain unsafe or unsound practices or breaches of fiduciary duty, unless the administrative action or civil proceeding has resulted in a final prohibition order against the IAP.

(10) *Troubled Condition* means that the corporate credit union:

(i) *Has been assigned:*

(A) A 4 or 5 Corporate Risk Information System (CRIS) rating by NCUA in either the Financial Risk or Risk Management composites, in the case of a federal corporate credit union, or

(B) An equivalent 4 or 5 CRIS rating in either the Financial Risk or Risk Management composites by the state supervisory authority (SSA) in the case of a federally insured, state-chartered corporate credit union in a state that has adopted the CRIS system, or an equivalent 4 or 5 CAMEL composite rating by the SSA in the case of a federally insured, state-chartered corporate credit union in a state that uses the CAMEL system, or

(C) A 4 or 5 CRIS rating in either the Financial Risk or Risk Management composites by NCUA based on core work papers received from the SSA in the case of a federally insured, state-chartered credit union in a state that does not use either the CRIS or CAMEL system. In this case, the SSA will be notified in writing by the Director of the Office of Corporate Credit Unions that the corporate credit union has been designated by NCUA as a troubled institution; or

(ii) Has been granted assistance as outlined under Sections 208 or 216 of the Federal Credit Union Act.

(b) *Golden parachute payments prohibited.* No corporate credit union will make or agree to make any golden parachute payment, except as otherwise provided in this section.

(c) *Prohibited indemnification payments.* No corporate credit union will make or agree to make any prohibited indemnification payment, except as provided in this section.

(d) *Permissible golden parachute payments.* (1) A corporate credit union may agree to make or may make a golden parachute payment if and to the extent that:

(i) Such an agreement is made in order to hire a person to become an IAP either at a time when the corporate credit union satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in paragraph (a)(4)(ii) of this section, and the Board, consents in writing to the amount and terms of the golden parachute payment. Such consent by the Board must not improve the IAP's position in the event of the insolvency of the corporate credit union since such consent can neither bind a liquidating agent nor affect the provability of claims in liquidation. In the event that the institution is placed into conservatorship or liquidation, the conservator or the liquidating agent, as the case may be, will not be obligated to pay the promised golden parachute and the IAP will not be accorded preferential treatment on the basis of such prior approval; or

(ii) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a merger with another corporate credit union; provided, however, that a corporate credit union must obtain the consent of the Board, before making such a payment and this paragraph (d)(1)(iii) does not apply to any merger between corporates that results from an assisted transaction as described in Section 208 of the Act (12 U.S.C. 1788) or the corporate credit union being placed into conservatorship or liquidation; or

(iii) The Board, with the written concurrence of the appropriate state supervisory authority (in the case of a state-chartered corporate), determines that such a payment or agreement is permissible.

(2) A corporate credit union making a request pursuant to paragraphs (d)(1)(i) through (iii) of this section must demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the corporate credit union that has had or is likely to have a material adverse effect on the corporate credit union;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or liquidating agent for, or the troubled condition, as defined by § 701.14(b)(4), of the corporate credit union;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the corporate credit union; and

(iv) The IAP has violated or conspired to violate Section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of Title 18 of the United States Code, or Section 1341 or 1343 of such title affecting a federally insured financial institution as defined in Title 18 of the United States Code.

(3) In making a determination under paragraphs (d)(1)(i) through (iii) of this section, the Board may consider:

(i) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(ii) The length of time the IAP was affiliated with the corporate credit union, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(iii) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of Section 206(t) of the Act or this part.

(e) *Permissible indemnification payments.* (1) A corporate credit union may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by NCUA or a state regulatory authority if:

(i) The corporate credit union's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he/she believed to be in the best interests of the membership;

(ii) The corporate credit union's board of directors, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness;

(iii) The indemnification payments do not constitute prohibited indemnification payments as that term is defined in § 704.20(c); and

(iv) The IAP agrees in writing to reimburse the corporate credit union, to the extent not covered by payments from insurance or bonds purchased pursuant to § 704.20(a)(9)(iv)(A), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined in § 704.20(a)(9).

(2) An IAP seeking indemnification payments must not participate in any way in the board's discussion and approval of such payments; provided, however, that such IAP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(3) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions delineated in paragraph (e)(1) of this section have been met. If independent legal counsel opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(4) In the event that all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board will authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions delineated in paragraph (e)(1) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

(f) *Filing instructions.* Requests to make excess nondiscriminatory severance plan payments pursuant to § 704.20(a)(4)(iv)(E) and golden parachute payments permitted by § 704.20(d) must be submitted in writing to the Board. The request must be in letter form and must contain all relevant factual information as well as the reasons why such approval should be granted.

(g) *Applicability in the event of liquidation or conservatorship.* The provisions of this part, or any consent or approval granted under the provisions of this part by the Board, will not in any way bind any liquidating agent or conservator for a failed corporate credit union and will not in any way obligate the liquidating agent or conservator to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits that are contingent, even if otherwise vested, when a liquidating agent or conservator is appointed for any corporate credit union, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such liquidating agent or conservator. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1786(t)(3).

■ 19. Revise Appendix A to part 704 to read as follows:

Appendix A to Part 704—Capital Prioritization and Model Forms

Part I—Optional Capital Prioritization

Notwithstanding any other provision in this chapter, a corporate credit union, at its option, may determine that capital contributed to the corporate on or after January 18, 2011 will have priority, for purposes of availability to absorb losses and payout in liquidation, over capital contributed to the corporate before that date. The board of directors at a corporate credit union that desires to make this determination must:

(a) On or before January 18, 2011, adopt a resolution implementing its determination.

(b) Inform the credit union's members and NCUA, in writing and as soon as practicable after adoption of the resolution, of the contents of the board resolution.

(c) Ensure the credit union uses the appropriate initial and periodic Model Form disclosures in Part II below.

Part II—Model Forms

Part II contains model forms intended for use by corporate credit unions to aid in compliance with the capital disclosure requirements of § 704.3 and Part I of this Appendix.

Model Form A

Terms and Conditions of Membership Capital Account

Note: This form is for use before October 20, 2011 in the circumstances where the credit union has determined NOT to give newly issued capital priority over older capital as described in Part I of this Appendix.

(1) A membership capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A membership capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the membership capital account transfers to the continuing credit union. In the event of a charter conversion, the membership capital account transfers to the new institution. In the event of liquidation, the membership capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) A member credit union may withdraw membership capital with three years' notice.

(4) Membership capital cannot be used to pledge borrowings.

(5) Membership capital is available to cover losses that exceed retained earnings and paid-in capital.

(6) Where the corporate credit union is liquidated, membership capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF.

(7) Where the corporate credit union is merged into another corporate credit union, the membership capital account will transfer to the continuing corporate credit union. The three-year notice period for withdrawal of the membership capital account will remain in effect.

(8) If an adjusted balance account—: The membership capital balance will be adjusted—(1 or 2)—time(s) annually in relation to the member credit union's—(assets or other measure)— as of—(date(s))—. If a term certificate—: The membership capital account is a term certificate that will mature on—(date)—.

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the membership capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

The annual disclosure notice form must be signed by the chair of the corporate credit union. The chair must then sign a statement that certifies that the notice has been sent to member credit unions with membership capital accounts. The certification must be maintained in the corporate credit union's files and be available for examiner review.

Model Form B

Terms and Conditions of Membership Capital Account

Note: This form is for use before October 20, 2011 in the circumstances where the credit union has determined THAT IT WILL give newly issued capital priority over older capital as described in Part I of this Appendix.

(1) A membership capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A membership capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the membership capital account transfers to the continuing credit union. In the event of a charter conversion, the membership capital account transfers to the new institution. In the event of liquidation, the membership capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) A member credit union may withdraw membership capital with three years' notice.

(4) Membership capital cannot be used to pledge borrowings.

(5)(a) Membership capital that is issued on or after January 18, 2011, is available to cover losses that exceed retained earnings, contributed capital issued before January 18, 2011, and perpetual capital issued on or after January 18, 2011. Any such losses will be distributed *pro rata,* at the time the loss is realized, among membership capital account holders with accounts issued on or after January 18, 2011. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(b) Membership capital that is issued before January 18, 2011 is available to cover losses that exceed retained earnings and perpetual capital issued before January 18, 2011. Any such losses will be distributed *pro rata,* at the time the loss is realized, among membership capital account holders with accounts issued before January 18, 2011. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(c) Attached to this disclosure is a statement that describes the amount of NCA the credit union has with the corporate credit union in each of the categories described in paragraphs (5)(a) and (5)(b) above.

(6) If the corporate credit union is liquidated:

(a) Membership capital accounts issued on or after January 18, 2011 are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including contributed capital accounts issued before January 18, 2011 and perpetual capital accounts issued on or after January 18, 2011. However, membership capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

(b) Membership capital accounts issued before January 18, 2011, are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including perpetual capital accounts issued before January 18, 2011. However, membership capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

(7) Where the corporate credit union is merged into another corporate credit union, the membership capital account will transfer to the continuing corporate credit union. The three-year notice period for withdrawal of the membership capital account will remain in effect.

(8) If an adjusted balance account—: The membership capital balance will be adjusted—(1 or 2)—time(s) annually in relation to the member credit union's—(assets or other measure)—as of —(date(s))—. If a term certificate—: The membership capital account is a term certificate that will mature on—(date)—.

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the membership capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

The annual disclosure notice form must be signed by the chair of the corporate credit union. The chair must then sign a statement that certifies that the notice has been sent to member credit unions with membership capital accounts. The certification must be maintained in the corporate credit union's files and be available for examiner review.

Model Form C

Terms and Conditions of Nonperpetual Capital

Note: This form is for use on and after October 20, 2011 in the circumstances where the credit union has determined NOT to give newly issued capital priority over older capital as described in Part I of this Appendix. Also, corporate credit unions should ensure that existing membership capital accounts that do not meet the qualifying conditions for nonperpetual capital are modified so as to meet those conditions.

Terms and Conditions of Nonperpetual Capital Account

(1) A nonperpetual capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A nonperpetual capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the nonperpetual capital account transfers to the continuing credit union. In the event of a charter conversion, the nonperpetual capital account transfers to the new institution. In the event of liquidation, the nonperpetual capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) If the nonperpetual capital account is a notice account, a member credit union may withdraw the nonperpetual capital with a minimum of five years' notice. If the nonperpetual capital account is a term instrument it may be redeemed only at maturity. The corporate credit union may not redeem any account prior to the expiration of the notice period, or maturity, without the prior written approval of the NCUA.

(4) Nonperpetual capital cannot be used to pledge borrowings.

(5) Nonperpetual capital is available to cover losses that exceed retained earnings and perpetual contributed capital. Any such losses will be distributed *pro rata* among nonperpetual capital account holders at the time the loss is realized. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(6) Where the corporate credit union is liquidated, nonperpetual capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF. However, nonperpetual capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

(7) Where the corporate credit union is merged into another corporate credit union, the nonperpetual capital account will transfer to the continuing corporate credit union. For notice accounts, the five-year notice period for withdrawal of the nonperpetual capital account will remain in effect. For term accounts, the original term will remain in effect.

(8) If a term certificate—: The nonperpetual capital account is a term certificate that will mature on—(date)—(insert date with a minimum five-year original maturity).

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the nonperpetual capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

The annual disclosure notice form must be signed by the chair of the corporate credit union. The chair must then sign a statement that certifies that the notice has been sent to member credit unions with nonperpetual capital accounts. The certification must be maintained in the corporate credit union's files and be available for examiner review.

Model Form D

Terms and Conditions of Nonperpetual Capital

Note: This form is for use before October 20, 2011 in the circumstances where the credit union has determined THAT IT WILL give newly issued capital priority over older capital as described in Part I of this Appendix. Also, corporate credit unions should ensure that existing membership capital accounts that do not meet the qualifying conditions for nonperpetual capital are modified so as to meet those conditions.

Terms and Conditions of Nonperpetual Capital Account

(1) A nonperpetual capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A nonperpetual capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the nonperpetual capital account transfers to the continuing credit union. In the event of a charter conversion, the nonperpetual capital account transfers to the new institution. In the event of liquidation, the nonperpetual capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) If the nonperpetual capital account is a notice account, a member credit union may withdraw the nonperpetual capital with a minimum of five years' notice. If the nonperpetual capital account is a term instrument it may be redeemed only at maturity. The corporate credit union may not redeem any account prior to the expiration of the notice period, or maturity, without the prior written approval of the NCUA.

(4) Nonperpetual capital cannot be used to pledge borrowings.

(5)(a) Nonperpetual capital that is issued on or after January 18, 2011 is available to cover losses that exceed retained earnings, all contributed capital issued before January 18, 2011, and perpetual capital issued on or after January 18, 2011. Any such losses will be distributed *pro rata,* at the time the loss is realized, among nonperpetual capital account holders with accounts issued on or after January 18, 2011. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(b) Nonperpetual capital that is issued before January 18, 2011, is available to cover losses that exceed retained earnings and perpetual capital issued before January 18, 2011. Any such losses will be distributed *pro rata,* at the time the loss is realized, among nonperpetual capital account holders with accounts issued before January 18, 2011. To the extent that NCA funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(c) Attached to this disclosure is a statement that describes the amount of NCA the credit union has with the corporate credit union in each of the categories described in paragraphs (5)(a) and (5)(b) above.

(6) If the corporate credit union is liquidated:

(a) Nonperpetual capital accounts issued on or after January 18, 2011 are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including contributed capital accounts issued before January 18, 2011 or perpetual capital accounts issued on or after January 18, 2011. However, nonperpetual capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

(b) Nonperpetual capital accounts issued before January 18, 2011 are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including perpetual capital accounts issued before January 18, 2011. However, nonperpetual capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

(7) Where the corporate credit union is merged into another corporate credit union, the nonperpetual capital account will transfer to the continuing corporate credit union. For notice accounts, the five-year notice period for withdrawal of the nonperpetual capital account will remain in effect. For term accounts, the original term will remain in effect.

(8) If a term certificate—: The nonperpetual capital account is a term certificate that will mature on—(date)—(insert date with a minimum five-year original maturity).

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the nonperpetual capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

The annual disclosure notice form must be signed by the chair of the corporate credit union. The chair must then sign a statement that certifies that the notice has been sent to member credit unions with nonperpetual capital accounts. The certification must be maintained in the corporate credit union's files and be available for examiner review.

Model Form E

Terms and Conditions of Paid-In Capital

Note: This form is for use before October 20, 2011 in the circumstances where the credit union has determined NOT to give newly issued capital priority over older capital as described in Part I of this Appendix.

Terms and Conditions of Paid-In Capital

(1) A paid-in capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A paid-in capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the paid-in capital account transfers to the continuing credit union. In the event of a charter conversion, the paid-in capital account transfers to the new institution. In the event of liquidation, the paid-in capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) The funds are callable only at the option of the corporate credit union and only if the corporate credit union meets its minimum required capital and NEV ratios after the funds are called. The corporate must also obtain NCUA's approval before the corporate calls any paid-in capital.

(4) Paid-in capital cannot be used to pledge borrowings.

(5) Paid-in capital is available to cover losses that exceed retained earnings.

(6) Where the corporate credit union is liquidated, paid-in capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, and membership capital holders.

(7) Where the corporate credit union is merged into another corporate credit union, the paid-in capital account will transfer to the continuing corporate credit union.

(8) Paid-in capital is perpetual maturity and noncumulative dividend.

I have read the above terms and conditions and I understand them. I further agree to maintain in the credit union's files the annual notice of terms and conditions of the paid-in capital instrument.

The notice form must be signed by either all of the directors of the credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

Model Form F

Terms and Conditions of Paid-In Capital

Note: This form is for use before October 20, 2011 in the circumstances where the credit union has determined THAT IT WILL give newly issued capital priority over older capital as described in Part I of this Appendix.

Terms and Conditions of Paid-In Capital

(1) A paid-in capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A paid-in capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the paid-in capital account transfers to the continuing credit union. In the event of a charter conversion, the paid-in capital account transfers to the new institution. In the event of liquidation, the paid-in capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) The funds are callable only at the option of the corporate credit union and only if the corporate credit union meets its minimum required capital and NEV ratios after the funds are called. The corporate must also obtain NCUA's approval before the corporate calls any paid-in capital.

(4) Paid-in capital cannot be used to pledge borrowings.

(5) Availability to cover losses.

(a) Paid-in capital issued before January 18, 2011 is available to cover losses that exceed retained earnings. Any such losses must be distributed *pro rata,* at the time the loss is realized, among holders of paid-in capital issued before January 18, 2011. To the extent that paid-in capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(b) Paid-in capital issued on or after January 18, 2011 is available to cover losses that exceed retained earnings and any contributed capital issued before January 18, 2011. Any such losses must be distributed *pro rata,* at the time the loss is realized, among holders of paid-in capital issued on or after January 18, 2011. To the extent that paid-in capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(c) Attached to this disclosure is a statement that describes the amount of perpetual capital the credit union has with the corporate credit union in each of the categories described in paragraphs (5)(a) and (5)(b) above.

(6) Where the corporate credit union is liquidated:

(a) Paid-in capital accounts issued on or after January 18, 2011 are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including contributed capital accounts issued before January 18, 2011. However, paid-in capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

(b) Paid-in capital accounts issued before January 18, 2011 are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, nonperpetual accounts issued before January 18, 2011 and contributed capital accounts issued on or after January 18, 2011. However, paid-in capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

(7) Where the corporate credit union is merged into another corporate credit union, the paid-in capital account will transfer to the continuing corporate credit union.

(8) Paid-in capital is perpetual maturity and noncumulative dividend.

I have read the above terms and conditions and I understand them. I further agree to maintain in the credit union's files the annual notice of terms and conditions of the paid-in capital instrument.

The notice form must be signed by either all of the directors of the credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

Model Form G

Terms and Conditions of Perpetual Contributed Capital

Note: This form is for use on and after October 20, 2011 in the circumstances where the credit union has determined NOT to give newly issued capital priority over older capital as described in Part I of this Appendix. Also, capital previously issued under the nomenclature "paid-in capital" is considered perpetual contributed capital.

(1) A perpetual contributed capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A perpetual contributed capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the perpetual contributed capital account transfers to the continuing credit union. In the event of a charter conversion, the perpetual contributed capital account transfers to the new institution. In the event of liquidation, the perpetual contributed capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) The funds are callable only at the option of the corporate credit union and only if the corporate credit union meets its minimum required capital and NEV ratios after the funds are called. The corporate must also obtain the prior, written approval of the NCUA before releasing any perpetual contributed capital funds.

(4) Perpetual contributed capital cannot be used to pledge borrowings.

(5) Perpetual contributed capital is perpetual maturity and noncumulative dividend.

(6) Perpetual contributed capital is available to cover losses that exceed retained earnings. Any such losses must be distributed *pro rata* among perpetual contributed capital holders at the time the loss is realized. To the extent that perpetual contributed capital funds are used to cover losses, the corporate credit union is

prohibited from restoring or replenishing the affected accounts under any circumstances.

(7) Where the corporate credit union is liquidated, perpetual contributed capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, and nonperpetual capital holders. However, perpetual contributed capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

I have read the above terms and conditions and I understand them. I further agree to maintain in the credit union's files the annual notice of terms and conditions of the perpetual contributed capital instrument.

The notice form must be signed by either all of the directors of the credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

Model Form H

Terms and Conditions of Perpetual Contributed Capital

Note: This form is for use before October 20, 2011 in the circumstances where the credit union has determined THAT IT WILL give newly issued capital priority over older capital as described in Part I of this Appendix. Also, capital previously issued under the nomenclature "paid-in capital" is considered perpetual contributed capital.

(1) A perpetual contributed capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A perpetual contributed capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the perpetual contributed capital account transfers to the continuing credit union. In the event of a charter conversion, the perpetual contributed capital account transfers to the new institution. In the event of liquidation, the perpetual contributed capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) The funds are callable only at the option of the corporate credit union and only if the corporate credit union meets its minimum required capital and NEV ratios after the funds are called. The corporate must also obtain the prior, written approval of the NCUA before releasing any perpetual contributed capital funds.

(4) Perpetual contributed capital cannot be used to pledge borrowings.

(5) Perpetual contributed capital is perpetual maturity and noncumulative dividend.

(6) Availability to cover losses.

(a) Perpetual contributed capital issued before January 18, 2011 is available to cover losses that exceed retained earnings. Any such losses must be distributed *pro rata,* at the time the loss is realized, among holders of perpetual contributed capital issued before January 18, 2011. To the extent that perpetual contributed capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(b) Perpetual contributed capital issued on or after January 18, 2011 is available to cover losses that exceed retained earnings and any contributed capital issued before January 18, 2011. Any such losses must be distributed *pro rata,* at the time the loss is realized, among holders of perpetual contributed capital issued on or after January 18, 2011. To the extent that perpetual contributed capital funds are used to cover losses, the corporate credit union is prohibited from restoring or replenishing the affected accounts under any circumstances.

(c) Attached to this disclosure is a statement that describes the amount of perpetual capital the credit union has with the corporate credit union in each of the categories described in paragraphs (6)(a) and (6)(b) above.

(7) Where the corporate credit union is liquidated:

(a) Perpetual contributed capital accounts issued on or after January 18, 2011 are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, but not including contributed capital accounts issued before January 18, 2011. However, perpetual contributed capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

(b) Perpetual contributed capital accounts issued before January 18, 2011 are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF, nonperpetual capital accounts issued before January 18, 2011, and all contributed capital accounts issued on or after January 18, 2011. However, perpetual contributed capital that is used to cover losses in a calendar year previous to the year of liquidation has no claim against the liquidation estate.

I have read the above terms and conditions and I understand them. I further agree to maintain in the credit union's files the annual notice of terms and conditions of the perpetual contributed capital instrument.

The notice form must be signed by either all of the directors of the credit union or, if authorized by board resolution, the chair and secretary of the board of the credit union.

■ 21. Revise Appendix B to Part 704 to read as follows:

Appendix B to Part 704—Expanded Authorities and Requirements

A corporate credit union may obtain all or part of the expanded authorities contained in this Appendix if it meets the applicable requirements of Part 704 and Appendix B, fulfills additional management, infrastructure, and asset and liability requirements, and receives NCUA's written approval. Additional guidance is set forth in the NCUA publication Guidelines for Submission of Requests for Expanded Authority.

A corporate credit union seeking expanded authorities must submit to NCUA a self-assessment plan supporting its request. A corporate credit union may adopt expanded authorities when NCUA has provided final approval. If NCUA denies a request for expanded authorities, it will advise the corporate credit union of the reason(s) for the denial and what it must do to resubmit its request. NCUA may revoke these expanded authorities at any time if an analysis indicates a significant deficiency. NCUA will notify the corporate credit union in writing of the identified deficiency. A corporate credit union may request, in writing, reinstatement of the revoked authorities by providing a self-assessment plan detailing how it has corrected the deficiency.

A state chartered corporate credit union may not exercise any expanded authority that exceeds the powers and authorities provided for under its state laws. Accordingly, requests by state chartered corporate credit unions for expansions under this part must be approved by the state regulator before being submitted to NCUA.

Minimum Requirement

In order to participate in any of the authorities set forth in Base-Plus, Part I, Part II, Part III, or Part IV of this Appendix, a corporate credit union must evaluate monthly, including once on the last day of the month, the changes in NEV, NEV ratio, NII, WAL, and duration as required by paragraphs (d)(1)(i), (e), (f), (g), and (i) of § 704.8.

Base-Plus

A corporate that has met the requirements for this Base-plus authority may, in performing the rate stress tests set forth in 704.8(d)(1)(i), allow its NEV to decline as much as 20 percent.

Part I

(a) A corporate credit union that has met all the requirements established by NCUA for this Part I, including a minimum capital ratio of at least six percent, may:

(1) Purchase investments with long-term ratings no lower than A− (or equivalent);

(2) Purchase investments with short-term ratings no lower than A−2 (or equivalent), provided that the issuer has a long-term rating no lower than A− (or equivalent) or the investment is a domestically-issued asset-backed security;

(3) Engage in short sales of permissible investments to reduce interest rate risk;

(4) Purchase principal only (PO) stripped mortgage-backed securities to reduce interest rate risk; and

(5) Enter into a dollar roll transaction.

(b) In performing the rate stress tests set forth in § 704.8(d), the NEV of a corporate credit union that has met the requirements of this Part I may decline as much as:

(1) 20 percent;

(2) 28 percent if the corporate credit union has a seven percent minimum capital ratio and is specifically approved by NCUA; or

(3) 35 percent if the corporate credit union has an eight percent minimum capital ratio and is specifically approved by NCUA.

(c) The maximum aggregate amount in unsecured loans and lines of credit to any one member credit union, excluding pass-through and guaranteed loans from the CLF and the NCUSIF, must not exceed 100 percent of the corporate credit union's capital. The board of directors must establish the limit, as a percent of the corporate credit union's capital plus pledged shares, for secured loans and lines of credit.

(d) The aggregate total of investments purchased under the authority of Part I (a)(1) and Part I (a)(2) may not exceed the lower of 500 percent of the corporate credit union's capital or 25 percent of assets.

(e) On or after October 20, 2011, corporate credit unions will substitute "leverage ratio" for "capital ratio" wherever it appears in Part I.

Part II

(a) A corporate credit union that has met the requirements of Part I of this Appendix and the additional requirements established by NCUA for Part II may invest in:

(1) Debt obligations of a foreign country;

(2) Deposits and debt obligations of foreign banks or obligations guaranteed by these banks;

(3) Marketable debt obligations of foreign corporations. This authority does not apply to debt obligations that are convertible into the stock of the corporation; and

(4) Foreign issued asset-backed securities.

(b) All foreign investments are subject to the following requirements:

(1) Investments must be rated no lower than the minimum permissible domestic rating under the corporate credit union's Part I authority;

(2) A sovereign issuer, and/or the country in which an obligor is organized, must have a long-term foreign currency (non-local currency) debt rating no lower than AA− (or equivalent);

(3) For each approved foreign bank line, the corporate credit union must identify the specific banking centers and branches to which it will lend funds;

(4) Obligations of any single foreign obligor may not exceed 25 percent of capital or $5 million, whichever is greater; and

(5) Obligations in any single foreign country may not exceed 250 percent of capital.

Part III

(a) A corporate credit union that has met the requirements established by NCUA for this Part III may enter into derivative transactions specifically approved by NCUA to:

(1) Create structured products;

(2) Mitigate interest rate risk and credit risk on its own balance sheet; and

(3) Hedge the balance sheets of its members.

(b) Credit Ratings:

(1) All derivative transactions are subject to the following requirements:

(i) If the intended counterparty is domestic, the counterparty rating must be no lower than A− (or equivalent) by every NRSRO that provides a publicly available long-term rating on the counterparty;

(ii) If the intended counterparty is foreign, the corporate must have Part II expanded authority and the counterparty rating must be no lower than the minimum permissible rating for a comparable term investment under Part II Authority;

(iii) The corporate must identify the rating(s) relied upon to meet the requirements of this part at the time the transaction is entered into and monitor those ratings for as long as the contract remains open; and

(iv) The corporate credit unions must comply with § 704.10 of this part if any rating relied upon to meet the requirements of paragraphs (b)(1)(i) or (ii) of this part is downgraded below the minimum rating requirements.

(2) Exceptions. Credit ratings are not required for derivative transactions with:

(i) Domestically chartered credit unions;

(ii) U.S. government sponsored enterprises; or

(iii) Counterparties where the transaction is fully guaranteed by an entity with a minimum permissible rating for comparable term investments.

Part IV

A corporate credit union that has met all the requirements established by NCUA for this Part IV may participate in loans with member natural person credit unions as approved by the NCUA and subject to the following:

(a) The maximum aggregate amount of participation loans with any one member credit union must not exceed 25 percent of capital; and

(b) The maximum aggregate amount of participation loans with all member credit unions will be determined on a case-by-case basis by the NCUA.

■ 22. Add a new Appendix C to Part 704 to read as follows:

Appendix C to Part 704—Risk-Based Capital Credit Risk-Weight Categories

Table of Contents

Part I: Introduction

(a) Scope

(1) This Appendix explains how a corporate credit union must compute its risk-weighted assets for purposes of determining its capital ratios.

(2) Risk-weighted assets equal risk-weighted on-balance sheet assets (computed under Section II(a) of this Appendix), plus risk-weighted off-balance sheet activities (computed under Section II(b) of this Appendix), plus risk-weighted recourse obligations, direct credit substitutes, and certain other positions (computed under Section II(c) of this Appendix).

(3) Assets not included (*i.e.,* deducted from capital) for purposes of calculating capital under part 704 are not included in calculating risk-weighted assets.

(4) Although this Appendix describes risk-weightings for various assets and activities, this Appendix does not provide authority for corporate credit unions to invest in or purchase any particular type of asset or to engage in any particular type of activity. A corporate credit union *must have other identifiable authority* for any investment it makes or activity it engages in. So, for example, this Appendix describes risk weightings for subordinated securities. Section 704.5, however, prohibits corporate credit unions from investing in subordinated securities, and so a corporate credit union cannot invest in subordinated securities.

(b) Definitions

The following definitions apply to this Appendix. Additional definitions, applicable to this entire Part, are located in § 704.2 of this Part.

Cash items in the process of collection means checks or drafts in the process of collection that are drawn on another depository institution, including a central bank, and that are payable immediately upon presentation; U.S. Government checks that are drawn on the United States Treasury or any other U.S. Government or Government-sponsored agency and that are payable immediately upon presentation; broker's security drafts and commodity or bill-of-lading drafts payable immediately upon presentation; and unposted debits.

Commitment means any arrangement that obligates a corporate credit union to:

(1) Purchase loans or securities;

(2) Extend credit in the form of loans or leases, participations in loans or leases, overdraft facilities, revolving credit facilities, home equity lines of credit, eligible ABCP liquidity facilities, or similar transactions.

Depository institution means a financial institution that engages in the business of providing financial services; that is recognized as a bank or a credit union by the supervisory or monetary authorities of the country of its incorporation and the country of its principal banking operations; that receives deposits to a substantial extent in the regular course of business; and that has the power to accept demand deposits. In the United States, this definition encompasses all federally insured offices of commercial banks, mutual and stock savings banks, savings or building and loan associations (stock and mutual), cooperative banks, credit unions, and international banking facilities of domestic depository institutions.

Bank holding companies and savings and loan holding companies are excluded from this definition. For the purposes of assigning risk-weights, the differentiation between OECD depository institutions and non-OECD depository institutions is based on the country of incorporation. Claims on branches and agencies of foreign banks located in the United States are to be categorized on the basis of the parent bank's country of incorporation.

Direct credit substitute means an arrangement in which a corporate credit union assumes, in form or in substance, credit risk associated with an on-balance sheet or off-balance sheet asset or exposure that was not previously owned by the corporate credit union (third-party asset) and the risk assumed by the corporate credit union exceeds the *pro rata* share of the corporate credit union's interest in the third-party asset. If a corporate credit union has no claim on the third-party asset, then the corporate credit union's assumption of any credit risk is a direct credit substitute. Direct credit substitutes include:

(1) Financial standby letters of credit that support financial claims on a third party that exceed a corporate credit union's *pro rata* share in the financial claim;

(2) Guarantees, surety arrangements, credit derivatives, and similar instruments backing financial claims that exceed a corporate credit union's *pro rata* share in the financial claim;

(3) Purchased subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets, including any tranche of asset-backed securities that is not the most senior tranche;

(4) Credit derivative contracts under which the corporate credit union assumes more than its *pro rata* share of credit risk on a third-party asset or exposure;

(5) Loans or lines of credit that provide credit enhancement for the financial obligations of a third party;

(6) Purchased loan servicing assets if the servicer is responsible for credit losses or if the servicer makes or assumes credit-enhancing representations and warranties with respect to the loans serviced. Servicer cash advances as defined in this section are not direct credit substitutes;

(7) Clean-up calls on third-party assets. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the corporate credit union are not direct credit substitutes; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

Exchange rate contracts means cross-currency interest rate swaps; forward foreign exchange rate contracts; currency options purchased; and any similar instrument that, in the opinion of the NCUA, may give rise to similar risks.

Face amount means the notational principal, or face value, amount of an off-balance sheet item or the amortized cost of an on-balance sheet asset.

Financial asset means cash or other monetary instrument, evidence of debt, evidence of an ownership interest in an entity, or a contract that conveys a right to receive or exchange cash or another financial instrument from another party.

Financial standby letter of credit means a letter of credit or similar arrangement that represents an irrevocable obligation to a third-party beneficiary:

(1) To repay money borrowed by, or advanced to, or for the account of, a second party (the account party); or

(2) To make payment on behalf of the account party, in the event that the account party fails to fulfill its obligation to the beneficiary.

OECD-based country means a member of that grouping of countries that are full members of the Organization for Economic Cooperation and Development (OECD) plus countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements To Borrow. This term excludes any country that has rescheduled its external sovereign debt within the previous five years. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's inability or unwillingness to meet its external debt service obligations, but generally would not include renegotiations of debt in the normal course of business, such as a renegotiation to allow the borrower to take advantage of a decline in interest rates or other change in market conditions.

Original maturity means, with respect to a commitment, the earliest date after a commitment is made on which the commitment is scheduled to expire (*i.e.,* it will reach its stated maturity and cease to be binding on either party), provided that either:

(1) The commitment is not subject to extension or renewal and will actually expire on its stated expiration date; or

(2) If the commitment is subject to extension or renewal beyond its stated expiration date, the stated expiration date will be deemed the original maturity only if the extension or renewal must be based upon terms and conditions independently negotiated in good faith with the member at the time of the extension or renewal and upon a new, bona fide credit analysis utilizing current information on financial condition and trends.

Performance-based standby letter of credit means any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer to make payment on account of any default by a third party in the performance of a nonfinancial or commercial obligation. Such letters of credit include arrangements backing subcontractors' and suppliers' performance, labor and materials contracts, and construction bids.

Prorated assets means the total assets (as determined in the most recently available GAAP report but in no event more than one year old) of a consolidated CUSO multiplied by the corporate credit union's percentage of ownership of that consolidated CUSO.

Qualifying mortgage loan means a loan that:

(1) Is fully secured by a first lien on a one- to four-family residential property;

(2) Is underwritten in accordance with prudent underwriting standards, including standards relating the ratio of the loan amount to the value of the property (LTV ratio), as presented in the *Interagency Guidelines for Real Estate Lending Policies,* 57 FR 62890 (December 31, 1992). A nonqualifying mortgage loan that is paid down to an appropriate LTV ratio (calculated using value at origination, appraisal obtained within the prior six months, or updated value using an automated valuation model) may become a qualifying loan if it meets all other requirements of this definition;

(3) Maintains an appropriate LTV ratio based on the amortized principal balance of the loan; and

(4) Is performing and is not more than 90 days past due.

If a corporate credit union holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a single loan secured by a first lien for the purposes of determining the LTV ratio and the appropriate risk-weight under Appendix C. Also, a loan to an individual borrower for the construction of the borrower's home may be included as a qualifying mortgage loan.

Qualifying multifamily mortgage loan. (1) *Qualifying multifamily mortgage loan* means a loan secured by a first lien on multifamily residential properties consisting of 5 or more dwelling units, provided that:

(i) The amortization of principal and interest occurs over a period of not more than 30 years;

(ii) The original minimum maturity for repayment of principal on the loan is not less than seven years;

(iii) When considering the loan for placement in a lower risk-weight category, all principal and interest payments have been made on a timely basis in accordance with its terms for the preceding year;

(iv) The loan is performing and not 90 days or more past due;

(v) The loan is made in accordance with prudent underwriting standards; and

(vi) If the interest rate on the loan does not change over the term of the loan, the current loan balance amount does not exceed 80 percent of the value of the property securing the loan, and for the property's most recent calendar year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120 percent, or in the case of cooperative or other not-for-profit housing projects, the property generates sufficient cash flows to provide comparable protection to the institution; or

(vii) If the interest rate on the loan changes over the term of the loan, the current loan balance amount does not exceed 75 percent of the value of the property securing the loan, and for the property's most recent calendar year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 115 percent, or in the case of cooperative or other not-for-profit housing projects, the property generates sufficient cash flows to provide comparable protection to the institution.

(2) For purposes of paragraphs (1)(vi) and (1)(vii) of this definition, the term value of the property means, at origination of a loan to purchase a multifamily property, the lower of the purchase price or the amount of the initial appraisal, or if appropriate, the initial evaluation. In cases not involving purchase of a multifamily loan, the value of the property is determined by the most current appraisal, or if appropriate, the most current evaluation. In cases where a borrower refinances a loan on an existing property, as an alternative to paragraphs (1)(iii), (1)(vi), and (1)(vii) of this definition:

(i) All principal and interest payments on the loan being refinanced have been made on a timely basis in accordance with the terms of that loan for the preceding year; and

(ii) The net income on the property for the preceding year would support timely principal and interest payments on the new loan in accordance with the applicable debt service requirement.

Qualifying residential construction loan, also referred to as a residential bridge loan, means a loan made in accordance with sound lending principles satisfying the following criteria:

(1) The builder must have substantial project equity in the home construction project;

(2) The residence being constructed must be a 1–4 family residence sold to a home purchaser;

(3) The lending entity must obtain sufficient documentation from a permanent lender (which may be the construction lender) demonstrating that the home buyer intends to purchase the residence and has the ability to obtain a permanent qualifying mortgage loan sufficient to purchase the residence;

(4) The home purchaser must have made a substantial earnest money deposit;

(5) The construction loan must not exceed 80 percent of the sales price of the residence;

(6) The construction loan must be secured by a first lien on the lot, residence under construction, and other improvements;

(7) The lending credit union must retain sufficient undisbursed loan funds throughout the construction period to ensure project completion;

(8) The builder must incur a significant percentage of direct costs (*i.e.,* the actual costs of land, labor, and material) before any drawdown on the loan;

(9) If at any time during the life of the construction loan any of the criteria of this rule are no longer satisfied, the corporate must immediately recategorize the loan at a 100 percent risk-weight and must accurately report the loan in the corporate's next quarterly call report;

(10) The home purchaser must intend that the home will be owner-occupied;

(11) The home purchaser(s) must be an individual(s), not a partnership, joint venture, trust corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing the home(s) for speculative purposes; and

(12) The loan must be performing and not more than 90 days past due.

The NCUA retains the discretion to determine that any loans not meeting sound lending principles must be placed in a higher risk-weight category. The NCUA also reserves the discretion to modify these criteria on a case-by-case basis provided that any such modifications are not inconsistent with the safety and soundness objectives of this definition.

Qualifying securities firm means:

(1) A securities firm incorporated in the United States that is a broker-dealer that is registered with the Securities and Exchange Commission (SEC) and that complies with the SEC's net capital regulations (17 CFR 240.15c3(1)); and

(2) A securities firm incorporated in any other OECD-based country, if the corporate credit union is able to demonstrate that the securities firm is subject to consolidated supervision and regulation (covering its subsidiaries, but not necessarily its parent organizations) comparable to that imposed on depository institutions in OECD countries. Such regulation must include risk-based capital requirements comparable to those imposed on depository institutions under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998).

Recourse means a corporate credit union's retention, in form or in substance, of any credit risk directly or indirectly associated with an asset it has sold (in accordance with Generally Accepted Accounting Principles) that exceeds a *pro rata* share of that corporate credit union's claim on the asset. If a corporate credit union has no claim on an asset it has sold, then the retention of any credit risk is recourse. A recourse obligation typically arises when a corporate credit union transfers assets in a sale and retains an explicit obligation to repurchase assets or to absorb losses due to a default on the payment of principal or interest or any other deficiency in the performance of the underlying obligor or some other party. Recourse may also exist implicitly if a corporate credit union provides credit enhancement beyond any contractual obligation to support assets it has sold. Recourse obligations include:

(1) Credit-enhancing representations and warranties made on transferred assets;

(2) Loan servicing assets retained pursuant to an agreement under which the corporate credit union will be responsible for losses associated with the loans serviced. Servicer cash advances as defined in this section are not recourse obligations;

(3) Retained subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets;

(4) Assets sold under an agreement to repurchase, if the assets are not already included on the balance sheet;

(5) Loan strips sold without contractual recourse where the maturity of the transferred portion of the loan is shorter than the maturity of the commitment under which the loan is drawn;

(6) Credit derivatives that absorb more than the corporate credit union's *pro rata* share of losses from the transferred assets;

(7) Clean-up calls on assets the corporate credit union has sold. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the corporate credit union are not recourse arrangements; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

Replacement cost means, with respect to interest rate and exchange-rate contracts, the loss that would be incurred in the event of a counterparty default, as measured by the net cost of replacing the contract at the current market value. If default would result in a theoretical profit, the replacement value is considered to be zero. This mark-to-market process must incorporate changes in both interest rates and counterparty credit quality.

Residential properties means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence, or timeshare properties.

Residual interest. (1) *Residual interest* means any on-balance sheet asset that:

(i) Represents an interest (including a beneficial interest) created by a transfer that qualifies as a sale (in accordance with Generally Accepted Accounting Principles) of financial assets, whether through a securitization or otherwise; and

(ii) Exposes a corporate credit union to credit risk directly or indirectly associated with the transferred asset that exceeds a *pro rata* share of that corporate credit union's claim on the asset, whether through subordination provisions or other credit enhancement techniques.

(2) Residual interests generally include credit-enhancing interest-only strips, spread accounts, cash collateral accounts, retained subordinated interests (and other forms of overcollateralization), and similar assets that function as a credit enhancement. Residual interests further include those exposures that, in substance, cause the corporate credit union to retain the credit risk of an asset or exposure that had qualified as a residual interest before it was sold. Residual interests generally do not include assets purchased from a third party, but a credit-enhancing interest-only strip that is acquired in any asset transfer is a residual interest.

(3) Corporate credit unions will use this definition of the term "residual interests," and not the definition in § 704.2, for purposes of applying this Appendix.

Risk participation means a participation in which the originating party remains liable to the beneficiary for the full amount of an obligation (*e.g.,* a direct credit substitute), notwithstanding that another party has acquired a participation in that obligation.

Risk-weighted assets means the sum total of risk-weighted on-balance sheet assets, as calculated under Section II(a) of this Appendix, and the total of risk-weighted off-balance sheet credit equivalent amounts. The total of risk-weighted off-balance sheet credit equivalent amounts equals the risk-weighted off-balance sheet activities as calculated under Section II(b) of this Appendix plus the risk-weighted recourse obligations, risk-weighted direct credit substitutes, and certain other risk-weighted positions as calculated under Section II(c) of this Appendix.

Servicer cash advance means funds that a residential mortgage servicer advances to ensure an uninterrupted flow of payments, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the loan. A servicer cash advance is not a recourse obligation or a direct credit substitute if:

(1) The servicer is entitled to full reimbursement and this right is not subordinated to other claims on the cash flows from the underlying asset pool; or

(2) For any one loan, the servicer's obligation to make nonreimbursable advances is contractually limited to an insignificant amount of the outstanding principal amount on that loan.

Structured financing program means a program where receivable interests and asset- or mortgage-backed securities issued by multiple participants are purchased by a special purpose entity that repackages those exposures into securities that can be sold to investors. Structured financing programs allocate credit risk, generally, between the participants and credit enhancement provided to the program.

Traded position means a position retained, assumed, or issued in connection with a securitization that is rated by a NRSRO, where there is a reasonable expectation that, in the near future, the rating will be relied upon by:

(1) Unaffiliated investors to purchase the security; or

(2) An unaffiliated third party to enter into a transaction involving the position, such as a purchase, loan, or repurchase agreement.

Unconditionally cancelable means, with respect to a commitment-type lending arrangement, that the corporate credit union may, at any time, with or without cause, refuse to advance funds or extend credit under the facility.

United States Government or its agencies means an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States Government.

United States Government-sponsored agency or corporation means an agency or corporation originally established or chartered to serve public purposes specified by the United States Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the United States Government.

Part II: Risk-Weightings

(a) On-Balance Sheet Assets

Except as provided in Section II(b) of this Appendix, risk-weighted on-balance sheet assets are computed by multiplying the on-balance sheet asset amounts times the appropriate risk-weight categories. The risk-weight categories are:

(1) Zero percent Risk-Weight (Category 1).

(i) Cash, including domestic and foreign currency owned and held in all offices of a corporate credit union or in transit. Any foreign currency held by a corporate credit union must be converted into U.S. dollar equivalents;

(ii) Securities issued by and other direct claims on the U.S. Government or its agencies (to the extent such securities or claims are unconditionally backed by the full faith and credit of the United States Government) or the central government of an OECD country;

(iii) Notes and obligations issued or guaranteed by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund and backed by the full faith and credit of the United States Government;

(iv) Deposit reserves at, claims on, and balances due from Federal Reserve Banks;

(v) The book value of paid-in Federal Reserve Bank stock;

(vi) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.

(viii) Claims on, and claims guaranteed by, a qualifying securities firm that are collateralized by cash on deposit in the corporate credit union or by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country. To be eligible for this risk-weight, the corporate credit union must maintain a positive margin of collateral on the claim on a daily basis, taking into account any change in a corporate credit union's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

(2) 20 percent Risk-Weight (Category 2).

(i) Cash items in the process of collection;

(ii) That portion of assets conditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country;

(iii) That portion of assets collateralized by the current market value of securities issued or guaranteed by the United States government or its agencies, or the central government of an OECD country;

(iv) Securities (not including equity securities) issued by and other claims on the U.S. Government or its agencies which are not backed by the full faith and credit of the United States Government;

(v) Securities (not including equity securities) issued by, or other direct claims on, United States Government-sponsored agencies;

(vi) That portion of assets guaranteed by United States Government-sponsored agencies;

(vii) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies;

(viii) Claims on, and claims guaranteed by, a qualifying securities firm, subject to the following conditions:

(A) A qualifying securities firm must have a long-term issuer credit rating, or a rating on at least one issue of long-term unsecured debt, from a NRSRO. The rating must be in one of the three highest investment grade categories used by the NRSRO. If two or more NRSROs assign ratings to the qualifying securities firm, the corporate credit union must use the lowest rating to determine whether the rating requirement of this paragraph is met. A qualifying securities firm may rely on the rating of its parent consolidated company, if the parent consolidated company guarantees the claim.

(B) A collateralized claim on a qualifying securities firm does not have to comply with the rating requirements under paragraph (a) if the claim arises under a contract that:

(*1*) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

(*2*) Is collateralized by debt or equity securities that are liquid and readily marketable;

(*3*) Is marked-to-market daily;

(*4*) Is subject to a daily margin maintenance requirement under the standard industry documentation; and

(*5*) Can be liquidated, terminated or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided under applicable law of the relevant jurisdiction. For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to Section 555 or 559 of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under Section 207(c)(8) of the Federal Credit Union Act (12 U.S.C. 1787(c)(8)) or Section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under Sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or Regulation EE (12 CFR part 231).

(C) If the securities firm uses the claim to satisfy its applicable capital requirements, the claim is not eligible for a risk-weight under this paragraph II(a)(2)(viii);

(ix) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity;

(x) Balances due from and all claims on domestic depository institutions. This includes demand deposits and other transaction accounts, savings deposits and time certificates of deposit, federal funds sold, loans to other depository institutions, including overdrafts and term federal funds, holdings of the corporate credit union's own discounted acceptances for which the account party is a depository institution, holdings of bankers acceptances of other institutions and securities issued by depository institutions, except those that qualify as capital;

(xi) The book value of paid-in Federal Home Loan Bank stock;

(xii) Deposit reserves at, claims on and balances due from the Federal Home Loan Banks;

(xiii) Assets collateralized by cash held in a segregated deposit account by the reporting corporate credit union;

(xiv) Claims on, or guaranteed by, official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member; [1]

(xv) That portion of assets collateralized by the current market value of securities issued by official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.

(xvi) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the member or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in

[1] These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investments Bank, the International Monetary Fund and the Bank for International Settlements.

bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category;

(xvii) Claims on, or guaranteed by depository institutions other than the central bank, incorporated in a non-OECD country, with a remaining maturity of one year or less;

(xviii) That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the corporate credit union has local currency liabilities in that country.

(3) 50 percent Risk-Weight (Category 3).

(i) Revenue bonds issued by any public-sector entity in an OECD country for which the underlying obligor is a public-sector entity, but which are repayable solely from the revenues generated from the project financed through the issuance of the obligations;

(ii) Qualifying mortgage loans and qualifying multifamily mortgage loans;

(iii) Privately-issued mortgage-backed securities (*i.e.,* those that do not carry the guarantee of the U.S. Government, a U.S. government agency, or a U.S. government sponsored enterprise) representing an interest in qualifying mortgage loans or qualifying multifamily mortgage loans. If the security is backed by qualifying multifamily mortgage loans, the corporate credit union must receive timely payments of principal and interest in accordance with the terms of the security. Payments will generally be considered timely if they are not 30 days past due; and

(iv) Qualifying residential construction loans.

(4) 100 percent Risk-Weight (Category 4).

All assets not specified above or deducted from calculations of capital pursuant to § 704.2 and § 704.3 of this part, including, but not limited to:

(i) Consumer loans;

(ii) Commercial loans;

(iii) Home equity loans;

(iv) Non-qualifying mortgage loans;

(v) Non-qualifying multifamily mortgage loans;

(vi) Residential construction loans;

(vii) Land loans;

(viii) Nonresidential construction loans;

(ix) Obligations issued by any state or any political subdivision thereof for the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligations, *e.g.,* industrial development bonds;

(x) Debt securities not specifically risk-weighted in another category;

(xi) Investments in fixed assets and premises;

(xii) Servicing assets;

(xiii) Interest-only strips receivable, other than credit-enhancing interest-only strips;

(xiv) Equity investments;

(xv) The prorated assets of subsidiaries (except for the assets of consolidated CUSOs) to the extent such assets are included in adjusted total assets;

(xvi) All repossessed assets or assets that are more than 90 days past due; and

(xvii) Intangible assets not specifically weighted in some other category.

(5) Indirect ownership interests in pools of assets. Assets representing an indirect holding of a pool of assets, *e.g.,* mutual funds, are assigned to risk-weight categories under this section based upon the risk-weight that would be assigned to the assets in the portfolio of the pool. An investment in shares of a mutual fund whose portfolio consists primarily of various securities or money market instruments that, if held separately, would be assigned to different risk-weight categories, generally is assigned to the risk-weight category appropriate to the highest risk-weighted asset that the fund is permitted to hold in accordance with the investment objectives set forth in its prospectus. The corporate credit union may, at its option, assign the investment on a *pro rata* basis to different risk-weight categories according to the investment limits in its prospectus. In no case will an investment in shares in any such fund be assigned to a total risk-weight less than 20 percent. If the corporate credit union chooses to assign investments on a *pro rata* basis, and the sum of the investment limits of assets in the fund's prospectus exceeds 100 percent, the corporate credit union must assign the highest *pro rata* amounts of its total investment to the higher risk categories. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk-weight, such securities will generally be disregarded in determining the risk-weight category into which the corporate credit union's holding in the overall fund should be assigned. The prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk-weighting of the mutual fund investment. For example, the use of hedging instruments by a mutual fund to reduce the interest rate risk of its government bond portfolio will not increase the risk-weight of that fund above the 20 percent category. Nonetheless, if the fund engages in any activities that appear speculative in nature or has any other characteristics that are inconsistent with the preferential risk-weighting assigned to the fund's assets, holdings in the fund will be assigned to the 100 percent risk-weight category.

(6) Derivatives. Certain transactions or activities, such as derivatives transactions, may appear on a corporate's balance sheet but are not specifically described in the Section II(a) on-balance sheet risk-weight categories. These items will be assigned risk-weights as described in Section II(b) or II(c) below.

(b) Off-Balance Sheet Items

Except as provided in Section II(c) of this Appendix, risk-weighted off-balance sheet items are determined by the following two-step process. First, the face amount of the off-balance sheet item must be multiplied by the appropriate credit conversion factor listed in this Section II(b). This calculation translates the face amount of an off-balance sheet exposure into an on-balance sheet credit-equivalent amount. Second, the credit-equivalent amount must be assigned to the appropriate risk-weight category using the criteria regarding obligors, guarantors, and collateral listed in Section II(a) of this Appendix.[2] The following are the credit conversion factors and the off-balance sheet items to which they apply.

(1) 100 percent credit conversion factor (Group A).

(i) Risk participations purchased in bankers' acceptances;

(ii) Forward agreements and other contingent obligations with a certain draw down, *e.g.,* legally binding agreements to purchase assets at a specified future date. On the date a corporate credit union enters into a forward agreement or similar obligation, it should convert the principal amount of the assets to be purchased at 100 percent as of that date and then assign this amount to the risk-weight category appropriate to the obligor or guarantor of the item, or the nature of the collateral;

(iii) Indemnification of members whose securities the corporate credit union has lent as agent. If the member is not indemnified against loss by the corporate credit union, the transaction is excluded from the risk-based capital calculation. When a corporate credit union lends its own securities, the transaction is treated as a loan. When a corporate credit union lends its own securities or is acting as agent, agrees to indemnify a member, the transaction is assigned to the risk-weight appropriate to the obligor or collateral that is delivered to the lending or indemnifying institution or to an independent custodian acting on their behalf; and

(iv) Unused portions of ABCP liquidity facilities that do not meet the definition of an eligible ABCP liquidity facility. The resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph II(c)(3) of this Appendix, if applicable.

(2) 50 percent credit conversion factor (Group B).

(i) Transaction-related contingencies, including, among other things, performance bonds and performance-based standby letters of credit related to a particular transaction;

(ii) Unused portions of commitments (including home equity lines of credit and eligible ABCP liquidity facilities) with an original maturity exceeding one year except those listed in paragraph II(b)(5) of this Appendix. For eligible ABCP liquidity facilities, the resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under

[2] The sufficiency of collateral and guarantees for off-balance sheet items is determined by the market value of the collateral or the amount of the guarantee in relation to the face amount of the item, except for derivative contracts, for which this determination is generally made in relation to the credit equivalent amount. Collateral and guarantees are subject to the same provisions noted under paragraph II(d) of this Appendix C.

paragraph II(c)(3) of this Appendix, if applicable; and

(iii) Revolving underwriting facilities, note issuance facilities, and similar arrangements pursuant to which the corporate credit union's CUSO or member can issue short-term debt obligations in its own name, but for which the corporate credit union has a legally binding commitment to either:

(A) Purchase the obligations the member is unable to sell by a stated date; or

(B) Advance funds to its member, if the obligations cannot be sold.

(3) 20 percent credit conversion factor (Group C). Trade-related contingencies, *i.e.,* short-term, self-liquidating instruments used to finance the movement of goods and collateralized by the underlying shipment. A commercial letter of credit is an example of such an instrument.

(4) 10 percent credit conversion factor (Group D). Unused portions of eligible ABCP liquidity facilities with an original maturity of one year or less. The resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph II(c)(3) of this Appendix, if applicable;

(5) Zero percent credit conversion factor (Group E). (i) Unused portions of commitments with an original maturity of one year or less, except for eligible ABCP liquidity facilities;

(ii) Unused commitments with an original maturity greater than one year, if they are unconditionally cancelable at any time at the option of the corporate credit union and the corporate credit union has the contractual right to make, and in fact does make, either:

(A) A separate credit decision based upon the borrower's current financial condition before each drawing under the lending facility; or

(B) An annual (or more frequent) credit review based upon the borrower's current financial condition to determine whether or not the lending facility should be continued; and

(iii) The unused portion of retail credit card lines or other related plans that are unconditionally cancelable by the corporate credit union in accordance with applicable law.

(6) Off-balance sheet derivative contracts; interest rate and foreign exchange rate contracts (Group F).

(i) Calculation of credit equivalent amounts. The credit equivalent amount of an off-balance sheet derivative contract that is not subject to a qualifying bilateral netting contract in accordance with paragraph II(b)(6)(ii) of this Appendix is equal to the sum of the current credit exposure, *i.e.,* the replacement cost of the contract, and the potential future credit exposure of the contract. The calculation of credit equivalent amounts is measured in U.S. dollars, regardless of the currency or currencies specified in the contract.

(A) Current credit exposure. The current credit exposure of an off-balance sheet derivative contract is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current credit exposure equals that mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero. In determining its current credit exposure for multiple off-balance sheet derivative contracts executed with a single counterparty, a corporate credit union may net positive and negative mark-to-market values of off-balance sheet derivative contracts if subject to a bilateral netting contract as provided in paragraph II(b)(6)(ii) of this Appendix.

(B) Potential future credit exposure. The potential future credit exposure of an off-balance sheet derivative contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal by a credit conversion factor.[3] Corporate credit unions, subject to examiner review, should use the effective rather than the apparent or stated notional amount in this calculation. The conversion factors are: [4]

Remaining maturity	Interest rate contracts (percent)	Foreign exchange rate contracts (percent)	Other derivative contracts (percent)
One year or less	0.0	1.0	10.0
Over one year but less than five years	0.50	5.0	12.0
Over five years	0.50	5.0	15.0

(ii) Off-balance sheet derivative contracts subject to bilateral netting contracts. In determining its current credit exposure for multiple off-balance sheet derivative contracts executed with a single counterparty, a corporate credit union may net off-balance sheet derivative contracts subject to a bilateral netting contract by offsetting positive and negative mark-to-market values, provided that:

(A) The bilateral netting contract is in writing;

(B) The bilateral netting contract creates a single legal obligation for all individual off-balance sheet derivative contracts covered by the bilateral netting contract. In effect, the bilateral netting contract provides that the corporate credit union has a single claim or obligation either to receive or pay only the net amount of the sum of the positive and negative mark-to-market values on the individual off-balance sheet derivative contracts covered by the bilateral netting contract. The single legal obligation for the net amount is operative in the event that a counterparty, or a counterparty to whom the bilateral netting contract has been validly assigned, fails to perform due to any of the following events: Default, insolvency, bankruptcy, or other similar circumstances;

(C) The corporate credit union obtains a written and reasoned legal opinion(s) representing, with a high degree of certainty, that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy or similar circumstances, the relevant court and administrative authorities would find the corporate credit union's exposure to be the net amount under:

(*1*) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(*2*) The law that governs the individual off-balance sheet derivative contracts covered by the bilateral netting contract; and

(*3*) The law that governs the bilateral netting contract;

(D) The corporate credit union establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the bilateral netting contract continues to satisfy the requirements of this section; and

(E) The corporate credit union maintains in its files documentation adequate to support the netting of an off-balance sheet derivative contract.[5]

(iii) Walkaway clause. A bilateral netting contract that contains a walkaway clause is not eligible for netting for purposes of calculating the current credit exposure amount. The term "walkaway clause" means

[3] For purposes of calculating potential future credit exposure for foreign exchange contracts and other similar contracts, in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts to each party falling due on each value date in each currency.

[4] No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices, so-called floating/floating or basis swaps; the credit equivalent amount is measured solely on the basis of the current credit exposure.

[5] By netting individual off-balance sheet derivative contracts for the purpose of calculating its credit equivalent amount, a corporate credit union represents that documentation adequate to support the netting of an off-balance sheet derivative contract is in the corporate credit union's files and available for inspection by the NCUA. Upon determination by the NCUA that a corporate credit union's files are inadequate or that a bilateral netting contract may not be legally enforceable under any one of the bodies of law described in paragraphs II(b)(5)(ii) of this Appendix, the underlying individual off-balance sheet derivative contracts may not be netted for the purposes of this section.

a provision in a bilateral netting contract that permits a nondefaulting counterparty to make a lower payment than it would make otherwise under the bilateral netting contract, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the bilateral netting contract.

(iv) Risk-weighting. Once the corporate credit union determines the credit equivalent amount for an off-balance sheet derivative contract, that amount is assigned to the risk-weight category appropriate to the counterparty, or, if relevant, to the nature of any collateral or guarantee. Collateral held against a netting contract is not recognized for capital purposes unless it is legally available for all contracts included in the netting contract. However, the maximum risk-weight for the credit equivalent amount of such off-balance sheet derivative contracts is 50 percent.

(v) Exceptions. The following off-balance sheet derivative contracts are not subject to the above calculation, and therefore, are not part of the denominator of a corporate credit union's risk-based capital ratio:

(A) A foreign exchange rate contract with an original maturity of 14 calendar days or less; and

(B) Any interest rate or foreign exchange rate contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

(C) Asset-backed commercial paper programs.

(*1*) A corporate credit union that qualifies as a primary beneficiary and must consolidate an ABCP program that is a variable interest entity under Generally Accepted Accounting Principles may exclude the consolidated ABCP program assets from risk-weighted assets if the corporate credit union is the sponsor of the ABCP program.

(*2*) If a corporate credit union excludes such consolidated ABCP program assets from risk-weighted assets, the corporate credit union must assess the appropriate risk-based capital requirement against any exposures of the corporate credit union arising in connection with such ABCP programs, including direct credit substitutes, recourse obligations, residual interests, liquidity facilities, and loans, in accordance with Sections II(a), II(b), and II(c) of this Appendix.

(*3*) If a corporate credit union has multiple overlapping exposures (such as a program-wide credit enhancement and a liquidity facility) to an ABCP program that is not consolidated for risk-based capital purposes, the corporate credit union is not required to hold duplicative risk-based capital under this part against the overlapping position. Instead, the corporate credit union should apply to the overlapping position the applicable risk-based capital treatment that results in the highest capital charge.

(c) Recourse Obligations, Direct Credit Substitutes, and Certain Other Positions

(1) In general. Except as otherwise permitted in this Section II(c), to determine the risk-weighted asset amount for a recourse obligation or a direct credit substitute (but not a residual interest):

(i) Multiply the full amount of the credit-enhanced assets for which the corporate credit union directly or indirectly retains or assumes credit risk by a 100 percent conversion factor (For a direct credit substitute that is an on-balance sheet asset (*e.g.,* a purchased subordinated security), a corporate credit union must use the amount of the direct credit substitute and the full amount of the asset it supports, *i.e.,* all the more senior positions in the structure); and

(ii) Assign this credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral. Section II(a) lists the risk-weight categories.

(2) Residual interests. Except as otherwise permitted under this Section II(c), a corporate credit union must maintain risk-based capital for residual interests as follows:

(i) Credit-enhancing interest-only strips. A corporate credit union must maintain risk-based capital for a credit-enhancing interest-only strip equal to the remaining amount of the strip even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred.

(ii) Other residual interests. A corporate credit union must maintain risk-based capital for a residual interest (excluding a credit-enhancing interest-only strip) equal to the face amount of the residual interest, even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred.

(iii) Residual interests and other recourse obligations. Where a corporate credit union holds a residual interest (including a credit-enhancing interest-only strip) and another recourse obligation in connection with the same transfer of assets, the corporate credit union must maintain risk-based capital equal to the greater of:

(A) The risk-based capital requirement for the residual interest as calculated under Section II(c)(2)(i) through (ii) of this Appendix; or

(B) The full risk-based capital requirement for the assets transferred, subject to the low-level recourse rules under Section II(c)(5) of this Appendix.

(3) Ratings-based approach—(i) Calculation. A corporate credit union may calculate the risk-weighted asset amount for an eligible position described in Section II(c)(3)(ii) of this section by multiplying the face amount of the position by the appropriate risk-weight determined in accordance with Table A or B of this section.

TABLE A

Long term rating category	Risk-weight (in percent)
Highest or second highest investment grade	20
Third highest investment grade	50
Lowest investment grade	100
One category below investment grade	200

TABLE B

Short term rating category	Risk-weight (in percent)
Highest investment grade	20
Second highest investment grade	50
Lowest investment grade	100

(ii) Eligibility.

(A) Traded positions. A position is eligible for the treatment described in paragraph II(c)(3)(i) of this Appendix if:

(*1*) The position is a corporate debt obligation with a remaining maturity of 120 days or less, a recourse obligation, a direct credit substitute, a residual interest, or an asset- or mortgage-backed security and is not a credit-enhancing interest-only strip;

(*2*) The position is a traded position; and

(*3*) The NRSRO has rated a long term position as one grade below investment grade or better or a short term position as investment grade. If two or more NRSROs assign ratings to a traded position, the corporate credit union must use the lowest rating to determine the appropriate risk-weight category under paragraph (3)(i).

(B) Non-traded positions. A position that is not traded is eligible for the treatment described in paragraph(3)(i) if:

(*1*) The position is a recourse obligation, a direct credit substitute, a residual interest, or an asset- or mortgage-backed security extended in connection with a securitization and is not a credit-enhancing interest-only strip;

(*2*) More than one NRSRO rate the position;

(*3*) All of the NRSROs that rate the position rate it as no lower than one grade below investment grade (for long term position) or no lower than investment grade (for short term investments). If the NRSROs assign different ratings to the position, the corporate credit union must use the lowest rating to determine the appropriate risk-weight category under paragraph (3)(i);

(*4*) The NRSROs base their ratings on the same criteria that they use to rate securities that are traded positions; and

(*5*) The ratings are publicly available.

(C) Unrated senior positions. If a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security is not rated by an NRSRO, but is senior or preferred in all features to a traded position (including collateralization and maturity), the corporate credit union may risk-weight the face amount of the senior position under paragraph (3)(i) of this section, based on the rating of the traded position, subject to supervisory guidance. The corporate credit union must satisfy NCUA that this treatment is appropriate. This paragraph (3)(i)(c) applies only if the traded position provides substantive credit support to the unrated position until the unrated position matures.

(iii) Consistent use of Ratings Based Approach. A corporate credit union that determines to use the ratings based approach must do so in a consistent manner. For example, if the corporate credit union employs the ratings based approach on at least one security or position on a given call report, the credit union must use the ratings based approach on that call report for every security and position that is eligible for the ratings based approach.

(4) Certain positions that are not rated by NRSROs. (i) Calculation. A corporate credit union may calculate the risk-weighted asset amount for eligible position described in paragraph II(c)(4)(ii) of this section based on the corporate credit union's determination of the credit rating of the position. To risk-weight the asset, the corporate credit union must multiply the face amount of the position by the appropriate risk-weight determined in accordance with Table C of this section.

TABLE C

Rating category	Risk-weight (in percent)
Investment grade	100
One category below investment grade	200

(ii) Eligibility. A position extended in connection with a securitization is eligible for the treatment described in paragraph II(c)(4)(i) of this section if it is not rated by an NRSRO, is not a residual interest, and meets the one of the three alternative standards described in paragraphs (A), (B), or (C) below:

(A) Position rated internally. A direct credit substitute, but not a purchased credit-enhancing interest-only strip, is eligible for the treatment described under paragraph II(c)(4)(i) of this Appendix, if the position is assumed in connection with an asset-backed commercial paper program sponsored by the corporate credit union. Before it may rely on an internal credit risk rating system, the corporate must demonstrate to NCUA's satisfaction that the system is adequate. Acceptable internal credit risk rating systems typically:

(*1*) Are an integral part of the corporate credit union's risk management system that explicitly incorporates the full range of risks arising from the corporate credit union's participation in securitization activities;

(*2*) Link internal credit ratings to measurable outcomes, such as the probability that the position will experience any loss, the expected loss on the position in the event of default, and the degree of variance in losses in the event of default on that position;

(*3*) Separately consider the risk associated with the underlying loans or borrowers, and the risk associated with the structure of the particular securitization transaction;

(*4*) Identify gradations of risk among "pass" assets and other risk positions;

(*5*) Use clear, explicit criteria to classify assets into each internal rating grade, including subjective factors;

(*6*) Employ independent credit risk management or loan review personnel to assign or review the credit risk ratings;

(*7*) Include an internal audit procedure to periodically verify that internal risk ratings are assigned in accordance with the corporate credit union's established criteria;

(*8*) Monitor the performance of the assigned internal credit risk ratings over time to determine the appropriateness of the initial credit risk rating assignment, and adjust individual credit risk ratings or the overall internal credit risk rating system, as needed; and

(*9*) Make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

(B) Program ratings.

(*1*) A recourse obligation or direct credit substitute, but not a residual interest, is eligible for the treatment described in paragraph II(c)(4)(i) of this Appendix, if the position is retained or assumed in connection with a structured finance program and an NRSRO has reviewed the terms of the program and stated a rating for positions associated with the program. If the program has options for different combinations of assets, standards, internal or external credit enhancements and other relevant factors, and the NRSRO specifies ranges of rating categories to them, the corporate credit union may apply the rating category applicable to the option that corresponds to the corporate credit union's position.

(*2*) To rely on a program rating, the corporate credit union must demonstrate to NCUA's satisfaction that that the credit risk rating assigned to the program meets the same standards generally used by NRSROs for rating traded positions. The corporate credit union must also demonstrate to NCUA's satisfaction that the criteria underlying the assignments for the program are satisfied by the particular position.

(*3*) If a corporate credit union participates in a securitization sponsored by another party, NCUA may authorize the corporate credit union to use this approach based on a program rating obtained by the sponsor of the program.

(C) Computer program. A recourse obligation or direct credit substitute, but not a residual interest, is eligible for the treatment described in paragraph II(c)(4)(i) of this Appendix, if the position is extended in connection with a structured financing program and the corporate credit union uses an acceptable credit assessment computer program to determine the rating of the position. An NRSRO must have developed the computer program and the corporate credit union must demonstrate to NCUA's satisfaction that the ratings under the program correspond credibly and reliably with the rating of traded positions.

(5) Limitations on risk-based capital requirements—

(i) Low-level exposure rule. If the maximum contractual exposure to loss retained or assumed by a corporate credit union is less than the effective risk-based capital requirement, as determined in accordance with this Section II(c), for the assets supported by the corporate credit union's position, the risk-based capital requirement is limited to the corporate credit union's contractual exposure less any recourse liability account established in accordance with Generally Accepted Accounting Principles. This limitation does not apply when a corporate credit union provides credit enhancement beyond any contractual obligation to support assets it has sold.

(ii) Mortgage-related securities or participation certificates retained in a mortgage loan swap. If a corporate credit union holds a mortgage-related security or a participation certificate as a result of a mortgage loan swap with recourse, it must hold risk-based capital to support the recourse obligation and that percentage of the mortgage-related security or participation certificate that is not covered by the recourse obligation. The total amount of risk-based capital required for the security (or certificate) and the recourse obligation is limited to the risk-based capital requirement for the underlying loans, calculated as if the corporate credit union continued to hold these loans as an on-balance sheet asset.

(iii) Related on-balance sheet assets. If an asset is included in the calculation of the risk-based capital requirement under this Section II(c) and also appears as an asset on the corporate credit union's balance sheet, the corporate credit union must risk-weight the asset only under this Section II(c), except in the case of loan servicing assets and similar arrangements with embedded recourse obligations or direct credit substitutes. In that case, the corporate credit union must separately risk-weight the on-balance sheet servicing asset and the related recourse obligations and direct credit substitutes under this section, and incorporate these amounts into the risk-based capital calculation.

(6) Obligations of CUSOs. All recourse obligations and direct credit substitutes retained or assumed by a corporate credit union on the obligations of CUSOs in which the corporate credit union has an equity investment are risk-weighted in accordance with this Section II(c), unless the corporate credit union's equity investment is deducted from the credit union's capital and assets under § 704.2 and § 704.3.

(d) *Collateral.* The only forms of collateral that are recognized for risk-weighting purposes are cash on deposit in the corporate credit union; Treasuries, U.S. Government agency securities, and U.S. Government-sponsored enterprise securities; and securities issued by multilateral lending institutions or regional development banks. Claims secured by cash on deposit are assigned to the zero percent risk-weight category (to the extent of the cash amount). Claims secured by securities are assigned to the twenty percent risk-weight category (to the extent of the fair market value of the securities).

PART 709—INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY INSURED CREDIT UNIONS IN LIQUIDATION.

■ 23. The authority citation for part 709 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1767, 1786(h), 1787, 1788, 1789, 1789a.

■ 24. Revise paragraphs (b)(7) and (b)(9) of § 709.5 to read as follows:

§ 709.5 Payout priorities in involuntary liquidation.

* * * * *

(b) * * *

(7) in a case involving liquidation of a corporate credit union, holders of then-outstanding membership capital accounts and nonperpetual capital accounts or instruments to the extent not depleted in a calendar year prior to the date of liquidation and also subject to the capital priority option described in Appendix A of part 704 of this chapter;

* * * * *

(9) in a case involving liquidation of a corporate credit union, holders of then-outstanding paid in capital or perpetual contributed capital instruments to the extent not depleted in a calendar year prior to the date of liquidation and also subject to the capital priority option described in Appendix A of Part 704 of this chapter;

* * * * *

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS.

■ 25. The authority citation for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1786, 1787; 42 U.S.C. 4012a; Pub. L. 101–410; Pub. L. 104–134.

■ 26. Effective October 20, 2011, add a new subpart M to part 747 to read as follows:

Subpart M—Issuance, Review and Enforcement of Orders Imposing Prompt Corrective Action on Corporate Credit Unions

Sec.

Subpart M—Issuance, Review and Enforcement of Orders Imposing Prompt Corrective Action on Corporate Credit Unions

§ 747.3001 Scope.

(a) *Independent review process.* The rules and procedures set forth in this subpart apply to corporate credit unions which are subject to discretionary supervisory actions under § 704.4 of this chapter and to reclassification under § 704.4(d)(3) of this chapter to facilitate prompt corrective action, and to senior executive officers and directors of such corporate credit unions who are dismissed pursuant to a discretionary supervisory action imposed under § 704.4 of this chapter. Section 747.3002 of this subpart provides an independent appellate process to challenge such decisions.

(b) *Notice to State officials.* With respect to a State-chartered corporate credit union under §§ 747.3002, 747.3003 and 747.3004 of this subpart, any notices, directives and decisions on appeal served upon a corporate credit union, or a dismissed director or officer thereof, by the NCUA will also be served upon the appropriate State official. Responses, requests for a hearing and to present witnesses, requests to modify or rescind a discretionary supervisory action and requests for reinstatement served upon the NCUA by a corporate credit union, or any dismissed director or officer of a corporate credit union, will also be served upon the appropriate State official.

§ 747.3002 Review of orders imposing discretionary supervisory action.

(a) *Notice of intent to issue directive.*—(1) *Generally.* Whenever the NCUA intends to issue a directive imposing a discretionary supervisory action under §§ 704.4(k)(2)(v) and 704.4(k)(3) of this chapter on a corporate credit union classified "undercapitalized" or lower, the NCUA will give the corporate credit union prior notice of the proposed action and an opportunity to respond.

(2) *Immediate issuance of directive without notice.* The NCUA may issue a directive to take effect immediately under paragraph (a)(1) of this section without notice to the corporate credit union if the NCUA finds it necessary in order to carry out the purposes of § 704.4 of this chapter. A corporate credit union that is subject to a directive which takes effect immediately may appeal the directive in writing to the NCUA Board (Board). Such an appeal must be received by the Board within 14 calendar days after the directive was issued, unless the Board permits a longer period. Unless ordered by the NCUA, the directive will remain in effect pending a decision on the appeal. The Board will consider any such appeal, if timely filed, within 60 calendar days of receiving it.

(b) *Contents of notice.* The NCUA's notice to a corporate credit union of its intention to issue a directive imposing a discretionary supervisory action will state:

(1) The corporate credit union's capital measures and capital category classification;

(2) The specific restrictions or requirements that the Board intends to impose, and the reasons therefore;

(3) The proposed date when the discretionary supervisory action would take effect and the proposed date for completing the required action or terminating the action; and

(4) That a corporate credit union must file a written response to a notice within 14 calendar days from the date of the notice, or within such shorter period as the Board determines is appropriate in light of the financial condition of the corporate credit union or other relevant circumstances.

(c) *Contents of response to notice.* A corporate credit union's response to a notice under paragraph (b) of this section must:

(1) Explain why it contends that the proposed discretionary supervisory action is not an appropriate exercise of discretion under this section;

(2) Request the Board to modify or to not issue the proposed directive; and

(3) Include other relevant information, mitigating circumstances, documentation, or other evidence in support of the corporate credit union's position regarding the proposed directive.

(d) *NCUA Board consideration of response.* The Board, or an independent person designated by the Board to act on the Board's behalf, after considering a response under paragraph (c) of this section, may:

(1) Issue the directive as originally proposed or as modified;

(2) Determine not to issue the directive and to so notify the corporate credit union; or

(3) Seek additional information or clarification from the corporate credit union or any other relevant source.

(e) *Failure to file response.* A corporate credit union which fails to file a written response to a notice of the Board's intention to issue a directive imposing a discretionary supervisory action, within the specified time period, will be deemed to have waived the opportunity to respond, and to have consented to the issuance of the directive.

(f) *Request to modify or rescind directive.* A corporate credit union that is subject to an existing directive imposing a discretionary supervisory action may request in writing that the Board reconsider the terms of the directive, or rescind or modify it, due to changed circumstances. Unless otherwise ordered by the Board, the directive will remain in effect while such request is pending. A request under this paragraph which remains pending 60 days following receipt by the Board is deemed granted.

§ 747.3003 Review of order reclassifying a corporate credit union on safety and soundness criteria.

(a) *Notice of proposed reclassification based on unsafe or unsound condition or practice.* When the Board proposes to reclassify a corporate credit union or subject it to the supervisory actions applicable to the next lower capitalization category pursuant to § 704.4(d)(3) of this chapter (such action hereinafter referred to as "reclassification"), the Board will issue and serve on the corporate credit union reasonable prior notice of the proposed reclassification.

(b) *Contents of notice.* A notice of intention to reclassify a corporate credit union based on unsafe or unsound condition or practice will state:

(1) The corporate credit union's current capital ratios and the capital category to which the corporate credit union would be reclassified;

(2) The unsafe or unsound practice(s) and/or condition(s) justifying reasons for reclassification of the corporate credit union;

(3) The date by which the corporate credit union must file a written response to the notice (including a request for a hearing), which date will be no less than 14 calendar days from the date of service of the notice unless the Board determines that a shorter period is appropriate in light of the financial condition of the corporate credit union or other relevant circumstances; and

(4) That a corporate credit union which fails to —

(i) File a written response to the notice of reclassification, within the specified time period, will be deemed to have waived the opportunity to respond, and to have consented to reclassification;

(ii) Request a hearing will be deemed to have waived any right to a hearing; and

(iii) Request the opportunity to present witness testimony will be deemed to have waived any right to present such testimony.

(c) *Contents of response to notice.* A corporate credit union's response to a notice under paragraph (b) of this section must:

(1) Explain why it contends that the corporate credit union should not be reclassified;

(2) Include any relevant information, mitigating circumstances, documentation, or other evidence in support of the corporate credit union's position;

(3) If desired, request an informal hearing before the Board under this section; and

(4) If a hearing is requested, identify any witness whose testimony the corporate credit union wishes to present and the general nature of each witness's expected testimony.

(d) *Order to hold informal hearing.* Upon timely receipt of a written response that includes a request for a hearing, the Board will issue an order commencing an informal hearing no later than 30 days after receipt of the request, unless the corporate credit union requests a later date. The hearing will be held in Alexandria, Virginia, or at such other place as may be designated by the Board, before a presiding officer designated by the Board to conduct the hearing and to recommend a decision.

(e) *Procedures for informal hearing.*—(1) The corporate credit union may appear at the hearing through a representative or through counsel. The corporate credit union will have the right to introduce relevant documents and to present oral argument at the hearing. The corporate credit union may introduce witness testimony only if expressly authorized by the Board or the presiding officer. Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure (12 CFR part 747) will apply to an informal hearing under this section unless the Board orders otherwise.

(2) The informal hearing will be recorded, and a transcript will be furnished to the corporate credit union upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or by the presiding officer. The presiding officer may ask questions of any witness.

(3) The presiding officer may order that the hearing be continued for a reasonable period following completion of witness testimony or oral argument to allow additional written submissions to the hearing record.

(4) Within 20 calendar days following the closing of the hearing and the record, the presiding officer will make a recommendation to the Board on the proposed reclassification.

(f) *Time for final decision.* Not later than 60 calendar days after the date the record is closed, or the date of receipt of the corporate credit union's response in a case where no hearing was requested, the Board will decide whether to reclassify the corporate credit union, and will notify the corporate credit union of its decision. The decision of the Board will be final.

(g) *Request to rescind reclassification.* Any corporate credit union that has been reclassified under this section may file a written request to the Board to reconsider or rescind the reclassification, or to modify, rescind or remove any directives issued as a result of the reclassification. Unless otherwise ordered by the Board, the corporate credit union will remain reclassified, and subject to any directives issued as a result, while such request is pending.

§ 747.3004 Review of order to dismiss a director or senior executive officer.

(a) *Service of directive to dismiss and notice.* When the Board issues and serves a directive on a corporate credit union requiring it to dismiss from office any director or senior executive officer under §§ 704.4(g) and 704.4(k)(3) of this chapter, the Board will also serve upon the person the corporate credit union is directed to dismiss (Respondent) a copy of the directive (or the relevant portions, where appropriate) and notice of the Respondent's right to seek reinstatement.

(b) *Contents of notice of right to seek reinstatement.* A notice of a Respondent's right to seek reinstatement will state:

(1) That a request for reinstatement (including a request for a hearing) must be filed with the Board within 14 calendar days after the Respondent receives the directive and notice under paragraph (a) of this section, unless the Board grants the Respondent's request for further time;

(2) The reasons for dismissal of the Respondent; and

(3) That the Respondent's failure to—

(i) Request reinstatement will be deemed a waiver of any right to seek reinstatement;

(ii) Request a hearing will be deemed a waiver of any right to a hearing; and

(iii) Request the opportunity to present witness testimony will be deemed a waiver of the right to present such testimony.

(c) *Contents of request for reinstatement.* A request for reinstatement in response to a notice under paragraph (b) of this section must:

(1) Explain why the Respondent should be reinstated;

(2) Include any relevant information, mitigating circumstances, documentation, or other evidence in support of the Respondent's position;

(3) If desired, request an informal hearing before the Board under this section; and

(4) If a hearing is requested, identify any witness whose testimony the Respondent wishes to present and the general nature of each witness's expected testimony.

(d) *Order to hold informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a corporate credit union to dismiss from office any director or senior executive officer, the Board will issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing will be held in Alexandria, Virginia, or at such other place as may be designated by the Board, before a presiding officer designated by the Board to conduct the hearing and recommend a decision.

(e) *Procedures for informal hearing.*—(1) A Respondent may appear at the hearing personally or through counsel. A Respondent will have the right to introduce relevant documents and to present oral argument at the hearing. A Respondent may introduce witness testimony only if expressly authorized by the Board or by the presiding officer. Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure (12 CFR part 747) apply to an informal hearing under this section unless the Board orders otherwise.

(2) The informal hearing will be recorded, and a transcript will be furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer. The presiding officer may ask questions of any witness.

(3) The presiding officer may order that the hearing be continued for a reasonable period following completion of witness testimony or oral argument to allow additional written submissions to the hearing record.

(4) A Respondent will bear the burden of demonstrating that his or her continued employment by or service with the corporate credit union would materially strengthen the corporate credit union's ability to —

(i) Become "adequately capitalized," to the extent that the directive was issued as a result of the corporate credit union's capital classification category or its failure to submit or implement a capital restoration plan; and

(ii) Correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of reclassification of the corporate credit union pursuant to § 704.4(d)(3) of this chapter.

(5) Within 20 calendar days following the date of closing of the hearing and the record, the presiding officer will make a recommendation to the Board concerning the Respondent's request for reinstatement with the corporate credit union.

(f) *Time for final decision.* Not later than 60 calendar days after the date the record is closed, or the date of the response in a case where no hearing was requested, the Board will grant or deny the request for reinstatement and will notify the Respondent of its decision. If the Board denies the request for reinstatement, it will set forth in the notification the reasons for its decision. The decision of the Board will be final.

(g) *Effective date.* Unless otherwise ordered by the Board, the Respondent's dismissal will take and remain in effect pending a final decision on the request for reinstatement.

§ 747.3005 Enforcement of directives.

(a) *Judicial remedies.* Whenever a corporate credit union fails to comply with a directive imposing a discretionary supervisory action, or enforcing a mandatory supervisory action under § 704.4 of this chapter, the Board may seek enforcement of the directive in the appropriate United States District Court pursuant to 12 U.S.C. 1786(k)(1).

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to 12 U.S.C. 1786(k)(2)(A), the Board may assess a civil money penalty against any corporate credit union that violates or otherwise fails to comply with any final directive issued under § 704.4 of this chapter, or against any institution-affiliated party of a corporate credit union (per 12 U.S.C. 1786(r)) who participates in such violation or noncompliance.

(2) *Failure to implement plan.* Pursuant to 12 U.S.C. 1786(k)(2)(A), the Board may assess a civil money penalty against a corporate credit union which fails to implement a capital restoration plan under § 704.4(e) of this chapter, regardless whether the plan was published.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the Board may seek enforcement of the directives issued under Section 704.4 of this chapter through any other judicial or administrative proceeding authorized by law.

§ 747.3006 Conservatorship or liquidation of critically undercapitalized corporate credit union.

Notwithstanding any other provision of this title, the NCUA may, without any administrative due process, immediately place into conservatorship or liquidation any corporate credit union that has been categorized as critically undercapitalized.

[FR Doc. 2010–24616 Filed 10–19–10; 8:45 am]

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October 20, 2010

Part III

Environmental Protection Agency

40 CFR Parts 51 and 52

Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC); Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2006–0605; FRL–9210–9]

RIN 2060–AO24

Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is amending the requirements for particulate matter less than 2.5 micrometers ($PM_{2.5}$) under the Prevention of Significant Deterioration (PSD) program by adding maximum allowable increases in ambient pollutant concentrations ("increments") and two screening tools, known as the Significant Impact Levels (SILs) and a Significant Monitoring Concentration (SMC) for $PM_{2.5}$. The SILs for $PM_{2.5}$ are also being added to two other New Source Review (NSR) rules that regulate the construction and modification of any major stationary source locating in an attainment or unclassifiable area, where the source's emissions may cause or contribute to a violation of the national ambient air quality standards (NAAQS).

DATES: This final rule is effective on December 20, 2010.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2006–0605. All documents in the docket are listed on the *http://www.regulations.gov* Web Site. Although listed in the index, some information may not be publicly available, *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 Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Dan deRoeck, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5593, facsimile number: (919) 541–5509, e-mail address: *deroeck.dan@epa.gov.*

SUPPLEMENTARY INFORMATION: The information in this Supplementary Information section of this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

Entities affected by this rule include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups:

Industry group	NAICS [a]
Electric services	221111, 221112, 221113, 221119, 221121, 221122
Petroleum refining	32411
Industrial inorganic chemicals	325181, 32512, 325131, 325182, 211112, 325998, 331311, 325188
Industrial organic chemicals	32511, 325132, 325192, 325188, 325193, 32512, 325199
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551
Natural gas liquids	211112
Natural gas transport	48621, 22121
Pulp and paper mills	32211, 322121, 322122, 32213
Paper mills	322121, 322122
Automobile manufacturing	336111, 336112, 336712, 336211, 336992, 336322, 336312, 33633, 33634, 33635, 336399, 336212, 336213
Pharmaceuticals	325411, 325412, 325413, 325414

[a] North American Industry Classification System.

Entities affected by this rule also include State and local permitting authorities, and tribal authorities that implement these regulations.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this final rule will be posted in the regulations and standards section of our NSR home page located at *http://www.epa.gov/nsr*.

II. Purpose

The purpose of this rulemaking is to finalize certain program provisions under the regulations to prevent significant deterioration of air quality due to emissions of $PM_{2.5}$ (*i.e.,* under the $PM_{2.5}$ PSD regulations). This final rule supplements the final implementation rule for $PM_{2.5}$, known as the Clean Air Fine Particle Implementation Rule (CAFPIR) that we promulgated on April 25, 2007 (72 FR 20586), and the $PM_{2.5}$ NSR Implementation Rule that we promulgated on May 16, 2008 (73 FR 28321). Together, these three rules encompass the elements necessary for implementation of a $PM_{2.5}$ program in any area. This final rule is important because it establishes increments, SILs, and an SMC for $PM_{2.5}$ to facilitate ambient air quality monitoring and modeling under the PSD regulations for areas designated attainment or unclassifiable for $PM_{2.5}$.

III. Overview of Final $PM_{2.5}$ PSD Regulations

A. Increments

This rulemaking establishes increments for $PM_{2.5}$ pursuant to the legal authority contained in section 166(a) of the Clean Air Act (CAA or Act) for pollutants for which NAAQS are promulgated after 1977. The final $PM_{2.5}$ increments were identified as Option 1 in the 2007 Notice of Proposed Rulemaking (NPRM) for this action, and are as follows:

Averaging period	NAAQS (µg/m³)	Increments (µg/m³)		
		Class I	Class II	Class III
Annual	15	1	4	8
24-hour	35	2	9	18

As discussed in more detail in sections V.F and VIII, the increments for $PM_{2.5}$ will become applicable on October 20, 2011 in order to comply with section 166(b) of the Act (providing that regulations under section 166(a) "shall become effective one year after the date of promulgation").

This final rule does not revoke the annual increments for particulate matter less than 10 micrometers (PM_{10}) as proposed under Option 1 in the 2007 NPRM. Thus, we are retaining the 24-hour and annual PM_{10} increments in addition to adding $PM_{2.5}$ increments. This outcome is discussed in greater detail in section V.H of this preamble.

B. Significant Impact Levels

This rule establishes SILs for $PM_{2.5}$ for evaluating the impact a proposed new source or modification may have on the NAAQS and PSD increments for $PM_{2.5}$. The SILs for $PM_{2.5}$ were developed by scaling the existing PM_{10} SILs using a $PM_{2.5}$-to-PM_{10} NAAQS ratio. The final SILs were identified as Option 3 in the 2007 NPRM, and are as follows:

Averaging period	SILs (μg/m³)		
	Class I	Class II	Class III
Annual	0.06	0.3	0.3
24-hour	0.07	1.2	1.2

These values will be added to the State implementation plan (SIP) provisions for PSD at 40 CFR 51.166 (as an optional screening tool) and the Federal PSD program at 40 CFR 52.21, as well as under the preconstruction review permit requirements at 40 CFR 51.165(b) and part 51, Appendix S. *See* a more detailed discussion of the SILs, as well as the relevant comments and our responses to them, in section VI of this preamble. The SILs for $PM_{2.5}$ are incorporated into the Federal PSD program as well as into the regulations for State-implemented PSD programs, although they are regarded as optional for State programs. The effective date for implementing the SILs under the Federal PSD program is the effective date of this final rule. *See* section VIII of this preamble for further discussion of the effective date.

C. Significant Monitoring Concentration

This final rule establishes the SMC for $PM_{2.5}$ as 4 μg/m³ $PM_{2.5}$ (24-hour average). This value has been developed pursuant to proposed Option 1; however, it should be noted that the value being established in this final rule is lower than the proposed value of 10 μg/m³ that was originally developed under Option 1. A more detailed discussion of the proposed SMC is presented in section VII of this preamble, describing the rationale for altering the proposed SMC, and the relevant comments on the proposed SMC and our responses to them. The SMC for $PM_{2.5}$ is incorporated into the Federal PSD program as well as into the regulations for State-implemented PSD programs, although they are regarded as optional for State programs. As with the SILs for $PM_{2.5}$, the effective date for implementing the SMC under the Federal PSD program is the effective date of this final rule. *See* section VIII of this preamble for further discussion of the effective date.

IV. Background

A. PSD Program

The NSR provisions of the Act are a combination of air quality planning and air pollution control technology program requirements for new and modified stationary sources of air pollution. In brief, section 109 of the Act requires us to promulgate primary NAAQS to protect public health and secondary NAAQS to protect public welfare. Once we have set these standards, states must develop, adopt, and submit to us for approval SIPs that contain emission limitations and other control measures to attain and maintain the NAAQS and to meet the other requirements of section 110(a) of the Act. Part C of title I of the Act contains the requirements for a component of the major NSR program known as the PSD program. This program sets forth procedures for the preconstruction review and permitting of new and modified major stationary sources of air pollution locating in areas meeting the NAAQS ("attainment" areas) and areas for which there is insufficient information to classify an area as either attainment or nonattainment ("unclassifiable" areas). Most states have SIP-approved preconstruction permit (major NSR) programs. The Federal PSD program at 40 CFR 52.21 applies in some states that lack a SIP-approved permit program, and in Indian country.[1] The applicability of the PSD program to a major stationary source must be determined in advance of construction and is a pollutant-specific determination. Once a major source is determined to be subject to the PSD program (PSD source), among other requirements, it must undertake a series of analyses to demonstrate that it will use the best available control technology (BACT) and will not cause or contribute to a violation of any NAAQS or increment. For the latter demonstration, the PSD regulations generally require sources to submit for review and approval a source impact analysis and an air quality analysis.

The source impact analysis is primarily a modeling analysis designed to show that the allowable emissions increase from the proposed project, in conjunction with other emissions increases from existing sources, will not result in a violation of either the NAAQS or increments. In cases where the source's emissions may adversely affect an area classified as a Class I area, additional review is conducted to protect the increments and special attributes of such an area defined as "air quality related values" (AQRVs).

The air quality analysis must assess the ambient air quality in the area that the proposed project would affect. For this analysis, the owner or operator of the proposed project must submit as part of a complete permit application air quality monitoring data that represent the air quality in the area affected by the proposed source for the 1-year period preceding receipt of the application. Where data may already exist to represent existing air quality, it may be used by the applicant; otherwise, the source owner or operator is responsible for the installation and operation of monitors to collect the necessary data.

Historically, EPA has allowed the use of several types of screening tools to facilitate implementation of the preconstruction review process to reduce the permit applicant's burden and streamline the permitting process for *de minimis* circumstances. These tools include a significant emissions rate (SER), SILs, and a SMC. The SER, defined in tons per year (tpy) for each regulated pollutant, is used to determine whether the emissions increase from any proposed source or modification can be excluded from review on the grounds that the increase of any particular pollutant is *de minimis.* An emission increase for a particular pollutant that is greater than the SER defined in the NSR regulations for that pollutant is considered to be a significant increase.

The SIL, expressed as an ambient pollutant concentration (micrograms per cubic meter (μg/m³)), is used to determine whether the ambient impact of a particular pollutant (once it is determined to be emitted in significant amounts) is significant enough to warrant a complete source impact analysis involving modeling the collective impacts of the proposed project and emissions from other existing sources.

The PSD regulations generally require each PSD applicant to collect 1 year of continuous air quality monitoring data for any pollutant determined to be subject to preconstruction review as part of complete PSD permit application. Using the SMC as a screening tool, expressed as an ambient pollutant concentration (μg/m³), sources may be able to demonstrate that the modeled air

[1] We have delegated our authority to some states to implement the Federal PSD program. The EPA remains the reviewing authority in non-delegated states lacking SIP-approved programs and in Indian country.

quality impact of emissions from the new source or modification, or the existing air quality level in the area where the source would construct, is less than the SMC, *i.e., de minimis,* and may be allowed to forego the preconstruction monitoring requirement for a particular pollutant at the discretion of the reviewing authority.[2] *See* 40 CFR 51.166(i)(5) and 52.21(i)(5).

When the reviewing authority reaches a preliminary decision to authorize construction of a proposed major new source or major modification, it must provide notice of the preliminary decision and an opportunity for comment by the general public, industry, and other persons that may be affected by the emissions of the proposed major source or major modification. After considering these comments, the reviewing authority may issue a final determination on the construction permit in accordance with the PSD regulations.

B. History of Particulate Matter (PM) NAAQS

1. Total Suspended Particulate (TSP) and PM_{10} NAAQS

The EPA initially established NAAQS for PM in 1971, measured by the TSP indicator. Based on the size of the particles collected by the "high-volume sampler," which at that time was the reference method for determining ambient concentrations, TSP included all PM up to a nominal size of 25 to 45 micrometers. We established both annual and 24-hour NAAQS for TSP.

On July 1, 1987, we revised the NAAQS for PM and changed the indicator from TSP to PM_{10}; the latter indicator includes particles with a mean aerodynamic diameter less than or equal to 10 micrometers. The PM_{10} particles are the subset of inhalable particles small enough to penetrate to the thoracic region (including the tracheobronchial and alveolar regions) of the respiratory tract (referred to as thoracic particles). We established annual and 24-hour NAAQS for PM_{10}, and revoked the NAAQS for TSP. (52 FR 24634).

2. $PM_{2.5}$ NAAQS

On July 18, 1997, we again revised the NAAQS for PM in several respects. While we determined that the NAAQS should continue to focus on particles less than or equal to 10 micrometers in diameter, we also determined that the fine and coarse fractions of PM_{10} should be considered separately. We established new annual and 24-hour NAAQS using $PM_{2.5}$ (referring to particles with a nominal mean aerodynamic diameter less than or equal to 2.5 micrometers) as the indicator for fine particles. The 1997 NAAQS rule also modified the PM_{10} NAAQS for the purpose of regulating the coarse fraction of PM_{10} (referred to as thoracic coarse particles or coarse-fraction particles; generally including particles with a nominal mean aerodynamic diameter greater than 2.5 micrometers and less than or equal to 10 micrometers, or $PM_{10-2.5}$); however, this part of the rulemaking was vacated during subsequent litigation, leaving the pre-existing 1987 PM_{10} NAAQS in place (62 FR 38652).

3. Revised $PM_{2.5}$ and PM_{10} NAAQS

On October 17, 2006, we promulgated revisions to the NAAQS for $PM_{2.5}$ and PM_{10} with an effective date of December 18, 2006 (71 FR 61144). We lowered the 24-hour NAAQS for $PM_{2.5}$ from 65 μg/m³ to 35 μg/m³, and retained the existing annual $PM_{2.5}$ NAAQS of 15 μg/m³. In addition, we retained the existing PM_{10} 24-hour NAAQS of 150 μg/m³, and revoked the annual PM_{10} NAAQS (set at 50 μg/m³).

C. Implementation of NSR for $PM_{2.5}$

After we established new annual and 24-hour NAAQS based on $PM_{2.5}$ as the indicator for fine particles in July 1997, we issued a guidance document titled "Interim Implementation for the New Source Review Requirements for $PM_{2.5}$," John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA, October 23, 1997. As noted in that guidance, section 165 of the Act implies that certain PSD requirements become effective for a new NAAQS upon the effective date of the NAAQS. Section 165(a)(1) of the Act provides that no new or modified major source may be constructed without a PSD permit that meets all of the section 165(a) requirements with respect to the regulated pollutant. Moreover, section 165(a)(3) provides that the emissions from any such source may not cause or contribute to a violation of any increment or NAAQS. Also, section 165(a)(4) requires BACT for each pollutant subject to PSD regulation. The 1997 guidance stated that sources would be allowed to use implementation of a PM_{10} program as a surrogate for meeting $PM_{2.5}$ NSR requirements until certain difficulties were resolved. These difficulties included the lack of necessary tools to calculate the emissions of $PM_{2.5}$ and related precursors, the lack of adequate modeling techniques to project ambient impacts, and the lack of $PM_{2.5}$ monitoring sites.

On April 5, 2005, we issued a guidance document entitled "Implementation of New Source Review Requirements in PM–2.5 Nonattainment Areas," Stephen D. Page, Director, Office of Air Quality Planning and Standards, EPA. This memorandum provided guidance on the implementation of the nonattainment major NSR provisions in $PM_{2.5}$ nonattainment areas in the interim period between the effective date of the $PM_{2.5}$ NAAQS designations (April 5, 2005) and when we promulgate regulations to implement nonattainment major NSR for the $PM_{2.5}$ NAAQS. In addition to affirming the continued use of the John S. Seitz guidance memo in $PM_{2.5}$ attainment areas, this memo recommended that, until we promulgated the $PM_{2.5}$ major NSR regulations, states should use a PM_{10} nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for the $PM_{2.5}$ NAAQS.

On November 1, 2005, we proposed a rule to implement the $PM_{2.5}$ NAAQS, including proposed revisions to the NSR program. For those states with EPA-approved PSD programs, we proposed to continue the 1997 NSR guidance to use PM_{10} as a surrogate for $PM_{2.5}$, but only during the SIP development period. We also indicated in that proposal that we would be developing increments, SILs, and an SMC in a separate rulemaking, *i.e.,* this final rule. Since there was an interim surrogate NSR program in place, *i.e.,* the PM_{10} Surrogate Policy, EPA decided to first promulgate the non-NSR part of the implementation rule (including attainment demonstrations, designations, control measures, *etc.*). This rule was promulgated as the CAFPIR on April 25, 2007 (72 FR 20586).

The NSR part of the implementation rule was issued separately as a final rule on May 16, 2008 (73 FR 28321), and included sets of NSR regulations for both attainment (PSD) and nonattainment areas (nonattainment NSR) for $PM_{2.5}$. In the May 16, 2008 rule we added one of the important screening tools—the SER—for $PM_{2.5}$. The SER for $PM_{2.5}$ is defined as an emissions rate of 10 tpy for direct $PM_{2.5}$ emissions. We also listed sulfur dioxide (SO_2) and nitrogen oxides (NO_X) as precursors of ambient $PM_{2.5}$ and defined "significant" as 40 tpy or more of either precursor pollutant. States were allowed up to 3 years from the date of publication in the **Federal Register** to

[2] The basic monitoring exemption provision is part of the original monitoring requirements adopted in the 1980 PSD rulemaking. 45 FR 52676, 52710, August 7, 1980.

revise their SIPs and submit their revised NSR programs to EPA for approval.

D. Increments Under the PSD Program

Under section 165(a)(3) of the Act, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility "will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant * * *." The "maximum allowable increase" of an air pollutant that is allowed to occur above the applicable baseline concentration for that pollutant is known as the PSD increment. By establishing the maximum allowable level of ambient pollutant concentration increase in a particular area, an increment defines "significant deterioration" of air quality in that area.

For PSD baseline purposes, a baseline area for a particular pollutant emitted from a source includes the attainment or unclassifiable area in which the source is located, as well as any other attainment or unclassifiable area in which the source's emissions of that pollutant are projected (by air quality modeling) to result in a significant ambient pollutant increase. *See, e.g.,* 40 CFR 52.21(b)(15)(i). Once the baseline area is established, subsequent PSD sources locating in that area need to consider that a portion of the available increment may have already been consumed by previous emissions increases.

In general, the submittal date of the first complete PSD permit application in a particular area is the operative "baseline date." [3] On or before the date of the first complete PSD application, emissions generally are considered to be part of the baseline concentration, except for certain emissions from major stationary sources, as explained in the following discussion of baseline dates. Most emissions increases that occur after the baseline date will be counted toward the amount of increment consumed. Similarly, emissions decreases after the baseline date restore or expand the amount of increment that is available.

In practice, three dates related to the PSD baseline concept are important in understanding how to calculate the amount of increment consumed—(1) Trigger date; (2) major source baseline date; and (3) minor source baseline date. The first relevant date is the trigger date. The trigger date, as the name implies, triggers the overall increment consumption process nationwide. Specifically, this is a fixed date, which must occur before the minor source baseline date can be established for the pollutant-specific increment in a particular attainment area. *See,* 40 CFR 51.166(b)(14)(ii) and 52.21(b)(14)(ii). For PM (regulated as TSP) and SO_2, Congress defined the applicable trigger date as August 7, 1977—the date of the 1977 amendments to the Act when the original statutory increments were established by Congress. For nitrogen dioxide (NO_2), we selected the trigger date as February 8, 1988—the date on which we proposed increments for NO_2. *See* 53 FR 40656, 40658; October 17, 1988. In this final rule, as described later, we are establishing a separate trigger date for purposes of implementing the $PM_{2.5}$ increments. *See* section V.F of this preamble for additional discussion of the trigger date for $PM_{2.5}$.

The two remaining dates—"minor source baseline date" and "major source baseline date"—as described later, are necessary to properly account for the emissions that are to be counted toward the amount of increment consumed following the national trigger date, in accordance with the statutory definition of "baseline concentration" in section 169(4) of the Act. The statutory definition provides that the baseline concentration of a pollutant for a particular baseline area is generally the air quality at the time of the first application for a PSD permit in the area. Consequently, any increases in actual emissions occurring after that date (with some possible exceptions that we will discuss later) would be considered to consume the applicable PSD increment. However, the statutory definition in section 169(4) also provides that "[e]missions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted in pollutant concentrations established under this part."

To make this distinction between the date when emissions resulting from the construction at a major stationary source consume the increment and the date when emissions changes in general (*i.e.,* from both major and minor sources) begin to consume the increment, we established the terms "major source baseline date" and "minor source baseline date," respectively. *See* 40 CFR 51.166(b)(14) and 52.21(b)(14). Accordingly, the "major source baseline date," which precedes the trigger date, is the date after which actual emissions increases associated with construction at any major stationary source consume the PSD increment. In accordance with the statutory definition of "baseline concentration," the PSD regulations define a fixed date to represent the major source baseline date for each pollutant for which an increment exists. Congress defined the major source baseline date for the statutory increments for PM and SO_2 as January 6, 1975. For the NO_2 increments, which we promulgated in 1988 under our authority to establish an increment system under section 166(a) of the Act, the major source baseline date we selected was February 8, 1988—the date on which we proposed increments for NO_2. 53 FR 40656. In both instances, the major source baseline date for the individual increments was set as a date which preceded the date on which the regulations pertaining to those increments were issued. In this final rule, as described later, we are establishing a separate major source baseline date for implementing the $PM_{2.5}$ increments. *See* section V.F of this preamble for further discussion of the major source baseline date for $PM_{2.5}$.

The "minor source baseline date" is the earliest date after the trigger date on which a source or modification submits the first complete application for a PSD permit in a particular area. After the minor source baseline date, any increase in actual emissions (from both major and minor sources) consumes the PSD increment for that area.

Once the minor source baseline date is established, the new emissions increase from that major source consumes a portion of the increment in that area, as do any subsequent actual emissions increases that occur from any new or existing source in the area. When the maximum pollutant concentration increase defined by the increment has been reached, additional PSD permits cannot be issued until sufficient amounts of the increment are "freed up" via emissions reductions that may occur voluntarily, (*e.g.,* via source shutdowns) or by mandatory control requirements imposed by the reviewing authority. Moreover, the air quality in a region cannot deteriorate to a level in excess of the applicable NAAQS, even if all the increment in the area has not been consumed. Therefore, new or modified sources located in areas where the air pollutant concentrations are near the level allowed by the NAAQS may not have full use of the amount of

[3] Baseline dates are pollutant specific. That is, a complete PSD application establishes the baseline date only for those regulated NSR pollutants that are projected to be emitted in significant amounts (as defined in the regulations) by the applicant's new source or modification. Thus, an area may have different baseline dates for different pollutants.

pollutant concentration increase allowed by the increment.

Under EPA guidance, the actual increment analysis that a proposed new or modified source undergoing PSD review must complete depends on the area impacted by the source's new emissions. We have provided approved air quality models and guidelines for sources to use to project the air quality impact of each pollutant (over each averaging period) for which an increment analysis must be done.[4] In addition, we established SILs for each pollutant under the permit requirements applicable to new and modified major stationary sources locating in attainment areas that would cause or contribute to a violation of any NAAQS. *See* 40 CFR 51.165(b) and part 51, Appendix S, section III.A. These SILs have also been used for implementing the PSD program to identify levels below which the source's modeled impact of a particular pollutant is regarded as *de minimis.* In this final rule, we are establishing SILs (24-hour and annual) for $PM_{2.5}$ that are being added to the aforementioned regulations containing SILs for other pollutants, as well as to the PSD regulations in 40 CFR 51.166 and 52.21. *See* further discussion of the SILs for $PM_{2.5}$ in section VI of this preamble.

In the event that a source's modeled impacts of a particular pollutant are below the applicable SIL at all ambient air locations modeled, *i.e., de minimis* everywhere, EPA's policy for PSD provides that no further modeling analysis is required for that pollutant. Our longstanding policy under the PSD program is that when a preliminary screening analysis based on the SIL is sufficient to demonstrate that the source's emissions throughout the area modeled will not cause or contribute to a violation of the increment, there is no need for a comprehensive source impact analysis involving a cumulative evaluation of the emissions from the proposed source and other sources affecting the area.

Within the impact area of a source subject to PSD, that is, the area within which the proposed project's emissions increase does have a significant impact, increment consumption is calculated using the source's proposed emissions increase, along with other actual emissions increases or decreases of the particular pollutant from any sources in the area, which have occurred since the minor source baseline date established for that area. In addition, the emissions increases or decreases from any major source that has commenced construction since the major source baseline date (which precedes the minor source baseline date) will consume or expand increment. Thus, an emissions inventory of sources whose emissions, in whole or in part, of a particular pollutant consume or expand the available increment in the area must be compiled. The inventory of increment-consuming emissions includes not only sources located directly in the impact area, but sources outside the impact area that affect the air quality for the particular pollutant within the impact area.

The inventory of increment-consuming emissions includes emissions from increment-affecting sources at two separate time periods—the baseline date and the current period of time. For each source that was in existence on the relevant baseline date (major source or minor source), the inventory includes the source's actual emissions on the baseline date and its current actual emissions. The change in emissions over these time periods represents the emissions that consume increment (or, if emissions have gone down, expand the available increment). For sources constructed since the relevant baseline date, all their current actual emissions consume increment and are included in the inventory.

When the inventory of increment-consuming emissions has been compiled, computer modeling is used to determine the change in ambient concentration that will result from these emissions when combined with the proposed emissions increase from the new major source or major modification that is undergoing PSD review. The modeling has generally been guided by the "Guideline on Air Quality Models" (40 CFR part 51, Appendix W), which includes provisions on air quality models and the meteorological data input into these models. The model output (expressed as a change in concentration) for each relevant averaging period is then compared to the corresponding allowable PSD increment.

E. Historical Approaches for Developing Increments

1. Congressional Enactment of Increments for PM and SO_2

Congress established the first increments defining significant deterioration of air quality in the 1977 Amendments to the Act. These amendments, among other things, added part C to title I, setting out the requirements for PSD. In section 163, Congress included numerical increments for PM and SO_2 for Class I, II, and III areas.

The three area classes are part of the increment system originally established by Congress. Congress designated Class I areas (including certain national parks and wilderness areas) as areas of special national concern, where the need to prevent deterioration of air quality is the greatest. Consequently, the allowable level of incremental change is the smallest relative to the other area classes, *i.e.,* most stringent, in Class I areas. The increments of Class II areas are larger than those of Class I areas and allow for a moderate degree of emissions growth. For future redesignation purposes, Congress defined a "Class III" classification to allow the redesignation of any existing Class II area for which a State may desire to promote a higher level of industrial development (and emissions growth). Thus, Class III areas are allowed to have the greatest amount of pollutant increase of the three area classes while still achieving the NAAQS. To date, there have been no redesignations made to establish a Class III area.

In establishing these PSD increments, Congress used the then-existing NAAQS for those pollutants as the benchmark for determining what constitutes "significant deterioration." Congress established the increments for PM as a percentage of the then-existing PM NAAQS. At the time the Act was amended in 1977, the NAAQS for PM were expressed in terms of ambient concentrations of TSP. Thus, EPA interpreted the statutory increments for PM using the same ambient TSP "indicator."

2. EPA's Promulgation of Increments for NO_2 and PM_{10}

Congress also provided authority for EPA to promulgate additional increments and to update the original PM increments created by statute. The EPA has promulgated two regulations pursuant to this authority.

a. Increments for NO_2 Using the "Contingent Safe Harbor" Approach Under Section 166(a) of the Act

Based on section 166(a) of the Act, on October 17, 1988, EPA promulgated increments for NO_2 to prevent significant deterioration of air quality due to emissions of NO_X (53 FR 40656). The EPA based these increments on percentages of the NAAQS in the same way that Congress derived the statutory increments for PM and SO_2. Those NO_2 increments were challenged in 1988 by the Environmental Defense Fund (EDF) when EDF filed suit in the U.S. Court of

[4] *See* EPA's "Guideline on Air Quality Models" at 40 CFR part 51, Appendix W.

Appeals for the District of Columbia Circuit against the Administrator (*Environmental Defense Fund, Inc.* v. *Reilly,* No. 88–1882). The EDF successfully argued that we failed to sufficiently consider certain provisions in section 166 of the Act. The court remanded the case to EPA "to develop an interpretation of section 166 that considers both subsections (c) and (d), and if necessary to take new evidence and modify the regulations." *See Environmental Defense Fund* v. *EPA,* 898 F.2d 183, 190 (D.C. Cir. 1990) (*EDF* v. *EPA*). Section 166(c) of the Act requires the PSD regulations to, among other things, meet the goals and purposes set forth in sections 101 and 160 of the Act. Section 166(d) requires these regulations be at least as effective as the increments established for PM (in the form of TSP) and SO_2 in section 163 of the Act. The court considered the NO_2 increment values determined using the percentage-of-NAAQS approach as "safe harbor" increments which met the requirements of section 166(d) of the Act. However, the court also determined that EPA's reliance on such increment levels was contingent upon our completing the analyses required under section 166(c), which provided that the final increment values must address the goals of sections 101 and 160 of the Act to protect public health and welfare, parks, and AQRVs [5] and to insure economic growth.

In response to the court's decision, we proposed rulemaking on increments for NO_2 on February 23, 2005 (70 FR 8880) and finalized the rule on October 12, 2005 (70 FR 59582). In the final rule, we established our policy on how to interpret and apply the requirements of sections 166(c) and (d) of the Act. In accordance with the court ruling, we conducted further analyses (considering the health and welfare effects of NO_X) and concluded that the existing NO_2 increments were adequate to fulfill the requirements of section 166(c). *See* 70 FR 59586 for our detailed analysis of how pollutant regulations satisfy the requirements of section 166 of the Act. Hence, we retained the existing NO_2 increments along with other parts of the existing framework of pollutant-specific NO_2 increment regulations. We also amended the PSD regulations under 40 CFR 51.166 to make it clear that states may seek EPA approval of SIPs that utilize a different approach than EPA used to establish these NO_2 increments. To receive our approval of an alternative program, a State must demonstrate that its program satisfies the requirements of sections 166(c) and 166(d) of the Act and prevents significant deterioration of air quality from emissions of NO_X.[6]

b. Increments for PM_{10} Using "Equivalent Substitution" Approach Under Section 166(f) of the Act

On October 5, 1989, we proposed PM_{10} increments. *See* 54 FR 41218. Although section 163 did not expressly define the existing statutory increments for PM in terms of a specific indicator, EPA reasoned that Congress' knowledge that TSP was the indicator for the PM NAAQS, and that the TSP standards were the starting point for the increments levels when the increments were established in 1977, meant that TSP was also the appropriate measure for the PM increments in section 163. As a consequence, EPA believed that the statutory PM increments could not simply be administratively redefined as PM_{10} increments, retaining the same numerical values, following the revision of the PM NAAQS. Rather, we stated our belief that with the promulgation of the PM_{10} NAAQS, EPA had both the responsibility and the authority under sections 166 and 301 of the Act to promulgate new increments for PM to be measured in terms of PM_{10}. We further concluded that promulgating PM_{10} increments to replace, rather than supplement, the statutory TSP increments under section 163 represented the most sensible approach for preventing significant deterioration with respect to PM. *See* 54 FR 41220–41221.

We promulgated PM_{10} increments to replace the then-existing TSP increments on June 3, 1993 (58 FR 31622). In the interim between proposal and promulgation, Congress enacted the 1990 CAA Amendments. As part of these amendments, Congress amended section 166 to add a new section 166(f). This section specifically authorized EPA to substitute PM_{10} increments for the existing section 163 PM increments based on TSP, provided that the substituted increments are "of equal stringency in effect" as the section 163 increments.

Thus, we were able to replace the TSP increments under section 163 of the Act using PM_{10} increments based directly on the newly enacted authority under section 166(f) of the Act. In the PM_{10} rule, we maintained the existing baseline dates and baseline areas for PM that had been previously established using the TSP indicator. Also, as proposed, we promulgated PM_{10} increments based on an approach we called the "equivalent to statutory increments" approach. Under this approach, we used the original TSP increments as a benchmark for calculating the PM_{10} increments, thereby retaining roughly the same limitations on future deterioration of air quality as was allowed under the TSP increments.

In using this approach, we considered the historical consumption of TSP increment by a sample population of permitted PSD sources, and then determined the PM_{10} increments for each area classification and averaging time that would provide approximately the same percentage of PM_{10} increment consumption, on average, by the same population of sources. Then, all future calculations of increment consumption after the PM_{10} implementation date would be based on PM_{10} emissions. *See* 58 FR 31622 and 31625.

V. Final Action on $PM_{2.5}$ Increments

In this section of the preamble, we will summarize the considerations that went into our proposed action and describe the final action being taken regarding new regulations for preventing significant deterioration of $PM_{2.5}$ air quality—including $PM_{2.5}$ increments (sections V.A through V.E, baseline dates and other permit requirements for $PM_{2.5}$ (section V.F), baseline areas for $PM_{2.5}$ (section V.G), and PM_{10} increments (section V.H).

A. Decision To Establish $PM_{2.5}$ Increments Using "Contingent Safe Harbor Approach" Under Section 166(a)

The EPA's 2007 NPRM contained three options for developing numerical $PM_{2.5}$ increments. Option 1 used the authority of section 166(a) of the Act to establish increments for $PM_{2.5}$ as a new pollutant for which NAAQS were established after August 7, 1977, and established 24-hour and annual $PM_{2.5}$ increments (Class I, II, and III) based on the "contingent safe harbor" approach. Options 2 and 3 used the contingent safe harbor approach under section 166(a) to only develop 24-hour $PM_{2.5}$ increments (Class I, II, and III), while using the "equivalent substitution"

[5] The term "air quality related values" is not defined in the Act, but the legislative history provides language saying that "The term 'air quality related values' of Federal lands designated as Class I includes the fundamental purposes for which such lands have been established and preserved by the Congress and the responsible Federal agency. For example, under the 1916 Organic Act to establish the National Park Service (16 U.S.C. 1), the purpose of such national park lands 'is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.' " S. Rep. No. 95–127 at 36 (1977).

[6] Under the 2005 NO_X regulation, states can adopt measures other than increments as long as they can demonstrate that the measures selected comply with the same criteria and goals of sections 166(c) and (d) of the Act that must be met for increments.

approach under section 166(f) of the Act to develop annual $PM_{2.5}$ increments. Each of these options is discussed in detail in the 2007 NPRM. 72 FR 54123–54138. In addition, significant comments on each of the three options, and our responses to them, are provided in this section V of this preamble.

In this final rule, after considering the available information and comments from interested parties, EPA has decided to select Option 1 and establish increments for $PM_{2.5}$ using the "contingent safe harbor" approach in accordance with the authority provided in section 166(a) of the Act.

This final rule establishes increments for $PM_{2.5}$ at the following levels:

Averaging period	NAAQS (µg/m³)	Increments (µg/m³)		
		Class I	Class II	Class III
Annual	15	1	4	8
24-hour	35	2	9	18

B. Rationale for the Applicability of Section 166(a)

In the 2007 NPRM, we expressed our belief that it is permissible to interpret section 166(a) to apply to $PM_{2.5}$. Section 166(a) requires EPA to develop regulations to prevent the significant deterioration of air quality due to emissions of certain named pollutants, and to develop such regulations for any pollutants for which NAAQS are subsequently promulgated. Although EPA has generally characterized the NAAQS for $PM_{2.5}$ as a NAAQS for a new indicator of PM, EPA did not replace the PM_{10} NAAQS with the NAAQS for $PM_{2.5}$ when the latter NAAQS were promulgated in 1997. Rather, EPA retained the annual and 24-hour PM_{10} NAAQS (retaining PM_{10} as an indicator of coarse particulate matter), and established new annual and 24-hour NAAQS for $PM_{2.5}$ as if $PM_{2.5}$ was a new pollutant, even though EPA had already developed air quality criteria for PM generally. Thus, for purposes of section 166(a), the promulgation of a NAAQS for $PM_{2.5}$ established a NAAQS for an additional pollutant after 1977.

Nine commenters supported our proposed Option 1, although only three of these explicitly expressed support for the use of section 166(a) authority to promulgate $PM_{2.5}$ increments. Ten other commenters specifically opposed the use of section 166(a) authority and/or supported the use of section 166(f) authority (on which the annual increments under Options 2A and 2B were based).

One of the commenters who explicitly agreed with our proposed use of section 166(a) authority stated that it is the only option that is legally available. This commenter asserted that section 166(a) plainly applies to $PM_{2.5}$ because $PM_{2.5}$ is a pollutant for which NAAQS were promulgated after August 7, 1977. This commenter held that EPA's rulemaking duty under section 166(a) is not confined to "new pollutants," but is triggered by post-1977 NAAQS promulgations, regardless of whether for new or previously regulated pollutants. On the other hand, this commenter noted that by its terms, section 166(f) is limited to authorizing the adoption of PM_{10} increments as a substitute for the statutory TSP increments and does not provide for substitution of $PM_{2.5}$ increments for TSP or PM_{10} increments.

The opposing commenters did not believe that section 166(a) provides a legal basis for EPA to promulgate $PM_{2.5}$ increments. One of these commenters stated that section 166(a) can only be used for a new pollutant, and $PM_{2.5}$ is not a new pollutant.

Another commenter who opposed the use of section 166(a) authority argued that nothing in section 166(a) of the Act can be interpreted to allow it to be used as the basis of increments when EPA revises an existing NAAQS. The commenter explained that, on its face, section 166(a) can only be interpreted to apply to pollutants other than PM and SO_2 since increments for these pollutants were enacted by Congress in section 163 of the Act. The commenter added that it can be argued that Congress intended to have section 166(a) apply to the four other pollutants specifically listed there.

This commenter found unpersuasive our argument that we are not "substituting" increments (as section 166(f) requires for PM_{10}) but rather adding $PM_{2.5}$ increments to the existing PM_{10} increments, and that only section 166(a) allows such an approach (72 FR 54121). The commenter asserted that if EPA had defined a coarse fraction to the particulate matter standards, then that fraction, together with the $PM_{2.5}$ standards, would form the set of "substituted" new standards for the existing PM_{10} standards, and, thus, the increments.

The commenter also disagreed with EPA's argument that it can treat $PM_{2.5}$ as a new pollutant under section 166(a) of the Act since it has been demonstrated that sub-$PM_{2.5}$ particles have distinctly different health and welfare effects than the other forms of PM (*i.e.,* coarse or PM_{10}). The commenter indicated that just as EPA replaced the TSP standards by PM_{10} as a better indicator of health effects, ongoing research has led to establishment of the $PM_{2.5}$ standards as a better indicator of certain health effects, and it is the natural outcome of such research that has enabled EPA to separate the effect of total particulate matter into two fractions with distinct effects. The commenter added that given that the definition of particulate matter includes a vast conglomeration of solids and liquids, the finding of differing effects should not come as a surprise. The commenter explained that as is the case of different pollutants having similar effects that are, nonetheless, treated as separate pollutants, the same concept should apply to a range or fraction of particulate matter found to have different effects in establishing it as another indicator and not a different pollutant.

The commenter did not disagree with the specific numerical increments proposed by EPA under Option 1, but did have concerns with the potential consequences of the section 166(a) approach. The commenter's primary concern was the proposal to allow states to substitute other measures in the place of uniform national increments for $PM_{2.5}$. (This is discussed further in section V.C.5 of this preamble.) Another commenter also expressed this concern.

Another commenter who opposed the section 166(a) approach believes that the legal and congressional history regarding the establishment of PM increments shows that Congress added section 166(f) to the Act based on the conviction that without it, EPA had no authority to revise the PM increments for PM_{10} (citing and quoting from S. Rep. No. 228, 101st Cong., 2nd Sess. 75 (1990), reprinted in 1990 U.S.C.C.A.N. 3385, 3461). The commenter concluded that EPA did not have authority in 1987 under section 166(a) to adopt PM_{10} increments, and does not have authority now under section 166(a) to adopt $PM_{2.5}$ increments.

We read section 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of sections 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977. Most of the pollutants identified in section 166(a) (NO_X, photochemical oxidants, carbon monoxide) are pollutants for which EPA had established NAAQS in 1977 when Congress adopted section 166 of the Act. There was no need for Congress to list other criteria pollutants, SO_2 and PM, in section 166(a) because Congress had already established increments for these pollutants in section 163 of the Act. In addition to requiring regulations for the enumerated pollutants, we conclude that under section 166 of the Act Congress intended to authorize EPA to establish additional pollutant-specific PSD regulations, potentially containing increments, for any additional pollutants for which EPA promulgated a NAAQS under section 109 of the Act. Furthermore, because the Act refers to pollutants for which EPA promulgates NAAQS after 1977, and does not use the phrase "additional pollutants," section 166(a) provides authority for EPA to promulgate new increments after revising an existing NAAQS (including NAAQS first promulgated before 1977), when we find that such action is appropriate.

Moreover, any new increments developed pursuant to section 166(a) have no effect on existing increments, as there is no indication therein that an existing increment should be revoked or replaced when additional increments are promulgated. This was the situation following the promulgation of new NAAQS for PM in 1987 when EPA replaced the old NAAQS based on TSP with new ones based on PM_{10}. Had Congress not added new section 166(f) in 1990, increments for PM_{10} could have been developed pursuant to section 166(a) of the Act, but such increments would have had no effect on the original statutory increments for PM (based on TSP). Consequently, seeing no basis for retaining the original increments, Congress added section 166(f) which explicitly provides for the replacement of the existing increments with PM_{10} increments.

One commenter asserted that if EPA establishes increments for $PM_{2.5}$ under the authority of section 166(a) on the basis that $PM_{2.5}$ is a new pollutant, then it must also establish PM_{10} increments under section 166(a) because (according to the commenter's analysis) PM_{10} is also a new pollutant. In the same analysis, the commenter concluded that EPA must adopt new measures to prevent significant deterioration from coarse PM based on section 166(a).

In this final rule, EPA is not setting or amending any increments for PM_{10} or otherwise taking action with respect to PM_{10} increments. The preexisting annual and 24-hour increments for PM_{10} are being retained. *See* section V.H. Similarly, EPA is not taking any action with respect to coarse PM in this rule. For these reasons, the commenter's arguments on what authority must be used to set increments for PM_{10} and/or coarse PM, and that EPA has some obligation to take action with respect to coarse PM, are not on point for this rule. Thus, no substantive response to this comment is needed. Nevertheless, as mentioned earlier, Congress provided explicit authority under section 166(f) of the Act to address increments for $PM_{10,}$ because it intended for such increments to be substitute increments for the original statutory increments for PM measured as TSP. Thus, the PM_{10} increments legally supersede the original statutory increments for PM. Had the PM_{10} increments been developed under section 166(a), which prior to the 1990 Act Amendments was the only authority available for developing new increments, then the original statutory PM increments would have remained in effect in addition to the PM_{10} increments.

One commenter expressed general objections to EPA's legal rationale for the $PM_{2.5}$ increments proposal, asserting that we failed to expressly state and support our legal authority for the $PM_{2.5}$ increments, offering two possible sources of authority ("contingent safe harbor," "equivalent substitution," or possibly a combination of the two) but never stating our legal position with clarity. The commenter agreed with EPA's assessment that the $PM_{2.5}$ increments should and must fulfill the legal requirements of the Act (72 FR 54121), and added that it is the government's burden of proof to establish its legal authority for action. The commenter stated that it would be arbitrary and capricious to promulgate these regulations for which EPA has not stated legal authority.

We do not disagree that the 2007 NPRM described two different legal authorities for the two different options for establishing increments, but we disagree that these discussions did not clearly present the alternative legal bases that the Agency was considering for taking action in this rule. In particular, we clearly described our legal authority for developing the 24-hour and annual $PM_{2.5}$ increments under section 166(a) of the Act, which is the basis on which we are taking final action in this rule.[7] First, we expressly stated that Option 1 was based on the statutory authority of section 166(a) of the Act. *See* 72 FR 54123 (Under the first option, "we would use the authority of section 166(a) of the Act to develop new increments for $PM_{2.5}$"). Second, we provided a discussion of this authority both in general (*see* 72 FR 54118–54119 and 54120–54123), and how it would be applied to establish increments for $PM_{2.5}$ (*see* 72 FR 54119–120 and 54123–136).

We now believe that section 166(a) provides the most straightforward approach for developing increments for a pollutant or pollutant indicator for which no increments have yet been established. Our position is also consistent with the comments we received which supported the delay in implementation of the $PM_{2.5}$ increments, opposed the potential for two sets of definitions for "major source baseline date" and "trigger date" for the $PM_{2.5}$ increment system, and highlighted the complexities involved with having to establish and maintain two sets of emissions inventories for the 24-hour and annual $PM_{2.5}$ increments. (*See* further description of relevant comments in section VIII of this section.)

C. EPA's Interpretation of the Requirements Under Sections 166(a)–(d) of the Act

In section 166(a) of the Act, Congress directed EPA to develop pollutant-specific regulations to prevent significant deterioration of air quality. Congress further specified that such regulations meet specific requirements set forth in sections 166(c) and 166(d) of the Act. We stated in the 2007 NPRM that because we believed that section 166(a) could be applied to the development of increments for $PM_{2.5}$, we would follow the interpretation of sections 166(a)–(d) that the Agency adopted in its most recent NO_2 increments rule. 70 FR 59582, October 12, 2005. That particular interpretation and application was upheld in *Environmental Defense* v. *EPA,* 489 F.3d 1320 (D.C. Cir. 2007).

The EPA's interpretation of these provisions is grounded on five principles and conclusions. First, we read section 166 of the Act to direct EPA to conduct a holistic analysis that considers how a complete system of regulations will collectively satisfy the

[7] We also believe that we sufficiently described how section 166(f) might provide alternative authority for establishing increments for $PM_{2.5}$ (see, *e.g.,* 72 FR 54120–54121), but will not address that in detail here because the increments in this rule are not based on section 166(f) authority.

applicable criteria, rather than evaluating one individual part of a regulatory scheme in isolation. Second, we use a "contingent safe harbor" approach which calls for EPA to first determine an increment that is at least as effective as the increments in section 163 of the Act, as required under section 166(d) and then to conduct further analysis to determine if additional measures are necessary to fulfill the requirements of section 166(c). Third, we interpret section 166(c) of the Act to identify eight statutory factors that EPA must apply when promulgating pollutant-specific regulations to prevent significant deterioration of air quality. Fourth, where these factors are at odds with each other, we interpret the statute to require EPA to use its judgment to balance the conflicting factors. Fifth, we recognize that the requirements of section 166 may be satisfied by adopting other measures besides an increment and that EPA may allow states to demonstrate that alternatives to increments contained in a SIP meet the requirements of sections 166(c) and 166(d). Below is a brief discussion of each of these five principles and conclusions. A more detailed description of each of these is contained in the 2007 NPRM at 72 FR 54121–54123.

1. Regulations as a Whole Should Fulfill Statutory Requirements

Section 166(a) of the Act directs EPA to develop pollutant-specific regulations to prevent the significant deterioration of air quality. Sections 166(c) and 166(d) provide detail on the contents of those regulations, but do not necessarily require the same type of increment system Congress created in section 163 of the Act. The EPA interprets section 166 to require that the entire system of PSD regulations (the framework and details, as described in section V.D of this preamble) for a particular pollutant must, as a whole, satisfy the criteria in sections 166(c) and 166(d) of the Act.

2. Contingent Safe Harbor Approach

Section 166(c) of the Act describes the kinds of measures to be contained in the regulations to prevent significant deterioration of air quality called for in section 166(a) and specifies that these regulations are to "fulfill the goals and purposes" set forth in sections 160 and 101 of the Act. Section 166(d) of the Act directs EPA to "fulfill such goals and purposes" by providing "specific measures at least as effective as the increments established in section 163 * * *." Thus, EPA reads section 166(d) to require that the Agency identify "safe harbor" pollutant-specific PSD regulations adopted under section 166.

The EPA reads section 166(c) to require that the Agency conduct further review to determine whether, based on the criteria in section 166(c), EPA's pollutant-specific PSD regulations under section 166 should contain measures that are different from the "safe harbor" identified under section 166(d). The EPA construes section 166(d) to require that the measures be "at least as effective" as the statutory increments set forth in section 163.

To apply the "contingent safe harbor" approach for $PM_{2.5}$, we first identified "safe harbor" increments for each area classification (Class I, II, or III), using: (1) Equivalent percentages of the NAAQS as the percentages used for developing the statutory increments; (2) the same pollutant as the NAAQS, *i.e.,* $PM_{2.5}$, and (3) the same time (averaging) periods as were used for the $PM_{2.5}$ NAAQS. We concluded that this approach would ensure that the increments would be "at least as effective as the increments established in section 163," as required by section 166(d). Second, EPA conducted further review to determine whether the "safe harbor" increments, in conjunction with existing elements of the PSD program or additional measures proposed under section 166 to augment the increments, sufficiently fulfill the criteria in subsection (c) of section 166.

In this review, we weighed and balanced the criteria set forth in subsection (c) (and, as provided in subsection (c), the incorporated goals and purposes of the Act in section 101 and the PSD program in section 160) to determine whether additional measures might be needed to satisfy the criteria in subsection (c). *See* section V.E.6 of this preamble for further discussion of our evaluation, comments on the evaluation, and our response to them.

3. The Statutory Factors Applicable Under Section 166(c)

The EPA interprets section 166(c) of the Act to establish eight factors to be considered in the development of PSD regulations for the pollutants covered by this provision. These eight factors included the three criteria stated in section 166(c) and the five goals and purposes identified in section 160 of the Act (which, as noted below, also cover the goals and purposes set forth in section 101). The three stated criteria in section 166(c) indicate that PSD regulations for specific pollutants should provide: (1) Specific numerical measures for evaluating permit applications; (2) a framework for stimulating improved control technology, and (3) protection of air quality values. The five goals and purposes in section 160 are incorporated into the analysis by virtue of the fourth criterion in section 166(c), which directs that EPA's pollutant-specific PSD regulations "fulfill the goals and purposes" set forth in sections 160 and 101 of the Act. We construed the term "fulfill the goals and purposes," as used in section 166(c), to mean that EPA should apply the goals and purposes listed in section 160 as factors applicable to pollutant-specific PSD regulations established under section 166. The Agency's view is that PSD measures that satisfy the specific goals and purposes of section 160 also satisfy the more general purposes and goals identified in section 101 of the Act. *See* 72 FR 54122.

One commenter disagreed with our interpretation that the goals and purposes of section 160 also satisfy all of those in section 101. This commenter asserted that although there is some overlap between the two sections, they are not identical. As an example, the commenter noted that section 101 expressly states that a primary goal of the Act is to promote pollution prevention—a goal not stated in section 160. The commenter asserted that, although the proposed increments would limit some pollution increases, there was no provision in the proposal that would require or promote pollution prevention.

We disagree with the commenter and continue to believe that measures that satisfy the specific goals and purposes of section 160 also satisfy the more general purposes and goals identified in section 101 of the Act. As we stated in the 2005 NO_2 increment rulemaking, the overall goals and purposes of the Act listed in sections 101(b) and 101(c) are general goals regarding protecting and enhancing the nation's air resources and controlling and preventing pollution. Because these broad goals are given more specific meaning in section 160, EPA does not believe it is necessary to consider them in detail when evaluating whether PSD regulations satisfy the criteria in section 166(c). 70 FR 59587 FN 3.

Regarding pollution prevention specifically, we believe that this general goal is encompassed in, and given more specific meaning by, sections 160(1), 160(2), and 160(4) of the Act. These sections spell out the specific purposes under the PSD program for the general section 101 goals of controlling and preventing pollution. We believe that any requirement to limit or reduce emissions serves to promote pollution prevention, which is often the most cost effective means of lowering pollutant emissions.

In addition to citing the purposes set out in section 160, section 166(c) includes the criterion that pollutant-specific PSD regulations should provide a framework for stimulating improved control technology. As discussed subsequently in sections V.D.1 and V.D.6 of this preamble, we believe that this criterion is fulfilled by the system of increments for $PM_{2.5}$ and by the requirement for PSD permittees to apply BACT to minimize $PM_{2.5}$ emissions. In stimulating improved control technology generally, these elements of the PSD program also promote pollution prevention. As noted previously, pollution prevention is often the most cost effective means of control, particularly for new sources and new process lines at existing sources. In addition, because BACT is a case-by-case determination that considers cost and collateral environmental impacts, pollution prevention, where technically feasible, often fairs well in BACT analyses because it is typically free from the negative environmental impacts that result from the use of add-on air pollution control devices.

4. Balancing the Factors Applicable Under Section 166(c)

While the eight factors in section 166(c) are generally complementary, there are circumstances where some of the objectives may be in conflict with each other. In these situations, some degree of balance or accommodation is inherent in the requirement to establish regulations that satisfy all of these factors. As first discussed in our 2005 NO_2 increments rulemaking (70 FR 59582 at 59587), we believe this balancing test derives primarily from the third goal and purpose set forth in section 160: To insure economic growth consistent with the preservation of existing clean air resources. A more detailed discussion of how the balancing of factors should be interpreted is contained in the 2007 NPRM at 72 FR 54122–54123.

One commenter claimed that EPA "incorrectly and repeatedly asserts" that a goal of section 160 of the Act is to insure economic growth. The commenter claimed that neither section 160 nor section 101 of the Act uses language to support a goal of promoting or maximizing opportunities for economic growth. Instead, the commenter asserted that both sections state only that any growth that does occur must be consistent with protection of air quality. The commenter concluded that "EPA's notion that the need to satisfy the other requirements of Section 166 and other goals and purposes in Sections 101 and 160 can never preclude additional emissions from economic growth unlawfully elevates such growth over all other statutory factors."

The language in section 160(3) provides that one of the purposes of the PSD program is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." The commenter suggests that this language can only be read as if the statutory phrase "economic growth" actually said "any economic growth that does occur" such that section 160(3) says "to insure that any economic growth that does occur will occur in a manner consistent with the preservation of existing clean air resources." We disagree; the phrasing used by Congress is "to insure that economic growth will occur." Thus, we believe the plain language of the statute supports EPA's reading that section 160(3) requires a balancing of the goals of (1) economic growth and (2) preservation of existing clean air resources. At a minimum, if the language were to be considered ambiguous enough to allow the commenter's reading, then the Agency's interpretation is also a reasonable reading of the statutory language.

5. Authority for States To Adopt Alternatives to Increments

While section 166 of the Act authorizes EPA to promulgate increments for pollutants listed under section 166(a), we have also interpreted the section to allow states to employ approaches other than increments to prevent significant deterioration of air quality, so long as such an approach otherwise meets the requirements of sections 166(c) and 166(d). This interpretation was explained in the 2005 NO_2 increment rulemaking (70 FR 59611–59612), in which we amended the PSD regulations at 40 CFR 51.166 by adding new paragraph (c)(2) to codify this statutory authority. Under the existing provision in 40 CFR 51.166(c)(2), states may seek EPA approval of SIPs that use an alternative approach to increments if the State can demonstrate that the alternative program satisfies the requirements of sections 166(c) and 166(d). However, the current language at paragraph (c)(2) states the authority for states to adopt alternative measures only with respect to increments for NO_2. To clarify our interpretation that the authority to adopt alternative measures covers any pollutant listed in section 166(a), we are revising 40 CFR 51.166(c)(2) to make it inclusive to all applicable pollutants rather than just NO_2.

Two commenters supported our proposal to revise paragraph (c)(2) to include $PM_{2.5}$, while four State/local agency commenters expressed opposition. An environmental commenter agreed that the Act allows for other approaches, but believes that such approaches must be in addition to the national increments. Specifically, this commenter stated that "although EPA can provide for states to adopt approaches in addition to increments in order to fulfill the statutory purposes, the agency must make clear that states cannot adopt approaches that are less protective that the national increments." This commenter further stated that "to the extent that EPA is suggesting that it can allow states to adopt PSD programs that do not include the minimum Federal increments, that position is contrary to the statute."

As in the 2005 NO_2 increment rulemaking, we are codifying the basic principle that states can seek to use alternative measures without defining any specific type of alternative program that would be approved or otherwise creating standards beyond the requirements of sections 166(c) and 166(d). Instead, we plan to make determinations on a case-by-case basis when a State submits a specific alternative approach for EPA to approve as part of a SIP. In making those determinations, we will address the specific alternative measures as states propose them to the Agency in light of the requirements of sections 166(c) and 166(d), including whether the alternative program is "at least as effective as the increments established in section 163," as required in section 166(d).

The four State/local agency commenters opposing the revision to 40 CFR 51.166(c)(2) expressed the importance of using uniform national increments for $PM_{2.5}$. One commenter argued that a nationally inconsistent approach to $PM_{2.5}$ in attainment areas could result in a patchwork of State PSD regulations—and the exact kinds of economic repercussions that Congress wished to avoid. The same commenter argued that varying increment-equivalent measures could also result in an uneven playing field for industry and could exacerbate difficulties between states experiencing transport problems.

Another opposing commenter was concerned that allowing states to adopt alternatives to increments would likely lead to a "mish-mash" of State approaches which defeats the intention of Congress that there be uniformity in PSD rules to avoid economic dissimilarities from State to State that could allow interstate competition for industry based upon which State offers the best (least expensive) environmental compliance regulations. Another commenter objected to allowing the use of alternatives to increments by stating that such alternative allowances undermine the desired national consistency, and EPA has failed to even identify any Act programs which would benefit from this approach.

While we acknowledge the potential problems identified by the commenters associated with allowing states to adopt alternative approaches to the numerical increments that we are establishing, we also note that section 166(d) expressly gives EPA some latitude in promulgating regulations that will be at least as effective as the increments in section 163, by stating that such regulations "may contain air quality increments, emission density requirements, or other measures." Thus, EPA is authorized to provide that states may consider alternatives to the increments established in this rule. That said, the statutory authority is not a blank check for states to do as they please, but enables states to consider options that may provide a meaningful way for them to manage their air resources within the framework allowed by the statutory PSD requirements.

D. Framework for Pollutant-Specific PSD Regulations for $PM_{2.5}$

In the 2007 NPRM, we proposed to apply the same basic framework for pollutant-specific PSD regulations for $PM_{2.5}$ that we used in our 2005 NO_2 increments regulations. Specifically, we proposed adopting an increment and area classification system for $PM_{2.5}$ and applying the statutory AQRV review process to $PM_{2.5}$ as well. We also indicated that while some of the factors applicable under section 166(c) are fulfilled by using this type of framework for pollutant-specific PSD regulations under section 166(a) of the Act, this framework of regulations also needs to satisfy the other applicable factors. Thus, the details of our regulations (such as the characteristics of the increments themselves) are important, and we evaluated the effectiveness of the framework in conjunction with more detailed elements of our regulations. As discussed in the following subsections, we believe our obligations under section 166(c) of the Act are satisfied when the PSD regulations collectively satisfy the factors applicable under 166(c) of the Act.

1. Increment System

An increment-based program satisfies the requirements under 166(c) to provide "specific numerical measures against which permit applications may be evaluated." An increment is the maximum allowable level of ambient pollutant concentration increase that is allowed to occur above the applicable baseline concentration in a particular area. As such, an increment defines "significant deterioration." Establishing an increment system for $PM_{2.5}$ will fulfill two of the factors applicable under section 166(c): (1) Providing specific numerical measures to evaluate permit applications, and (2) stimulating improved control technology.

First, under section 165(a)(3) of the Act, a permit applicant must demonstrate that emissions from the proposed construction and operation of a facility "will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant * * *." Once the baseline date associated with the application for the first new major stationary source or major modification in an area is established, the new emissions from that source consume a portion of the increment in that area, as do any subsequent emissions increases that occur from any source in the area. When the maximum pollutant concentration increase defined by the increment has been reached, additional PSD permits cannot be issued until sufficient amounts of the increment are "freed up" via emissions reductions that may be required by the reviewing authority. Thus, an increment is a quantitative value that establishes a "maximum allowable increase" for a particular pollutant. It functions, therefore, as a specific numerical measure that can be used to evaluate whether an applicant's proposed project will cause or contribute to air pollution in excess of allowable levels.

Increments also satisfy the second factor in section 166(c) by providing "a framework for stimulating improved control technology." Increments establish an incentive to apply improved control technologies in order to avoid violating the increment and to "free up" available increment to promote continued economic growth. These control technologies may become the basis of BACT determinations elsewhere, as the technologies become more commonplace and the costs tend to decline.

One commenter stated that, although increments may encourage the use of existing control technologies, EPA has not cited any evidence that increments actually stimulate the development of improved technologies. Moreover, the commenter asserted that even if increments provide the incentive asserted by EPA, any encouragement of improved control technology is wholly incidental and hardly amounts to a "framework" whose purpose is to stimulate such technology.

We continue to believe that the total program, encompassing increments and BACT, does provide an appropriate framework to stimulate BACT in such a way that it is not simply "wholly incidental," as the commenter claims. The fact that economic growth in an area must occur within a defined amount of allowable air quality deterioration should logically lead to the application of improved pollution control technology as the amount of deterioration increases, and should not be regarded as an incidental consequence. As stated in the 2007 NPRM, Congress envisioned that the increments they originally established would serve as an incentive: "The incremental ceiling should serve as an incentive to technology, as a potential source may wish to push the frontiers of technology in a particular case to obtain greater productive capacity with the limits of the increments." S. Rep. 95–127 at 18, 30 (3 LH at 1392, 1404). We, too, believe that as the available increment in an area becomes smaller, and as states try to preserve some of the remaining increments for future growth, it will be necessary to require sources to install more stringent controls in that area. Such levels of control ultimately must be considered in subsequent BACT evaluations in other PSD areas throughout the country. Admittedly, the increasing stringency of control technologies over time, as observed in EPA's BACT/Lowest Achievable Emission Rate (LAER) Clearinghouse, supports but cannot in itself conclusively demonstrate that the PSD program has already stimulated development of improved control technology; there are undoubtedly a number of factors that could cause such trends. Nevertheless, even the need to require a more stringent BACT determination in only a few PSD areas (due to dwindling increment availability) necessitates consideration of that level of control for all other PSD sources wherever they may decide to locate. In any event, while the commenter generally questions the effectiveness of the increments as an incentive for tightening BACT, they provided no evidence that more stringent BACT is not related to the increment system established as an integral part of the PSD program.

2. Area Classifications

In this final rule, EPA is establishing the same three-tiered area classification system for $PM_{2.5}$ that is applicable to the increments for NO_2 and other pollutants under the PSD program and the Act. Accordingly, areas that are currently Class I for other pollutants will also be Class I for $PM_{2.5}$ and all other areas will be Class II for $PM_{2.5}$ unless we redesignate the area based on a request by a State or tribe pursuant to the process in section 164 of the Act and EPA's regulations at 40 CFR 51.166(g) and 52.21(g).

As explained earlier in section IV.E.1, Class I areas are areas where very clean air is most desirable. In contrast, Class III areas are designed as those areas in which a State wishes to permit the highest relative level of industrial development, and thus allow the largest incremental increase in pollution. Areas that are not especially sensitive and where states have not provided for a higher level of industrial growth are classified as Class II. When Congress established this three-tiered scheme for SO_2 and PM, it intended that Class II areas be subject to an increment that allows "moderately large increases over existing pollution." H.R. Rep. 95–294, 4 LH at 2609.

Establishing increments at different levels for each of the three area classifications helps to fulfill two of the factors applicable under section 166(c) of the Act. First, establishing the smallest increments in Class I areas helps fulfill EPA's obligation to establish regulations that "preserve, protect, and enhance the air quality" in parks and special areas. Class I areas are primarily the kinds of parks and special areas covered by section 160(2) of the Act. Second, by providing for two additional area classifications with increment levels that are higher but still protective, the area classification system helps satisfy the goal in section 160(3) of the Act that EPA "insure that economic growth will occur in a manner consistent with preservation of clean air resources." In those areas where clean air resources may not require as much protection, more growth is allowed. By employing an intermediate level (Class II areas) and higher level (Class III areas), this classification scheme helps ensure that growth can occur where it is needed (Class III areas) without putting as much pressure on existing clean air resources in other areas where some growth is still desired (Class II areas).

By requesting that EPA redesignate an existing Class II area to Class III, states may accommodate economic growth and air quality in areas where the Class II increment is too small to allow the siting of new or modified sources. The procedures specified by the Act for such a redesignation require a commitment by the State government to create such an area, extensive public review, local government participation in the SIP area redesignation process, and a finding that the redesignation will not result in the applicable increment being exceeded in a nearby Class I or Class II area. *See* sections 164(a) and (b) of the Act. (No State has yet requested a Class III redesignation.) The EPA believes that the three-tiered classification system has allowed for economic growth, consistent with the preservation of clean air resources.

However, an area classification system alone may not completely satisfy the factors applicable under section 166(c) of the Act. The increment that is employed for each class of area is also relevant to an evaluation of whether the area classification system achieves the goals of the PSD program. We briefly discuss the characteristics of increments in section V.E.5.

One commenter took issue with our assessment of the two factors that we believe a classification system helps to fulfill. As discussed previously in section V.C.4, the commenter asserted that EPA has unlawfully interpreted section 160(3) of the Act to elevate economic growth over all other statutory factors. As explained in greater detail in section V.C.4, we disagree that our interpretation elevates economic growth over other factors, and believe that the plain language of the statute supports EPA's reading that section 160(3) requires a balancing of the goals of (1) economic growth and (2) preservation of existing clean air resources.

The commenter also stated that EPA has failed to demonstrate that the classification system and safe harbor increments, in combination with the other elements of the regulatory framework, will "preserve, protect, and enhance the air quality" in parks and special areas as required under section 160(2) of the Act. These comments and our response to them are found in section V.E.6 of this preamble where we discuss our evaluation of the safe harbor increments.

3. Permitting Procedures

Two of the factors applicable under section 166(c) are fulfilled by the case-by-case permit review procedures that are built into our existing PSD regulations. The framework of our existing PSD regulations employs the preconstruction permitting system and procedures required under section 165 of the Act. These requirements are generally reflected in 40 CFR 51.166 and 52.21 of EPA's PSD regulations. These permitting and review procedures, which apply to construction of new major sources and to major modifications, fulfill the goals set forth in sections 160(4) and 160(5) of the Act. These goals require that PSD programs in one State not interfere with the PSD programs in other states and that PSD programs assure that any decision to permit increased air pollution is made after careful evaluation and public participation in the decision-making process. For the same reasons discussed in our proposal for the pollutant-specific NO_2 increments regulations (70 FR 8896, February 23, 2005), we believe these factors are also fulfilled for $PM_{2.5}$ by employing the permit review procedures.

4. AQRV Review by Federal Land Manager and Reviewing Authority

In this final rule, we apply the existing requirements to evaluate impacts on AQRVs in Class I areas (*see* existing 40 CFR 51.166(p) and 52.21(p)) to $PM_{2.5.}$ The existing requirements for an AQRV review, which Congress applied to SO_2 and TSP, provide Federal land managers (FLMs) with the responsibility to review source impacts on site-specific AQRVs in Class I areas and to bring any alleged adverse impacts to the attention of the reviewing authority. Under an increment approach, we consider this review to be an additional measure that helps satisfy the factors in sections 166(c) and 160(2) which require EPA's pollutant-specific PSD regulations to protect (1) air quality values, and (2) parks and other special areas, respectively.

Two State/local agency commenters supported our proposal to apply the requirements to evaluate impacts on AQRV in Class I areas to $PM_{2.5}$ review. However, one commenter indicated that FLM review does not and cannot assure the prevention of all significant $PM_{2.5}$-related deterioration because it applies only to the construction or modification of very large stationary sources (*e.g.,* factories and power plants) affecting Class I areas. This commenter pointed out that Class I areas do not include Bureau of Land Management wilderness and wilderness study areas (encompassing more than 15 million acres), 341 of the nation's 390 national park units (only 49 national parks are Class I), and many U.S. Forest Service lands (including a number of wilderness areas). The commenter added that FLM review does not help to fulfill section 160(2)'s goal of preserving and protecting air quality in "other areas of special national or regional natural, recreational, scenic, or historic value," such as State and local parks, wildlife refuges, recreation areas, lakes, and historic areas, none of which are Class I areas. In addition, the commenter noted that FLM review does not apply to emissions increases from sources of $PM_{2.5}$ and precursor pollution other than major stationary sources, such as motor vehicles and non-major industrial sources (which are sources that emit substantial amounts of $PM_{2.5}$ and precursors). *Alabama Power* v. *Costle,* 636 F.2d 323, 362 (D.C. Cir. 1979) (*Alabama Power*) (expressly recognizing that "[s]ignificant deterioration may occur due to increased emissions from unregulated minor sources.").

The commenter also asserted that FLM review is of limited reach even where it does apply. Under the current PSD regulations, a State must consider an FLM's objections and must justify its decision in writing when it disagrees with those objections, but the State can still issue a PSD permit over those objections unless emissions are predicted to cause an exceedance of the applicable increment. The commenter believes that, given these limitations, EPA cannot plausibly claim that the existing provision for FLM review ensures the preservation, protection, and enhancement of air quality for parks and natural areas throughout the nation as required by section 160(2) of the Act.

In our rulemakings addressing PSD for NO_X, EPA extended the AQRV review procedures set forth in 40 CFR 51.166(p) and 52.21(p) to cover NO_2. These AQRV review procedures were established based on section 165(d) of the Act, and they were originally applied only in the context of the statutory increments for PM and SO_2. However, because they also address many of the factors applicable under section 166(c) of the Act, EPA also applied them to NO_X through regulation. In this final rule, we are amending the existing PSD regulations to extend, as proposed, the AQRV review procedures to include $PM_{2.5}$ by explicitly including $PM_{2.5}$ in the regulatory text that now simply references "particulate matter." *See* new 40 CFR 51.166(p)(4) and 52.21(p)(5).

Section 165(d) creates a scheme in which the FLM and reviewing authority must review the impacts of a proposed new or modified source's emissions on AQRVs. The Act assigns to the FLM an "affirmative responsibility" to protect the AQRVs in Class I areas. This is in notable contrast to the reviewing authority's responsibility for protecting the increments—including Class I increments. The FLM may object to or concur in the issuance of a PSD permit based on the impact, or lack thereof, that new emissions may have on any affected AQRV that the FLM has identified and for which information is available to the general public. If the proposed source's emissions are shown not to cause or contribute to a violation of a Class I increment, the FLM may still prevent issuance of the permit by demonstrating to the satisfaction of the reviewing authority that the source or modification will have an adverse impact on AQRVs. Section 165(d)(2)(C). On the other hand, if the proposed source is shown to cause or contribute to a violation of a Class I increment, the reviewing authority (State or EPA) shall not issue the permit unless the owner or operator demonstrates to the satisfaction of the FLM that there will be no adverse impact on AQRVs.[8] Thus, the showing of compliance with the increment determines whether the FLM or the permit applicant has the burden of satisfactorily demonstrating whether or not the proposed source's emissions would have an adverse impact on AQRVs.[9] In any event, the FLM plays an important and material role by raising these issues for consideration by the reviewing authority, which in the majority of cases will be the State.

Extending the AQRV review procedures of the PSD regulations to $PM_{2.5}$ helps to provide protection with respect to potential adverse effects from $PM_{2.5}$ for parks and special areas (which are generally the Class I areas subject to this review) not afforded by the increment system alone. As discussed later, we believe the factors applicable under section 166(c) of the Act can be fulfilled when the review of AQRVs is applied in conjunction with increments and other aspects of our PSD regulations. In those cases where the increment is not violated and the reviewing authority agrees that a proposed project will adversely affect AQRVs, the parks and other special areas will be protected by denying issuance of the permit or by requiring the applicant to modify the project to alleviate the adverse impact.

We read the legislative history to show that Congress intended the AQRV review provisions of section 165(d) to provide a special layer of protection, beyond that provided by increments. The Senate committee report stated the following:

> A second test of protection is provided in specified Federal land areas (Class I areas), such as national parks and wilderness areas; these areas are also subjected to a review process based on the effect of pollution on the area's air quality related values."

S. Rep. 95–127, at 17, 4 LH at 1401.

As we stated in the NO_2 increment rule, we believe the term "air quality values" should be given the same meaning as "air quality related values." Legislative history indicates that the term "air quality value" was used interchangeably with the term "air quality *related* value" (AQRV) regarding Class I lands.[10]

The commenter is correct that the FLM (or AQRV) review applies only to Class I areas, and not to other "special" areas such as the numerous State and local parks and some other areas that could be seen as being covered by the protective purposes of section 160(2) of the Act. This level of coverage by FLM review to protect AQRVs was established by Congress when it enacted the PSD program, including the purposes set out in section 160(2). Thus, we conclude that Congress believed that the special areas not designated as Class I areas were properly addressed by the other elements of the PSD program. As discussed further in the next section, one such element is the requirement for sources to conduct an "additional impacts analysis," which includes an

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[8] Even if such a waiver of the Class I increment is allowed upon a finding of no adverse impact, the source must comply with such emissions limitations as may be necessary to ensure that alternative increments specified in the rules for SO_2 or PM are not exceeded. The alternative increments are generally at the level of the Class II increments, with the lone exception being a more restrictive 3-hour increment for SO_2. Section 165(d)(2)(C)(iv). The EPA made this provision applicable to the PSD provisions for NO_X at the level of the NO_2 Class II increment (53 FR 3704; 53 FR 40656) and substituted the PM_{10} Class II increments for the statutory alternative PM increments, which were based on TSP (58 FR 31622). This final rule expands this provision to include the $PM_{2.5}$ Class II increments as well. *See* 40 CFR 51.166(p)(4) and 52.21(p)(5).

[9] In response to concerns that Class I increment would hinder growth in areas surrounding the Class I area, Congress established Class I increments as a means of determining where the burden of proof should lie for a demonstration of adverse effects on AQRVs. *See* Senate Debate, June 8, 1977 (3 LH at 725).

[10] *See* S. Rep. 95–127, at 12, reprinted at 3 LH at 1386, 1410 (describing the goal of protecting "air quality values" in "Federal lands—such as national parks and wilderness areas and international parks," and in the next paragraph and subsequent text using the term "air quality related values" to describe the same goal); *id.* at 35, 36 ("The bill charges the Federal land manager and the supervisor with a positive role to protect *air quality values* associated with the land areas under the jurisdiction of the [FLM]" and then describing the statutory term as "air quality related values"). H.R. Report 95–564 at 532 (describing duty of Administrator to consider "air quality values" of the tribal and State lands in resolving an appeal of a tribal or State redesignation, which is described in the final bill as "air quality related values").

analysis of the impacts on visibility, soils, and vegetation of the proposed source and associated growth, regardless of the classification of the area impacted by the source. Note also that states have the option under the Act of designating additional areas as Class I areas and providing for AQRV review for these State Class I areas if they believe that there are areas within their borders that merit such protection.

The commenter is not correct in saying that the review to protect AQRVs does not apply to emissions increases from sources other than major stationary sources. While it is generally true that a major stationary source may trigger the analysis as part of the required PSD review for new major stationary sources and major modifications where such source's emissions increase may affect a Class I area, the review itself includes the impacts on an AQRV of other emissions in the area, including emissions from non-major sources. In addition, states may adopt requirements in their State implementation plans to require certain minor sources seeking a permit to undergo an AQRV analysis if they choose to do so.

We agree with the commenter that the AQRV review has certain limitations in that a State can, under some circumstances, issue a PSD permit over the objection of the FLM. Here again, Congress enabled this outcome when it provided that a permit would not be issued when the FLM demonstrates "to the satisfaction of the State" that the source will have an adverse impact on AQRVs in a Class I area. Section 165(d)(2)(C)(ii). We read this provision to reflect Congress's judgment on the appropriate balance between State and FLM discretion in the reach of AQRV review. That said, when a reviewing authority declines to follow a determination of adverse impact by the FLM, the reviewing authority is expected to provide a rational basis for doing so, and a reviewing authority's rejection of an FLM's finding may not be arbitrary and capricious. As stated by EPA's Environmental Appeals Board in *In the Matter of: Hadson Power 14—Buena Vista,* 4 E.A.D. 258, 1992 WL 345661 (October 5, 1992)(in Section II.A):

> States do not have unfettered discretion to reject an FLM's adverse impact determination. If a State determines that an FLM has not satisfactorily demonstrated an adverse impact on AQRVs from the proposed facility, the State must provide a "rational basis" for such a conclusion, "given the FLMs' affirmative responsibility and expertise regarding the Class I areas within their jurisdiction." 50 FR 28549, July 12, 1985. Arbitrary and capricious rejections of adverse impact determinations are not sustainable. (citations omitted).

In sum, the commenter correctly enumerated some of the limitations of the AQRV review under the Act. However, such review is only one element of the full PSD program, which must be evaluated against the statutory requirements in their entirety. We continue to believe, as previously stated, that under an increment approach, FLM review for AQRV impacts is an additional measure that helps satisfy the factors in sections 166(c) and 160(2) of the Act (which require EPA's pollutant-specific PSD regulations to protect (1) air quality values, and (2) parks and other special areas, respectively) in balance with the other statutory factors. We add that the AQRV review requirements of the existing regulations mirror these requirements in the Act, which reflect Congress' judgment of how AQRV review should properly be used to promote the purposes of the program as set out in section 160 of the Act.

5. Additional Impacts Analysis

The "additional impacts analysis" requirements set forth in our part 51 and 52 PSD regulations also help fulfill the criteria and goals and purposes in sections 166(c) and 160. The additional impacts analysis involves a case-by-case review of potential harm to visibility, soils, and vegetation in Class II and III areas that could occur from the construction or modification of a PSD source.

Sections 51.166(o)(1) and 52.21(o)(1) of the PSD regulations require that a permit provide the following analysis:

> An analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

This requirement was based on section 165(e)(3)(B) of the Act, which provides that EPA establish regulations that require "an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by emissions from such facility * * *."

As mentioned in the previous section, one commenter argued that the provisions for protection of Class I areas are of no help in fulfilling the goal set forth in section 160(2) of the Act to preserve and protect air quality in the countless "other areas of special national or regional natural, recreational, scenic, or historic value" such as State and local parks, wildlife refuges, recreation areas, lakes and historic areas, none of which were originally defined by Congress as Class I areas.

We acknowledge that the special provisions for protecting Class I areas are not applicable for protecting areas that are not designated as "Class I." However, we believe that the "additional impacts analysis" provisions are especially helpful for satisfying the requirements of section 166(c) in Class II and Class III areas, including the types of areas described by the commenter, that are not Class I areas but are worthy of special protection beyond what might be provided by the NAAQS and increments. 40 CFR 51.166(o) and 52.21(o). These areas are not subject to the special AQRV review that applies only in Class I areas. While the additional impacts analysis is not as intensive a review as the AQRV analysis required in Class I areas, the requirement to consider impairments to visibility, soils, and vegetation through the additional impacts analysis contributes to satisfying the factors applicable under section 166(c) of the Act in all areas, including Class II and Class III areas.

6. Installation of BACT

The requirement that new sources and modified sources subject to PSD apply BACT is an additional measure that helps to satisfy the factors in sections 166(c), 160(1), and 160(2) of the Act. This requirement, based on section 165(a)(4) of the Act, is already included in EPA's PSD regulations for all pollutants generally and thus, in the 2007 NPRM we considered it to be a part of the regulatory framework for the Agency's pollutant-specific regulations for $PM_{2.5}$. 40 CFR 51.166(j) and 52.21(j). Our existing regulations define "best available control technology" as "an emission limitation * * * based on the maximum degree of reduction for each pollutant subject to regulation under the Act * * * which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source through application of production processes or available methods, systems, and techniques * * *." 40 CFR 51.166(b)(12) and 52.21(b)(12). This pollutant control technology requirement, in practice, has required significant reductions in the pollutant emissions increases from new and modified sources while also stimulating the on-going improvement of control technology. The control of $PM_{2.5}$ emissions through the application of BACT helps to protect air quality values, public health and welfare, and parks and other special areas.

E. Final $PM_{2.5}$ Increments

Based on our evaluation of the effects of $PM_{2.5}$ and a balancing of the criteria in section 166(c) of the Act (and the incorporated goals and purposes of the Act contained in section 101 and the statutory PSD program in section 160 of the Act), EPA has concluded that the "safe harbor" increments for $PM_{2.5}$ (which satisfy section 166(d) of the Act) are sufficient to fulfill the criteria in section 166(c) when combined with the other measures described earlier that we apply to $PM_{2.5}$. Since several of the eight factors applicable under section 166(c) are satisfied by adopting the framework and other measures described earlier, our development of these increments for $PM_{2.5}$ was guided by the four remaining factors that may not be fully satisfied by the framework and other measures: (1) Protecting AQRVs; (2) protecting the public health and welfare from reasonably-anticipated adverse effects; (3) protecting the air quality in parks and special areas, and (4) insuring economic growth.[11] In accordance with the "contingent safe harbor" approach, to determine the specific characteristics of the proposed increments, we first established safe harbor increments representing the level of effectiveness necessary to satisfy the "at least as effective as" requirement in section 166(d) of the Act and then conducted further analysis to determine if additional measures are necessary to fulfill the requirements of section 166(c).

1. Identification of Safe Harbor Increments

Using the percentage-of-NAAQS approach under proposed Option 1, as explained in section V.C.2 of this preamble, we derived the following safe harbor increments for $PM_{2.5}$:

Averaging period	NAAQS (μg/m³)	Increments (μg/m³)		
		Class I	Class II	Class III
Annual	15	1	4	8
24-hour	35	2	9	18

The table shows $PM_{2.5}$ NAAQS levels (primary and secondary NAAQS) at 15 μg/m³ for the annual averaging time and 35 μg/m³ for the 24-hour averaging time. *See* 40 CFR 50.7. From these NAAQS levels, we calculated the safe harbor increments based on the same percentages that were used by Congress to establish the original PM increments (measured as TSP) in section 163 of the Act, *i.e.,* 6.6 percent of the NAAQS for Class I areas, 25 percent of the NAAQS for Class II areas, and 50 percent of the NAAQS for Class III areas. We have concluded that increments with these characteristics are sufficient to satisfy the requirement in section 166(d) that we adopt increments (or other PSD regulations) that are "at least as effective as" the increments established in section 163 of the Act. *See EDF* v. *EPA,* 898 F.2d at 188, 190.

Nine commenters supported proposed Option 1, either explicitly or implicitly supporting our method of calculating the safe harbor increments used to develop increments for $PM_{2.5}$. One of these commenters, while agreeing with the safe harbor increment approach under Option 1, disagreed with our analysis of the adequacy of the safe harbor increments, as discussed in other sections of this preamble. One commenter who opposed Option 1 (based on the belief that section 166(a) of the Act is not the appropriate basis for $PM_{2.5}$ increments) nevertheless supported the percentage-of-NAAQS approach for developing $PM_{2.5}$ increments under the statutory authority at section 166(f).

A commenter who opposed our proposal to calculate increments using percentages of the NAAQS argued that this approach for setting the $PM_{2.5}$ increments is not scientifically supported. This commenter indicated that basing the $PM_{2.5}$ increments on the same percentage of the NAAQS that were used to set PM_{10} increments based on the TSP NAAQS ignores the relationship between PM_{10} and $PM_{2.5}$ emissions, which may be much different than the relationship between TSP and PM_{10} emissions. The commenter argued that, because the ratio of $PM_{2.5}$ to PM_{10} emissions is 0.8, it appears that using the percentages proposed by EPA would indirectly restrict PM_{10}/TSP emissions and air quality impacts to proportionally lower levels than the PM_{10} increments in order to avoid exceeding the $PM_{2.5}$ increments. The commenter conceded that using the 0.8 factor to set $PM_{2.5}$ increments may seem too high, but asserted that using the safe harbor approach would set increments for $PM_{2.5}$ that are too low.

We conclude that the commenter is mistaken in saying that the $PM_{2.5}$ increments use the same percentage of the NAAQS that were used to set the PM_{10} NAAQS. We adopted the PM_{10} increments using the "equivalent substitution" approach set forth under section 166(f) of the Act. Under that approach, rather than calculating the PM_{10} increments as specific percentages of the PM_{10} NAAQS (using the same percentages that Congress used for setting the statutory increments for PM and SO_2), EPA determined the levels of the PM_{10} increments that could represent an equivalent amount of increment consumed, as if the TSP increments were still in effect. *See* 58 FR 31622, June 3, 1993, at 31626–31627. Nevertheless, the commenter is correct that, in cases where the ratio of $PM_{2.5}$ to PM_{10} emissions is 0.8 for an individual source, the source may have to reduce its PM_{10} emissions more than would otherwise be necessary to meet the PM_{10} increments in order to control its $PM_{2.5}$ emissions sufficiently to meet the safe harbor $PM_{2.5}$ increments.[12] This is because the safe harbor $PM_{2.5}$ increments are less than 80 percent of the PM_{10} increments. For example, the Class II 24-hour $PM_{2.5}$ safe harbor increment (9 μg/m³) is only 30 percent of the corresponding PM_{10} increment (30 μg/m³).

The underlying reason that the safe harbor $PM_{2.5}$ increments are so much less than the PM_{10} increments is that the $PM_{2.5}$ NAAQS are much less than the PM_{10} NAAQS.[13] This is the result of the evolution in our knowledge about the health and welfare effects of PM, in particular the effects of the fine PM

[11] We have paraphrased these factors here and in other sections to facilitate the explanation of our reasoning. However, we recognize, as we did in our regulation for NO_X, that the statutory language is broader than the shorthand we use here for convenience.

[12] Note that the PM_{10} increment may still be more limiting in areas where much of that increment has already been consumed.

[13] The 24-hour $PM_{2.5}$ NAAQS (35 μg/m³) is about 23 percent of the 24-hour PM_{10} NAAQS (150 μg/m³).

represented by $PM_{2.5}$. We believe that it is fitting for $PM_{2.5}$ increments to reflect our greater knowledge about $PM_{2.5}$ effects (as embodied in the NAAQS), rather than to simply maintain the control level required by the PM_{10} increments as suggested by the commenter. If this results in $PM_{2.5}$ increments that are more limiting than PM_{10} increments, we believe that this outcome is appropriate in light of our statutory requirement to prevent significant deterioration of air quality as it relates to $PM_{2.5}$.

2. Data Used by EPA for the Evaluation of the Safe Harbor Increments for $PM_{2.5}$

We evaluated whether measures other than the safe harbor increments are necessary by analyzing primarily the scientific and technical information on the health and welfare effects of $PM_{2.5}$ contained in the June 2005 OAQPS Staff Paper which accompanied the last full review of the PM NAAQS completed in 2006.[14]

Section 166(a) of the Act provides that EPA establish pollutant-specific PSD regulations, such as increments, after the establishment of a NAAQS for the applicable pollutants. The Act provides that EPA will promulgate new PSD regulations under section 166, including new increments if appropriate, within 2 years from the promulgation of any NAAQS after 1977. Within that time frame, the health and welfare information used for the setting of the NAAQS would also be "current" for purposes of establishing pollutant-specific PSD regulations. We believe this timing reflects congressional intent that EPA consider the same body of information concerning a pollutant's health and welfare effects when it promulgates the NAAQS and subsequent PSD increments (or other measures) defining significant air quality deterioration for the same pollutant. However, when we used that same information as the basis for our proposed pollutant-specific PSD regulations, we evaluated that information under the legal criteria in section 166 of the Act rather than the criteria in section 109 applicable to the promulgation of NAAQS. *See EDF* v. *EPA,* 898 F.2d at 190.

At the time of our proposal of $PM_{2.5}$ increments, we had just completed a review of the $PM_{2.5}$ NAAQS. Thus, the information used in the NAAQS review was current and timely for purposes of establishing pollutant-specific PSD regulations for $PM_{2.5}$. On October 17, 2006, based primarily on considerable new data on the air quality and human health effects for $PM_{2.5}$ directly, EPA revised the primary and secondary NAAQS to provide increased protection of public health and welfare by retaining the level of the annual standard and tightening the level of the 24-hour standard from 65 to 35 $\mu g/m^3$ while retaining the 24-hour PM_{10} NAAQS and revoking the annual PM_{10} NAAQS. The information contained in both the 2004 Criteria Document and 2005 Staff Paper that was used for the latest review of the PM NAAQS was also considered for the purpose of evaluating the $PM_{2.5}$ increments that we have established in this final rule.

The 2004 Criteria Document and 2005 Staff Paper are the products of a rigorous process that is followed to validate and interpret the available scientific and technical information, and provided the basis for recommending the $PM_{2.5}$ NAAQS. In accordance with the Act, the NAAQS process begins with the development of "air quality criteria" under section 108 for air pollutants that "may reasonably be anticipated to endanger public health or welfare" and that come from "numerous or diverse" sources. Section 108(a)(1). For each NAAQS review, the Administrator must appoint "an independent scientific review committee composed of seven members of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies," known as the Clean Air Scientific Advisory Committee (CASAC). Section 109(d)(2)(A). The CASAC is charged with recommending revisions to the criteria document and NAAQS, and advising the Administrator on several issues, including areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised NAAQS. Section 109(d)(2)(B),(C).

"Air quality criteria" must reflect the latest scientific knowledge on "all identifiable effects on public health or welfare" that may result from a pollutant presence in the ambient air. Section 108(a)(2). The scientific assessments constituting air quality criteria generally take the form of a "criteria document," a rigorous review of all pertinent scientific studies and related information. The EPA also develops a "staff paper" to "bridge the gap" between the scientific review and the judgments the Administrator must make to set standards. *See Natural Resources Defense Council* v. *EPA* ("*NRDC*"), 902 F.2d 962, 967 (D.C. Cir. 1990). Both documents undergo extensive scientific peer review as well as public notice and comment. *See, e.g.,* 62 FR 386542.

3. Scope of Effects Considered

The effects of ambient $PM_{2.5}$ concentrations may include effects from secondarily-formed $PM_{2.5}$. Thus, when we analyzed the data in this rulemaking, we evaluated the health and welfare effects of both direct $PM_{2.5}$ and secondarily-formed $PM_{2.5}$ that may result from the transformation of other pollutants such as SO_2 and NO_X. This was consistent with the approach we described for addressing these effects in the review of our pollutant-specific NO_2 increments regulations. 70 FR 59590.

4. Evaluation of the Health and Welfare Effects of $PM_{2.5}$

Airborne PM is not a specific chemical entity, but rather is a mixture of liquid and solid particles from different sources and of different sizes, compositions, and properties. Particle size distributions show that atmospheric particles exist in two classes: Fine particles and coarse particles. The indicator for fine particles is $PM_{2.5}$, which represents that population of particles that is mostly less than 2.5 micrometers in size. The indicator for thoracic coarse particles is "$PM_{10-2.5}$," which represents particles sized between 2.5 and 10 micrometers. In the last two reviews of the PM NAAQS, EPA concluded that these two indicators, because of their different sources, composition, and formation processes, should be treated as separate subclasses of PM pollution for purposes of setting ambient air quality standards.

Fine PM is derived directly from combustion material that has volatilized and then condensed to form primary PM or from precursor gases, such as SO_2 and NO_X, reacting in the atmosphere to form secondary PM. Major components of fine particles are sulfates, strong acid, ammonium nitrate, organic compounds, trace elements (including metals), elemental carbon, and water. Primary and secondary fine particles have long lifetimes in the atmosphere (days to weeks) and travel long distances (hundreds to thousands of kilometers). They tend to be uniformly distributed over urban areas and larger regions, especially in the eastern United States. As a result, they are not easily traced back to their individual sources.

a. Health Effects

The EPA reported important progress since the last PM NAAQS review in advancing our understanding of potential mechanisms by which ambient $PM_{2.5}$, alone and in combination with other pollutants, is causally linked to a

[14] The review completed in 2006 updated the previous review, which began in 1994 and resulted in revised standards for PM in 1997.

number of key health effects. The more extensive and stronger body of evidence used by EPA to study the health effects of $PM_{2.5}$ in our latest review identified a broader range of effects than those previously documented, involving premature mortality and indices of morbidity (including respiratory hospital admissions and emergency room visits, school absences, work loss days, restricted activity days, effects on lung function and symptoms, morphological changes, and altered host defense mechanisms) associated with both long-term and short-term exposure to $PM_{2.5}$. A more detailed discussion of the health effects associated with $PM_{2.5}$ is contained in the 2007 NPRM. 72 FR 54127–54128. In addition, an overview of the scientific and technical evidence considered in the 2004 Criteria Document and 2005 Staff Paper can be found in our proposed rule for revising the NAAQS for PM (71 FR 2619, January 17, 2006).

b. Welfare Effects

Ambient PM alone, and in combination with other pollutants, can have a variety of effects on public welfare. While visibility impairment is the most noticeable effect of fine particles present in the atmosphere, both fine and coarse particles can have other significant welfare-related effects, including effects on vegetation and ecosystems, materials (*e.g.,* soiling and corrosion), and climate change processes.

In reaching our decision in 2006 to revise the suite of PM secondary standards, EPA factored in several key conclusions from the scientific and technical information contained in the 2004 Criteria Document and 2005 Staff Paper. These conclusions included the following: (1) PM-related visibility impairment is principally related to fine particle levels, and most directly related to instantaneous levels of visual air quality associated with short-term averaging periods; (2) $PM_{2.5}$ concentrations can be used as a general surrogate for visibility impairment in urban areas; (3) any secondary NAAQS for visibility protection should be considered in conjunction with the regional haze program as a means of achieving appropriate levels of protection against PM-related visibility impairment in urban, non-urban, and Class I areas nationwide; (4) the available evidence is not sufficient to support distinct secondary standards for fine or coarse particles for any non-visibility related welfare effects; and (5) the secondary standards should be considered in conjunction with protection afforded by other programs intended to address various aspects of air pollution effects on ecosystems and vegetation, such as the acid deposition program and other regional approaches to reducing pollutants linked to nitrate or acidic deposition.

In this rulemaking, EPA has reviewed the scientific and technical information concerning welfare related effects considered in the 2004 Criteria Document and 2005 Staff Paper to determine whether there is any basis for modifying the safe harbor increments developed for $PM_{2.5}$ to satisfy the criteria under sections 166(c) and 160 of the Act. Our review included information on visibility impairment, and effects on vegetation and other ecosystem components, materials and soiling, and climate changes. A detailed discussion of the various welfare effects we considered for evaluating the safe harbor increments for $PM_{2.5}$ is contained in the 2007 NPRM. 72 FR 54128–54133.

5. Fundamental Elements of Increments

As we have previously noted, under the model established in the Act and prior EPA regulations, the function of an increment is not like that of the NAAQS in that an increment is not intended to set a uniform ambient pollutant concentration "ceiling" across the United States. *See* 70 FR 59600. Instead, while both increments and NAAQS generally serve to limit ambient air pollution levels, increments are designed to allow a uniform amount of pollutant concentration increase for each area in the United States having a particular classification, *i.e.,* Class I, II, or III. The amount of the allowable increase is measured against a baseline air quality level that is typically different for each particular area.[15] Because the baseline air quality level varies from one location to another, and is not established for a particular area until a source proposing to construct in that area submits a complete PSD permit application, it is not possible to determine what the maximum ambient pollutant concentration attainable will be for a given area (to be used to determine the protection afforded by an increment against potential adverse environmental effects) until the specific baseline air quality level is known.

For the reasons described in our NO_2 increments rule, our objective is to establish uniform increments, consistent with the increments for SO_2 and PM originally established by Congress, that allow the same level of deterioration for each area of the country having the same classification. 70 FR 59601. It is important to understand that increments are not intended to reduce ambient concentrations of an air pollutant below existing baseline levels in each area, but rather to define a level of allowable increase in pollutant concentrations above baseline levels, and to identify the level at which "significant" deterioration occurs for each area, in accordance with its specific classification. 70 FR 59600.

6. Evaluation of the Safe Harbor Increments

As indicated earlier (in section V.E.2 of this preamble), mindful of the considerations made about the fundamental characteristics of the increments, we reviewed the scientific and technical evidence available for the 2005 review of the NAAQS for PM in order to determine whether, and to what extent, the "safe harbor" increments might need to be modified in order to protect air quality values, health and welfare, and parks while insuring economic growth consistent with the preservation of clean air resources in accordance with sections 166(c) and 160 of the Act. As we did in our evaluation of the safe harbor NO_2 increments (70 FR 59603–59606), we relied on an approach that evaluates how protective the safe harbor $PM_{2.5}$ increments are by comparing the marginal pollutant concentration increases allowed by the safe harbor increment levels against the pollutant concentrations at which various environmental responses occur.

We analyzed the available evidence from both a quantitative and qualitative perspective to reach a decision about whether we should modify the contingent safe harbor $PM_{2.5}$ increments and whether we have sufficient information to select a specific alternative level, averaging time, or pollutant indicator for the increments. As a result of our analysis, we proposed to conclude that it was not necessary to modify the safe harbor increments to protect human health, address non-visibility welfare effects, or further protect visibility. This analysis is described in detail in the 2007 NPRM.

After considering the comments on our evaluation of the safe harbor increments and the conclusions we reached in the 2007 NPRM (summarized in the following paragraphs), we continue to believe that the safe harbor increments for $PM_{2.5}$ (which satisfy section 166(d) of the Act) are sufficient to fulfill the criteria in section 166(c) of the Act (and the incorporated goals and purposes of the Act in section 101 and the PSD program in section 160) when

[15] It should be noted, however, that an increment does not allow air pollution levels in an area to increase beyond the ambient concentration of a pollutant that would exceed the level allowed by the NAAQS.

combined with the other measures described earlier that we apply to $PM_{2.5}$. Consequently, this final rule establishes the $PM_{2.5}$ increments at the level of the proposed safe harbor increments.

An environmental group submitted extensive comments arguing that the $PM_{2.5}$ safe harbor increments are not sufficient to meet the Act's requirements for PSD and that our analysis was inadequate, and two other commenters submitted more narrowly targeted comments in this area. A summary of the major comments, along with our responses, follows. A more detailed treatment of the comments can be found in the Response to Comments document for this rulemaking, which is available in the rulemaking docket.[16]

The environmental group commenter stated that EPA has not complied with section 166(c) of the Act because the Agency has not made a finding or demonstrated that the $PM_{2.5}$ PSD rules will (as required by section 160(2) of the Act) preserve, protect, and enhance the air quality in parks and special areas. The commenter asserted that EPA offered only vague assertions that the proposed increments would "satisfy" the statutory factors and that they, along with other programs, would "help" to fulfill the statutory purposes. The commenter went on to argue that EPA sought to excuse its failure to show fulfillment of the statutory purposes by asserting that it cannot develop a uniform, quantitative, dose-response relationship between fine particle levels and certain ecosystem impacts (citing 72 FR 54134), but that, even if true, such a claim does not excuse the agency from satisfying its statutory duty under section 166(c).

We conclude that the 2007 NPRM demonstrated that the safe harbor increments, in combination with the other aspects of the regulatory framework, fulfill the statutory requirements despite the scientific uncertainties. We reiterate that finding today. The fact that we did not, in the 2007 NPRM, explicitly state this as a finding does not diminish the demonstration made there and reiterated in this preamble.

The environmental group commenter believes that the relationship between $PM_{2.5}$ and adverse effects can be quantified to a greater extent than stated by EPA. Regarding acid rain and other adverse ecological impacts, the commenter asserted that critical loads can be established as a way of quantifying and limiting the $PM_{2.5}$ contribution to degradation, and noted that critical loads are now used by authorities in Europe, have been endorsed by leading North American scientists, and have been used by Federal land management agencies. To comply with section 166(c), the commenter believes that EPA must establish a mechanism to supplement the nationally uniform increments with additional measures, including a requirement to establish area-specific critical loads or equally protective limits, where necessary to protect and enhance air quality in specific parks and natural areas.

With regard to the critical load concept, we agree conceptually with the commenter that critical loads could be used to supplement the existing increments, especially as a means of protecting the known sensitive ecosystems within Class I areas. While we disagree that the critical loads concept can be used as an effective replacement to increments for limiting air quality degradation, we believe that the concept offers considerable promise in helping to protect sensitive receptors in specific Class I areas. However, we do not believe that it would be appropriate at this time to establish a requirement for area-specific critical loads under the PSD program. In our 2005 PSD rule for NO_2 increments, we indicated that states could propose using information on critical loads as part of their approach for managing air quality in their individual SIP-approved PSD programs, but sufficient information was not yet available for EPA to incorporate the use of critical loads into the national PSD program. *See* 70 FR 59613.

The concept of critical loads is useful for estimating how much pollution a particular ecosystem can experience on a prolonged basis without showing adverse effects. In addition to addressing the opportunity for using critical loads under its NO_2 increment rule, EPA has addressed the concept of critical loads in the last review of the PM NAAQS and currently in the secondary NO_2/SO_2 NAAQS review.[17] To date in the United States, critical loads have had their primary application in the area of atmospheric deposition of sulfur (S) and nitrogen (N). In the last review of the PM NAAQS, EPA found that ambient PM was contributing to the total load of pollutants entering the U.S. ecosystem annually. However, the review also concluded that there were "insufficient data for the vast majority of U.S. ecosystems that differentiate the PM contribution to total N [nitrate] or S [sulfate] deposition to allow for practical application of this approach as a basis for developing national standards to protect sensitive U.S. ecosystems from adverse effects related to PM deposition." The 2005 Staff Paper for the PM NAAQS, in reaching this conclusion, addressed various important factors, including (1) the lack of a long-term, historic database of annual speciated PM deposition rates to establish relationships between PM deposition and ecosystem responses; (2) uncertainty in predicting the amount of PM deposited to sensitive receptors from measured concentrations of PM in the ambient air; and (3) the unique nature of each ecosystem and the current inability to extrapolate with confidence any effect from one ecosystem to another. The 2005 Staff Paper recommended that EPA give serious attention to the critical load concept and recommended the collection of data from a "greater variety of ecosystems over longer time scales to determine how ecosystems respond to different loading rates over time." 2005 Staff Paper at page 7–19.

The review of the secondary NAAQS for NO_X and sulfur oxides (SO_X), which is currently underway, is evaluating ecological effects due to the atmospheric deposition of NO_X and SO_X. The two main targeted effects are acidification and nutrient enrichment in both aquatic and terrestrial ecosystems. This review is attempting to use critical loads to evaluate the impact of current depositional loads and alternative loads in several case study areas. However, as mentioned earlier, the estimation of ecosystem critical loads expressed in terms of PM requires long-term ecosystem-level data on speciated PM deposition rates for which an adequate database is currently lacking for most sites in the United States.

The environmental group commenter also asserted that the safe harbor increments would allow $PM_{2.5}$ air quality to deteriorate to the level of the NAAQS in many locations. According to the commenter's analysis, at 55 percent of the locations with $PM_{2.5}$ monitors that were not already exceeding the $PM_{2.5}$ NAAQS, 24-hour $PM_{2.5}$ concentrations would be allowed to increase up to the level of the NAAQS. In addition, the analysis showed that for 84 percent of locations not already exceeding the NAAQS, the 24-hour $PM_{2.5}$ concentrations would be allowed to increase to a level of 30 μg/

[16] Docket No. EPA–HQ–OAR–2006–0605 can be accessed on line at *http://www.regulations.gov.*

[17] In the 2005 OAQPS Staff Paper reviewing the NAAQS for PM, EPA cited the following accepted definition of "critical load": "quantitative estimate of an exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge." *See* page 6–45.

m^3 or more. The commenter believes that allowing such levels would not be protective of public health, given that we stated in the 2007 NPRM that we had previously found that $PM_{2.5}$ concentrations less than a range of 30–35 µg/m^3 (24-hour average) were protective of public health (citing 72 FR 54128).

The environmental group commenter's analysis showed similar results for the proposed annual $PM_{2.5}$ increments. The commenter asserted that $PM_{2.5}$ concentrations would be allowed to increase up to the level of the annual NAAQS in 55 percent of the locations that are currently in attainment, and that 87 percent of these sites would be allowed $PM_{2.5}$ concentrations of 12 µg/m^3 or higher. Again, the commenter believes that allowing annual concentrations at or above 12 µg/m^3 would not be protective of public health, based on our statement in the 2007 NPRM that we had previously found that $PM_{2.5}$ concentrations less than a range of 12–15 µg/m^3 (annual average) were protective of public health (citing 72 FR 54128).

We do not believe that increments must be set at levels that ensure that the full amount of increment will be available in all locations. The statutory provisions in the PSD program have always been clear that a source must demonstrate that it will comply with both the NAAQS and increments for any pollutant. Consistent with congressional intent, the PSD program does not allow a source to violate the NAAQS just because its emissions will not cause the increments to be exceeded. If the increments were to be developed in such a way that all areas, taking into account current ambient air quality status, would be able to utilize the full amount of increment, then the increment levels would have to be unnecessarily stringent in areas that are substantially cleaner than levels allowed by the NAAQS.

Congress recognized that all areas of the country might not be able to utilize the full amount of increment when they provided provisions within the Act requiring that both the NAAQS and increments must continue to be met at all times. In areas where the full amount of increment is not available due to levels of pollution approaching the NAAQS, states may need to require emissions reductions at existing sources to accommodate the desired amount of economic growth. Hence, we do not believe it is reasonable to unduly restrict economic growth in cleaner areas by setting more restrictive increments to help maintain air quality levels below the NAAQS in areas which are currently only marginally attainment.

In addition, we disagree with the commenter's assertion that the increments will not protect public health. In setting the $PM_{2.5}$ NAAQS at 35 µg/m^3 (24-hour) and 15 µg/m^3 (annual), EPA concluded that these levels protect public health with an adequate margin of safety. Regardless of the level at which the increments are set, no source is permitted to cause the NAAQS to be exceeded. That is, as noted previously, the upper bound on the permissible concentration of $PM_{2.5}$ is determined by the increment or the NAAQS, whichever is more restrictive in each particular case. Thus, the entire framework of the $PM_{2.5}$ regulations, including the safe harbor increments, is protective of public health. In asserting otherwise, the commenter has misconstrued our statements in this regard.

In the 2007 NPRM section on the health effects of $PM_{2.5}$ (72 FR 54127–54128), we discussed the fact that we considered setting the 24-hour NAAQS in the range of 30 to 35 µg/m^3 and the annual NAAQS in the range of 12 to 15 µg/m^3. However, we concluded in setting the NAAQS that 35 µg/m^3 (24-hour) and 15 µg/m^3 (annual) are protective of public health with an adequate margin of safety. We did not say, nor do we believe, that $PM_{2.5}$ concentrations must be below 30 µg/m^3 (24-hour average) or 12 µg/m^3 (annual average) to protect public health.

The environmental group commenter believes that there is a quantifiable relationship between visibility impairment and $PM_{2.5}$ levels, citing the 2007 NPRM discussion (72 FR 54135) as well as the most recent Criteria Document and Staff Paper for $PM_{2.5}$. The commenter pointed out that in the 2007 NPRM (72 FR 54135), EPA observed that the proposed Class II short-term safe harbor increment of 9 µg/m^3, if combined with the estimated daily background levels in most areas (*i.e.,* 10 µg/m^3), would be below the minimum values recommended in the 2005 Staff Paper for the secondary short-term standard for $PM_{2.5}$ (which was 20 µg/m^3). Rather than supporting the adequacy of 9 µg/m^3 as an increment level to protect visibility, the commenter believes that this shows that the safe harbor increment is inadequate because consumption of an increment of 9 µg/m^3 combined with background levels alone would cause an area to reach within 1 µg/m^3 of the staff-recommended value of 20 µg/m^3. The commenter added that most areas would have $PM_{2.5}$ pollution from motor vehicles and stationary sources in concentrations substantially greater than background levels, easily placing these areas above 20 µg/m^3 (citing the 2005 Staff Paper at 2–77).

The environmental group commenter went on to assert that the safe harbor $PM_{2.5}$ increments will not be sufficient to protect visibility in parks and other natural areas. In the 2007 NPRM, we stated that a 24-hour average $PM_{2.5}$ concentration of 20 µg/m^3 correlates to a visual range of approximately 25 to 35 kilometers. 72 FR 54129. The commenter asserted that this visual range distance falls far short of what the National Park Service considers to be good visibility for national parks, adding that the National Park Service has stated that visibility used to be 90 miles (145 km) on average in eastern parks, and 140 miles (225 km), on average in western parks.[18] The commenter stated that the safe harbor increments would allow parks and other natural areas to experience $PM_{2.5}$ pollution that is correlated with a 25–35 km visual range.

The visibility impairment issue is more complex than suggested by the environmental group commenter. In addition to predicting what the maximum ambient change in air quality is for a particular area, a visibility impairment assessment considers such things as the frequency, magnitude, and duration of visibility impacts in order to conclude that an adverse impact will occur.

In addition, the environmental group commenter misconstrued the illustration we included in the 2007 NPRM. We noted that the lowest level we considered as a secondary $PM_{2.5}$ NAAQS was 20 µg/m^3, which was considered to address visibility issues in urban areas. We also noted that in most areas, the estimated 98th percentile of daily background concentrations is less than 10 µg/m^3. In adding the Class II safe harbor increment (9 µg/m^3) to the 98th percentile of background levels, we were simply showing that even in the worst case, the combination of the safe harbor increment and background $PM_{2.5}$ would not exceed the most stringent level we considered for the secondary $PM_{2.5}$ NAAQS. The commenter presented this rough, worst-case calculation as if it represented the typical situation that would result from the safe harbor increments. In addition, the environmental group commenter's statements do not apply to parks and special areas that are classified as Class

[18] The commenter cited *http://www.nps.gov/shen/naturescience/visibility_and_haze.htm* for historic visibility in national parks.

I areas because the safe harbor increments for such areas are much lower.

Another commenter stated that the proposed 24-hour Class I increment (2 $\mu g/m^3$) would not be protective of AQRVs, particularly visibility. This commenter noted that the National Park Service uses a 5 percent change in light extinction from estimated natural conditions as the threshold for "adverse impacts" to Class I visibility. The commenter indicated that depending on the constituents of the ambient $PM_{2.5}$ and the humidity, a concentration of 2 $\mu g/m^3$ in a typical Class I area would result in a change in light extinction ranging from 13 to 80 percent in the Western United States and from 8 to 50 percent in the Eastern United States and, therefore, would likely constitute "adverse impacts" to Class I visibility. While acknowledging that the FLM may still determine that the visibility in the Class I area is adversely affected by an increase in concentration that is less than the increment, this commenter pointed out that we stated in the 2007 NPRM that "generally speaking an increment should not be so large that it routinely results in substantially more pollution in Class I areas than is generally acceptable under the AQRV approach" (citing 72 FR 54135). The commenter concluded that the proposed 24-hour $PM_{2.5}$ increment does not meet this test and recommended that EPA set a lower $PM_{2.5}$ 24-hour increment.

This commenter appears to have identified a worst-case scenario in terms of increment concentrations, and although we agree with the visibility impacts related to those concentrations discussed in the comment, we do not believe the proposed increment level compromises the protection of visibility or other AQRVs. Although the "AQRV test" uses 5 percent light extinction as a screening threshold, the determination of adverse impact is made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency, and time of visibility impairment and how these factors correlate with visitation to the Class I area. The suggestion that the 5 percent threshold is routinely exceeded by PSD sources or that an absolute worst-case scenario is occurring to the geographic extent, intensity, duration, and frequency that would warrant an adverse impact determination is unsupported, especially considering the relatively few adverse impact determinations that have been made in the past. It is, however, important to note that the AQRV analysis is independent of the PSD increment analysis; whether or not the increment is projected to be exceeded does not determine the need for an AQRV analysis. The determination that a facility does or does not cause an adverse impact on a Class I area is not solely contingent upon the PSD increment, so we do not believe that lowering the proposed increment is necessarily more protective of the AQRV.

With respect to these two commenters' concerns about visibility protection, we continue to believe that the increments cannot be expected to be the sole means of protecting various welfare concerns. In the 2007 NPRM, we stated that "visibility protection in Class I areas is more adequately provided by the AQRV process." Congress defined AQRVs to specifically include visibility and left it for the FLMs to define other special attributes of Class I areas that warranted special protection. We also noted that Congress has established several visibility programs that target emissions reductions to achieve desired visibility benefits. *See* 72 FR 54135. Collectively, these protective programs, along with the totality of the PSD program, offer an effective means of addressing unique local problems that cannot be addressed solely by uniform national increments.

However, the environmental group commenter asserted that these other programs will not fulfill the statutory purposes. As discussed previously in sections V.D.4 and 5, the commenter does not believe that FLM review in the AQRV process and the air quality impacts analysis required by section 165(a) of the Act are adequate. We disagree; *see* sections V.D.4 and 5 for more detail on the comments and our responses.

The environmental group commenter also noted that we cited the regional haze program as a justification for adopting less protective PSD rules (referring to 72 FR 54135), but the commenter pointed out that the haze program applies only to Class I areas and does not apply at all to the majority of the nation, which is Class II. The commenter further noted that we stated in the 2007 NPRM that "some State and local governments have also developed programs to improve visual air quality in specific urban areas" (citing 72 FR 54135), and pointed out that we gave no specific information on such programs, nor any information about the visibility protection that they provide beyond that provided by the proposed increments. The commenter asked that we identify the specific State and local programs, and that we specify how much visibility protection such programs are providing.

The commenter is correct that the regional haze program directly addresses only Class I areas. As we have discussed before, these are the areas that Congress defined as deserving of the most protection under PSD, including the visibility protection provisions in subpart 2 of title I, part C of the Act, which is the statutory basis for the regional haze program. While Class I areas are the target for the regional haze program, we believe that many areas of the nation will receive collateral visibility benefits from this program. As emissions of the pollutants that cause regional haze are reduced, many areas in the paths of transport will benefit. In addition, as discussed previously in section V.D.5 of this preamble, PSD applicants must prepare an analysis of "other impacts," including visibility impacts, in areas other than Class I areas.

Regarding State and local visibility programs, in the 2005 Staff Paper EPA described several existing programs to improve visual air quality in urban areas. These programs were located in Denver, CO; Phoenix, AZ; and Lake Tahoe, CA. Also, the states of California and Vermont have each established standards to protect visibility. *See* the 2005 Staff Paper, pages 6–17 through 6–23.

The environmental group commenter cited the 2007 NPRM (72 FR 54135) where we said that the use of "distinct PM increments for visibility protection is not the most effective means of addressing the visibility problem." The commenter believes that this claim is based on false premises, including the idea (discussed previously) that other programs effectively protect visibility nationwide, and the idea that the only option is a "distinct" PM increment for visibility protection. As to the latter, the commenter stated that EPA can strengthen the safe harbor increment to ensure visibility protection and need not adopt a separate "visibility" increment. In addition, the commenter asserted that EPA has ignored the statutory mandate that the PSD rules fulfill the statutory goals and purposes, and that we cannot shirk that statutory duty merely because we claim some other type of action would be "more effective."

We continue to believe that Class I area visibility protection under the PSD program is appropriately addressed via the AQRV process. As mentioned previously, Congress explicitly included "visibility" as an AQRV for which FLMs would have an affirmative responsibility to protect in Class I areas under their jurisdictions. Where the FLM successfully demonstrates that there would be an adverse impact on the AQRV (*e.g.,* visibility), a State cannot issue a PSD permit, even when the source's emissions do not violate the $PM_{2.5}$ increments. In addition, we continue to believe that the analysis of other impacts, including visibility, in non-Class I areas is the appropriate means of addressing visibility protection in these areas, as envisioned by Congress when it enacted the PSD provisions of the Act.

As a result, we do not believe it is necessary to create a distinct increment (*e.g.,* with a different averaging period) or to lower the safe harbor increments to protect visibility in urban, non-urban, or Class I areas across the United States. We reach this conclusion in proper consideration of the other, more direct approaches being used to address visibility problems in the United States. The primary such approach, the regional haze program, is within the PSD framework for $PM_{2.5}$. Note that part C of title I of the Act, "Prevention of Significant Deterioration of Air Quality," includes subpart 2, which is the statutory basis for the regional haze program. Regarding our consideration of other State and local visibility protection measures that are outside the PSD framework, we do not believe it is reasonable to disregard these area-specific measures that focus on the preferences of individual communities where a uniform national increment for visibility protection generally cannot.

The environmental group commenter also stated that the proposed PSD rules fail to ensure fulfillment of the "enhancement goal" set out in the Act. The commenter noted that section 101(a) states as the Act's first purpose: "to protect and enhance the quality of the Nation's air resources," while section 160(2) states that the purpose of the PSD program is to "preserve, protect, and enhance" air quality in parks and other special areas. The commenter asserted that the proposed rule did not address these enhancement requirements or explain how the proposed increments would fulfill those requirements.

This same issue was raised in the 2005 PSD rule affirming the NO_2 increments. At that time we expressed our belief that the goal to enhance air quality in national parks and wilderness areas is implemented through the regional haze program while the PSD program focuses on preserving and protecting air quality in these areas. However, when a PSD increment violation is identified, we agree that EPA may require a State to revise its SIP to correct the violation. *See* 40 CFR 51.166(a)(3). Otherwise, we do not interpret these PSD provisions to authorize us to direct states in their SIPs to achieve reductions in emissions from existing sources for PSD purposes.

We recognized at that time, and continue to believe, that the growth management goals of PSD may also be fulfilled when the states adopt controls on existing sources that would reduce emissions and allow growth from new sources and major modifications to existing sources without causing significant deterioration. Under the increment approach, we have interpreted the PSD rules to allow states to require reductions from existing sources in order to expand the allowable increments and, thereby, allow for more growth under the PSD program. However, we have never required states to do so because, in the absence of an increment violation, we do not believe section 166 and other provisions in part C of title I of the Act give us the legal authority to mandate such reductions for PSD purposes.

Another commenter stated that the $PM_{2.5}$ increments should be twice the recommended levels because scientific studies do not support the need for such low levels for protection of health and welfare. The commenter believes that increments at the proposed levels would jeopardize the goal of providing opportunities for economic growth. The commenter expressed concern over EPA's use of epidemiologic studies and questioned the ability of such studies to provide a reliable evaluation of health risks. The commenter claimed that epidemiologic studies are capable of finding association between a substance or exposure and a health effect but rarely capable of determining if there is causation, while toxicological studies using randomized trials are specifically designed to determine causation. The commenter added that other factors providing evidence for causation include dose-response relationships, consistency, and repeatability of studies, which the commenter said are not present in the studies cited by EPA. The commenter specifically referred to two studies, acknowledged by EPA to show no evidence of a dose-response relationship gradient between $PM_{2.5}$ and specific health related effects.

We disagree with the commenter's recommendation that the increments should be twice the proposed (and final) levels. The scientific studies to which the commenter referred pertain to studies that EPA used to determine the health-based NAAQS for $PM_{2.5}$, and we do not believe it is relevant to this rule to respond to comments related to the setting of the NAAQS. The NAAQS are designed to protect public health and welfare; increments then are intended to insure that air quality in clean areas is not allowed to deteriorate significantly, and the PSD regulations insure that any such deterioration does not lead to air pollution levels that exceed the levels defined by the NAAQS.

As discussed previously, we are finalizing this rulemaking using the safe harbor approach under section 166(a) of the Act. Using this approach, we calculated the "safe harbor" increments as percentages of the NAAQS comparable to the percentages that Congress used to establish the original statutory increments for PM and SO_2. These values represent the level of effectiveness necessary to satisfy section 166(d) of the Act, and could be tightened if necessary based on further analysis to determine if additional measures are necessary to fulfill the requirements of section 166(c) of the Act. Thus, under this approach and on this record, we do not conclude that it is appropriate to finalize increments at levels any less stringent than the safe harbor increments, as the commenter recommends.

7. Compliance Determinations for the $PM_{2.5}$ Increments

a. Modeling Compliance With $PM_{2.5}$ Increments

Section 163(a) of the Act provides that "In the case of *any* maximum allowable increase * * * for a pollutant based on concentrations permitted under the national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year [emphasis added]." Accordingly, the existing PSD rules allow one exceedance per year of each short-term increment defined by the rules. *See* 40 CFR 51.166(c) and 52.21(c). With the addition of the $PM_{2.5}$ increments to the list of maximum allowable concentrations in the PSD rules, the existing provision allowing one exceedance per year applies equally to the 24-hour $PM_{2.5}$ increments as well. Thus, when modeling increment compliance, the highest value of the second-highest modeled increase in estimated $PM_{2.5}$ concentrations at each model receptor for the 24-hour averaging time should be less than or equal to the maximum allowable increase for $PM_{2.5.}$ For the annual increments, the modeled annual averages should not exceed the annual maximum allowable increase for $PM_{2.5}$. *See* EPA's "Guideline on Air Quality Models" at 40 CFR part 51 appendix W, section 10.2.3.3.

We did not expressly state in the 2007 NPRM the implications of adding $PM_{2.5}$ increments to the existing list of increments in 40 CFR 51.166(c) and 52.21(c) of the PSD regulations. Nevertheless, it should have been clear at the time that, in the absence of alternative language for $PM_{2.5}$, the existing provision allowing one exceedance for the short-term increments would apply to the increments for $PM_{2.5}$ along with the increments already listed. We did not receive any comments either supporting or opposing these methods for determining compliance with the $PM_{2.5}$ increments.

We recognize that the above approach for determining compliance with the 24-hour $PM_{2.5}$ increments differs from the approach contained in guidance that we provided in a March 23, 2010 memo titled "Modeling Procedures for Demonstrating Compliance with $PM_{2.5}$ NAAQS," which sets forth a procedure designed to demonstrate compliance with a statistically based standard that is met when the 98th percentile 24-hour concentration is less than or equal to 35 ug/m^3. A similar dichotomy exists for the 24-hour PM_{10} increments and NAAQS, where compliance with the 24-hour PM_{10} NAAQS is based on an expected exceedance form of the standard.

b. Condensable PM

Initially, the EPA will not require PSD applicants under the Federal PSD program to consider condensable PM in emissions calculations to determine whether a proposed project is subject to the PSD requirements. In addition, we will not require the condensable portion to be considered in the required $PM_{2.5}$ air quality analyses. In our May 2008 $PM_{2.5}$ NSR Implementation Rule, we announced that we would not require that states address condensable PM in establishing enforceable emissions limits for either PM_{10} or $PM_{2.5}$ in NSR permits until the completion of a transition period. Further, we indicated that the transition period would end January 1, 2011 unless EPA advanced the date through the rulemaking process. We also indicated that such rulemaking would involve the assessment and possible revision of test methods for measuring condensable emissions and taking comment on an earlier closing date for the transition period in the NSR program if we are on track to meet our expectations to complete the test methods rule much earlier than January 1, 2011.[19] In addition, states that have developed the necessary tools are not precluded from acting to include condensable PM emissions in NSR permit actions prior to the end of the transition period, especially if it is required in an applicable SIP. *See* 73 FR 28334–28336.

c. $PM_{2.5}$ Precursors

In the 2007 NPRM, we proposed to add SILs for $PM_{2.5}$ to the PSD regulations at 40 CFR 51.166 and 52.21. (The SILs are described more fully in section VI of this preamble.) Accompanying these SILs, we proposed to add a new paragraph to the regulations explaining that the requirements for a source impact analysis for $PM_{2.5}$ would be considered to be satisfied, without further air quality modeling, if it were to be shown that the increase in direct $PM_{2.5}$ emissions from the source or modification will cause air quality impacts less than the prescribed SILs for $PM_{2.5}$. The reasoning at the time was that state-of-the-art modeling would not be available to adequately account for secondary $PM_{2.5}$ impacts resulting from emissions of precursors of $PM_{2.5}$, *e.g.*, SO_2 and NO_X. Nevertheless, the existing PSD rules currently define potential precursors of $PM_{2.5}$. Based on the proposed language, the required compliance demonstration for the $PM_{2.5}$ NAAQS and the $PM_{2.5}$ increments (when promulgated) would be limited by regulation to an analysis of direct $PM_{2.5}$ emissions, and would not include consideration of emissions of $PM_{2.5}$ precursors for comparing the modeled source impacts to the prescribed SILs for $PM_{2.5}$.

The impacts of $PM_{2.5}$ precursors on ambient concentrations of $PM_{2.5}$ cannot be determined from the dispersion models that EPA has currently approved for modeling individual PSD sources. Such models are not designed to consider chemical transformations that occur in the atmosphere after the precursor emissions have been released from the source. Consideration of these transformations is necessary to be able to add precursor impacts into the total modeled ambient $PM_{2.5}$ concentrations for comparison to the SILs for $PM_{2.5}$.

The technical tools needed to complete a comprehensive analysis of all emissions that contribute to ambient concentrations of $PM_{2.5}$ are only in the developmental stage; nevertheless, we believe that it would be inappropriate to restrict the regulatory language in such a way that future regulatory amendments would be required to enable the inclusion of precursor impacts in the $PM_{2.5}$ analysis as the necessary technical tools become available. Estimating techniques are being developed that will be able to be applied to the $PM_{2.5}$ analysis in the near future, which could not be required if the regulatory language precluded them. We acknowledge the concerns that have been expressed by some commenters about the shortcomings of not considering the impacts of $PM_{2.5}$ precursors under the $PM_{2.5}$ air quality analyses. Accordingly, we believe that the new provision for applying the SILs for $PM_{2.5}$ to the required analyses for the NAAQS and increments should not be self-limiting by specifying the use of only direct $PM_{2.5}$ emissions. Instead, the new provision contained in this final rule provides that the test will be based on whether "the emissions increase * * * would cause * * * air quality impacts less than [the $PM_{2.5}$ SILs]." *See* new 40 CFR 51.166(k)(2) and 52.21(k)(2). We believe that it would be more effective to rely on interim policy and guidance as appropriate to help determine the best methods available to make the required assessment of source impacts on ambient $PM_{2.5}$ resulting from any emissions.

F. Final Action on Trigger and Baseline Dates for $PM_{2.5}$ Increments

In the 2007 NPRM, we proposed as part of Option 1 to require the implementation of the $PM_{2.5}$ increment system (annual and 24-hour increments) with new baseline areas, baseline dates, and trigger date. Specifically, we proposed that the major source baseline date and trigger date, both fixed dates, would be defined as the effective date of the final rule and would reflect a date 1 year from the date of promulgation, in accordance with section 166(b) of the Act. In contrast, under Option 2 (both 2A and 2B), we proposed to establish new baseline dates for the 24-hour $PM_{2.5}$ increments, but to retain the existing baseline areas and dates for the annual $PM_{2.5}$ increments because the annual increments would be equivalent substitutes for the existing annual PM_{10} increments.

In light of the then-current and expected trends in $PM_{2.5}$ concentrations, our judgment was that starting with new baseline dates on or after the effective date of this rule would make the PSD increments for $PM_{2.5}$ more protective. We proposed that any emissions reductions occurring prior to the effective date of this rule would lower

[19] We proposed test methods for measuring PM_{10} and $PM_{2.5}$, including condensable PM emissions, from stationary sources on March 25, 2009 (74 FR 12970). In the same notice, we sought comments on whether to end the NSR transition period for condensable PM earlier than January 1, 2011. We anticipate publication of a final rule announcing our decision on the NSR transition period in July 2010.

the baseline concentration rather than be used for expanding the $PM_{2.5}$ increment. If a retroactive baseline date were to apply, emissions reductions occurring prior to the effective date of this rule would serve to expand the available increments, enabling more new pollution than would otherwise be allowed to occur.

We also expressed our belief that starting with different baseline dates to implement increments for $PM_{2.5}$ would be appropriate because Option 1 treats $PM_{2.5}$ essentially as a "new" pollutant for purposes of PSD and section 166 of the Act. We continue to believe that establishing a new baseline also overcomes significant implementation concerns that would otherwise exist if the existing PM baseline were maintained. In particular, if we were to require sources and reviewing authorities to conduct $PM_{2.5}$ increment analyses based on the minor source baseline dates previously established years or even decades ago under the TSP or PM_{10} program, they would have to attempt to recreate the $PM_{2.5}$ emissions inventory as of the minor source baseline date in order to determine the baseline $PM_{2.5}$ concentration for the area. For early minor source baseline dates in particular (*e.g.,* 1976 in some areas of the United States), establishing the emissions inventory for $PM_{2.5}$ would be extremely difficult, cumbersome, and potentially inaccurate because historic emissions inventories did not include $PM_{2.5}$ emissions. For all of these reasons, we proposed Option 1 as our preferred option and requested comment on this contingent safe harbor approach for annual and 24-hour $PM_{2.5}$ increments under Option 1.

Under Option 1, we proposed that the $PM_{2.5}$ increments would be subjected to a 1-year delay consistent with the procedures under section 166(b) of the Act, which provides in general that these rules "shall become effective one year after the date of promulgation." Alternatively, we sought comment on a 60-day delay as part of our proposal under Option 1. In the proposal we requested comment on the argument that, while the Act includes a 1-year implementation delay for new increments, the same provision calls for EPA to promulgate new increments within 2 years of the promulgation of the NAAQS. Given that these $PM_{2.5}$ increments are being promulgated more than 2 years after promulgation of the NAAQS, we expressed our belief that the overall congressional intent reflected in section 166 of the Act could possibly be met by setting the effective date of the $PM_{2.5}$ increments earlier than the "one year after the date of promulgation" provided in section 166(b) of the Act.

Twelve commenters supported our proposal under Option 1 to establish new trigger and baseline dates for $PM_{2.5}$, regardless of the particular increment option that they otherwise supported. These commenters generally saw new dates as being the best approach because of various problems that would result from retaining existing trigger and baseline dates. Some commenters claimed that it would be technically difficult to try to reconstruct old inventories to determine the amount of $PM_{2.5}$ emitted by sources in the past.

One commenter stated that establishing $PM_{2.5}$ increment inventories using existing PM_{10} baseline dates would be "extremely difficult, cumbersome, and necessarily inaccurate and unreliable as historic emissions did not speciate $PM_{2.5}$ emissions." A State/local agency commenter said that it would be "virtually impossible for States to calculate the $PM_{2.5}$ component of previously consumed PM_{10} increments because data on the fine and coarse fractions of source emissions are largely unavailable."

Yet another commenter claimed that "resurrecting $PM_{2.5}$ inventories based on the PM_{10} baseline dates would be insurmountable." Similar comments were echoed by several commenters who supported the use of legal authority set forth in section 166(f) ("equivalent substitution" approach) for developing the numerical values for the $PM_{2.5}$ increments. One of these commenters stated that he did not "believe the establishment of new baseline dates for $PM_{2.5}$ would abandon past cases of increment consumption for PM_{10}, because the 24-hour PM_{10} increments would still be in effect * * *."

One commenter suggested that "EPA establish the trigger date as of the date when it officially established the non-attainment and attainment areas for $PM_{2.5}$; that is, April 5, 2005." The commenter explained that this approach is consistent with the PSD regulations from their inception and partially mitigates EPA's delays in implementing the PSD program for $PM_{2.5}$. The commenter believes "that States should be required to use the baseline areas previously established for their PSD program, unless the process for redefining these areas strictly follow procedures in the PSD regulations and EPA policy." The commenter claimed, "this will minimize any inconsistent applications of the regulations for $PM_{2.5}$."

One commenter noted that our proposed $PM_{2.5}$ increments were very low and "facilities may find themselves immediately out of compliance with the $PM_{2.5}$ increments upon promulgation of the rule, based on a January 1975 or 1977 baseline date."

One commenter indicated that the historic TSP/PM_{10} baseline dates should be retained. This commenter favored the equivalent substitution approach under section 166(f) and, consistent with that approach, retention of the existing baseline dates.

Having considered all the comments, we believe that the most reasonable approach for addressing the relevant dates associated with the $PM_{2.5}$ increments is to start anew with the baseline date concept. As already mentioned, the commenters have identified difficulties that would occur if the $PM_{2.5}$ emissions inventory for increment analyses had to be created for an earlier period of time, and the existence of these difficulties supports the approach under Option 1 to establish new dates for implementing the $PM_{2.5}$ increments. Also, these new baseline dates for $PM_{2.5}$ increments will not undo the current protection provided by the existing increments for PM because we are not revoking the 24-hour or annual PM_{10} increments under this new rule. Accordingly, this final rule establishes independent $PM_{2.5}$ increments using a "trigger date" and "major source baseline date" that are separate from the dates defined for the PM_{10} increments. Consequently, new minor source baseline dates and the corresponding baseline areas will be used for the annual and 24-hour $PM_{2.5}$ increments, and will be established when a source applies for a PSD permit any time on or after the new trigger date for $PM_{2.5}$. (See also the discussion about changes to the definition of "baseline area" in section V.G of this preamble.)

The "major source baseline date" for $PM_{2.5}$ is being set as October 20, 2010—the date of publication of this final rule. The setting of this date differs from previous major source baseline dates which were set as the date of publication of the proposed rule, but is similar to the major source baseline date set for the other increments in that the date precedes the effective date for implementing the increments, and thereby requires that certain major source emissions increases that occur before the trigger date retroactively count toward the amount of increment consumed.

The "trigger date" is being set at October 20, 2011, which is 1 year after the date of promulgation of this final rule. We are using this approach to define the date on which the $PM_{2.5}$ increments become effective as 1 year from the date of publication, consistent with the 1-year delay required under section 166(b) of the Act. This date for the "trigger date" separates the applicability date of the $PM_{2.5}$ increments from the effective date of this final rule in general, but also ensures that the "minor source baseline date" for $PM_{2.5}$ for any particular $PM_{2.5}$ attainment or unclassifiable area cannot be established until after the increments become effective in this final rule. The implementation of these dates as part of the $PM_{2.5}$ increment system is discussed in greater detail in section VIII of this preamble.

We recognize that some may still have a concern about our decision to set the major source baseline date as the date of publication of this final rule in light of the fact that the $PM_{2.5}$ NAAQS have been in place since 1997; however, we believe that the selection of possible earlier dates would require states to retroactively establish $PM_{2.5}$ emissions inventories for increment analyses during a period when sources were generally not required to conduct $PM_{2.5}$ air quality analyses. Hence, given the lack of information, and considering the technical difficulties in doing so, we do not believe that it would be appropriate to require states and sources to retroactively account for $PM_{2.5}$ increment consumption by setting the major source baseline date at an earlier date than the date we have selected.

G. Definition of "Baseline Area" for $PM_{2.5}$

No changes were proposed with respect to the definition of "baseline area" for $PM_{2.5}$ increments. One commenter, however, noted that fact in claiming that we did not adequately account for significant impacts of $PM_{2.5}$ for purposes of defining the "baseline area" for the $PM_{2.5}$ increments. Under the existing regulations, the establishment of a baseline area for any PSD increment results from the submittal of the first complete PSD application, and is based on both the location of the proposed source and the impact of the source's emissions on the area. In accordance with the definition, the attainment or unclassifiable area in which the proposed source would construct is always part of the baseline area in which the minor source baseline date is established and the increment analysis is conducted. In addition, the definition provides that any surrounding attainment or unclassifiable area in which the proposed source's impact is greater than 1 μg/m³, annual average, would also become part of the baseline area, assuming the area had not already been established as a baseline area by a previous application for a PSD permit. *See* 40 CFR 51.166(b)(15) and 52.21(b)(15).

As explained in the preamble for the 1980 PSD regulations, EPA selected an impact of 1 μg/m³, annual average, for the definition of "baseline area" because that value was considered the level of significance for both SO_2 and PM when the definition was originally established.[20] There was no mandate at that time that a 1 μg/m³ impact be used to determine the baseline area for increments for other pollutants; however, the use of a 1 μg/m³ impact in the definition of "baseline area" was not changed when EPA developed increments for NO_2 in 1988 because EPA also defined "significant" for NO_2 using the same annual average concentration of 1 μg/m³. The EPA has determined, however, that "significant" for $PM_{2.5}$ ambient impacts should be considered to occur at a lower concentration than 1 μg/m³. Elsewhere in this preamble, we have indicated that the SIL for $PM_{2.5}$ in this final rule is 0.3 μg/m³, annual average. Consequently, although no change to the definition of "baseline area" was proposed in this rule, we believe it is necessary and appropriate to define in this final rule a level of significance of 0.3 μg/m³, annual average, for establishing a new baseline area for purposes of $PM_{2.5}$ increments. *See* revised 40 CFR 51.166(b)(15)(i) and 52.21(b)(15)(i).

Had we established the SIL at 1 μg/m³, annual average, as proposed under Option 1 for SILs, then the definition of "baseline area" would not need to be revised. However, the revised definition in this final rule is consistent with our decision to establish a SIL of 0.3 μg/m³, annual average, for $PM_{2.5}$. We consider this action to be a logical outgrowth of our decision to establish a SIL for $PM_{2.5}$ and the comment concerning the effect of that action on the definition of "baseline area." Thus, we believe that our failure to initially propose this change to the definition of "baseline area," based on the possibility of selecting Option 3 for defining the SIL for $PM_{2.5}$, does not warrant a reproposal.

H. No Final Action With Respect to the Proposed Revocation of PM_{10} Annual Increments

In the 2007 NPRM, we proposed to either revoke or replace the annual increments (Class I, II, and III) for PM_{10} to conform to the earlier revocation of the annual PM_{10} NAAQS. We proposed to revoke the annual increments, based on the same technical evidence that led us to revoke the annual PM_{10} NAAQS, if we decided to use Option 1 for adopting $PM_{2.5}$ increments, and discussed our authority and rationale for doing so. 72 FR 54136.

As an alternative, under Options 2A and 2B we proposed to replace the existing annual PM_{10} increments with equivalent substitute $PM_{2.5}$ increments using the authority under section 166(f) of the Act. After further analysis and consideration of the comments on this issue, we have decided not to take any final action on our proposal to revoke the existing increments for PM_{10} as part of this rulemaking. The effect of not taking final action with respect to the PM_{10} annual increments is to leave those increments in place and unchanged.

Three commenters agreed with EPA's proposal to "adopt the 24-hour and annual $PM_{2.5}$ increments and to revoke the annual PM_{10} increments." One commenter stated, "counting and tracking increment is confusing enough without adding the confusion of potentially overlapping PM standards." The commenter noted that the "cleanest approach is to establish a single new $PM_{2.5}$ increment and work from there." The commenter suggested that EPA first "develop a coarse fraction increment, once EPA establishes coarse PM NAAQS." The commenter added that the removal of the PM_{10} annual increment is supported by the removal of the "health based standard for annual PM_{10}."

One of the commenters agreed, "it makes no sense for EPA's regulations to contain an annual increment for PM_{10} even though an annual PM_{10} NAAQS no longer exists." The commenter added, "EPA is without authority under Section 166(f) to retain the PM_{10} annual increment if it adopts a $PM_{2.5}$ annual increment." This commenter explained, "EPA is compelled by law to eliminate the PM_{10} annual increment."

We agree with this commenter that section 166(f) is a "substitution" approach; however, as we stated in our 2007 NPRM, we expressed some concern about using section 166(f) to substitute $PM_{2.5}$ increments for PM_{10} increments. In fact, some commenters challenged our authority under section 166(f) to replace the PM_{10} increments. In our response to the following comments, we address the legal issues that we believe prevent us from simply revoking the PM_{10} increments.

[20] "A source will be considered to impact an area if it has an impact of 1 μg/m³ or more of SO_2 or PM on an annual basis. This figure has been selected because it corresponds to levels of significance used in previous Agency determinations for SO_2 and PM. 45 FR 52716.

One environmental commenter claimed, "the agency has no authority to repeal an existing PM_{10} increment without at the same time restoring the corresponding TSP increment." The commenter noted, "Congress established the TSP increments by statute and gave EPA no authority to revoke them," and "instead, Congress gave EPA only limited authority to substitute PM_{10} increments for TSP increments under the conditions specified in Section 166(f)." The commenter explained, "EPA cannot revoke the annual PM_{10} increments, either by "replacing" them with $PM_{2.5}$ increments or otherwise, unless EPA at the same time restores the annual TSP increment." The commenter noted, "retention of the PM_{10} annual increment is also entirely compatible with the statutory purposes, notwithstanding EPA's revocation of the annual PM_{10} NAAQS." The commenter further noted the following examples/evidence that retention of the annual PM_{10} increments is important to achieving the goals of the Act's PSD provisions:

- "While EPA attributes the visibility impairing impacts of PM pollution primarily to elevated short term fine particle concentrations, EPA recognizes that PM_{10} plays a significant role in the other welfare related impacts of PM pollution." 72 FR 54136.
- "EPA also states that the most significant PM-related ecosystem-level effects result from long term cumulative deposition * * * that exceeds the natural buffering or storage capacity of the ecosystem and/or affects the nutrient status of the ecosystem." 72 FR 54131.

Five State/local agency commenters opposed the revocation of PM_{10} annual increments "until EPA makes a determination on a PM-coarse NAAQS" and/or "establishes equivalent increments for PM-coarse." One of these commenters added, "it is prudent to maintain the PM_{10} increments until EPA makes a determination on the health and environmental effects of the coarse fraction of PM." The commenter claimed that, "if EPA retains the annual PM_{10} increments" "then the determination of $PM_{2.5}$ increments can complement the continuation of PM_{10} increment determinations without any discontinuities or unwanted degradation concerns."

Another one of these commenters stated, "the basis for dismissing the annual PM_{10} NAAQS by the substitution of fine particle NAAQS to address certain health and welfare effects does not provide a basis for dismissing a PSD increment which is meant to stop significant degradation of air quality." The commenter noted, "as refinements are made to estimation of fine particle emissions or in instances where these are deemed not to be a major component of particulate emissions, the PM_{10} annual increment could prevent long term deterioration of air quality associated with the coarse component."

One State/local agency commenter noted, "EPA also proposes to replace the PM_{10} annual increment with the corresponding $PM_{2.5}$ increment under the Section 166(f) options 2A and 2B as well, but does not provide a substantive basis for such an action." The commenter does "not see the tension noted by EPA between Sections 166(a) and (f) with respect to reaching a holistic solution if EPA views $PM_{2.5}$ as a new indicator of PM, as we believe it can." The commenter explained, "under this approach, if EPA determines that coarse particle levels are necessary to protect the public from certain exposures not addressed by $PM_{2.5}$, then it will be appropriate for EPA to define complementary increments for coarse particulates as another indicator of PM." The commenter also asserted that the 24-hour increments for $PM_{2.5}$ must be based on section 166(f) authority, but believes that the $PM_{2.5}$ increment need not replace the PM_{10} increment for this averaging period.

One commenter requested that EPA "keep the PM_{10} PSD program (especially the increments) in place until the full $PM_{2.5}$ program is adopted and in place."

One commenter "does not support revoking the annual PM_{10} increments," because the commenter feels that "there are too many uncertainties regarding $PM_{2.5}$." The commenter provided the following example: "The program has been dragging for years, analytical methods are not formulated, the NSR part of the implementation rule has not issued, condensables are not yet included, and the impact of precursors has not been definitively explored." The commenter explained that "under these conditions, nothing concerning PM_{10} should be revoked until the reasons for doing so are clearly understood and the overall impact on ensuring clean air and the public health and welfare have been fully explored." The commenter suggested, "PM_{10} increments and NAAQS should remain in effect until these issues have been resolved to the satisfaction of the Administrator." This commenter believed that Options 2A and 2B must be based entirely on section 166(f) of the Act, but that the presence of increments for both PM_{10} and $PM_{2.5}$ can be supported under this section because the two sets of increments complement each other. The commenter indicated that the problem will be resolved when sufficient data are available to revoke the PM_{10} NAAQS and increments and/or PM_{10} is replaced by $PM_{10-2.5}$.

One State/local agency association commenter recommended that "EPA can and should continue both the 24-hour and annual average PM_{10} PSD increment program until $PM_{10-2.5}$ standards are promulgated." The commenter explained that "EPA has the discretion to accomplish this under CAA § 166(f)" and "at a minimum, the agency should continue the 24-hour PM_{10} increments in conjunction with the continuation of the 24-hour PM_{10} NAAQS."

As stated previously, in this rule we are taking no final action on our proposal to revoke the annual PM_{10} increments even though the annual PM_{10} NAAQS has been revoked. Based on comments and our own legal analysis of the PM_{10} increments, we have concluded that there is a strong legal basis for not revoking the annual increments at this time. The PM_{10} increments were promulgated on June 3, 1993 (58 FR 31622) as replacement increments for the then existing statutory increments for PM measured as TSP. The fact that EPA promulgated the PM_{10} increments as "equivalent" replacements for the TSP increments under the authority of section 166(f) of the Act is important in that EPA does not have authority to simply remove the TSP increments that were explicitly defined within the PSD program requirements in the Act. Accordingly, we believe that the annual TSP increments would be restored by default should we decide to revoke the annual PM_{10} increments as proposed. However, even if the original annual TSP increments were not restored, there is no basis for automatically revoking the annual PM_{10} increments simply because we have revoked the annual PM_{10} NAAQS, because annual increments are not contingent upon the existence of annual NAAQS. This is clear from the court's decision in the earlier NO_2 increment litigation stating that increments for a particular pollutant do not necessarily need to match the averaging periods that have been established for NAAQS for the same pollutant. *EDF* v. *EPA,* at 189–190 ("* * * the 'goals and purposes' of the PSD program, set forth in § 160, are not identical to the criteria on which the ambient standards are based.").

I. Other Comments on Increments

Ten commenters (including State/local agencies and industry commenters) supported section 166(f) of the Act as the basis for $PM_{2.5}$ increments. These commenters typically voiced the belief that when Congress enacted section 166(f), it authorized EPA to update PM increments when another indicator was defined, and that section 166(f) allows EPA to continue do so as long as these increments are of equal stringency to the prior increments. Some of these commenters believe that section 166(f) is the only legitimate approach under the Act, while others indicated simply that it is preferable to section 166(a). Some of the commenters believe that section 166(f) authority can be used to add $PM_{2.5}$ increments to the existing PM_{10} increments. Others believe that $PM_{2.5}$ increments finalized under section 166(f) must fully replace the existing PM_{10} increments, and recommended doing so.

For the reasons discussed previously in this preamble, EPA has decided to finalize the $PM_{2.5}$ increments under the authority of section 166(a) of the Act. With respect to the potential creation of $PM_{2.5}$ increments under section 166(f) (as discussed in the 2007 NPRM at 72 FR 54120–54121), we have not reached any final conclusion as to whether that approach is authorized by the statute, but believe that such an approach raises significant legal issues. Because the Agency is not relying on section 166(f) in this rulemaking, we do not address these issues in this preamble, though some additional discussion is included in the Response to Comments document for this rule.

One industry association that supported the Option 1 approach based on section 166(a) authority also acknowledged that EPA is authorized to use the Option 2 approach based on section 166(f) authority. An industry commenter indicated that 2007 NPRM's arguments regarding the alternative legal authorities under section 166(a) and (f) were not compelling; the commenter recommended setting the $PM_{2.5}$ increments at the levels proposed as Option 2B because they would have the lowest economic impact.

As noted previously, we have decided to finalize Option 1 based on section 166(a) authority because we believe that provision provides the clearest statutory authority for purposes of developing increments based on $PM_{2.5}$. We would point out, however, that any conclusion as to which option would yield increments that "have the lowest economic impact" must include a consideration of not only the levels of the increments but also the associated baseline dates that define when emissions changes must be considered to affect the amount of increment consumed. Under Options 2 and 3, the $PM_{2.5}$ increments would be regarded as replacement increments for the PM_{10} increments and, as such, would include amounts of increment (based upon the $PM_{2.5}$ component) already consumed under the existing PM_{10} increment system. Thus, portions of the substitute $PM_{2.5}$ increments could have already been consumed by previous PSD sources that emit PM. If, in fact, a portion of the $PM_{2.5}$ increments had already been consumed by the prior PM_{10} increment consumption process, than there would be a basis to conclude that less additional economic growth would be allowed under a set of replacement $PM_{2.5}$ increments as compared to $PM_{2.5}$ increments based on separate, independent baseline dates.

One industry commenter suggested that EPA develop geographic area-specific increments (and SILs and SMCs) that take local conditions into account. The commenter pointed out that $PM_{2.5}$ levels in PSD areas proximate to international borders may be elevated by sources outside the legal and practical control of the United States and State authorities. The commenter also noted that $PM_{2.5}$ levels may be elevated by natural conditions, such as drought, fires, geologic formations (sandy or fine-grained surface features), high winds, etc., leading to excessively dusty ambient conditions over which the local area has no control. The commenter indicated that local area baselines must reflect these PM emissions, though they are not reflected in the local area's emissions inventory. The commenter urged EPA not to penalize such PSD areas by imposing uniform national PSD increments (or SILs or SMCs) where the conditions of concern are not capable of control.

As previously discussed, this final rule establishes an area classification system with prescribed, uniform $PM_{2.5}$ increments for each class. We do not believe that it is necessary to develop different increments (or SILs or SMC) for different areas of the country. Emissions from natural conditions such as those described by the commenter would not consume increment due to their natural and temporary nature. In addition, if a State wishes to disregard new emissions from sources outside the United States, the State's PSD program may provide that such emissions do not consume increment (*see* 40 CFR 51.166(f)(1)(iv)).

VI. Final Action on $PM_{2.5}$ SILs

A. EPA's Determination on SILs for $PM_{2.5}$

It is EPA's longstanding policy to allow the use of the SILs as *de minimis* thresholds under the NSR programs at 40 CFR 51.165(b) and part 51, Appendix S, to determine whether the predicted ambient impact resulting from the emissions increase at a proposed major new stationary source or modification is considered to cause or contribute to a violation of the NAAQS. We have also allowed the SILs under the PSD program to determine: (1) When a proposed source's ambient impacts warrant a comprehensive (cumulative) source impact analysis; (2) the size of the impact area within which the air quality analysis is completed, and (3) whether the emissions increase from a proposed new major stationary source or major modification is considered to cause or contribute to a violation of any NAAQS.

We proposed three separate options for setting SILs for $PM_{2.5}$. The first option relied upon the same approach we proposed for PM_{10} in the 1996 NSR Reform proposal. This set included Class I SILs set at 4 percent of the Class I $PM_{2.5}$ increments. For class II and III areas, we proposed to codify the SIL values that already existed for PM_{10}, *i.e.,* 1.0 µg/m³ (annual) and 5.0 µg/m³ (24-hour). Options 2 and 3 relied on scaling the PM_{10} SILs, as codified in 40 CFR 51.165(b), by a particular ratio. Specifically, for Option 2, the multiplier was the emissions ratio of $PM_{2.5}$ to PM_{10} for point sources in the 1999 NEI; for Option 3 the multiplier was the ratio of the $PM_{2.5}$ NAAQS to the PM_{10} NAAQS. The resulting SILs were proposed as follows:

Option	Proposed SILs (µg/m³)					
	Class I		Class II		Class III	
	Annual	24-hr	Annual	24-hr	Annual	24-hr
1	0.04	0.08	1.0	5.0	1.0	5.0
2	0.16	0.24	0.8	4.0	0.8	4.0
3	0.06	0.07	0.3	1.2	0.3	1.2

We have decided to finalize the $PM_{2.5}$ SILs proposed under Option 3. As explained earlier, these values will be used in the Federal PSD preconstruction review process consistent with our proposal. *See* 72 FR 54138–41 and 54143.

States are not required to adopt SILs in their NSR or PSD programs; the analyses for $PM_{2.5}$ required by each applicable regulation can be carried out without using a SIL.[21] Therefore, we do not intend for any specific deadlines to apply under the regulations at 40 CFR 51.165(b), 51.166, or part 51, Appendix S for states to submit SILs for $PM_{2.5}$, should they choose to do so, as part of their revisions to incorporate the final rules for $PM_{2.5}$ into SIPs. Nonetheless, we believe that the availability of SILs as a screening tool greatly improves PSD program implementation by streamlining the permit process and reducing labor hours necessary to submit and review a complete permit application where the projected impact of the proposed source is *de minimis* in the relevant area. For these reasons, we are including the $PM_{2.5}$ SILs in the Federal PSD regulations at 40 CFR 52.21 to screen proposed projects concerning the need for a cumulative source impact analysis for $PM_{2.5}$.

B. Response to Comments Concerning the SILs

The primary purpose of the SILs is to identify a level of ambient impact that is sufficiently low relative to the NAAQS or increments that such impact can be considered trivial or *de minimis.* Hence, the EPA considers a source whose individual impact falls below a SIL to have a *de minimis* impact on air quality concentrations that already exist. Accordingly, a source that demonstrates that the projected ambient impact of its proposed emissions increase does not exceed the SIL for that pollutant at a location where a NAAQS or increment violation occurs is not considered to cause or contribute to that violation. In the same way, a source with a proposed emissions increase of a particular pollutant that will have a significant impact at some locations is not required to model at distances beyond the point where the impact of its proposed emissions is below the SILs for that pollutant. When a proposed source's impact by itself is not considered to be "significant," EPA has long maintained that any further effort on the part of the applicant to complete a cumulative source impact analysis involving other source impacts would only yield information of trivial or no value with respect to the required evaluation of the proposed source or modification.

While some commenters opposed all of the proposed options for $PM_{2.5}$ SILs, most commenters generally supported the use of a SIL as a screening tool for $PM_{2.5}$ air quality analyses. Commenters who supported one of the proposed options for the SILs were divided as to their support of a particular approach for selecting the SIL value, with each option receiving some support. Commenters also tended to agree that the SILs should not be used for determining significant impacts on AQRVs in Class I areas.

Those commenters supporting the concept of the SILs, yet opposing all proposed options, believed that all options yielded SILs that were too low. Another commenter, an environmental group, presented extensive legal and policy arguments against the SILs concept in general. Some of the significant comments and our responses to them are addressed herein, while others are covered in the Response to Comments document which we have placed in the docket for this rulemaking.

1. Legal Basis for SILs

One commenter opposed all three proposed options on both legal and policy grounds claiming that EPA has no legal authority to promulgate SILs and that the *de minimis* doctrine endorsed by the court does not apply to increment analyses, where Congress has expressly directed that the letter of the law applies in all circumstances, as it has in this case. (The commenter's policy concerns about SILs are discussed later in this section of this preamble.) The commenter stated that "Congress codified increments in section 163 of the Act, directing that SIPs contain measures assuring that the increments shall not be exceeded." According to the commenter, "The Act plainly provides that no major source may be constructed unless it meets this requirement, and may not contribute to an exceedance 'for any pollutant in any area.' " The commenter further stated that "the *de minimis* doctrine is inapplicable because it applies only where the regulations will yield a gain that is demonstrably trivial or zero."

We disagree with this commenter's claim that there is no legal basis for SILs. As stated in the 2007 NPRM, the concept of a SIL is grounded on the *de minimis* principles described by the court in *Alabama Power* at 323, 360. In this case reviewing EPA's 1978 PSD regulations, the court recognized that "there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." *Alabama Power* at 360. *See* the 2007 NPRM for more on how we have applied the *de minimis* principle in the past. See also, *Sur Contra La Contaminacion* v. *EPA,* 202 F.3d 443, 448–49 (1st Cir. 2000) (upholding EPA's use of SILs to allow permit applicant to avoid full impact analysis.)

2. Levels of the SILs

Several commenters opposed all three proposed options on the grounds that all yielded levels of SILs that are too low. One of these commenters argued that the proposed SILs "imply a level of monitoring and modeling sophistication that is currently absent in our regulatory scheme." This commenter recommended that EPA "rethink the level of the proposed SILs and select concentrations less likely to be within the level of error inherent in current monitoring and modeling methods."

We disagree with these commenters' concerns about all the proposed SILs being too low. While we did not select the Option 1 levels, the Class II and III SILs for $PM_{2.5}$ under that option were the same ambient concentration levels that are used for the SILs for the other criteria pollutants under 40 CFR 51.165(b), and those existing SILs values are associated with NAAQS that are considerably higher than the NAAQS for $PM_{2.5}$. Clearly, it would have been inappropriate to select Class II and III SILs for $PM_{2.5}$ that represent relatively higher values than the existing SIL values for other pollutants in light of the more stringent NAAQS levels that exist for $PM_{2.5}$. We also disagree that the SILs should be consistent with current monitoring capabilities for $PM_{2.5}$. The SILs are a screening tool used in comparison with modeled predictions—not monitored concentrations—of $PM_{2.5}$. Monitoring accuracy is not a relevant concern in predicting with air quality dispersion models the concentrations of a pollutant that a source will cause if its construction and operation are allowed to occur.

Two commenters expressed concern about national *de minimis* values. One stated that "the idea that a single national number can define 'trivial' is flawed, given that even very small impact can be of great significance in an area that is close to an increment or NAAQS." The other commenter

[21] We note that, under the 2007 NPRM, we proposed that the SILs for $PM_{2.5}$ would not be treated as a minimum program element for State PSD programs; however, the proposed regulatory language at 40 CFR 51.166(k)(2) incorrectly stated the "the plan shall provide that," which would indicate that the use of the SILs for $PM_{2.5}$ was required in the State plan. This final rule corrects this error.

recommended that EPA "develop geographic area-specific * * * levels that take local conditions into account." This commenter reasoned that some PSD areas "should not be 'penalized' by a single, national PSD increment, significant impact levels and significant monitoring level, where the conditions of concern are not capable of control."

With regard to the first of these commenters, our longstanding policy has been that when a source has a *de minimis* impact on an existing air quality problem, that source should not necessarily be required to bear the burden of addressing its small contribution to a problem caused primarily by other sources. However, notwithstanding the existence of a SIL, permitting authorities should determine when it may be appropriate to conclude that even a *de minimis* impact will "cause or contribute" to an air quality problem and to seek remedial action from the proposed new source or modification.

We do not agree with the second of these comments concerning the development of regional SILs based on a concern that some amounts of $PM_{2.5}$ in a particular area are "not capable of control." The $PM_{2.5}$ SILs define a threshold level for determining whether a predicted ambient impact by a proposed major stationary source or major modification of $PM_{2.5}$ needs to undergo a more thorough analysis of the $PM_{2.5}$ NAAQS or increments. This value is not directly affected by the total amounts of $PM_{2.5}$ that may exist in an area or by what causes the existing $PM_{2.5}$ concentrations, rather by the impact of a single source relative to the levels of the NAAQS and increments that must be protected. Therefore, we do not see why the SILs should be influenced by the geographic area of concern, or how different levels of SILs for the same pollutant and averaging period would be necessary.

With regard to the commenters that supported at least one of the proposed SILs options, they generally did not prefer the entire suite of SILs (Class I, II, and III SILs) from a single option, but instead supported parts of different options, primarily divided by drawing a distinction between the Class I SILs and the SILs for Class II and III areas. Consistent with the way that commenters addressed the Class I, II, and III SILs, we will address the comments separately herein as well.

a. Class I SILs

Support and opposition for the proposed $PM_{2.5}$ SILs for Class I areas was fairly evenly divided. The $PM_{2.5}$ SILs for Class I areas proposed under Option 2 received the support of some commenters, but also received an equal amount of opposition. Option 1, which yielded the lowest (most restrictive) values for the Class I area SILs for $PM_{2.5}$ (annual and 24-hour averages), was supported by some commenters, including a Federal agency that serves as a FLM for Federal Class I areas under the PSD program, but was equally opposed. Finally, comments supporting the Class I SILs proposed under Option 3 (from which we derived the values included in the final rules) were matched by comments that opposed the Class I SILs under Option 3.

One commenter opposing the Option 3 SILs for Class I areas said that the values "appear to be unrealistically low and, if selected, would point to the need for EPA to conduct an economic impact analysis." We disagree that adopting the Option 3 SILs for Class I areas (and Class II and III areas) will result in economic impacts significant enough to warrant an economic impact analysis. Under the Paperwork Reduction Act, EPA is required to analyze, and receive approval from the Office of Management and Budget (OMB) for, the recordkeeping and reporting burden imposed by its regulations (referred to as the "Information Collection Request" or "ICR" for the regulation). For the PSD program, this includes the burden associated with the entire permitting process, including any required modeling analyses. In our analysis for this rulemaking, we have concluded that the number of PSD permits issued annually will be unchanged (at an estimated 274 per year), while the total burden across all PSD permit applicants of adding $PM_{2.5}$ analyses will increase by a total of approximately 29,000 hours per year at a cost of approximately $2.8 million per year. This total annual impact on industry is a small fraction of the threshold ($100 million per year) that is considered "significant" under Executive Order 12866 (Regulatory Planning and Review) and the Unfunded Mandates Reform Act. See sections X.B and X.D of this preamble for more on the Paperwork Reduction Act and the Unfunded Mandates Reform Act, respectively. Our analysis of the recordkeeping and reporting burden of this rulemaking can be found in the docket for this ICR.[22]

Another commenter stated that the use of a NAAQS-based ratio under Option 3 for the proposed SILs does not "translate back to the emissions point level when comparing PM_{10} and $PM_{2.5}$." This commenter continued, "this is an invalid method of proceeding because EPA has not shown that there is a correlation between the NAAQS and direct $PM_{2.5}$ since there is no accounting for precursors and EPA does not have a quantifiable sense of the portion of $PM_{2.5}$ that is condensable for various industries."

We disagree with the commenter's concern that the use of NAAQS-based ratios is an invalid method for developing the $PM_{2.5}$ SILs. The purpose of using the NAAQS ratio with the PM_{10} SILs to develop $PM_{2.5}$ SILs is to establish values that have a comparable relationship between ambient concentrations of PM_{10} and $PM_{2.5}$ and their respective NAAQS levels. Whether a particular ambient concentration of $PM_{2.5}$ results from direct $PM_{2.5}$ emissions or from precursor emissions is not relevant to this particular approach. The $PM_{2.5}$ SILs in this final rule are intended to be compared to the ambient concentrations of $PM_{2.5}$ that are predicted by modeling the emissions of a proposed new project. Ambient concentrations of $PM_{2.5}$ can be the result of direct $PM_{2.5}$ emissions, which may include condensable particulate matter, as well as precursor emissions, *e.g.,* SO_2 and NO_X.

We note that the 2007 NPRM included proposed regulatory language providing that demonstrations of whether the air quality impact of a major new source or modification would be less than the $PM_{2.5}$ SILs be based on direct $PM_{2.5}$ emissions from the proposed project. The intent of this was to recognize the technical limitations associated with modeling precursor emissions to predict ambient $PM_{2.5}$ impacts. However, in this final rule we have removed that limitation by removing the reference to "direct" $PM_{2.5}$ emissions.

One commenter, who did not support any of the proposed SILs options, was especially critical of the Class I SILs for $PM_{2.5}$ under Option 1, stating that multiplying the proposed $PM_{2.5}$ increment by 4 percent is without legal or practical merit. The commenter stated that just because "4 percent may have been a reasonable multiplier to use in establishing a significant emission rate threshold does not mean that the multiplier should be used for a completely different regulatory purpose." The commenter added that if the $PM_{2.5}$ SILs for Class I areas under Option 1 were codified, emissions from even the most well-controlled coal-fired electric generating station located as far away as 300 km from a Class I area could well exceed the threshold.

[22] *See* "Information Collection Request (ICR) for the Prevention of Significant Deterioration for $PM_{2.5}$-Increments, Significant Impact Levels and Significant Monitoring Concentration," Docket No. EPA–HQ–OAR–2007–0628.

In contrast, the Federal agency commenter supporting the $PM_{2.5}$ SILs for Class I areas under Option 1 explained that they analyzed the effectiveness of the three sets of proposed SILs by modeling four different coal-fired power plant scenarios using an EPA-approved long-range transport model. The modeled plants included a large 1,500 megawatt (MW) facility, a moderate-sized 500 MW facility, and two medium 800 MW facilities. Based on this modeling analysis, the commenter concluded that the proposed levels of the Class I 24-hour SILs based on Option 1 and Option 3 are "more appropriately protective of the proposed Class I $PM_{2.5}$ increment and impacts to visibility than the level obtained under Option 2." This commenter supported the consistency of using 4 percent of the Class I increments that was used by EPA in proposing Class I SILs for SO_2, NO_X, and PM_{10} in 1996.

We chose the Class I SILs under Option 3 because we believe that this option yields the most appropriate combination of SILs for all area classifications. Whether a particular source will have a significant impact on an area is determined to some extent by the amount of its emissions, but also by other factors such as the height of release, pollutant transport distance, terrain features, and meteorological factors. Thus, we did not select SILs values to address a certain size source or the degree of control of that source, but the ambient impact of that source relative to the NAAQS and increments that will result from the source's emissions. While the annual Class I SIL under Option 3 represents a level that is somewhat greater than 4 percent of the $PM_{2.5}$ annual increment for Class I areas, it is sufficiently close (as derived from a ratio of the $PM_{2.5}$ NAAQS to the PM_{10} NAAQS) so as to provide a reasonable threshold for defining *de minimis* for purposes of conducting a Class I increment analysis. We had proposed the use of 4 percent of the existing Class I increments to develop SILs for pollutants in the 1996 NSR Reform proposal; however, that particular component of the proposal was never finalized. *See* 61 FR 38250 beginning at 38291. We will further discuss our rationale for selecting the SILs under Option 3 in the discussion which follows for the Class II and III SILs.

b. Class II and III SILs

While many commenters tended to favor Option 2 with regard to the proposed Class I increments, they tended clearly to support Option 1 for defining Class II and III SILs for $PM_{2.5}$. These particular SILs for $PM_{2.5}$ were proposed so as to be equal to the existing Class II and III SILs for the existing pollutants. In all, six commenters supported Option 1. One of these commenters stated that Option 1 SILs for Class II and III areas are "sufficiently stringent and fully consistent with the *de minimis* justification for SILs." The commenter added that "when conducting an air quality impact analysis * * * most applicants assume all coarse PM_{10} to be $PM_{2.5}$." The commenter claimed that this assumption is conservative and "overestimates the amount of fine particles being emitted and renders the effective SIL thresholds for $PM_{2.5}$ lower than those written into the regulations."

We strongly disagree that the SILs proposed under Option 1 as applied to $PM_{2.5}$ are sufficiently stringent. The application of such values as SILs for $PM_{2.5}$ would result in ambient concentrations of $PM_{2.5}$ that consume a much larger portion of both the $PM_{2.5}$ NAAQS and increments than either of the other two options proposed for $PM_{2.5}$ in light of the correspondingly more stringent levels of the $PM_{2.5}$ NAAQS and increments than those for the other pollutants. We believe that of the 3 options proposed, the $PM_{2.5}$ SILs based on Option 3 represent values that are more closely aligned percentage-wise with the SILs that have been or are being used for other forms of PM when compared to their respective NAAQS and increments.

We also disagree with the commenter's suggestion that the development of the SILs for $PM_{2.5}$, or any other pollutant, should in any way be influenced by the possibility that some sources may use conservative techniques for estimating a source's emissions rate. Such conservative techniques may be needed to the extent that technical issues associated with the determination of $PM_{2.5}$ emissions are identified, and can certainly be used at any time as a simplified methodology for estimating $PM_{2.5}$ emissions. But when such an overly conservative approach fails to yield *de minimis* results, the source may find it necessary to rely upon more accurate techniques for determining the amount of $PM_{2.5}$ that the source will emit.

Finally, one commenter, objecting to all of the proposed SILs, stated that EPA must assure that SILs are truly *de minimis* and must also include limitations on the use of SILs as necessary to prevent air quality from significantly deteriorating. We acknowledge that we did not conduct any new modeling or other types of analyses of the proposed SILs in order to explicitly show that the final $PM_{2.5}$ SILs values in this final rule are *de minimis.* Instead, we have relied on past actions regarding the setting of *de minimis* levels to illustrate that the $PM_{2.5}$ values selected via Option 3 represent values that are as stringent as the previous levels that have been established to define *de minimis* for PM_{10} and TSP. See 45 FR 52706–708 (using modeling and representative data).

Using the 24-hour and annual NAAQS ratios of $PM_{2.5}$ to PM_{10}, and multiplying them by the corresponding existing PM_{10} SILs, we conclude that the $PM_{2.5}$ SILs define *de minimis* for the $PM_{2.5}$ NAAQS in the same way as the PM_{10} SILs do for PM_{10} NAAQS. Using the increments as a basis for comparison provides further support for our conclusion. The annual and 24-hour $PM_{2.5}$ SILs represent about 7.5 and 13 percent of the annual and 24-hour $PM_{2.5}$ increments, respectively. By comparison, the annual and 24-hour PM_{10} SILs represent about 5 and 17 percent of the annual and 24-hour PM_{10} increments, respectively. We believe the $PM_{2.5}$ SILs fall into a comparable relative range with the PM_{10} SILs and can be considered *de minimis.*

In EPA's 1980 final rule for PSD, EPA adopted SERs for the pollutants then subject to regulation under the PSD requirements. The SER adopted for PM (then measured as TSP) was 25 tpy, which represented an emissions rate for which EPA modeled impacts that represented about 4 percent of the TSP 24-hour NAAQS and about 28 percent of the 24-hour TSP increment. Thus, EPA considered it acceptable under the *de minimis* assessment for PM that a source of particulate matter capable of consuming around 28 percent of the applicable 24-hour TSP increment could be exempted from the requirements to complete a comprehensive source impact analysis for the PM NAAQS and increments. 45 FR 52708.

In looking at the amount of increment that could be consumed by a source that is ultimately exempted from having to complete a comprehensive modeling analysis, it should be pointed out that the maximum modeled concentration typically occurs in a relatively limited area, as compared to the entire modeling domain. In particular, for the short-term averaging periods, such as the 24-hour averaging period, modeled concentrations across the modeled area generally show that ground level impacts are reduced significantly from the peak value as the pollutant travels a relatively short distance from the source, so that the peak modeled concentrations represent the source's impact at only a relatively few receptors within the modeled area. In addition, it is important to note that the temporal and spatial conditions which lead to a maximum impact by one source are seldom the same for other sources, such that maximum impacts of individual sources do not typically occur at the same location or at the same time.

Thus, in an area where several sources can demonstrate that their modeled impacts are *de minimis,* it generally should not be assumed that their individual maximum (albeit *de minimis*) impacts on the increment are additive. For example, four sources with *de minimis* $PM_{2.5}$ impacts, each consuming 12 percent of the 24-hour $PM_{2.5}$ increment, would not necessarily consume 48% of the 24-hour increment. Increment consumption is determined by the cumulative impact of source emissions on each individual receptor or modeling point in the area of impact within the baseline area defined for the affected PSD sources.

The preamble for the 1980 final rule for PSD included a description of a modeling analysis that EPA conducted to illustrate that a number of major sources each making a *de minimis* emissions increase for SO_2 could locate in an area (in that case, the Dayton area) and not cause a violation of either the applicable SO_2 increment or NAAQS. In that particular case, the modeling indicated that the maximum aggregate increment consumption for 37 sources emitting 40 tpy of SO_2 (the *de minimis* emissions rate for SO_2) would have a cumulative impact at any location of less than 1.5 μg/m³ on a 24-hour basis—well below the NAAQS and increments for SO_2. 45 FR 52708.

With regard to the commenter's recommendation that we place limitations on the use of SILs, we earlier provided an example of when it might be appropriate to require a modified source to mitigate its contribution to a violation of a NAAQS or increment even when the predicted ambient impact of the proposed emissions increase would result in what is normally considered to be *de minimis.* In addition, we have historically cautioned states that the use of a SIL may not be appropriate when a substantial portion of any NAAQS or increment is known to be consumed. We have indicated elsewhere in this preamble that states are not required to adopt the SILs for $PM_{2.5}$ in this final rule. At their discretion they may choose not to rely on SILs to screen applicants or they may establish more stringent values.

Finally, it should be noted that while a source having only *de minimis* impacts may not be required to complete a comprehensive source impact analysis, the emissions from such sources are still considered to consume increment and would be counted as part of the next increment analysis required to be completed by a PSD applicant in that same area, or by the State under a periodic increment review.

3. Relationship Between SILs and AQRVs

While commenters generally supported EPA's position that the SILs should not be used in any way to determine effects of emissions increases on the AQRVs in a Class I area, two commenters urged that the *de minimis* concentration be used for analyzing Class I area impacts under certain circumstances. That is, they believed that the SILs should be used to determine the need for a Class I area air quality analysis when an FLM has not identified a specific AQRV related to the pollutant under evaluation or obtained ambient monitoring data to confirm that predicted concentrations from air dispersion models are representative of actual AQRV impacts in the Class I area. The commenters claimed that without this flexibility, applicants would be required to conduct complex and extensive Class I air dispersion modeling without any clear objective, and regulatory agencies would have to review the modeling with limited information to determine if the emissions could cause an "adverse" impact or if potentially costly controls should be required.

These commenters appear to be suggesting that an FLM may needlessly call for an analysis of a particular Class I area, involving "complex and extensive Class I area dispersion modeling" despite the fact that no AQRV has been identified for that Class I area. We agree that a Class I analysis in the absence of any known AQRVs would be unnecessary because any demonstration of an adverse impact must be made with respect to a pollutant adversely affecting an AQRV. We believe, however, that such analyses would be avoided under the procedures set forth in section 165(d)(2)(C) of the Act which require that a notice be filed alleging that a proposed source may cause or contribute to adverse effects, and identifying the adverse impact. Insofar as the FLM must also demonstrate "to the satisfaction of the State that emissions from such facility will have an adverse impact on the air quality related values," it would be difficult to require the source to undertake any kind of detailed analysis in the absence of an AQRV on which such adverse impacts must be demonstrated. Thus, we have concluded that it is not necessary to use the SILs as a safeguard against unnecessary Class I area analyses. Instead, we believe that the need for a Class I analysis, other than the required analysis of the NAAQS and Class I increments (for both of which the SILs are intended to be used), should be based on the potential for adverse effects on an AQRV that the FLM has identified and believes could be affected by a pollutant that would be emitted by the proposed project.

4. Form of the SILs

One commenter stated that "the Proposal does not indicate how the proposed $PM_{2.5}$ SILs are to be interpreted." This commenter believed that "the form of the SILs should be consistent with the form of the $PM_{2.5}$ NAAQS" adding that "the current $PM_{2.5}$ NAAQS requires that compliance with the 24-hour and annual standards be determined using 3-year averaging." Specifically, "The annual standard is calculated based upon the 3-year average of annual mean $PM_{2.5}$ concentrations, and the 24-hour standard is based on the 3-year average of the 98th percentile (or highest-8th high value) of 24-hour concentrations."

In a March 23, 2010 EPA memorandum titled "Modeling Procedures for Demonstrating Compliance with $PM_{2.5}$ NAAQS," we provided guidance for using the SILs in conjunction with the 24-hour and annual $PM_{2.5}$ NAAQS, which takes into account the statistical form of the NAAQS. Following promulgation of the $PM_{2.5}$ increments in this final rule, we intend to provide guidance for interpreting the SILs for their use with the 24-hour and annual $PM_{2.5}$ increments as well.

5. SILs for Other Pollutants

In proposing Option 1, we noted that many who commented on the 1996 NSR Reform proposal supported this approach and believed that the proposed PM_{10} SIL values would serve as appropriate *de minimis* values. In fact, we are aware that many states have been using these proposed SILs for PM_{10} as screening tools since 1996 or earlier.

Regarding the proposed Class I SILs under Option 1, we expressed our belief that where a proposed source consumes less than 4 percent of the Class I increment, the source's impact is sufficiently low so as not to warrant requiring the source to carry out a detailed analysis of the combined effects of the proposed source and all other increment-consuming emissions in the area. 72 FR 54140. We previously used a similar rationale to establish the SERs for PSD applicability purposes, concluding in part that emissions rates that resulted in ambient impacts less than 4 percent of the 24-hour standards for PM and SO_2 were sufficiently small so as to be considered *de minimis.* 45 FR 52707–8.

The original SIL values of 1.0 and 5.0 μg/m³ for TSP and PM_{10} were interpreted by EPA as representing the minimum amount of ambient impact that is significant. This formed the basis for the proposed Option 1 $PM_{2.5}$ SIL values of 1.0 and 5.0 μg/m³ for the annual and 24-hour averaging periods for Class II and III areas.

The SILs currently appear in EPA's regulations at 40 CFR 51.165(b). That particular NSR regulation provides that states must include a preconstruction review permit program for any new major stationary source or major modification that proposes to locate in an attainment or unclassifiable area and would cause or contribute to a violation of the NAAQS. These values, added to 40 CFR 51.165(b) on July 1, 1987, have previously been referred to as "significant ambient impact concentrations" and are used to enable a source to determine whether its emissions would cause or contribute to a NAAQS violation at "any locality that does not or would not meet the applicable national standard." 52 FR 24672, April 2, 1985, at 24688.

In 1985, when EPA proposed to add "significant ambient impact levels" for PM_{10}, we also indicated that for PSD purposes the requirements under section 51.165(b) [23] "would be applied to all applicable PSD requirements." The EPA has since applied these values in other analogous circumstances under the PSD program. Based on EPA interpretations and guidance, SILs have also been widely used in the PSD program as a screening tool for determining when a new major source or major modification that wishes to locate in an attainment or unclassifiable area must conduct a more extensive air quality analysis to demonstrate that it will not cause or contribute to a violation of the NAAQS or PSD increment in the attainment or unclassifiable area. The SILs are also used to define the extent of the Significant Impact Area where, using air dispersion models and ambient monitoring data, a cumulative source impact analysis accounting for emissions changes from affected sources is performed.[24] *See* the 2007 NPRM for additional information on the history of EPA's guidance related to SILs (72 FR 54138–39).

In the 1996 NSR Reform proposal, we proposed to add the SILs for PM_{10} and other pollutants already contained in 40 CFR 51.165(b)(2) directly into the PSD regulations at 40 CFR 51.166 and 52.21. Because the SILs in 40 CFR 51.165(b) did not include thresholds for Class I areas, we proposed to set Class I SILs at the level of 4 percent of the respective Class I increments. Thus, for PM_{10}, the proposed Class I SILs were 0.2 μg/m³ (annual) and 0.3 μg/m³ (24-hour), and the proposed Class II and III SILs were 1.0 μg/m³ (annual) and 5.0 μg/m³ (24-hour). The EPA has not yet taken final action on the 1996 proposal on SILs for pollutants other than $PM_{2.5}$; therefore, we rely upon our longstanding policy to use those values, as codified in 40 CFR 51.165(b)(2), for PSD permitting.

VII. Final Action on the $PM_{2.5}$ SMC

A. EPA's Determination on the $PM_{2.5}$ SMC

As with the increments and SILs for $PM_{2.5}$, we proposed three different options for establishing an SMC for $PM_{2.5}$. The first option, referred to as the "lowest detectable concentration" approach, relied on the method we used in 1980 to develop the SMCs for the pollutants then subject to PSD. This particular method focused on development of the SMC value based on the current capability of providing a meaningful measure of the pollutants. *See* relevant discussion later in this section and at 45 FR 52710. Options 2 and 3, called the "$PM_{2.5}$ to PM_{10} emissions ratio" and the "$PM_{2.5}$ to PM_{10} NAAQS ratio," respectively, used the SMC for PM_{10} as the base for multiplying the emissions and NAAQS ratios to derive an SMC for $PM_{2.5}$. *See* 72 FR 54141. The three proposed options yielded the following numerical levels for the SMC:

- Option 1: 10 μg/m³, (24-hour average);
- Option 2: 8.0 μg/m³ (24-hour average); and
- Option 3: 2.3 μg/m³ (24-hour average).

We are taking final action on the SMC for $PM_{2.5}$ using the "lowest detectable concentration" approach (Option 1). However, we have determined that the SMC value that is calculated under this methodology is lower than the proposed value of 10 μg/m³ to reflect "current capability" with respect to the measurement and collection of ambient $PM_{2.5}$ concentrations. The result of such revised calculation is that the SMC value in this final rule is different from (more stringent than) the proposed level. The revised value is 4 μg/m³ (24-hour average). Our basis for the revised calculation and the resulting lower value is described in greater detail later in this section.

The EPA and its delegated reviewing authorities will use the $PM_{2.5}$ SMC to determine when it may be appropriate to exempt a proposed new major stationary source or major modification from the ambient monitoring data requirements under the PSD rules. Similarly, states with EPA-approved PSD programs that adopt the SMC for $PM_{2.5}$ may use the SMC, once it is part of an approved SIP, to determine when it may be appropriate to exempt a particular major stationary source or major modification from the monitoring requirements under their State PSD programs (*see* 40 CFR 51.166(i)(5)).

B. Response to Comments Concerning the SMC

1. Legal Issues

Under the Act and EPA regulations, an applicant for a PSD permit is required to gather preconstruction monitoring data in certain circumstances. Section 165(a)(7) of the Act calls for "such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any areas which may be affected by emissions from such source." In addition, section 165(e) of the Act requires an analysis of the air quality in areas affected by a proposed major facility or major modification and calls for gathering 1 year of monitoring data unless the reviewing authority determines that a complete and adequate analysis may be accomplished in a shorter period. These requirements are codified in EPA's PSD regulations at 40 CFR 51.166(m) and 52.21(m).

In 1980, EPA adopted regulations that included pollutant-specific SMCs as a screening tool for sources to determine whether they should conduct site-specific preconstruction ambient monitoring.[25] We explained our

[23] In 1985, the requirements now contained in 40 CFR 51.165(b) were contained in 40 CFR 51.18(k), which was later part of a major restructuring of the part 51 SIP requirements.

[24] In the case of a NAAQS compliance analysis, all sources in the area are considered to contribute to the air quality levels; for increments, however, "all" refers only to those sources whose emissions, in whole or in part, consume PSD increment for a particular pollutant.

[25] The provision for the monitoring exemption was originally promulgated at 40 CFR 51.24(i)(8) and 52.21(i)(8); it should be noted, however, that this provision is now found at 40 CFR 51.166(i)(5) and 52.21(i)(5).

position that it was appropriate to exempt sources from preconstruction monitoring requirements for a pollutant if the source could demonstrate that its ambient air impact was less than a value known as the Significant Monitoring Concentration or SMC. At the time the SMCs were adopted, EPA described them as "air quality concentration *de minimis* level[s] for each pollutant [that were available] for the purpose of providing a possible exemption from monitoring requirements." 45 FR 52676, 52707 (August 7, 1980). The EPA explained that it believed there was "little to be gained from preconstruction monitoring" where a source could show that its projected impact of a pollutant within the affected area was below the *de minimis* concentration for that pollutant. 45 FR at 52710.

One commenter opposed our proposed establishment of any SMC for $PM_{2.5}$, claiming that SMCs in general are contrary to the Act. The commenter stated that "in Section 165(e) Congress mandated a full year of continuous air quality monitoring for each major source subject to the PSD program." With this in mind, the commenter indicated that there are no exceptions, other than the limited statutory provisions, discussed above, which allow for less than a year's worth of monitoring based on a determination that a complete and adequate analysis of such purposes may be accomplished in a shorter period. The commenter then argued that "the allowance for a 'shorter period' hardly amounts to authority to waive monitoring entirely, which is what EPA's SMC proposal would do."

As with the SMCs adopted by EPA in 1980, the SMCs that we proposed for $PM_{2.5}$ are supported by the *de minimis* doctrine set forth in the *Alabama Power* opinion. Like the other pollutants for which EPA has promulgated SMCs, EPA believes there is little to be gained from preconstruction monitoring of $PM_{2.5}$ concentrations that cannot be accurately measured.

Therefore, in developing the three proposed options for an SMC, EPA sought to use methods that would identify levels representing a *de minimis* or insignificant impact on $PM_{2.5}$ ambient air quality that makes the collection of additional monitoring data extraneous.

2. Level of the SMC

As indicated earlier, the SMC for $PM_{2.5}$ in this final rule is 4 µg/m³, 24-hour average. This value may be used by permitting authorities to determine when they may exempt a proposed major stationary source or major modification for $PM_{2.5}$ from the air quality monitoring requirements for $PM_{2.5}$ under 40 CFR 51.166. The EPA and its delegated State/local programs will also use this new value under the Federal PSD program at 40 CFR 52.21.

We proposed three options for developing the SMC for $PM_{2.5}$; each option yielded a different concentration value. In choosing between the three options, EPA proposed to select the option that reflected the degree of ambient impact on $PM_{2.5}$ concentrations that could be considered truly *de minimis* and used to justify exempting a source from the requirement to gather 1 year of ambient monitoring data for $PM_{2.5}$. Ultimately, we have selected the "lowest detectable concentration" approach (Option 1) that relies directly upon ambient monitoring measurement sensitivity and precision. That is, if either the predicted source impact or estimated existing air quality in an area is below a concentration that can be accurately measured, then it would not be reasonable to require a source to attempt to collect such ambient data.

In 1980, EPA determined the SMCs based on the then current capability of providing a meaningful measure of ambient pollutant concentrations. The EPA promulgated values that represented five times the lowest detectable concentration in ambient air that could be measured by the instruments available for monitoring the pollutants. 45 FR 52710. The factor of "five" took into account the measurement errors associated with the monitoring of these low pollutant levels or small incremental changes in concentration. These measurement errors were said to arise from various sources, such as sample collection, analytical measurement, calibration, and interferences. *See* May 20, 1980 EPA memorandum from Rehme, K. A., to Warren Peters, contained in the docket for this rulemaking. Accordingly, in the 2007 NPRM for $PM_{2.5}$, we voiced our belief that this was a reasonable approach, since it was also used for PM_{10} and TSP. 72 FR 54141.

Eight commenters expressed support for the SMC based on Option 1, albeit at the higher level as originally proposed. In some cases, it is not clear whether these commenters supported the particular approach (*i.e.,* an SMC linked to the lowest detectable level) or the fact that the calculated value was simply the highest value of the values proposed under the three options. Clearly, some of the commenters indicated their support for the approach because it is consistent with the approach used for setting the original SMCs in 1980. Two commenters opposed Option 1 because it resulted in an SMC value that was too high. These latter commenters noted that the SMC derived via Option 1 (10 µg/m³, 24-hour average) was greater than the proposed 24-hour $PM_{2.5}$ increment for Class II areas and argued that such an outcome is inappropriate. We believe that this important concern is adequately addressed by the level of the SMC for $PM_{2.5}$ that is established in this rulemaking.

Several commenters supported the levels derived from either Option 2 or Option 3, but were concerned that the justification for choosing either of these values would need to be further explained. Some of these commenters were specifically concerned about the use of a 0.8 $PM_{2.5}$-to-PM_{10} emissions ratio which, they argued, relied on inventory data that did not adequately address all sources that would likely affect ambient concentrations of $PM_{2.5}$ in an area.

We conclude that Option 1 is the appropriate option for defining the SMC for $PM_{2.5}$. The ability to accurately measure ambient $PM_{2.5}$ concentrations is not related to a ratio of $PM_{2.5}$ to PM_{10} either directly in terms of emissions or as expressed by the respective NAAQS, which were used to define the SMC for $PM_{2.5}$ under Options 2 and 3, respectively. Our original concern was that, while Option 1 linked the SMC directly to the concept of a minimum detectable concentration (in order to identify *de minimis* monitoring circumstances), the value originally derived from that approach in the 2007 NPRM was high in relationship to the concentrations of $PM_{2.5}$ defined by the existing NAAQS and increments for $PM_{2.5}$.

In considering the use of Option 1 for developing the SMC in the final rules, however, we recognized after publication of the proposed rule that it was necessary to re-examine the assumptions that we relied upon in 1980 to develop the numerical values for the original SMCs so that we could most accurately reflect current monitoring techniques for $PM_{2.5}$. Our re-examination for this final rule utilized the most current information concerning the physical capabilities of the $PM_{2.5}$ Federal Reference Method Samplers, and addresses uncertainties introduced to the measurement of $PM_{2.5}$ due to variability in the mechanical performance of the $PM_{2.5}$ samplers and the micro-gravimetric analytical balances that weigh filter samples.

The minimum detection limit (MDL) of 2 µg/m³, originally used in 1980 for the SMC for PM and promulgated for $PM_{2.5}$ in 1997 (*see* 40 CFR part 50, Appendix L, section 3.1), has been reaffirmed by 9 years of field blank data collected by EPA through the $PM_{2.5}$ Performance Evaluation Program. However, we found that new data exist to "indicate a conservative estimate of the aggregate uncertainty factor is no greater that '2' at the concentration equal to the MDL of 2 μg/m³."[26] Accordingly, the lowering of the uncertainty factor from "five" to "two" under Option 1 yields an SMC of 4 μg/m³ $PM_{2.5}$, 24-hour average, rather than the proposed concentration of 10 μg/m³.

We conclude that the modified level of 4 μg/m³ $PM_{2.5}$, 24-hour average, for the SMC under Option 1, based upon a more current understanding of monitoring precision for PM, especially fine PM, addresses commenter support for the use of a method that is consistent with the way other SMCs were developed and most directly reflects monitoring capability for the pollutant of concern, while at the same time responding to the concern of other commenters that a value in the lower range of proposed SMC values is most reasonable considering the levels of the NAAQS and increments for $PM_{2.5}$.

C. Correction of Cross Reference in PSD Ambient Monitoring Requirements

In the 2007 NPRM, we proposed to take final action to correct a cross reference contained in paragraph (i) of the part 51 and 52 PSD regulations. Specifically, at the time of the proposal, paragraphs (ii) and (iii) in 40 CFR 51.166(i)(5), and paragraph (ii) in 40 CFR 52.21(i)(5), each referred to concentrations listed in paragraph (i)(8)(i) of both regulations. However, there is no paragraph (i)(8)(i) in existing 40 CFR 51.166, and no concentration values are contained in existing section (i)(8)(i) of 40 CFR 52.21. The cross reference in these provisions was intended to reference the SMCs in paragraph (i)(5)(i) of the two PSD regulations, but EPA failed to make this change when the paragraphs were renumbered in an earlier rulemaking. We did not receive any comments concerning this proposed corrective action. We made the necessary correction as part of the May 16, 2008 final $PM_{2.5}$ NSR Implementation Rule (*see* 73 FR 28348 and 28349); therefore it is not necessary to take any further action in this final rule with regard to the proposed correction.

VIII. Dates Associated With Implementation of the Final Rule

This section describes the key dates that we have established for implementing the final rule. In the 2007 NPRM, we indicated that different dates appeared to be appropriate for implementing the $PM_{2.5}$ increments, each date depending on the legal authority that we relied upon to promulgate it. We described and took comment on some alternative effective dates for increments, as well. In addition, we discussed and took comment on potential implementation dates for the SILs and SMC components of the proposed rule, which we indicated were not subject to the same statutory considerations as the increments.

We received a number of comments on the different proposed dates. We carefully considered these comments in selecting the dates described below for the final rule. Some of the significant comments and our responses to those comments are provided below. The remaining comments and our responses are contained in the Response to Comments document included in the docket for this rulemaking.

A. Effective Date of the Final Rule

In the 2007 NPRM, we took comment on the effective date of the final rule by presenting the different options available for implementing the $PM_{2.5}$ increments. Under Option 1 for developing the increments, we stated that section 166(b) of the Act specifies that increments promulgated pursuant to section 166(a) are to become effective 1 year following their promulgation. In contrast, there is no such 1-year delay or any other date prescribed for increments promulgated in accordance with section 166(f) of the Act, upon which we based Options 2 and 3 for the annual $PM_{2.5}$ increments. Thus, increments promulgated under Option 1, which relies on the procedural provisions of section 166(b) of the Act, would normally be subject to a 1-year delay in implementation, while increments promulgated under either Option 2 or 3, relying on section 166(f) of the Act, could follow a 30- or 60-day effective date, typical of the effective date for most new rules in general. In either case, our consideration of the effective date for the $PM_{2.5}$ increments assumed that the selected date would also be the effective date of the final rule.

In the 2007 NPRM, we took comment on some alternative approaches to establishing the effective date for $PM_{2.5}$ increments. Specifically, while proposing a 1-year effective date under Option 1, we requested comment on whether we could promulgate these increments under section 166(a) of the Act with an effective date of only 60 days. *See* 72 FR 54142.

Nine commenters supported our proposal to establish the effective date of the part 51 and 52 PSD regulations for $PM_{2.5}$ as 1 year from the date of publication. Alternatively, two commenters encouraged us to apply the 60-day effective date, while three other commenters supported other effective dates, as described in this section.

Seven industry and industry association commenters supported our proposal to make the final rule for $PM_{2.5}$ increments effective 1 year after promulgation. Most of these commenters cited the additional time necessary to develop the needed $PM_{2.5}$ inventories needed for implementation of the $PM_{2.5}$ PSD program. Two of the commenters urged EPA to allow State programs sufficient time to adopt increments, particularly if condensable particulate matter is included in the increment and its analysis. These commenters stated that the Federal rule should not be effective for 1 year. (They also stated that states should have 3 years for the associated SIP revisions.) These same commenters added that this delay would provide time for sources that have permits in the pipeline or are just about to submit an application to be able to complete the permitting process without undue delay. One of the commenters specifically voiced support for Option 1 for the effective date of the final rule (1 year) and Option 2B for the period granted for SIP revisions (3 years). This commenter also explained that this additional time may give the Agency time to promulgate better measurement methods for sources of condensable particulate matter.

Another of these commenters noted that, at the time of the proposal, the NSR portion of the CAFPIR had not yet been promulgated, and that states would need time to incorporate that rule as well as the requirements of the proposal into their SIPs. This commenter added that making the $PM_{2.5}$ increments effective before states and sources have had a reasonable opportunity to begin, let alone complete, the SIP process for the two related rulemakings would unnecessarily complicate an already-complex regulatory process.

In contrast, the two commenters supporting the shorter effective date encouraged us to apply the 60-day period for the effective date under whatever option is finalized. One of these commenters urged us to take measures to expedite the

[26] This information is contained in a March 12, 2009 internal EPA memorandum from Dennis Crumpler to Raj Rao, titled "PSD Monitoring De Minimis Concentration for $PM_{2.5}$," which has been placed in the docket for this rulemaking.

implementation of the $PM_{2.5}$ final rule and suggested that we choose the shortest of the proposed effective dates which are allowed under any of the applicable regulations. This commenter indicated that in light of the excessive delay in the implementation of the $PM_{2.5}$ PSD program since the NAAQS were promulgated, the 60-day effective date should be applied under EPA's preferred option.

In light of our decision to promulgate $PM_{2.5}$ increments under the authority of section 166(a) of the Act (proposed Option 1), we are faced with the decision as to how to most effectively implement the long-awaited $PM_{2.5}$ increments, recognizing that the Act provides for a 1-year implementation delay. We have concluded that it is most appropriate to follow the plain language of the Act which calls for a 1-year effective date for implementing increments developed under section 166(a) of the Act. We agree with the commenters who suggested that a shortened implementation delay was desirable because of the substantial delay in the promulgation of measures to prevent significant air quality deterioration with respect to $PM_{2.5}$. Nevertheless, we believe it would be inappropriate in this action to disregard the statutory language which plainly calls for a 1-year delay. Accordingly, we are setting the effective date of the $PM_{2.5}$ increments at 1 year from the date of promulgation of this final rule, consistent with the 1-year delay required under section 166(b) of the Act. We are doing this by setting the "trigger date" for $PM_{2.5}$ as October 20, 2011. *See* new 40 CFR 51.166(b)(14)(i)(*c*) and (ii)(*c*), and new 40 CFR 52.21(b)(14)(i)(*c*) and (ii)(*c*). At the same time, we are establishing an effective date for the other provisions, *i.e.,* the SILs and SMC for $PM_{2.5}$, in this final rule as December 20, 2010. This will enable the implementation of these key elements of this rule under the Federal PSD program as soon as possible.

1. State PSD Programs

In this final rule, we are establishing the final $PM_{2.5}$ increments as minimum program elements for all State PSD programs. Accordingly, states must submit for EPA's approval revised SIPs that incorporate the final $PM_{2.5}$ increments or alternative measures that can be demonstrated to EPA's satisfaction to provide an equivalent level of protection as the $PM_{2.5}$ increments. In accordance with section 166(b) of the Act, we are requiring states to submit revised implementation plans to EPA for approval within 21 months of promulgation, that is, by July 20, 2012. Section 166(b) also specifies that we must approve or disapprove these revisions within 25 months of promulgation (4 months from the statutory deadline for SIP submittal). We regard these statutory deadlines as maximum allowed timeframes for action. Moreover, we do not believe that the Act restricts our ability to approve SIP revisions requested by a State at any time before these deadlines. In this final rule, we are amending the regulatory provisions at 40 CFR 51.166(a)(6)(i) to articulate the deadline set forth by the statute for the SIP submittals involving the $PM_{2.5}$ increments pursuant to section 166(a) of the Act.

It is very unlikely that states will be able to revise their SIPs and submit them to EPA for approval prior to the applicability date of the $PM_{2.5}$ increments in this final rule, which is October 20, 2011. Therefore, there is likely to be a period of time after October 20, 2010 when State laws will not require PSD applicants otherwise subject to PSD for $PM_{2.5}$ to complete an increment analysis for the $PM_{2.5}$ increments, even though the $PM_{2.5}$ increments, major source baseline date, and trigger date have been established as a result of this final rule. Similarly, it is not clear whether states will have the authority to consider such applicants as having triggered the minor source baseline date during this interim period before their revised PSD rules containing the $PM_{2.5}$ increments and relevant baseline dates become effective.

The EPA does not intend to prescribe the implementation timeline for State programs; rather, each State will need to determine how increment consumption and the setting of the minor source baseline date for $PM_{2.5}$ will occur under its own PSD program. Nevertheless, regardless of when a State begins to require $PM_{2.5}$ increment analyses and how it chooses to set the $PM_{2.5}$ minor source baseline date, the emissions from sources subject to PSD for $PM_{2.5}$ on which construction commenced after October 20, 2010 (the major source baseline date) will consume $PM_{2.5}$ increment and must be included in increment analyses occurring after the minor source baseline date is established for an area under the State's revised PSD program.

2. Federal PSD Program

The Federal PSD regulations under 40 CFR 52.21 apply where states do not have approved PSD programs and in Indian lands. In such cases, either EPA implements the PSD program or the State will implement it under authority granted by EPA through a delegation agreement.

We proposed to begin implementing the Federal PSD program for $PM_{2.5}$ on the effective date of the final rule, *i.e.,* either 1 year from the date of publication in the **Federal Register** or 60 days from date of publication, if we developed the $PM_{2.5}$ increments pursuant to proposed Option 1. Alternatively, we requested comment on whether we should delay implementation of the Federal PSD program until 25 months after promulgation, which is the latest date by which EPA is required to approve State SIP revisions. This is the same approach we took in 1988 to implement the then new NO_2 increments. *See* 53 FR 40658. We did not propose the 24-month delay for the $PM_{2.5}$ increments because of the significant delay that has already occurred between the time we promulgated the $PM_{2.5}$ NAAQS and the time the $PM_{2.5}$ increment rulemaking would be finalized. However, we sought comment on this alternative approach because we recognized that it might not be equitable to begin implementation of the new program requirements in those few areas where the Federal program applies before the majority of states are required to implement the program.

Two commenters urged EPA to hold off implementation of State programs administered under the Federal PSD program in order to provide a uniform and consistent national approach. One State agency supported implementing the Federal PSD program with a delayed effective date of 1 year after the effective date of the final rule instead of 60 days.

We have decided to begin implementing the revised Federal PSD program as set out previously in our introductory discussion of this issue in section VIII.A. That is, the revised regulations at 40 CFR 52.21 will become effective in 60 days, on December 20, 2010. This will allow EPA or the delegated State agency to begin using the SILs and SMC for $PM_{2.5}$ on that date, as described in section VIII.C of this preamble. However, the date established in the regulations for the trigger date will ensure that the $PM_{2.5}$ increments do not become effective for 1 year, consistent with section 166(b) of the Act, and that the minor source baseline date cannot be established until the $PM_{2.5}$ increments become effective. However, PSD sources subject to $PM_{2.5}$ that receive their PSD permit after the date of publication of this final rule will be considered to consume $PM_{2.5}$ increments by virtue of the fact that they will commence construction after the major source baseline date for $PM_{2.5}$, which is the date of publication of this final rule.

Thus, sources in an area subject to the Federal PSD program for $PM_{2.5}$ will be able to use the SILs and SMC as screening tools for the required $PM_{2.5}$ NAAQS compliance demonstration, but in most cases will not be required to submit a $PM_{2.5}$ increment analysis as part of a complete PSD permit application for a Federal PSD permit unless the application is submitted on or after October 20, 2011. On or after that date, when an applicant submits a complete PSD permit application that is required to address $PM_{2.5}$ under the Federal PSD program, that first application will establish the minor source baseline date for $PM_{2.5}$ in the applicable attainment or unclassifiable area.

As with the State PSD program requirements, prior to the establishment of the minor source baseline date in an area, emissions increases from minor sources in the area will be counted toward the baseline concentration, rather than to the $PM_{2.5}$ increment. As described earlier, the emissions from major stationary sources that commence construction after the major source baseline date, regardless of the date on which their PSD application is submitted, must be counted toward consumption of the $PM_{2.5}$ increments. While these sources will not be required to submit an increment analysis for $PM_{2.5}$ as part of their complete application as long as they receive their PSD permit before the trigger date for $PM_{2.5}$ (*see* discussion that follows in section VIII.B), the emissions increases resulting from the permitting of these sources ultimately must be counted toward the $PM_{2.5}$ increments when the first PSD permit application submitted after the trigger date establishes the minor source baseline date for the area of concern, and in all subsequent $PM_{2.5}$ increment analyses for that area.

B. Transition Period

In the 2007 NPRM, we proposed a transition period to clarify when PSD permit applications must contain an increment analysis demonstrating compliance with the $PM_{2.5}$ increments following the date the $PM_{2.5}$ increments become effective in any State or Federal PSD program. Specifically, we proposed to establish a grandfathering provision to allow complete applications submitted before the increment effective date, but for which the permit had not yet been issued by the effective date, to continue being processed using the PM_{10} Surrogate Policy to satisfy the requirement to demonstrate compliance with the new $PM_{2.5}$ requirements. The grandfathering provision for $PM_{2.5}$ was originally proposed in the 2007 NPRM at 40 CFR 51.166(i)(10) and 40 CFR 52.21(i)(11) for State and Federal PSD programs, respectively. *See* 72 FR 54149 and 54154.

Three commenters supported the proposed grandfathering provision for sources that submitted a complete application before the effective date of the applicable PSD rules. Another commenter felt that it was reasonable to allow states a choice between using PM_{10} or $PM_{2.5}$ increments during a transition period including SIP approval, where applicable.

During the time since the proposal of this rule in 2007, we have reconsidered the need for the proposed transition period in the Federal PSD program to effectively implement the $PM_{2.5}$ increments. In light of the importance of preventing significant deterioration of $PM_{2.5}$ air quality and the amount of time that has passed since the initial promulgation of the $PM_{2.5}$ NAAQS, we do not believe that further delay is warranted. We expect that most permits issued after October 20, 2011 will be from sources that submitted their PSD applications after the major source baseline date for $PM_{2.5}$, which is defined as the date of publication of this final rule, so that they will be increment-consuming sources. Therefore, when these sources apply for their PSD permits, they will have had significant advance notice of when the $PM_{2.5}$ increments will become effective, *i.e.,* 1 year from the date of publication of this final rule. The review and permitting of permit applications submitted prior to the publication date of this final rule should generally be completed prior to the effective date of $PM_{2.5}$ increments and thus effectively have a transition period of 1 year to complete processing.

Thus, we are requiring each source that receives its PSD permit after the effective date of the $PM_{2.5}$ increments, regardless of when the application was submitted, to provide a demonstration that the source's proposed emissions increase, along with other increment-consuming emissions, will not cause or contribute to a violation of the $PM_{2.5}$ increments.

Under this final rule, sources applying for a PSD permit under the Federal PSD program after the major source baseline date for $PM_{2.5}$ (*i.e.,* after the date of publication of this final rule), but before the $PM_{2.5}$ increments become effective (*i.e.,* the date 1 year after publication of this final rule), will be considered to consume $PM_{2.5}$ increment. While EPA will not require any such source to include a $PM_{2.5}$ increment analysis as part of its initial PSD application, an increment analysis ultimately will be required before the permit may be issued if the date of issuance will occur after the trigger date, when the $PM_{2.5}$ increments become effective under the Federal PSD program.

Finally, for the same reasons that we are not adopting the proposed transition period that would have exempted PSD applicants with pending permit applications from demonstrating compliance with the $PM_{2.5}$ increment requirements under the Federal PSD program, we have decided not to provide an option for states to apply a transition period under 40 CFR 51.166. We believe it is appropriate for all increment-consuming sources subject to $PM_{2.5}$ to demonstrate compliance with the $PM_{2.5}$ increments when the required permit is issued after the $PM_{2.5}$ increments become effective in the State's PSD regulations.

C. SILs and SMC for $PM_{2.5}$

In the 2007 NPRM, we explained our position that SILs and SMCs are not minimum required elements of an approvable SIP. While these *de minimis* values are widely considered to be useful components for implementing the PSD program, they are not absolutely necessary for the states to implement their PSD programs. That is, states can satisfy the statutory requirements for a PSD program by requiring each PSD applicant to submit air quality monitoring data and to conduct a comprehensive air quality impacts analysis for $PM_{2.5}$ without using *de minimis* thresholds to exempt certain sources from such requirements. Because the *de minimis* values for $PM_{2.5}$ (and other pollutants) are not mandatory elements, we proposed not to establish specific deadlines for submitting revisions to incorporate the specific values for $PM_{2.5}$ into SIPs.

One State/local commenter agreed that the SILs and SMCs should not be a required element of the PSD SIP. Another State/local commenter agreed with our proposal, but stated that EPA has the authority to include SILs and SMCs as minimum program requirements per the opinion set forth in *Alabama Power.* This commenter added that the EPA Environmental Appeals Board has affirmed EPA's interpretation of the Act to allow EPA to evaluate the significance of a source's impact when determining whether the source's emissions would "cause or contribute" to a NAAQS or increments violation under section 165(a)(3) of the Act.

Two commenters disagreed with our proposed position and argued that SILs and SMCs should be mandatory elements of a State PSD program. One of these commenters argued that the requirement to model without the use of screening models with SILs and SMCs is so unreasonable that EPA must require that states adopt the SILs and SMCs to meet the Purpose clause of the Act, which requires a balancing of environmental and economic considerations. The other opposing commenter stated that the increments, SILs, and SMCs need to be adopted as a single regulatory approach because the SILs and SMCs define when additional work is needed to ensure that PSD requirements, such as maintaining adequate increment, are met. This commenter added that there is no reason for sources to be placed in the position of conducting expensive modeling that can delay a project when it is unnecessary from an air quality perspective.

We agree that the SILs and SMCs used as *de minimis* thresholds for the various pollutants are useful tools that enable permitting authorities and PSD applicants to screen out "insignificant" activities; however, the fact remains that these values are not required by the Act as part of an approvable SIP program. We believe that most states are likely to adopt the SILs and SMCs because of the useful purpose they serve regardless of our position that the values are not mandatory. Alternatively, states may develop more stringent values if they desire to do so. In any case, states are not under any SIP-related deadline for revising their PSD programs to add these screening tools.

Using the SILs for $PM_{2.5}$, when a proposed major new source or major modification of $PM_{2.5}$ predicts (via air quality modeling) an impact less than the $PM_{2.5}$ *de minimis* value, the proposed source or modification is not considered to have a significant air quality impact and would not need to complete a cumulative impact analysis involving an analysis of other sources in the area. Also, a source with a *de minimis* ambient impact would not be considered to cause or contribute to a violation of either the $PM_{2.5}$ NAAQS or increments.

The $PM_{2.5}$ SILs will become effective under the Federal PSD program on the effective date of this final rule, that is, on December 20, 2010, when either EPA, or a State acting under a delegation of EPA's authority, implements the revised PSD permitting requirements for $PM_{2.5}$ pursuant to 40 CFR 52.21. The SILs will be for use initially with the compliance demonstration for the $PM_{2.5}$ NAAQS, and later for the $PM_{2.5}$ increment analysis, under the Federal PSD program. We emphasize, however, that the $PM_{2.5}$ SILs are not intended to be used as part of the determination of adverse impacts on AQRVs for $PM_{2.5}$ in Class I areas.

Similarly, we intend to use the $PM_{2.5}$ SMC (4 $\mu g/m^3$, 24-hour average) as a screening tool in the Federal PSD permit program beginning on December 20, 2010. Accordingly, when either the modeled $PM_{2.5}$ impact of, or the existing ambient air quality within the area of, the proposed new major source or major modification is less than the $PM_{2.5}$ SMC, the reviewing authority may exempt the source or modification from the monitoring data requirements for $PM_{2.5}$ under 40 CFR 52.21(m).

IX. Other Regulatory Changes

The Act provides that the PSD regulations apply to areas designated as "attainment" or "unclassifiable" as defined by the Act. When the original regulations were written, the Act provisions for designating areas as either "attainment" or "unclassifiable" were contained in sections 107(d)(1)(D) and (E), respectively. In 1990, Congress revised section 107 and changed the relevant paragraphs defining "attainment" and "unclassifiable" areas to sections 107(d)(1)(A)(ii) and (iii), respectively. In accordance with these statutory changes, we are correcting the references to the statutory classifications contained in the existing PSD rules to match the revised paragraphs in the Act. *See* revised 40 CFR 51.166(b)(14)(iii)(*a*) and (15)(i) and (ii), and 40 CFR 52.21(b)(14)(iii)(*a*) and (15)(i) and (ii).

In adding the SILs for $PM_{2.5}$ in this final rule, we restructured paragraph (k) ("Source impact analysis") in the existing PSD regulations at 40 CFR 51.166 and 52.21. Under the restructuring of paragraph (k), old paragraph (k)(2) is now paragraph (k)(1)(ii). To accommodate this restructuring change, we are also revising grandfathering provisions that are contained in existing paragraphs (i)(8) and (i)(9) at 40 CFR 51.166, and paragraphs (i)(9) and (i)(10) at 40 CFR 52.21, which contained references to requirements contained in paragraph (k)(2). As revised, the grandfathering provisions now reference new paragraph (k)(1)(ii).

X. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principle set forth in the Executive Order. Accordingly, EPA submitted this action to OMB for review under Executive Order 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 this rule have been submitted for approval to the OMB under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

Pursuant to title I, part C, of the Act, the PSD program requires the owner or operator to obtain a permit prior to either constructing a new major stationary source of air pollutants or making a major modification to an existing major stationary source. The information collection for sources under PSD results from the requirement for owners or operators to submit applications for NSR permits. In some cases, sources must conduct preconstruction monitoring to determine the existing ambient air quality. For reviewing authorities, the information collection results from the requirement to process permit applications and issue permits, and to transmit associated information to EPA. The EPA oversees the PSD program, and the information collected by sources and reviewing authorities is used to ensure that the program is properly implemented.

The final rule will increase the PSD permitting burden for owners and operators of major stationary sources of $PM_{2.5}$ emissions by adding $PM_{2.5}$ increments to the list of existing increments for which air quality impact analyses must be carried out to track the amount of increment consumed by the proposed source and other sources in the area. Over the 3-year period covered by the ICR, we estimate an average annual burden totaling about 29,000 hours and $2.8 million for all industry entities that will be affected by the final rule. For the same reasons, we also expect the final rule (when fully implemented) to increase burden for the State and local authorities reviewing PSD permit applications. In addition, there will be additional burden for State and local agencies to revise their SIPs to incorporate the proposed changes. Over the 3-year period covered by the ICR, we estimate that the average annual burden for all State and local reviewing authorities will total about 7,500 hours and $581,000. 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 rule on small entities, "small entity" is defined as: (1) A small business as defined by the Small Business Administration's 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.

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 final rule will not impose any requirements on small entities because small entities are not subject to the requirements of this rule.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. The final rules adds only a relatively small number of new requirements to the existing permit requirements already in place under the PSD program, since states are currently implementing a PM_{10} surrogate program pursuant to EPA guidance. Thus, this action is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The final rule applies only to new major stationary sources and to major modifications at existing major stationary sources.

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 makes relatively minor changes to the established PSD program, simply making it possible for states to implement PSD for $PM_{2.5}$ instead of relying on PM_{10} as a surrogate. Thus, Executive Order 13132 does not apply to this rule. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed rule from State and local officials.

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). The final rule provides the elements to implement a $PM_{2.5}$ PSD program in attainment areas. The Act provides for states to develop plans to regulate emissions of air pollutants within their jurisdictions. The Tribal Air Rule (TAR) under the Act gives tribes the opportunity to develop and implement Act programs to attain and maintain the $PM_{2.5}$ NAAQS, but leaves to the discretion of the tribes the decision of whether to develop these programs and which programs, or appropriate elements of a program, they will adopt. Thus, Executive Order 13175 does not apply to this action.

The EPA did reach out to national tribal organizations in 2006 to provide a forum for tribal professionals to provide input to the rulemaking. However, not much participation or input was received.

G. Executive Order 13045—Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. One of the basic requirements of the PSD program is that new and modified major sources must demonstrate that any new emissions do not cause or contribute to air quality in violation of the NAAQS.

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

This action 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 effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

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

The 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 does not affect the level of protection provided to human health or the environment. This final rule will provide regulatory certainty for implementing the preconstruction NSR permitting program for $PM_{2.5}$. However, the requirements are similar to the existing requirements of the PM_{10} program and hence do not impact the human health or environmental effects.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, 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. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). Nevertheless, this rule needs to be reviewed for the $PM_{2.5}$ increments being promulgated herein so that they can be scrutinized by Congress as intended under section 166(b) of the Act. Even though the $PM_{2.5}$ increments will not become applicable for 1 year, the final rule will become effective 60 days from the date of publication, that is, on December 20, 2010, for the screening tools (SILs and SMC) being established in this rule.

XI. Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by December 20, 2010. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

XII. Statutory Authority

The statutory authority for this final action is provided by sections 101, 160, 163, 165, 166, 301, and 307(d) of the Act as amended (42 U.S.C. 7401, 7470, 7473, 7475, 7476, 7601, and 7607(d)).

List of Subjects

40 CFR Part 51

Administrative practices and procedures, Air pollution control, Environmental protection, Intergovernmental relations.

40 CFR Part 52

Administrative practices and procedures, Air pollution control, Environmental protection, Intergovernmental relations.

Dated: September 30, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart I—[Amended]

■ 2. Section 51.165 is amended by revising the table in paragraph (b)(2) to read as follows:

§ 51.165 Permit requirements.

* * * * *

(b) * * *

(2) * * *

Pollutant	Annual	Averaging time (hours)			
		24	8	3	1
SO_2	1.0 μg/m³	5 μg/m³		25 μg/m³	
PM_{10}	1.0 μg/m³	5 μg/m³			
$PM_{2.5}$	0.3 μg/m³	1.2 μg/m³			
NO_2	1.0 μg/m³				
CO			0.5 mg/m³		2 mg/m³

* * * * *

■ 3. Section 51.166 is amended as follows:

■ a. By revising paragraph (a)(6)(i);

■ b. By revising paragraph (b)(14)(i)(*a*);

■ c. By removing the period at the end of paragraph (b)(14)(i)(*b*) and adding "; and" in its place;

■ d. By adding paragraph (b)(14)(i)(*c*);

■ e. By revising paragraph (b)(14)(ii)(*a*);

■ f. By removing the period at the end of paragraph (b)(14)(ii)(*b*) and adding "; and" in its place;

■ g. By adding paragraph (b)(14)(ii)(*c*);

■ h. By revising paragraph (b)(14)(iii)(*a*);

■ i. By revising paragraph (b)(15)(i) and paragraph (b)(15)(ii) introductory text;

■ j. By revising the table in paragraph (c)(1);

■ k. By revising paragraph (c)(2);

■ l. By revising paragraph (i)(5)(i)(*c*);

■ m. By redesignating existing paragraphs (i)(5)(i)(*d*) through (*j*) as paragraphs (i)(5)(i)(*e*) through (*k*);

■ n. By adding new paragraph (i)(5)(i)(*d*);

■ o. By removing "(k)(2)" from paragraph (i)(8) and adding "(k)(1)(ii)" in its place;

■ p. By removing in two places "(k)(2)" from paragraph (i)(9) and adding "(k)(1)(ii)" in those places;

■ q. By revising paragraph (k);

■ r. By removing the words "particulate matter" in the last sentence of paragraph (p)(4) introductory text and adding in their place "$PM_{2.5}$, PM_{10}"; and

■ s. By revising the table in paragraph (p)(4).

§ 51.166 Prevention of significant deterioration of air quality.

(a) * * *

(6) * * *

(i) Any State required to revise its implementation plan by reason of an amendment to this section, with the exception of amendments to add new maximum allowable increases or other measures pursuant to section 166(a) of the Act, shall adopt and submit such plan revision to the Administrator for approval no later than 3 years after such amendment is published in the **Federal Register**. With regard to a revision to an implementation plan by reason of an amendment to paragraph (c) of this section to add maximum allowable increases or other measures, the State shall submit such plan revision to the Administrator for approval within 21 months after such amendment is published in the **Federal Register**.

* * * * *

(b) * * *

(14)(i) * * *

(*a*) In the case of PM_{10} and sulfur dioxide, January 6, 1975;

* * * * *

(*c*) In the case of $PM_{2.5}$, October 20, 2010.

(ii) * * *

(*a*) In the case of PM_{10} and sulfur dioxide, August 7, 1977;

* * * * *

(*c*) In the case of $PM_{2.5}$, October 20, 2011.

(iii) * * *

(*a*) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166; and

* * * * *

(15)(i) *Baseline area* means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the Act in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact for the pollutant for which the baseline date is established, as follows: Equal to or greater than 1 $\mu g/m^3$ (annual average) for SO_2, NO_2, or PM_{10}; or equal or greater than 0.3 $\mu g/m^3$ (annual average) for $PM_{2.5}$.

(ii) Area redesignations under section 107(d)(1)(A)(ii) or (iii) of the Act cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

* * * * *

(c) * * *

(1) * * *

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I Area	
$PM_{2.5}$:	
Annual arithmetic mean	1
24-hr maximum	2
PM_{10}:	
Annual arithmetic mean	4
24-hr maximum	8
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
Nitrogen dioxide:	
Annual arithmetic mean	2.5
Class II Area	
$PM_{2.5}$:	
Annual arithmetic mean	4
24-hr maximum	9
PM_{10}:	
Annual arithmetic mean	17
24-hr maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	25
Class III Area	
$PM_{2.5}$:	
Annual arithmetic mean	8
24-hr maximum	18
PM_{10}:	
Annual arithmetic mean	34
24-hr maximum	60
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
Nitrogen dioxide:	

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Annual arithmetic mean	50

* * * * *

(2) Where the State can demonstrate that it has alternative measures in its plan other than maximum allowable increases as defined under paragraph (c)(1) of this section, that satisfy the requirements in sections 166(c) and 166(d) of the Clean Air Act for a regulated NSR pollutant for which the Administrator has established maximum allowable increases pursuant to section 166(a) of the Act, the requirements for maximum allowable increases for that pollutant under paragraph (c)(1) of this section shall not apply upon approval of the plan by the Administrator. The following regulated NSR pollutants are eligible for such treatment:

(i) Nitrogen dioxide.

(ii) $PM_{2.5}$.

* * * * *

(i) * * *

(5) * * *

(i) * * *

(*c*) $PM_{2.5}$–4 μg/m³, 24-hour average;

(*d*) PM_{10}–10 μg/m³, 24-hour average;

* * * * *

(k) *Source impact analysis*—(1) *Required demonstration.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reduction (including secondary emissions), would not cause or contribute to air pollution in violation of:

(i) Any national ambient air quality standard in any air quality control region; or

(ii) Any applicable maximum allowable increase over the baseline concentration in any area.

(2) *Significant impact levels.* The plan may provide that, for purposes of $PM_{2.5}$, the demonstration required in paragraph (k)(1) of this section is deemed to have been made if the emissions increase from the new stationary source alone or from the modification alone would cause, in all areas, air quality impacts less than the following amounts:

Pollutant	Averaging time	Class I area	Class II area	Class III area
$PM_{2.5}$	Annual	0.06 μg/m³	0.3 μg/m³	0.3 μg/m³
	24-hour	0.07 μg/m³	1.2 μg/m³	1.2 μg/m³

* * * * *

(p) * * *

(4) * * *

Pollutant	Maximum allowable increase (micrograms per cubic meter)
$PM_{2.5}$:	
Annual arithmetic mean	4
24-hr maximum	9
PM_{10}:	
Annual arithmetic mean	17
24-hr maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	325
Nitrogen dioxide:	
Annual arithmetic mean	25

* * * * *

■ 4. Appendix S to part 51 is amended by revising the table in section III.A to read as follows:

Appendix S to Part 51—Emission Offset Interpretative Ruling

* * * * *

III. * * *

A. * * *

Pollutant	Annual	Averaging time (hours)			
		24	8	3	1
SO_2	1.0 μg/m³	5 μg/m³		25 μg/m³	
PM_{10}	1.0 μg/m³	5 μg/m³			

Pollutant	Annual	Averaging time (hours)			
		24	8	3	1
$PM_{2.5}$	0.3 µg/m³	1.2 µg/m³			
NO_2	1.0 µg/m³				
CO			0.5 mg/m³		2 mg/m³

* * * * *

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

■ 2. Section 52.21 is amended as follows:

■ a. By revising paragraph (b)(14)(i)(*a*);

■ b. By removing the period at the end of paragraph (b)(14)(i)(*b*) and adding "; and" in its place;

■ c. By adding paragraph (b)(14)(i)(*c*);

■ d. By revising paragraph (b)(14)(ii)(*a*);

■ e. By removing the period at the end of paragraph (b)(14)(ii)(*b*) and adding "; and" in its place;

■ f. By adding paragraph (b)(14)(ii)(*c*);

■ g. By revising paragraph (b)(14)(iii)(*a*);

■ h. By revising paragraph (b)(15)(i) and paragraph (b)(15)(ii) introductory text;

■ i. By revising the table in paragraph (c);

■ j. By revising paragraph (i)(5)(i);

■ k. By removing "(k)(2)" from paragraph (i)(9) and adding "(k)(1)(ii)" in its place;

■ l. By removing in two places "(k)(2)" from paragraph (i)(10) and adding "(k)(1)(ii)" in those places;

■ m. By revising paragraph (k);

■ n. By removing the words "particulate matter" in the last sentence of paragraph (p)(5) introductory text and adding in their place "$PM_{2.5}$, PM_{10}"; and

■ o. By revising the table in paragraph (p)(5).

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(14)(i) * * *

(*a*) In the case of PM_{10} and sulfur dioxide, January 6, 1975;

* * * * *

(*c*) In the case of $PM_{2.5}$, October 20, 2010.

(ii) * * *

(*a*) In the case of PM_{10} and sulfur dioxide, August 7, 1977;

* * * * *

(*c*) In the case of $PM_{2.5}$, October 20, 2011.

(iii) * * *

(*a*) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166; and

* * * * *

(15)(i) *Baseline area* means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the Act in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact for the pollutant for which the baseline date is established, as follows: equal to or greater than 1 µg/m³ (annual average) for SO_2, NO_2, or PM_{10}; or equal or greater than 0.3 µg/m³ (annual average) for $PM_{2.5}$.

(ii) Area redesignations under section 107(d)(1)(A)(ii) or (iii) of the Act cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

* * * * *

(c) * * *

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I Area	
$PM_{2.5}$:	
Annual arithmetic mean	1
24-hr maximum	2
PM_{10}:	
Annual arithmetic mean	4
24-hr maximum	8
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
Nitrogen dioxide:	
Annual arithmetic mean	2.5
Class II Area	
$PM_{2.5}$:	
Annual arithmetic mean	4
24-hr maximum	9
PM_{10}:	
Annual arithmetic mean	17
24-hr maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20

Pollutant	Maximum allowable increase (micrograms per cubic meter)
24-hr maximum	91
3-hr maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	25
Class III Area	
$PM_{2.5}$:	
Annual arithmetic mean	8
24-hr maximum	18
PM_{10}:	
Annual arithmetic mean	34
24-hr maximum	60
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
Nitrogen dioxide:	
Annual arithmetic mean	50

* * * * *

(i) * * *

(5) * * *

(i) The emissions increase of the pollutant from the new source or the net emissions increase of the pollutant from the modification would cause, in any area, air quality impacts less than the following amounts:

(*a*) Carbon monoxide—575 µg/m^3, 8-hour average;

(*b*) Nitrogen dioxide—14 µg/m^3, annual average;

(*c*) $PM_{2.5}$—4 µg/m^3, 24-hour average;

(*d*) PM_{10}—10 µg/m^3, 24-hour average;

(*e*) Sulfur dioxide—13 µg/m^3, 24-hour average;

(*f*) Ozone;

(*g*) Lead—0.1 µg/m^3, 3-month average;

(*h*) Fluorides—0.25 µg/m^3, 24-hour average;

(*i*) Total reduced sulfur—10 µg/m^3, 1-hour average;

(*j*) Hydrogen sulfide—0.2 µg/m^3, 1-hour average;

(*k*) Reduced sulfur compounds—10 µg/m^3, 1-hour average; or

Note to paragraph (c)(50)(i)(*f*): No *de minimis* air quality level is provided for ozone. However, any net emissions increase of 100 tons per year or more of volatile organic compounds or nitrogen oxides subject to PSD would be required to perform an ambient impact analysis, including the gathering of ambient air quality data.

* * * * *

(k) *Source impact analysis*—(1) *Required demonstration.* The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

(i) Any national ambient air quality standard in any air quality control region; or

(ii) Any applicable maximum allowable increase over the baseline concentration in any area.

(2) *Significant impact levels.* For purposes of $PM_{2.5}$, the demonstration required in paragraph (k)(1) of this section is deemed to have been made if the emissions increase from the new stationary source alone or from the modification alone would cause, in all areas, air quality impacts less than the following amounts:

Pollutant	Averaging time	Class I area	Class II area	Class III area
$PM_{2.5}$	Annual	0.06 µg/m^3	0.3 µg/m^3	0.3 µg/m^3
	24-hour	0.07 µg/m^3	1.2 µg/m^3	1.2 µg/m^3

* * * * *

(p) * * *

(5) * * *

Pollutant	Maximum allowable increase (micrograms per cubic meter)
$PM_{2.5}$:	
Annual arithmetic mean	4
24-hr maximum	9
PM_{10}:	
Annual arithmetic mean	17
24-hr maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	325
Nitrogen dioxide:	
Annual arithmetic mean	25

* * * * *

[FR Doc. 2010–25132 Filed 10–19–10; 8:45 am]

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Part IV

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2550

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210–AB07

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains a final regulation under the Employee Retirement Income Security Act of 1974 (ERISA) that requires the disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans (*e.g.,* 401(k) plans). This regulation is intended to ensure that all participants and beneficiaries in participant-directed individual account plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings. This document also contains conforming changes to another regulation relating to plans that allow participants to direct the investments of their individual accounts. These regulations will affect plan sponsors, fiduciaries, participants and beneficiaries of participant-directed individual account plans, as well as providers of services to such plans.

DATES: *Effective Date.* December 20, 2010.

Applicability Date. Notwithstanding the effective date, the final rule and amendments will apply to individual account plans for plan years beginning on or after November 1, 2011.

FOR FURTHER INFORMATION CONTACT: Michael Del Conte, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

1. General

According to the Department of Labor's (Department) most recent data, there are an estimated 483,000 participant-directed individual account plans, covering an estimated 72 million participants, and holding almost $3 trillion in assets.[1] With the proliferation of these plans, which afford participants and beneficiaries the opportunity to direct the investment of all or a portion of the assets held in their individual plan accounts, participants and beneficiaries are increasingly responsible for making their own retirement savings decisions. This increased responsibility has led to a growing concern that participants and beneficiaries may not have access to or, if accessible, may not be considering, information critical to making informed decisions about the management of their accounts, particularly information on investment choices, including attendant fees and expenses.

Under ERISA, the investment of plan assets is a fiduciary act governed by the fiduciary standards in ERISA section 404(a)(1)(A) and (B), which require plan fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries. When a plan assigns investment responsibilities to the plan's participants and beneficiaries, it is the view of the Department that plan fiduciaries must take steps to ensure that participants and beneficiaries are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan, including its fees and expenses and designated investment alternatives, to make informed decisions about the management of their individual accounts. To some extent, disclosure of such information already is required by plans that elect to comply with the requirements of ERISA section 404(c) (*see* section 2550.404c–1(b)(2)(i)(B)). However, compliance with section 404(c)'s disclosure requirements is voluntary and does not extend to participants and beneficiaries in all participant-directed individual account plans.

The Department believes that all participants and beneficiaries with the right to direct the investment of assets held in their individual plan accounts should have access to basic plan and investment information. For this reason, the Department is issuing this regulation under ERISA section 404(a), with conforming amendments to regulations under section 404(c). This regulation under ERISA section 404(a) establishes uniform, basic disclosures for such participants and beneficiaries, without regard to whether the plan in which they participate is a section 404(c) plan. In addition, the regulation requires participants and beneficiaries to be provided investment-related information in a form that encourages and facilitates a comparative review among a plan's investment alternatives.

2. Request for Information and Proposed Regulation

To facilitate development of the regulation, the Department first published, on April 25, 2007, a Request for Information (RFI) in the **Federal Register**[2] requesting suggestions, comments and views from interested persons on a variety of issues relating to the disclosure of plan and investment-related fee and expense and other information to participants and beneficiaries in participant-directed individual account plans. Following its review of over 100 public comment letters submitted in response to the RFI, the Department next published a notice of proposed rulemaking in the **Federal Register** on July 23, 2008.[3] Interested persons were again invited to submit comments on the proposal, and, in response to this invitation, the Department received over 90 written comments from a variety of parties, including plan sponsors and fiduciaries, plan service providers, financial institutions, and employee benefit plan and participant representatives. These comments are available for review under "Public Comments" on the "Laws & Regulations" page of the Department's Employee Benefits Security Administration Web site at *http://www.dol.gov/ebsa.*

In addition to publishing an RFI and a proposed regulation, the Department engaged ICF International (ICF) to conduct a series of focus group studies concerning how participants generally make choices among their employee benefit plan's investment alternatives, and, specifically, how participants would react to the Model Comparative Chart for plan investment alternatives that was published as an appendix to proposed section 2550.404a–5. ICF issued a report to the Department concerning the results of these focus group studies, and these results, where appropriate, have been incorporated below in the Department's discussion of comments on the proposed regulation and Model Comparative Chart.

Set forth below is an overview of the final regulations and a discussion of the public comments received on the proposal.

[1] 2007 Form 5500 Data, U.S. Department of Labor. The estimated 483,000 plans include plans that permit participants to direct the investment of all or a portion of their individual accounts.

[2] 72 FR 20457 (April 25, 2007).

[3] 73 FR 43014 (July 23, 2008).

B. Final Rule § 2550.404a–5 Concerning Fiduciary Requirements for Disclosure

In general, the final regulation retains the basic structure of the proposal. Paragraph (a) of § 2550.404a–5 sets forth the general principle that, where documents and instruments governing an individual account plan provide for the allocation of investment responsibilities to participants and beneficiaries, a plan fiduciary, consistent with ERISA section 404(a)(1)(A) and (B), must take steps to ensure that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including plan fees and expenses, and regarding the designated investment alternatives available under the plan, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts. Paragraph (b) addresses the disclosure requirements that must be met by plan fiduciaries for plan years beginning on or after the applicability date. Under this paragraph, plan fiduciaries must comply with the requirements of paragraph (c), dealing with plan-related information, and paragraph (d), dealing with investment-related information. Paragraph (e) describes the form in which the required information may be disclosed, such as via the plan's summary plan description, a quarterly benefit statement, or the use of the provided model, depending on the specific information. Paragraph (e) recognizes the various acceptable means of disclosure; it does not preclude other means for satisfying the disclosure duties under this final regulation. Fiduciaries that meet the requirements of paragraphs (c) and (d) will have satisfied the duty to make the regular and periodic disclosures described in paragraph (a) of this section. As indicated in the preamble to the proposal, the Department believes, as an interpretive matter, that ERISA section 404(a)(1)(A) and (B) impose on fiduciaries of all participant-directed individual account plans a duty to furnish participants and beneficiaries information necessary to carry out their account management and investment responsibilities in an informed manner. In the case of plans that elected to comply with section 404(c) before the applicability of this final rule, the requirements of section 404(a)(1)(A) and (B) typically would have been satisfied by compliance with the disclosure requirements set forth at 29 CFR Sec. 2550.404c–1(b)(2)(i)(B). However, the Department expresses no view with respect to plans that did not comply with section 404(c) and the regulations thereunder as to the specific information that should have been furnished to participants and beneficiaries at any time before this regulation is finalized and applicable.

Pursuant to Executive Order 12866, the Department evaluated the benefits and costs of the final regulation, and concludes that the net present value of the rule's benefits is estimated at nearly $12.3 billion. The Department estimates that the regulation will affect 72 million participants in 483,000 participant-directed individual account plans containing assets valued at nearly $3.0 trillion.[4] Over the ten-year period 2012–2021, the Department estimates that the present value of the benefits provided by the final rule will be approximately $14.9 billion and the present value of the costs will be approximately $2.7 billion.[5] A significant benefit of this regulation is that it will reduce the amount of time participants spend collecting fee and expense information and organizing the information in a format that allows key information to be compared; this time savings is estimated to total nearly 54 million hours valued at nearly $2 billion in 2010 (2010 dollars). The anticipated cost of the regulation is $425 million in 2012 (2010 dollars), arising from legal compliance review, time spent consolidating information for participants, creating and updating Web sites, preparing and distributing annual and quarterly disclosures, and material and postage costs to distribute the disclosures. A more detailed discussion of the need for this regulatory action, consideration of regulatory alternatives, and assessment of benefits and costs is included in Section E of this preamble, entitled "Regulatory Impact Analysis."

1. General; Satisfaction of Duty To Disclose

As proposed, the obligation to disclose the required information was imposed generally on a plan fiduciary (paragraph (a) of proposed § 2550.404a–5). Commenters, however, requested guidance as to which fiduciary is responsible for satisfying the duty to disclose. The proposal described the party responsible for providing disclosures as "a fiduciary (or a person or persons designated by the fiduciary to act on its behalf)[.]" Commenters explained that any given plan might have many fiduciaries involved in its operation and requested clarification as to which fiduciary must provide the rule's required disclosures. Accordingly, consistent with other disclosure obligations under ERISA, the Department has clarified in paragraph (a) of the final rule that the plan administrator, as defined in ERISA section 3(16), is responsible for complying with the rule's disclosure requirements.

Paragraph (b) of the final rule, consistent with the proposal, addresses the disclosure requirements plan administrators must satisfy. Paragraph (b) has been modified from the proposal to clarify, at paragraph (b)(1), that a plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative. A footnote to the proposal included the following statement: "[F]iduciaries shall not be liable for their reasonable and good faith reliance on information furnished by their service providers with respect to those disclosures required by paragraph (d)(1)."[6] Although commenters generally were supportive of this reliance relief for plan administrators required to comply with the rule's disclosure requirements, many comments asked the Department to make this relief more prominent by including it in the text of the final rule, rather than as a mere footnote to the Department's preamble. The Department was persuaded that this relief should be more prominent, and the provision therefore has been added to the text of the final rule. Further, this provision has been expanded to enable reliance on information received from or provided by both service providers to the plan and, as applicable, issuers of plan designated investment alternatives (*e.g.,* mutual funds).

Some commenters requested that the final rule clarify whether IRA-based plans are subject to the disclosure rule. Commenters argued that IRA-based plans under the Internal Revenue Code of 1986 (Code) such as Code sections 408(k) simplified employee pensions (SEPs) and 408(p) simple retirement accounts (SIMPLEs) are already subject to disclosure regimes under the Code

[4] This estimate is based on 2007 Form 5500 data, which is the latest available data.

[5] This calculation uses a seven percent discount rate. The $14.9 billion of benefits and $2.7 billion of costs are valued in 2010 dollars.

[6] 73 FR 43014 at 43018, n. 7 (July 23, 2008).

and relevant securities laws. It also was argued that application of the disclosure rules would add administrative complexity to arrangements that, by their very nature, were intended to be simple and that complicating administration of such plans may serve to discourage employers from establishing or continuing such arrangement for their employees. Taking into account the foregoing arguments, as well as the fact that participants in IRA-based plans generally have considerable flexibility in the choice of their IRA provider or the ability to roll over their balances to an IRA provider of their choice, the Department has determined not to extend the application of this rule to such plans. To clarify the scope of the final rule, a new paragraph (b)(2) has been added defining the types of arrangements that constitute a "covered individual account plan" for purposes of the rule. In this regard, paragraph (b)(2) provides that a "covered individual account plan" is any participant-directed individual account plan, as defined in section 3(34) of ERISA, except that such term shall not include plans involving individual retirement accounts or individual retirement annuities described in sections 408(k) ("simplified employee pension") or 408(p) ("simple retirement account") of the Internal Revenue Code of 1986 (Code).

A few commenters suggested the rule be expanded to cover defined contribution plans that do not allow for participant direction. The Department did not adopt this suggestion. While it may be appropriate to review the disclosure rules applicable to such plans, the Department does not believe it has sufficient information at this time to fully evaluate and address potential disclosure gaps in the context of this rulemaking.

One commenter suggested that the Department exclude small plans (for example those with fewer than 100 participants) from the scope of the final rule. The Department did not adopt this suggestion. The Department believes that participants in smaller plans face the same challenges as participants in larger plans when it comes to understanding the operations of their plans and the investment options offered thereunder. For this reason, the Department has determined that the final rule should apply to covered participant-directed individual account plans without regard to size.

Several commenters suggested that the Department clarify, and in some cases modify, the scope of the proposal as to the specific participants and beneficiaries of covered plans to which the rule applies. The proposed rule required disclosures to each participant and beneficiary of the plan that "pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to his or her individual account." The question presented by the commenters was whether disclosures must be furnished to all eligible employees or only those who actually participate in the plan. Consistent with the definition of "participant" under section 3(7) of ERISA, disclosures must be made to all employees that are eligible to participate under the terms of the plan, without regard to whether the participant has actually become enrolled in the plan. One commenter recommended that the proposal be modified to require initial disclosures to all eligible employees, but limit annual disclosures only to those that actually enroll, make contributions, and direct their investments. The Department has not adopted this recommendation. The Department believes that, with regard to employees that have not enrolled in their plan, the annual notice will serve as an important reminder of their eligibility to participate in the plan. With regard to notification of beneficiaries, however, the obligation to disclose extends only to those beneficiaries that, in accordance with the terms of the plan, have the right to direct the investment of assets held in, or contributed to, their accounts. Such rights might arise as a result of the death of a participant or pursuant to a qualified domestic relations order.

2. Plan-Related Information

As noted above, paragraph (c) of the final rule addresses plan-related information that must be disclosed to participants and beneficiaries. Like the proposal, paragraph (c) sets forth three general categories of plan-related information that must be disclosed to participants and beneficiaries—general operational and identification information (paragraph (c)(1)), administrative expenses (paragraph (c)(2)), and individual expenses (paragraph (c)(3)). The required disclosures must be based on the latest information available to the plan.

a. General Operational and Identification Information

Paragraph (c)(1)(i), like the proposal, requires that certain operational and identification information be disclosed to participants and beneficiaries. Specifically, this paragraph requires that participants and beneficiaries be provided: (A) An explanation of the circumstances under which participants and beneficiaries may give investment instructions; (B) An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative;[7] (C) A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights; (D) An identification of any designated investment alternatives offered under the plan; (E) An identification of any designated investment managers; and (F) A description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. Subparagraph (F) was added to the final rule in response to comments requesting a clarification as to what, if anything, has to be disclosed about brokerage windows and similar arrangements that permit participants to invest their assets in other than designated investment alternatives offered by the plan. It should be noted that in addition to the general brokerage window information required by paragraph (F), other provisions of this rule require disclosure of any fees and expenses that participants will be expected to pay when utilizing the brokerage window or similar arrangement (*see* paragraph (c)(3)(i)(A)).

A number of commenters expressed concern about the requirement(s) that information be furnished to participants and beneficiaries "on or before the date of plan eligibility and at least annually thereafter." Specifically, the concerns focused on the compliance challenges posed by this disclosure requirement on plans that provide for plan eligibility as of the first day of employment, noting that employers may not be able to furnish the required disclosure in advance of employment and, therefore, may be required to modify their eligibility rules to avoid noncompliance with this disclosure obligation. Commenters suggested various

[7] Some commenters asked whether this requirement included limitations that are imposed at the investment or fund level. The Department intends that the disclosure pursuant to this paragraph would include only plan-based limitations and restrictions on a participant's ability to direct investments or transfer to or from designated investment alternatives. To the extent any limitations or restrictions are imposed at the investment, fund or portfolio level, those limitations or restrictions must be described as part of the investment-related information required by the final rule. *See* paragraph (d)(1)(iv) of the final regulation.

alternatives, such as requiring disclosure on or before enrollment in the plan or the first investment. The Department believes that the commenters make a valid point and, accordingly, has modified the rule to provide more flexibility. The final rule provides in this regard that participants and beneficiaries must be furnished the required information on or before the date on which they can first direct their investments. While not requiring disclosures as early as the date of plan eligibility, the provision does operate to ensure that participants are furnished the information either before or in connection with their first investment direction under the plan. The same timing issues exists with respect to those plan-related disclosures required by paragraphs (c)(2)(i)(A), (c)(3)(i)(A) and (d)(1) and, therefore, the Department has made identical changes to the timing requirements of those paragraphs in the final rule.

b. Changes to General Information

The proposal required in paragraph (c)(1)(ii) that participants or beneficiaries be furnished, not later than 30 days after the date of adoption of any material change to the general plan information described in paragraph (c)(1)(i), a description of such change. The Department received several comments requesting that the timing for furnishing a description of such a material change be determined with reference to the effective date of the change, rather than the date of its adoption. Commenters noted that the adoption date of a change sometimes precedes its effective date by as much as a year or more, and also that in some instances the date of adoption may be unclear. Several commenters also suggested that the required description of the change be furnished at least 30 days, but not more than 90 days, before the effective date of the material change, in order to apprise participants and beneficiaries of the change close to the time that it will be useful to them. In addition, questions were raised concerning what constitutes a "material" change in the required information.

With regard to the question as to what constitutes a "material" change, the Department is now of the view that, given the significance of the information that has to be disclosed under paragraph (c)(1)(i), virtually any change in the information would be a "material" change because of its importance to participants and beneficiaries. Accordingly, the Department has decided to drop the concept of "material" from the requirement to update plan participants and beneficiaries of changes in the required disclosures.

The Department also decided to amend the timing requirements in response to comments on the proposal. In this regard, the Department agrees with commenters that suggested that participants and beneficiaries should be notified of plan changes on the earliest possible date and, where practical, in advance of the effective date of the changes. In this regard, paragraph (c)(1)(ii) of the final rule provides that if there is a change to the information described in paragraph (c)(1)(i)(A) through (F), a description of such change(s) must be furnished to participants and beneficiaries at least 30 days, but not more than 90 days, in advance of the effective date of the change(s). The final rule, however, also recognizes that there may be circumstances when changes must be made within a time frame that precludes compliance with the 30-day advance notice requirement, such as the immediate elimination of an investment option when it is determined to be no longer a prudent investment alternative. In such cases, the rule requires that information be furnished as soon as reasonably practicable.

In connection with the development of the final rule, the Department also reviewed the information required to be disclosed under paragraph (c)(2)(i)(A) (relating to administrative expenses) and paragraph (c)(3)(i)(A) (relating to individual expenses) and concluded that an updating rule should apply to those disclosures as well, given the importance of the required information to participants and beneficiaries. These new updating requirements appear at paragraphs (c)(2)(i)(B) and (c)(3)(i)(B) of the final rule.

c. Administrative Expenses

Paragraph (c)(2)(i) of the final rule, like the proposal, requires that participants and beneficiaries be provided an explanation of any fees and expenses for general plan administrative services (*e.g.,* legal, accounting, recordkeeping) that may be charged against their individual accounts (whether by liquidating shares or deducting dollars), and the basis on which such charges will be allocated (pro rata, per capita). The provision makes clear that such charges do not include charges that are included in the annual operating expenses of designated investment alternatives. As noted above, this paragraph (c)(2) has been modified to establish disclosure timing and update requirements that conform with the requirements of paragraph (c)(1). *See* paragraph (c)(2)(i)(A) and (B).

Paragraph (c)(2)(ii), also like the proposal, requires that expenses described in paragraph (c)(2)(i) that are actually charged against a participant's or beneficiary's account be disclosed to participants and beneficiaries at least quarterly, along with a description of the service(s) to which the charge or charges relate.[8] However, in response to commenters' requests for specificity as to which services and charges are covered by this quarterly disclosure requirement, paragraph (c)(2)(ii)(A) both includes an explicit cross reference to the fees and expenses for administrative services described in paragraph (c)(2)(i) and a parenthetical noting that the disclosed charges arise from either the liquidation of shares or the deduction of dollars from individual accounts in compliance with paragraph (c)(2)(i)'s requirement that such charges are not included in the total annual operating expense of any designated investment alternative.

In a further effort to bring clarity to the disclosures provided to participants and beneficiaries, the Department has added a new subparagraph (C) to paragraph (c)(2)(ii) of the final rule. This new subparagraph is intended to provide those participants in plans with revenue sharing arrangements that serve to reduce plan administrative costs with a better picture as to how those costs are underwritten, at least in part, by fees and expenses attendant with investment alternatives offered under their plans. Specifically, paragraph (c)(2)(ii)(C) provides that, if applicable, the statement required to be furnished pursuant to paragraph (c)(2)(ii), must include an explanation that, in addition to the expenses reported on the statement, some of the plan's administrative expenses for the preceding quarter were paid from the annual operating expenses of one or more of the plan's designated investment alternatives (*e.g.,* through revenue sharing arrangements, Rule 12b–1 fees, sub-transfer agent fees). This required statement has been included in the final rule in response to many comments received by the Department on the provision in the proposal that administrative expenses must be disclosed pursuant to this paragraph

[8] Some commenters requested that the Department reiterate its position, discussed in the preamble to the proposed rule, that administrative charges do not need to be broken out into service-by-service detail on the quarterly statement. The Department continues to agree with commenters on the proposal and the RFI who believe that such a breakdown is not necessary, or particularly useful, to participants and beneficiaries; the final rule therefore also allows for "aggregate" disclosure of administrative expenses, as proposed. *See* 73 FR 43014, 43016 (July 23, 2008).

only "to the extent not otherwise included in investment-related fees and expenses[.]" Some commenters expressed concern that participants and beneficiaries may be misled into believing that there is little or no administrative expense associated with their participation in the plan when a significant portion of the cost of administrative services is actually paid out of investment-related charges. Other commenters disagreed and believed that, because any such administrative services would be paid for from the total annual operating expenses of the designated investment alternatives in which participants invest and because such annual operating expenses are required to be separately disclosed, participants and beneficiaries will receive comprehensive information about the total charges, for administration and investment, that will be assessed against their accounts. These commenters also argue that the burden associated with attempting to attribute some portion of total annual operating expenses to plan administrative services would be significant and vastly outweigh any potential benefit to participants and beneficiaries of such attribution. Most commenters, however, agreed that it is appropriate to inform participants, when applicable, that administrative expenses are paid from investment-related fees and are not reflected in the reported administrative expense amount. The Department was persuaded that some information, even if general, would help participants to better understand the fees and expenses attendant to operating their plan and of the fact that some fees and expenses might be underwritten by the investment alternatives offered by their plans.

Some commenters argued that administrative expenses charged to participant accounts should be reported on an annual, rather than a quarterly, basis. These commenters argued that the amounts reported as deducted during any given quarter have the potential to both mislead and confuse participants because such amounts are often subsequently reduced or restored by offsets or credits from revenue sharing and similar arrangements as part of year-end or periodic reconciliations. The commenters further argue that eliminating this information from quarterly disclosures will not affect the information available to participants because participants typically have access to Web sites where they can review the status of their account, including charges to their accounts, on a daily basis. Other commenters supported the quarterly disclosure requirement, noting that there is no other formal requirement for the disclosure of such information to participants and beneficiaries on a regular basis. After careful consideration of the various views on this requirement, the Department has decided to retain the requirement for quarterly disclosures of plan administrative expenses. While the Department recognizes that some participants may have questions concerning the debiting of charges and crediting of offsets to their accounts during the plan year, the Department is not persuaded that the potential for confusion and questions that might result from the requirement outweighs the benefits of participants and beneficiaries being informed on a regular basis of the actual amounts taken from (or credited to) their account during the quarter and the identification of services, albeit general, to which those amounts relate.

d. Individual Expenses

As noted above, paragraph (c)(3) requires the disclosure of those expenses charged against a participant's or beneficiary's account on an individual, rather than plan-wide basis. Examples of such charges include: Fees attendant to the processing of plan loans or qualified domestic relations orders; fees for investment advice; front or back-end loads or sales charges; redemption fees; and investment management fees attendant to a participant's or beneficiary's investment that are charged directly against the individual account of the participant or beneficiary, rather than included in the annual operating expenses of the investment (as might be the case, for example, with certain unregistered designated investment alternatives, such as bank collective investment funds). In addition to clarifying changes, paragraph (c)(3), like paragraphs (c)(1) and (c)(2), incorporates new disclosure timing and update requirements, which are discussed in detail above.

A few commenters requested clarification about the quarterly disclosure requirement for individual expenses. These commenters explained that some individual expenses currently are disclosed by a confirmation statement or other similar notice that is provided at the time the charge actually is assessed to the individual participant's or beneficiary's account; these commenters argued that the Department should avoid duplication, and potential confusion to participants and beneficiaries, that would result from requiring that these expenses also be disclosed on a quarterly statement. The Department does not intend such duplicative disclosure; the rule requires that this information be provided "at least quarterly," and the Department anticipates that actual charges may be disclosed more frequently than quarterly. To the extent such a charge is otherwise disclosed during a particular quarter, for example by a confirmation statement after a charge is deducted from an account, that charge would not have to be disclosed again on the subsequent quarterly statement. No quarterly statement in compliance with this paragraph (or with paragraph (c)(2)(ii) concerning quarterly disclosure of administrative expenses) must be furnished if there were no charges to a participant's or beneficiary's account during the preceding quarter.

e. Disclosures On or Before First Investment

In an effort to clarify the scope of the updating requirements and ensure that new participants were provided at least the same information that had been provided to existing participants prior to their participation, paragraph (d)(1)(v) of the proposal provided, for purposes of the disclosure of investment-related information to new participants, plan administrators could satisfy their obligation by furnishing the most recent annual disclosure along with any required updates furnished to participants and beneficiaries. The Department received no objections to this provision and, accordingly, is adopting it as proposed, with the exception of a paragraph re-designation and changes necessary to conform to the new timing requirements applicable to the annual disclosures. *See* paragraph (d)(1)(viii) of § 2550.404a–5. A question was raised, however, whether a similar clarification was needed for the plan-level disclosures required to be furnished to new participants and beneficiaries under the regulation. The Department found no basis for not providing similar guidance in the context of the required plan-level disclosures and, therefore, has added to the final rule a new paragraph (c)(4). Paragraph (c)(4) provides that for purposes of the requirements under paragraphs (c)(1)(i), (c)(2)(i)(A), and (c)(3)(i)(A) that plan administrators furnish information on or before the date on which a participant or beneficiary can first direct his or her investments, plan administrators may satisfy their obligations by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant those paragraphs and any changes to the information furnished to participants and beneficiaries pursuant to paragraphs (c)(1)(ii), (c)(2)(i)(B) and (c)(3)(i)(B) of the final rule.

3. Investment-Related Information

The Department received a number of comments relating to the disclosure of investment-related information pursuant to paragraph (d) of the proposal, and the related definitional section in paragraph (h). Many of the comments raised questions concerning the proposed application of mutual fund-type disclosures to non-registered investment vehicles. The Department has made a number of changes to this section of the final rule (and the related definitional section in paragraph (h)), in an effort to address the problems raised by the commenters, while, at the same time, attempting to maintain a reasonably uniform regime for the disclosure of investment-related information, a disclosure regime that would enable participants to compare competing mutual fund, insurance and banking products on a reasonably consistent and uniform basis. In considering these issues, the Department, in addition to considering comments and input from financial industry representatives, consulted with other appropriate regulators, including the Securities and Exchange Commission (Commission), the Office of the Comptroller of the Currency, and the Financial Industry Regulatory Authority (FINRA). The Department also employed focus groups, as discussed above, to learn more about how participants make investment decisions and whether the Department's proposed Model Comparative Chart would in fact assist such decisions. The Department believes that the investment-related disclosure requirements of the final rule, discussed below, strike an appropriate balance between accommodating, on one hand, the increasing innovation and complexity of the types of investments that are available to plan participants and beneficiaries and, on the other hand, participants' and beneficiaries' need for complete, but concise and user-friendly, information about their plan investment alternatives.

a. Information To Be Provided Automatically

Paragraph (d)(1) of the final rule, consistent with the proposal, describes the investment-related information that must be provided automatically, with respect to each designated investment alternative, to participants and beneficiaries on or before the date they first have the ability to direct their investments and at least annually thereafter. The specific information that must be disclosed pursuant to this paragraph is set forth below, as well as a discussion of how this required information has been modified in response to commenters' concerns. Additionally, paragraph (i) of the final rule provides special disclosure requirements for certain types of designated investment alternatives, which modify the requirements of paragraph (d)(1) of the final.

b. Identifying Information

The proposed regulation, in paragraph (d)(1)(i), required that certain identifying information be furnished with respect to each designated investment alternative offered under the plan. The first required piece of information, in subparagraph (A), is the name of the designated investment alternative. This straight-forward requirement did not generate any public comment and has been retained in the final rule.

Subparagraph (B) of paragraph (d)(1)(i) of the proposal required the furnishing of an Internet Web site address relating to each designated investment alternative. The Web site requirements of the final rule, as well as related comments on the proposal, are discussed below in this preamble under the heading "f. Internet Web site address."

Like the proposal, the final rule, at paragraph (d)(1)(i)(B), requires identification of the type or category of the investment (*e.g.,* money market fund, balanced fund (stocks and bonds), large-cap stock fund, employer stock fund, employer securities). This requirement is unchanged from the proposal, although the examples of types or categories in the parenthetical, which are set forth for illustrative purposes, have been expanded in response to questions from commenters about investment alternatives that did not clearly fall within the list of examples included in the proposal. One commenter suggested that fiduciaries should be permitted to utilize various commercial services to classify the type or category of a plan's designated investment alternatives. While the Department has not modified the proposal in response to this suggestion, the Department anticipates that plan administrators typically will rely on the investment issuer's classification of the type or category of an investment alternative.

Finally, paragraph (d)(1)(i)(D) of the proposal, which required disclosure of the type of management utilized by the investment (*e.g.,* actively managed, passively managed), has been eliminated from the final rule. Many commenters requested that this requirement be eliminated, arguing that they do not believe this information will be useful to most participants and beneficiaries; that some funds may not clearly fall within either one of these two categories, either because they have features of both or because neither category applies (for example, an employer stock fund); and, that it may even mislead participants and beneficiaries about the risks of a particular designated investment alternative. Other commenters argued that this requirement may be redundant; for example, a fund that lists its "type or category" as an index fund is by definition passively managed. Finally, the results of the Department's focus groups support the notion that this information is not necessarily helpful, and is potentially confusing, to participants. One focus group participant, for example, stated that without knowing what is meant by active or passive management, she would choose active management because it "sounds" better. The Department was persuaded by commenters that providing this information, especially as required in a comparative format, may not be meaningful to participants and beneficiaries. Accordingly, the final rule no longer requires plan administrators to furnish, as a separate piece of identifying information, the type of management utilized with respect to a designated investment alternative. The Department notes that, for participants who wish to obtain more information about the management of a designated investment alternative, the narrative description of an investment's objectives or goals, and of the investment's principal strategies and principal risks, is likely to convey more meaningful and contextual information concerning the style of management used with respect to a designated investment alternative.

c. Performance Data

The proposed rule, in paragraph (d)(1)(ii), required that performance data be disclosed for designated investment alternatives with respect to which the return is not fixed. Specifically, this paragraph required disclosure of the average annual total return (percentage) of the investment for the following periods, if available: 1-year, 5-years, and 10-years, measured as of the end of the applicable calendar year, as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future.

This provision, paragraph (d)(1)(ii), is being adopted generally as proposed. Several commenters raised issues regarding the "if available" language, suggesting that participants and beneficiaries could be deprived of as much as nearly five years of valuable return information in situations where the designated investment alternative has been in existence for a period of time just shy of the 5- or 10-year marks. These commenters noted that Commission rules require performance for the "life of the fund" to address this issue. In order to avoid the information gap identified by the commenters, and to maintain appropriate consistency with Commission requirements, the final regulation, at (d)(1)(ii)(A), requires disclosure of the average annual total return of the investment for 1-, 5-, and 10-calendar year periods ending on the date of the most recently completed calendar year (or for the life of the designated investment alternative, if shorter).

In the case of designated investment alternatives with respect to which the return is fixed for the term of the investment, paragraph (d)(1)(ii) of the proposal required disclosure of both the fixed rate of return and the term of the investment. While no commenters opposed the proposed requirement, some commenters did request a clarification as to how the disclosure requirement applied to contracts with respect to which there is no "term of investment." The commenters explain that certain contracts, while often having a minimum guaranteed rate for the life of the contract, permit the fixed rate to change upon notice, but never below the minimum guaranteed rate. One commenter suggested that, for such contracts, the pertinent information for participants and beneficiaries is the most recent rate of return, the minimum rate guaranteed under the contract, if any, and an explanation that the insurer may adjust the rate of return prospectively. The Department agrees. The most essential information for participants who choose to invest in fixed investment alternatives is the contractual interest rate paid to their accounts and the term of the investment during which their monies are shielded from market price fluctuations and reinvestment risks. The Department believes that, with respect to such contracts, it is particularly important that participants and beneficiaries be clearly advised of the issuer's ability to modify the rate of return and be able to readily determine the most current rate of return applicable to such investment. In this regard, the Department has modified the proposal, at paragraph (d)(1)(ii)(B) of the final, to require the disclosure of the current rate of return, the minimum rate guaranteed under the contract or agreement, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (*e.g.,* telephone or Web site) the most recent rate of return information available.

One commenter asked whether designated investment alternatives such as stable value funds and money market mutual funds are to be treated as fixed return or variable return investments for purposes of the regulation. The fixed return provisions of the regulation are limited to designated investment alternatives that provide a fixed or stated rate of return to the participant, for a stated duration, and with respect to which investment risks are borne by an entity other than the participant (*e.g.,* insurance company). Examples of fixed return investments include certificates of deposit, guaranteed insurance contracts, variable annuity fixed accounts, and other similar interest-bearing contracts from banks or insurance companies. While money market mutual funds and stable value funds generally aim to preserve principal, they are not free of investment risk to the investor. Accordingly, such investments are subject to the variable return provisions of the regulation, even though they routinely hold fixed-return investments.

Several commenters requested clarification on the relationship, if any, between the disclosure requirements in the proposal and the Securities and Exchange Commission's and FINRA's advertising rules. The primary concern of commenters seemed to be in connection with the requirement to disclose annually the performance data specified in paragraph (d)(1)(ii) of the proposal and the timeliness requirements in the Commission's advertising rules. The Department has consulted with the staff of the Commission and FINRA on this issue. The Commission's staff has advised that it expects to communicate its position to the Department in a staff no-action letter, which will be issued before the applicability date of this final rule. FINRA staff has stated that it will apply the Commission's advertising rules in a manner that is consistent with the Commission's staff position published in the no-action letter. The Department and the Commission will, in turn, make the letter available to the public on their respective Web sites.

d. Benchmarks

Paragraph (d)(1)(iii) of the proposal required, for each designated investment alternative with respect to which the return is not fixed, the disclosure of "the name and returns of an appropriate broad-based securities market index over the 1-year, 5-year, and 10-year periods * * *" for which performance data must be disclosed. The proposal also provided that the benchmark could not be administered by an affiliate of the investment provider, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

Some commenters suggested that the Department eliminate this requirement, while others called for permitting or requiring multiple benchmarks for each designated investment alternative. Some commenters suggested permitting composite or customized benchmarks. Those commenters who favored an ability to include multiple benchmarks for each designated investment option noted the existence of such flexibility under SEC rules, specifically Item 22(b)(7) of Form N–1A.[9] (*See, e.g.,* Instruction 6 to Item 22(b)(7), encouraging, in addition to a required broad-based securities market index, narrowly based indexes that reflect the market sectors in which a fund invests.) Commenters who advocated composite benchmarks stated that a fund that invests in both stocks and bonds (*e.g.,* lifecycle fund or balanced fund) should be permitted to compare itself to a benchmark consisting of a weighted average of both an equities index and a bond index. The commenters who favored eliminating the benchmark requirement stated that certain investment strategies are not managed to a benchmark, and therefore, providing benchmark information could be misleading. Supporters of the proposal, however, maintained that participants would benefit more from having a single recognizable benchmark for each designated investment alternative under the plan, rather than multiple or blended indices for each.

The Department continues to believe that appropriate benchmarks may be helpful tools for participants to use in assessing the various investment options available under their plans and, therefore, has retained this requirement in the final rule. However, benchmarks are more likely to be helpful when they are not subject to manipulation and are recognizable and understandable to the average plan participant, as is the case with broad-based indices contemplated

[9] Now Item 27 of Form N–1A, as revised February 2010.

by Instruction 5 to Item 27(b)(7) of Form N–1A. For this reason, the final rule retains the proposed requirement that a benchmark must be a broad-based securities market index and it may not be administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used. The Department, however, notes that paragraph (d)(2)(ii) of the final regulation permits the disclosure of information that is in addition to that which is required by this final regulation, so long as the additional information is not inaccurate or misleading. Thus, in the case of designated investment alternatives that have a mix of equity and fixed income exposure (*e.g.,* balanced funds or target date funds), a plan administrator may, pursuant to paragraph (d)(2)(ii) of the final rule, blend the returns of more than one appropriate broad-based index and present the blended returns along with the returns of the required benchmark, provided that the blended returns proportionally reflect the actual equity and fixed-income holdings of the designated investment alternative. For example, where a balanced fund's equity-to-bond ratio is 60:40, the returns of an appropriate bond index and an appropriate equity index may be blended in the same ratio and presented along with the benchmark returns mandated by paragraph (d)(1)(iii) of the final rule. Presenting blended returns that do not proportionally reflect the holdings of the designated investment alternative would, in the view of the Department, be misleading and, therefore, not permitted pursuant to paragraph (d)(2)(ii) of the final regulation.

e. Fee and Expense Information

Paragraph (d)(1)(iv) of the proposal required disclosure of fee and expense information for designated investment alternatives. This requirement has been retained in the final rule, with a few modifications in response to public comments. Paragraph (d)(1)(iv) also has been restructured so that subparagraph (A) addresses the fee and expense disclosure requirements for designated investment alternatives with respect to which the return is not fixed, and subparagraph (B) addresses such requirements for designated investment alternatives with respect to which the return is fixed for the term of the investment.

Consistent with the proposal, paragraph (d)(1)(iv)(A)(*1*) requires disclosure of the amount and a description of each shareholder-type fee (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees). No substantive changes were made to this provision from that which was proposed. Clarifying language, however, was added to the existing parenthetical language in order to distinguish shareholder-type fees from other investment-related fees and expenses. The new language provides that a fee or expense is a shareholder-type fee to the extent it is "not included in the total annual operating expenses of any designated investment alternative." Thus, the key distinction is how the fee is ultimately being paid by the participant or beneficiary. If the fee or expense is charged directly against participant's or beneficiary's individual investment or account, as is typically the case with sales loads, account fees, and the other items delineated in the parenthetical, then the fee or expense is to be disclosed as a shareholder-type fee. If, on the other hand, the fee or expense is paid from the operating expenses of a designated investment alternative, then the fee or expense is to be included in the total annual operating expenses of a designated investment alternative. The requirement to disclose the total annual operating expenses of each designated investment alternative is discussed below.

The Department recognizes that in some instances there will be an overlap in disclosures between shareholder type fees described in paragraph (d)(1)(iv)(A)(*1*), and individual expenses described in paragraph (c)(3) of the final rule, which are discussed in detail above under the heading "d. Individual expenses." For example, a front-end sales load imposed in connection with investing in a specific designated investment alternative that is charged (either by share or dollar deduction) directly against a participant's or beneficiary's individual account would properly be covered by and require disclosures under both paragraphs. The consequence of this overlap is that participants and beneficiaries will not only receive general information regarding the sales load before investing, but pursuant to paragraph (c)(3)(ii) of the final rule, will also receive a statement after investing showing the dollar amount actually charged against their individual accounts.

Some commenters asked whether only fees and expenses must be disclosed, or whether plan administrators also should notify participants and beneficiaries of other limitations or restrictions concerning the designated investment alternative, such as trading restrictions or limitations on how amounts liquidated from the designated investment alternative may be reinvested. In the Department's view, it is appropriate in this context to inform participants and beneficiaries of these restrictions and limitations so that they are fully aware of the consequences of their investment decisions. Accordingly, paragraph (d)(1)(iv)(A)(*1*) of the final rule has been expanded from the proposal to require a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions).

Paragraph (d)(1)(iv)(A)(*2*) requires disclosure of the total annual operating expenses of the investment expressed as a percentage (*e.g.,* expense ratio), calculated in accordance with paragraph (h)(5) of the final rule. This requirement is unchanged from the proposal, although, as discussed below, the definition of "total annual operating expenses" has been revised in the final rule.

Paragraph (d)(1)(iv)(A)(*3*) of the final rule includes a new requirement for an example illustrating the effect in dollars of each designated investment alternative's total annual operating expenses. Specifically, this paragraph requires disclosure of the total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment (assuming no returns and based on the total annual operating expenses percentage disclosed for paragraph (d)(1)(iv)(A)(*2*)). A significant number of commenters felt that a dollar-based disclosure would be more useful to participants, who cannot always convert operating expense ratios into dollars, which commenters argue is a more helpful way for participants to understand the significance of fees. The results of the Department's focus group studies also support the notion that examples in dollars will help participants to better understand how fees impact retirement savings. The Department was persuaded by the large number of commenters supporting inclusion of dollar-based disclosure in the context of investment fees and, accordingly, expanded the requirements of the final rule to provide for the disclosure of a designated investment alternative's total annual operating expenses in dollars.

Paragraph (d)(1)(iv)(A)(*4*) of the final rule requires a statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions. The Department did not receive any comments opposing this requirement; in fact, this required statement is consistent with the concern raised by commenters that participants and beneficiaries should not be encouraged to focus "only" on fees and expenses, since fee and expense information must be considered in context with other information about a plan's designated investment alternatives. This required statement has been retained, unchanged from the proposal.

Paragraph (d)(1)(iv)(A)(*5*) of the final rule includes a new required statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that participants and beneficiaries can visit the Internet Web site of the Employee Benefits Security Administration for information and an example demonstrating the long-term effect of fees and expenses. This statement has been added in response to the suggestion of commenters that participants and beneficiaries would benefit from an understanding that, over time, fees and expenses may substantially reduce the growth of their retirement accounts.

Finally, paragraph (d)(1)(iv)(B) of the final rule provides the fee and expense information that must be disclosed for designated investment alternatives with respect to which the return is fixed for the term of the investment. Consistent with the proposal, plan administrators must disclose the amount and a description of any shareholder-type fees, and a description of any restrictions or limitations that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part. For examples of fixed-return investments, *see* the discussion above in this preamble under the heading "c. Performance data."

f. Internet Web Site Address

The proposed rule contained a requirement that plan fiduciaries provide an "Internet Web site address that is sufficiently specific to lead participants and beneficiaries to supplemental information regarding the designated investment alternative, including the name of the investment's issuer or provider, the investment's principal strategies and attendant risks, the assets comprising the investment's portfolio, the investment's portfolio turnover, the investment's performance and related fees and expenses[.]"

The Department received a number of comments concerning this Web site requirement. Some commenters supported the requirement, but requested clarifications such as who would be responsible for maintaining the Web site address and whether participants and beneficiaries could be referred to the Web site of a service provider or investment issuer. Other commenters argued that the requirement should be eliminated because Web site information is not currently provided for all designated investment alternatives in the participant-directed plan marketplace; for example, Web site information often is not provided for bank collective investment funds, certain insurance products, and employer stock.

After careful consideration of these comments, the Department has decided to retain the Web site approach to disclosing investment-related information. *See* paragraph (d)(1)(v) of the final rule. The Department believes, in this regard, that the availability of information via a Web site reduces the amount of information required to be directly provided to participants and beneficiaries, without compromising a participant's or beneficiary's access to the additional information. While a critical objective of this rulemaking is to ensure that all participants and beneficiaries in participant-directed individual account plans are furnished the information they need to make informed investment decisions, the Department remains sensitive to the possibility that too much information may only serve to overwhelm, rather than inform, participants and beneficiaries. The Department believes that the Web site approach to disclosure strikes an appropriate balance in this context, accommodating different levels of participant interest in more detailed investment-related disclosures. While the Department recognizes, based on the comments, that the required Web sites may not currently be available for all investment vehicles offered by individual account plans in today's marketplace, the Department is not persuaded that the costs and burdens attendant to establishing and maintaining a Web site that will satisfy the disclosure requirements of this final rule will outweigh the benefits of improved disclosure and ready access to more detailed and current information by participants and beneficiaries.

Under the final rule, the responsibility for ensuring the availability of a Web site address falls upon the plan administrator. However, whether, and to what extent, the plan administrator is responsible for establishing and maintaining the Web site itself will depend on the responsibilities assumed by either the issuer of the designated investment alternative(s) or a service provider to the plan. That is, as provided in paragraph (b)(1) of the final rule, a plan administrator will not be liable for the completeness and accuracy of information used to satisfy the disclosure requirements of this regulation when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

In addition to the general comments discussed above, some commenters expressed concern about the specific items of information required to be made available on the Web site. Several commenters, for example, asked whether the list of items in the proposed rule was intended to be exclusive, or whether plans may be required, or be permitted, to provide additional information.[10] The final rule, at paragraph (d)(1)(v), has been revised to make clear that the supplemental information identified in the regulation is the only information that is required to be contained on the Web site; this clarification was accomplished by deleting the word "including" which had been used in the proposed regulation before the list of content items. Nonetheless, there is nothing in this final rule that precludes a plan administrator, service provider or the issuer of a designated investment alternative from including on the Web site additional information that may assist participants and beneficiaries in assessing the appropriateness of the designated investment alternative for their plan accounts.

Paragraph (d)(1)(v)(A) of the final retains the requirement from the proposal that the Web site include the name of the investment's issuer. The Department did not receive any comments on this provision.

Paragraph (d)(1)(v)(B) contains a new content requirement for supplemental information that is required to be contained on the Web site. Several commenters requested that the Department add, as another item of supplemental information available at a designated investment alternative's Web

[10] Paragraph (d)(1)(i)(B) of the proposal required disclosure of "supplemental information regarding the designated investment alternative, *including* * * *" (emphasis added). Some commenters argued that use of the word "including" could be read as "including, but not limited to." In that case, plans would be uncertain as to whether additional information must be provided and, if so, what information must be provided.

site, a description of the designated investment alternative's objectives or goals. These commenters felt that merely disclosing the "type or category" of investment, as required by subparagraph (d)(1)(i)(C) of the proposal, was not sufficient and that participants or beneficiaries would benefit from a narrative statement of the alternative's basic objectives or goals. The Department agrees with these commenters that participants and beneficiaries should be apprised of a designated investment alternative's objectives or goals and that this information will be helpful in understanding how the alternative's principal strategies are intended to achieve those objectives or goals. Commenters did not demonstrate that requiring this information would be problematic or burdensome; rather, it seems clear that investment issuers generally already disclose this information. The final rule has been modified from the proposal to explicitly require, in paragraph (d)(1)(v)(B), disclosure of the investment's objectives or goals in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate.

Although commenters generally were not opposed to the requirement in the proposal that the Web site for a designated investment alternative include information about the investment's "principal strategies and attendant risks," some commenters requested clarification as to the nature of the information that must be disclosed in order to satisfy this requirement. For example, some commenters asked if the Department intended to model this requirement after the requirement in securities laws that investment companies disclose their "principal investment strategies" and "principal risks." [11] The Department believes that the "strategies" and "risks" associated with an investment alternative should be well-understood concepts in the plan investment marketplace, and the Department does not anticipate that plan administrators or the parties providing the Web sites will have difficulty in satisfying this requirement. In response to the commenters, the Department has clarified that paragraph (d)(1)(v)(C) of the final rule requires disclosure of the investment's "principal strategies (including a general description of the types of assets held by the investment) and principal risks in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate" of the designated investment alternative. The Department believes that the standards for narrative disclosure contained in the Commission's requirements are general enough that this information can be furnished with respect to all designated investment alternatives.[12]

Several commenters requested clarification of the requirement in paragraph (d)(1)(i)(B) of the proposal to disclose the "assets comprising the investment's portfolio." Specifically, commenters asked whether this requirement mandates disclosure of every individual asset or security held by the investment alternative, which commenters argue will not be helpful to most participants, or, more simply, disclosure of the type or types of assets or securities held by the investment alternative. Some commenters also recommended eliminating this requirement, since investment alternatives that are not subject to Commission registration do not currently compile and disclose this information, and because the burden of compiling this information, especially for complex investments, would not justify its benefit. The Department did not intend that the Web site include a detailed list of all assets and securities that comprise the investment alternative's portfolio. The reference to "assets comprising the investment's portfolio" has not been included in the final rule. In addition, paragraph (d)(1)(v)(C) of the final rule, inside the parenthetical, now clarifies that a discussion of the investment's principal strategies includes "a general description of the types of assets held" by the investment.[13] This narrative description is supplemented by more specific information that is available on request to participants under paragraph (d)(4) of the final rule.

Some commenters raised concerns with the proposal's requirement that the Web site include information concerning a designated investment alternative's portfolio turnover. These commenters questioned what exactly must be disclosed about an investment's portfolio turnover; for example, whether a ratio or turnover rate would suffice. Other commenters recommended elimination of the requirement, because investment alternatives that are not subject to Commission registration are not currently required to disclose portfolio turnover information. The Department was not persuaded that this requirement should be eliminated for all designated investment alternatives. An investment alternative's portfolio turnover indicates the frequency with which the investment alternative is buying and selling securities. An investment that is frequently buying and selling securities may be generating higher trading costs. Trading costs are not included in an alternative's expense ratio, yet the cost of trading on a portfolio level does have an effect, in some cases a large effect, on the alternative's rate of return. The Department, therefore, believes that such information may be helpful to participants and beneficiaries in assessing the appropriateness of their investment options.

While the Department recognizes that not all designated investment alternatives available to plan participants and beneficiaries calculate portfolio turnover rates, the Department understands that such investment alternatives should be able to do so without significant difficulty or costs. The final rule, at paragraph (d)(1)(v)(D), therefore, has been revised to require that, unless expressly exempted elsewhere in the rule, the information on the Web site must include the investment's portfolio turnover rate in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate.[14] The Department has exempted certain designated investment alternatives, such as fixed-return and employer stock alternatives, from the portfolio turnover requirement where the Department has concluded that turnover rates are irrelevant to the participants and beneficiaries. *See* paragraph (i) of the final rule for special

[11] *See* Item 4(a) and (b) of Securities and Exchange Commission Form N–1A or Item 5(c) and (e) of Securities and Exchange Commission Form N–3.

[12] *See, e.g.,* Securities and Exchange Commission Form N–1A Item 4(a) (requiring a summary of how the mutual fund intends to achieve its investment objectives by identifying the fund's principal investment strategies, including the type or types of securities in which the fund will principally invest and any policy to concentrate in securities issuers in a particular industry or group of industries) and Item 4(b)(1) (requiring a summary of the principal risks of investing in the fund, including risks to which the fund's portfolio as a whole is subject and the circumstances reasonably likely to affect adversely the fund's net asset value, yield, or total return; Item 4(b)(1) also requires special disclosure for money market-type funds, investments sold through insured depository institutions, and non-diversified investments).

[13] This clarification is consistent with a requirement in the Department's 404(c) regulation, prior to its amendment herein, to disclose "information relating to the type and diversification of assets comprising the portfolio"). *See* 29 CFR 2550.404c–1(b)(2)(i)(B)(1)(ii).

[14] Consistent with Instruction 4(c) to Item 13(a) of Form N–1A and Instruction 11(e) to Item 4 of Form N–3, money market funds (and other investment products with similar investment objectives) may omit a portfolio turnover rate.

rules for certain designated investment alternatives and annuity options.

A few commenters requested clarification about what information must be disclosed on the Web site concerning "the investment's performance and related fees and expenses" as required by paragraph (d)(1)(i)(B) of the proposal. Specifically, these commenters ask to what extent this requirement is redundant given the performance and fee and expense information that is otherwise required to be disclosed on the annual disclosure document; if it is not redundant, commenters question what additional performance and fee and expense information must be provided on the Web site. The intent of this provision was to make available more recent information than what was provided to participants on an annual basis. In responses to these comments, the Department has modified the proposal to split this requirement into two separate provisions and has clarified the updating obligation for all supplemental information. Paragraph (d)(1)(v)(E) of the final rule addresses the performance data that must be displayed by reference to the return information specified in paragraph (d)(1)(ii) and requires that such information be updated on at least a quarterly basis (as defined in paragraph (h)(2) of the final rule), or more frequently if required by other applicable law. Other than providing the revised performance information on the Web site in compliance with this updating requirement, plan administrators are not obligated to provide any additional or different information concerning an investment's performance. Paragraph (d)(1)(v)(F) of the final rule addresses the fee and expense information that must be displayed by reference to the fee and expense information specified in paragraph (d)(1)(iv). This information must be updated in accordance with the general updating requirement for supplemental information discussed below. Corresponding to the content parameters for updating performance information, plan administrators are not obligated to provide any additional or different information concerning an investment's fees and expenses than that required by paragraph (d)(1)(iv) of the final rule.

Commenters also requested guidance as to how often the Web site supplemental information must be updated; the proposal did not provide an updating requirement. In view of the fact that participants will have continuing access to Web sites, it is the expectation that the information made available via the Web site will be accurate and updated by the plan administrator, service provider or the issuer of a designated investment alternative as soon as reasonably possible following a change, or notification thereof.

Recognizing that some participants may not have ready access to the information required to be made available on an Internet Web site, the final rule, at paragraph (d)(2)(i)(C), requires that participants and beneficiaries be furnished, as part of the required comparative format disclosure document, information about how to request, and obtain free of charge, a paper copy of the information required to be maintained on a Web site pursuant to paragraph (d)(1)(v) or paragraph (i), as applicable.

g. Glossary

Although not part of the proposed rule, a number of commenters suggested that participants and beneficiaries would benefit from a glossary of investment and financial terms relevant to the designated investment alternatives under the plan. Indeed, the lack of a glossary of investment terminology in the proposed regulation was perceived as a key weakness of the proposal by some of these commenters. One of these commenters, for example, commissioned a nationally representative online survey of 2,106 participants in 401(k) plans to gather feedback on the proposal's model comparative chart. A conclusion of that survey is that providing clear definitions of financial terminology and using vocabulary that is not perceived as complicated may help to improve participants' understanding of the disclosure. ICF's report to the Department following their focus group studies further supported the commenters and the conclusion of the online survey. The Department was persuaded that the furnishing of a glossary or access to a glossary of terms relevant to plan investments would be helpful to participants and, accordingly, has included such a requirement in the final rule. *See* paragraph (d)(1)(vi). Specifically, paragraph (d)(1)(vi) provides for the furnishing of a general glossary of terms to assist participants and beneficiaries in understanding the designated investment alternatives, or an Internet Web site address that is sufficiently specific to provide access to such a glossary along with a general explanation of the purpose of the address. The Department anticipates a number of ways to satisfy this furnishing requirement. For example, a plan administrator could satisfy this furnishing requirement either by including an appropriate glossary in the comparative disclosure document or, in lieu thereof, by including an Internet Web site address at which such a glossary may be accessed. Alternatively, the Web site address for each designated investment alternative, required pursuant paragraphs (d)(1)(v) and (i) of the final rule, may contain its own glossary of terms relevant to that specific alternative, or link to such a glossary.

Some commenters suggested that the Department prepare or make available such a glossary. At this juncture, the Department believes that plan administrators, in conjunction with their service providers and issuers of investment alternatives, are in the best position to determine the glossary (or glossaries) appropriate for their participants, taking into consideration the investment options made available under the plan. Nonetheless, the Department is interested in further exploring whether the Department should develop or identify general investment glossaries that could be utilized by plan administrators in satisfying their obligations under the final rule. Specifically, the Department invites interested persons to share their views as to what terminology should be addressed in a general investment glossary and whether, or to what extent, such glossaries currently exist that could serve as a resource for relatively unsophisticated participant-investors. Suggestions and views on the development and availability of one or more such glossaries should be addressed to *e-ORI@dol.gov,* subject: Participant Investment Glossary.

h. Annuity Options

The Department received a number of comments relating to the disclosure of information with respect to investment products that consist, in whole or in part, of annuities or annuitization guarantees. These commenters maintain that core concepts in the proposal, such as "average annual total return," "benchmarks," and "total annual operating expenses," while entirely appropriate for designated investment alternatives with respect to which returns can and do vary, such as mutual funds, collective investment funds, and portfolio operating companies within variable annuity contracts, are irrelevant to annuities or annuitization guarantees. The commenters, therefore, requested that the Department revise the proposal to require disclosure of information more appropriate to annuity contracts, funds or products. Some of the commenters emphasized that plan administrators need the flexibility to explain the benefits of these products which may provide annuities or annuitization guarantees along with exposure to the equities market and requested that the final rule allow for such explanations in the disclosure.

In response to these comments, the Department has added two new provisions to the final rule. The first new provision, at paragraph (d)(1)(vii) of the final rule, is intended to address commenters' concerns with annuity features that are contained within variable annuity contracts, under which participants and beneficiaries have a right to purchase an annuity with their accumulated plan savings at a rate specified in the contract ("variable annuity"). The information that must be disclosed pursuant to this paragraph (d)(1)(vii) for the variable annuity complements the investment-related information disclosed pursuant to paragraph (d)(1) for the related portfolio operating companies. Paragraph (d)(1)(vii) is applicable to any designated investment alternative consisting in part of a contract, fund or product that affords participants or beneficiaries the option to allocate contributions toward the future purchase of a stream of retirement income payments guaranteed by an insurance company. When applicable, paragraph (d)(1)(vii) of the final rule incorporates by cross reference the requirements of the second new provision, a special rule, at paragraph (i)(2)(i) through (vii) of the final regulation. This provision requires the disclosure of information relating to the variable annuity itself to the extent that the information is not otherwise disclosed pursuant to paragraph (d)(1)(iv). Through the combination of these two provisions, the Department intends for participants and beneficiaries to receive comprehensive disclosure of investment and annuity information pertaining to both portfolio operating companies within a variable annuity contract and the variable annuity itself. The special rule at paragraph (i)(2)(i) through (vii) of the final regulation is discussed more fully below.

i. Disclosures On or Before First Investment

As discussed above, paragraph (d)(1)(v) of the proposal provided, for purposes of the disclosure of investment-related information to new participants, that plan administrators could satisfy this obligation by furnishing the most recent annual disclosure along with any required updates furnished to participants and beneficiaries. The Department received no objections to this provision and, accordingly, is adopting it as proposed, except that it has been re-designated as paragraph (d)(viii) in the final rule and modified to conform with the new timing requirements (*i.e.,* to reflect the change from "on or before the date of plan eligibility" to "on or before the date on which the participant or beneficiary can first direct his or her investment").

j. Comparative Format Requirement

Paragraph (d)(2) of the proposed regulation provided that the investment-related information required pursuant to paragraph (d)(1) must be furnished in a chart or similar format that is designed to facilitate comparison of such information for each designated investment alternative offered under the plan. The Department also included as an Appendix to the proposal a Model Comparative Chart that could be used to satisfy this requirement. Several commenters on the proposal specifically noted their support for the requirement that investment-related information be disclosed in a comparative format. Further, participants in the Department's focus group studies believe that the Model Comparative Chart would make it easier to choose among a plan's designated investment alternatives; these individuals felt that the Chart is an improvement over the manner in which plan investment information currently is made available to them and that the Chart would encourage them, in some cases, to obtain additional information about plan designated investment alternatives.

The Department has retained this requirement in paragraph (d)(2) of the final rule, subject to a few minor modifications, and has also published with the final rule a revised Model Comparative Chart which reflects conforming changes to the final rule's disclosure requirements. Paragraph (d)(2)(i) of the final rule requires that the information described in paragraph (d)(1) and, if applicable, paragraph (i), must be furnished in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan. This paragraph of the final rule also requires that the date of the chart be prominently displayed. As proposed, the final rule requires in paragraphs (d)(2)(i)(A) and (B) a statement indicating the name, address, and telephone number of the plan administrator (or the plan administrator's designee) to contact for the provision of the information that must be made available upon request pursuant to paragraph (d)(4) of the final rule and a statement that additional investment-related information (including more current performance information) is available at the listed Internet Web site addresses.

As noted above, a new subparagraph (C) has been added to paragraph (d)(2)(i) of the final rule. This new subparagraph requires that the comparative disclosure include information about how participants and beneficiaries can request, and obtain, free of charge, paper copies of the information required to be maintained on a Web site pursuant to paragraph (d)(1)(v) of the final rule. This new disclosure requirement will help to ensure that participants and beneficiaries who do not have access to the Internet, nonetheless, can, if they so choose, obtain supplemental information contained on the Web sites, in order to facilitate a comprehensive consideration of the available investment choices under the plan. Because the final rule includes special Web site disclosure rules for certain designated investment alternatives and annuity options (paragraph (i)(2) for annuity options and paragraph (i)(3) for fixed-return alternatives), the new the subparagraph (C) includes explicit references to these special rules in order to eliminate any ambiguity as to whether the rights provided by new subparagraph (C) extend to such investment choices. In this regard, the Department notes that although paragraph (i)(1) contains a special rule for qualifying employer securities, certain requirements of paragraph (d)(1)(v) are not modified by the special rule and remain applicable to qualifying employer securities; consequently, the rights provided by new subparagraph (C) extend to qualifying employer securities via the reference to paragraph (d)(1)(v) in subparagraph (C).

Paragraph (d)(2)(ii), like the proposal, provides that nothing in the final rule precludes a plan administrator from including additional information that the plan administrator determines appropriate for such comparisons, provided such information is not inaccurate or misleading. The Department believes that the technical concerns raised by commenters on the Model Comparative Chart have been addressed in revisions to the operative provisions of the final rule.

One procedural question raised by commenters, for example on behalf of Code section 403(b) plans, was whether each issuer of designated investment alternatives could prepare its own comparative chart for distribution and send it directly to participants and beneficiaries, such that, for example, a participant in a plan with three investment issuers would receive three charts, stating that this would greatly simplify the plan administrator's task in meeting the comparative format requirement. It is the view of the Department that nothing in the final regulation precludes plan administrators from combining multiple documents for purposes of satisfying their obligation to provide the information required by this rule in a comparative form. For example, a chart could be divided such that one part presented stock funds while another part presented bond funds, as in the Department's model format. Similarly, a chart could group investment alternatives by issuer. On the other hand, the Department also is of the view that permitting individual investment issuers, or others, to separately distribute comparative charts reflecting their particular investment alternatives would not be furnishing information in a form that would facilitate a comparison of the required investment information and, therefore, would not comply with the requirements of paragraph (d)(2).

k. Information To Be Provided Subsequent to Investment

Paragraph (d)(3) of the final rule requires that, when a plan provides for the pass-through of voting, tender, and similar rights, the plan administrator must furnish participants and beneficiaries who have invested in a designated investment alternative with these features any materials about such rights that have been provided to the plan. This provision, which is unchanged from the proposal, is similar to the requirement currently applicable to ERISA section 404(c) plans.[15]

l. Information To Be Provided Upon Request

Paragraph (d)(4) of the final rule requires a plan administrator to furnish certain identified information either automatically or upon request by participants and beneficiaries, based on the latest information available to the plan. This provision, which also is unchanged from the proposal, is modeled on the requirements currently applicable to ERISA section 404(c) plans with respect to information to be furnished upon request.[16]

4. Form of Disclosure

Paragraph (e) of the final rule, like the proposal, specifically addresses the form in which the required disclosures may be made. Commenters on the proposal generally supported the ability of plan administrators to coordinate the requirements of this rule with other disclosure materials. The Department notes that, like the proposal, paragraph (e) merely recognizes various acceptable means of disclosure; it does not preclude other means for satisfying disclosure obligations under the final rule.

Specifically, paragraph (e)(1) makes clear that plan-related information required to be disclosed pursuant to paragraphs (c)(1)(i), (c)(2)(i)(A) and (c)(3)(i)(A) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with the time frames prescribed by paragraph (c) of this section. Paragraph (e)(2) of the final rule, like the proposal, makes clear that the information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).

Paragraph (e)(3) provides that a plan administrator that uses and accurately completes the model in the Appendix, taking into account each plan's specific provisions and each designated investment alternative offered under the plan, will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

Paragraph (e)(4) further clarifies that, except as otherwise explicitly required herein, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge. Finally, paragraph (e)(5) generally requires that the information required to be prepared by the plan administrator for disclosure under the regulation must be written in a manner calculated to be understood by the average plan participant.

5. Selection and Monitoring

Paragraph (f) of the final rule continues to make clear that nothing in the regulation would relieve a fiduciary of its responsibilities to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.[17]

This paragraph is unchanged from the proposal.

6. Manner of Furnishing

Paragraph (g) of the proposal addressed the "manner of furnishing" the disclosures required by the regulation. Specifically, paragraph (g) of the proposal provided that the required disclosure shall be furnished in any manner consistent with the requirements of 29 CFR 2520.104b–1, including paragraph (c) of that section relating to the use of electronic media.

This proposal produced significant comments. A number of commenters recommended that the Department expand the permissibility of electronic disclosure beyond that currently addressed in the Department's safe harbor regulation, at § 2520.104b–1(c). They argued that such forms of disclosure would be more efficient, less burdensome, and less costly for plans and, therefore, participants. Other commenters cautioned against broadening the electronic disclosure standards, arguing that many workers do not have Internet access or prefer paper over electronically disclosed materials. Important questions involve the extent of the cost savings from expanded use of electronic disclosure and the number of workers who would be disadvantaged from such an expansion (which could itself take various forms, perhaps including "opt out" electronic disclosure).

In light of these differing views and the significance of the issues surrounding the use of electronic disclosure, the Department has decided to reserve paragraph (g) of the regulation while further exploring whether, and possibly how, to expand or modify the standards applicable to the electronic distribution of required plan disclosures. To ensure a full review of the issue, the Department will, in the near future, be publishing a **Federal Register** notice requesting public comments, views, and data relating to the electronic distribution of plan information to plan participants and beneficiaries. Pending the completion of this review and the issuance of further guidance, the Department notes that the general disclosure regulation at 29 CFR

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[15] *See* 29 CFR 2550.404c–1(b)(2)(i)(B)(1)(ix).

[16] *See* 29 CFR 2550.404c–1(b)(2)(i)(B)(2).

[17] Also, with regard to ERISA's general fiduciary standards, as noted in the preamble to the proposal, 73 FR 43014 at 43018, n. 8, it should be noted that there may be extraordinary situations when fiduciaries will have a disclosure obligation beyond those addressed by the final rule. For example, if a fiduciary knew that, due to a fraud, information contained in a public financial report would mislead investors concerning the value of a designated investment alternative, the fiduciary would have an obligation to take appropriate steps to protect the plan's participants, such as disclosing the information or preventing additional investments in that alternative by plan participants until the relevant information is made public. *See also Varity Corp.* v. *Howe,* 516 U.S. 489 (1996) (plan fiduciary has a duty not to misrepresent to participants and beneficiaries material information relating to a plan).

§ 2520.104b–1 applies to material furnished under this regulation, including the safe harbor for electronic disclosures at paragraph (c) of that regulation. It is anticipated, however, that resolution of this issue will occur in advance of the compliance date for this regulation, so as to ensure for appropriate notice for plans.

7. Definitions

The proposed rule contained, in section (h), a series of definitions for some of the terms used in the rule. These definitions of technical terms were intended to assist plan administrators, their service providers, and issuers of designated investment alternatives in complying with the requirements of the rule. In response to comments and clarifications requested by commenters, the Department made some additions and modifications to the definitions contained in section (h), which are discussed below in this section. One commenter suggested that the Department should address potential changes to the cross-references contained in the rule's definitions, which refer to rules under the Securities and Exchange Commission's jurisdiction, for example by referencing the Commission's Form N–1A. Absent further guidance, it is the Department's intention that these cross-references will refer, as appropriate, to successor rules and instructions.

The Department also received comments requesting that the rule define some of the terms used in the Model Comparative Chart, but these commenters appeared to focus on defining terms for the benefit of participants and beneficiaries, for example suggesting that a glossary or other index of terms, with "plain English" definitions, be provided. In response to these commenters, and in response to participants in the Department's focus group studies, who similarly supported the inclusion of definitions for investment and financial terms, the Department, at paragraph (d)(1)(vi) of the final rule, now requires the furnishing of or access to a general glossary of terms appropriate to assist participants and beneficiaries in understanding their designated investment alternatives. This glossary requirement is discussed above with the other investment-related information requirements.

The Department did not receive any comments or questions concerning the definitions of "at least annually thereafter" or "at least quarterly;" accordingly, those phrases continue to be defined, as proposed, in the final rule.

a. Average Annual Total Return

The proposal, in paragraph (h)(2), defined "average annual total return" to mean the average annual profit or loss realized by a designated investment alternative at the end of a specified period, calculated in the same manner as average annual total return is calculated under Item 21 of Securities and Exchange Commission Form N–1A [18] with respect to an open-end management investment company registered under the Investment Company Act of 1940 (1940 Act). In general, the commenters strongly supported the concept of providing participants with this type of performance data. However, in response to several technical comments as to how this definition would be applied to products other than those that register using the Form N–1A, the final rule, in paragraph (h)(3), contains a revised definition. As revised, the term "average annual total return" means the "average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N–1A, N–3, or N–4, as appropriate, except that such method of computation may exclude any front-end, deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan." The new references to Form N–3 and N–4 are to provide additional guidance with respect to designated investment alternatives that consist of separate accounts offering variable annuity contracts which are registered under the 1940 Act. The sales loads exception responds to commenters' concerns that the proposed definition, specifically the reference to Item 21 of the Form N–1A (now Item 26 in Form N–1A, as revised), might result in participants and beneficiaries receiving inaccurate information about actual returns in cases where the designated investment alternative waives sales loads; under this exception, plan administrators may disregard any requirement under Commission Forms to assume sales loads if they are not actually charged to plan participants and beneficiaries. The use of this definition is intended to assure that all participants and beneficiaries will, taking into account the variety of investments available through ERISA plans, receive the most uniform and comparable performance information available for their investment options, without regard to whether the designated investment alternative is a product registered under the 1940 Act.

[18] Now item 26 of Form N–1A, as revised, February 2010.

b. Designated Investment Alternatives

Several commenters expressed concern with the Department's definition of "designated investment alternatives" in paragraph (h)(1) of the proposal. Specifically, commenters questioned the definition's exclusion of "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. Commenters argued that the proposal was not clear as to what information would in fact have to be disclosed concerning participants' and beneficiaries' investments through such an arrangement. The final rule retains the proposed definition of "designated investment alternatives," although re-designated as paragraph (h)(4) in the final, and therefore continues to exclude brokerage windows and similar arrangements from the definition. However, as discussed earlier, it is important that participants and beneficiaries understand how brokerage windows operate and the expenses attendant thereto when they are offered as part of the investment platform of a plan. For this reason, the final rule includes more specific requirements than the proposal concerning the information that must be disclosed about brokerage windows or similar arrangements. *See* paragraph (c)(1)(i)(F) of the final rule.

c. Total Annual Operating Expenses

The proposed regulation defined the term "total annual operating expenses" as "annual operating expenses of the designated investment alternative (*e.g.,* investment management fees, distribution, service, and administrative expenses) that reduce the rate of return to participants and beneficiaries, expressed as a percentage, calculated in the same manner as total annual operating expenses is calculated under Instruction 3 to Item 3 of the Commission's Form N–1A with respect to an open-end management investment company registered under the Investment Company Act of 1940." The Department invited comments on what, if any, problems the proposed definition presented for investment funds and products that are not subject to the 1940 Act and, any suggestions for alternative definitions or approaches.

Some commenters questioned whether it is appropriate for the Department to model its disclosure requirement for calculating expenses for all designated investment alternatives in ERISA plans on a mutual fund methodology. These commenters suggested the Department might instead consider developing multiple methodologies that take into account the unique characteristics of the many different types of investment options in participant-directed individual account plans, particularly those that are not registered under the 1940 Act. The Department considered this suggestion and has accordingly modified the expense calculation as discussed more fully below. A core objective of the regulation is to ensure that participants receive uniform and reliable information about their plan's investment options whether or not such options are registered or unregistered under Commission requirements. The Department believes that the final rule's revised definition will achieve this result and produce a comparable expense calculation across the different types of investment options offered under ERISA plans.

Specifically, one commenter, representing the insurance industry, noted that certain insurance products are required to be registered under the Securities Act of 1933, 1940 Act, or both and that such registrants must file their registration statements on the Commission's Forms N–3 or N–4. The commenter pointed out that both of these forms set forth a methodology for reporting the total annual expenses of the insurance product. This commenter suggested that the Department should consider utilizing these established methodologies with respect to designated investment alternatives offered through variable annuity contracts, rather than the methodology in the Commission's Form N–1A, where appropriate, in order to reduce direct and indirect compliance costs. The Department reviewed the methodologies in the Forms N–3 and N–4 and concluded that while they require substantially the same methodology as the Form N–1A, the suggested methodologies and language offer more precision with respect to certain annual expenses unique to variable annuity contracts ("mortality and expense risk fees"), which are not addressed in the Form N–1A. Therefore, paragraph (h)(5)(i) of the final rule has been revised to accommodate this commenter's request.

Other commenters, representing the banking industry, were concerned that the proposed definition with its reliance on Commission standards may not work well when applied to a designated investment alternative that consists of a bank collective investment fund because these alternatives typically are not registered under the 1940 Act. These commenters stated that, unlike a mutual fund, a bank collective investment fund is not required to deduct all of its operating expenses from the fund's assets, and may instead charge some or all of its operating expenses directly to the plans investing in the fund. These commenters asserted that the proposed definition would not capture such expenses and emphasized their unfamiliarity with the required expense calculation as well as its impact on bank collective investment funds. The Department found these comments persuasive and, in the final rule, added paragraph (h)(5)(ii), a separate definition of total annual operating expenses for these unregistered alternatives. The Department believes that this new definition will produce an expense calculation that is substantially the same as the expense calculation for registered alternatives while capturing the different ways that unregistered alternatives charge plans.

Paragraph (h)(5)(ii) of the final rule defines the term "total annual operating expenses" as "the sum of the fees and expenses described in paragraphs (h)(5)(ii)(A) through (C) of this section before waivers and reimbursements, for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year." [19] Paragraph (h)(5)(ii)(A) requires the inclusion of all "management fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return." Paragraph (h)(5)(ii)(B) requires the inclusion of any "distribution and/or servicing fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return." Paragraph (h)(5)(ii)(C) requires the inclusion of any "other fees or expenses not included in subparagraph (A) or (B) that reduce the alternative's rate of return" such as externally negotiated investment management fees charged by bank collective investment funds, but excludes "brokerage costs as described in Item 21 of Securities and Exchange Commission Form N–1A." [20]

The following example illustrates the requirements of paragraphs (h)(5)(ii) of the final rule. Plan A offers Designated Investment Alternative One (DIA 1) which invests $125 million in bank collective investment fund XYZ, an unregistered investment alternative, with assets of $1.2 billion. XYZ investment management fees of .22% are deducted directly from the fund's assets. Additional investment management fees of XYZ of .16% are invoiced directly to Plan A, which pays the expense and then proportionately reduces the value of the shares of Plan A participants and beneficiaries who are invested in DIA 1. Recordkeeping expenses of XYZ of $15,000 are invoiced directly to Plan A which allocates this charge proportionally to the accounts of Plan A participants and beneficiaries that are invested in DIA 1. XYZ also charges a servicing fee of .10% for marketing materials it makes available to Plan A participants and beneficiaries. These fees are deducted directly from the fund's assets.

The provisions of paragraph (h)(5)(ii) of the final rule require these four expenses to be included in the total annual operating expenses of DIA 1 because they reduce the alternative's rate of return to participants and beneficiaries. In other words, the sum of these expenses is subtracted from the alternative's gross returns, which indirectly reduces the value of a participant's investment in DIA 1. In this example, the total annual operating expenses of DIA 1 are the sum of these four expenses or .492% (represented as .49% after rounding to the nearest hundredth of a percent). The investment management fee of .22% and the servicing fee of .10% are included by virtue of paragraph (h)(5)(ii)(A) and paragraph (h)(5)(ii)(B), respectively. The additional investment management fee of .16% is included by virtue of paragraph (h)(5)(ii)(C), and so is the recordkeeping fee of .012% (calculated as: $15,000/$125,000,000). Thus, the annual cost to the participants and beneficiaries who invest in DIA 1 is $4.92 for every $1,000 invested.

Under paragraph (h)(5)(ii) of the final rule, if a fee or expense does not reduce a designated investment alternative's

[19] The Department intends to achieve as much symmetry between registered and unregistered designated investment alternatives as is possible. For that reason, consistent with Instructions 3(d)(i) and 6(a) to Item 3 Form N–1A, paragraph (h)(5)(ii) of the final regulation directs the calculation of total annual operating expenses before any waivers or reimbursements.

[20] Brokerage costs are not included in a mutual fund's expense ratio because, under generally accepted accounting principles, they are either included as part of the cost basis of securities purchased or subtracted from the net proceeds of securities sold and ultimately are reflected as changes in the realized and unrealized gain or loss on portfolio securities in the fund's financial statements. *See* 68 FR 74820.

rate of return, the fee or expense is not to be included in the total annual operating expense of that alternative. Thus, if the recordkeeping expenses of $15,000 in the above example were paid from plan assets by liquidating shares of DIA 1 from participants' accounts, rather than reducing the value of their shares, the total annual operating expenses of DIA 1 would be .48% rather than .492%. In such circumstances, the recordkeeping fee would instead be covered by paragraph (c)(3) of the final regulation, not paragraph (h)(5)(ii), and would have to be disclosed on the statement required by paragraph (c)(3)(ii) of the final regulation.

8. Special Rules for Certain Designated Investment Alternatives

Many commenters expressed concern that the framework of the proposed regulation as it related to investment-related information could not be meaningfully applied to certain types of investment options. Specifically, these commenters argued that many of the pieces of information that the proposal mandates must be disclosed do not apply to certain designated investment alternatives, such as employer securities or investments that include annuity or annuitization guarantee features, and that it would be difficult to disclose the unique characteristics of these investment alternatives within the framework of the proposal. Accordingly, the Department expanded the final rule to include special rules, described below, to address these concerns and require that plan administrators and their service providers disclose relevant information concerning these investment options.

a. Special Rules for Designated Investment Alternatives That Consist of Employer Securities

Several commenters stated that investments in employer securities should warrant separate treatment from other designated investment alternatives under the final rule because many of the required investment-related disclosures fail to correspond with investment characteristics of company stock. Some commenters even argued that investments in employer securities should be completely excluded from the definition of designated investment alternatives. Another commenter claimed that the proposal would create a cause of action under ERISA section 502 for disclosure regulated by the securities laws, permitting litigants to evade the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). However, in the Department's view, this rule does nothing to impair the disclosure requirements of the securities laws, which remain in full force and effect. Causes of action under ERISA section 502 are limited to remedying violations of ERISA and plan provisions. This section does not allow plaintiffs to bring suits for violations of securities law or with respect to securities not belonging to an ERISA plan. Plaintiffs bringing suit for violations of the securities laws continue to be subject to the PSLRA and SLUSA.

The Department has been persuaded to modify several aspects of the proposal for investments in employer securities rather than creating a complete exclusion from the investment-related disclosures. The Department has rejected a complete exclusion under the final rule because, as stated by one commenter to the proposal, 20 million Americans invest in stock in their companies through 401(k) plans, based on the 2006 General Social Survey.[21] The Department's 5500 data for 2007 indicates that there are approximately 72.2 million participants in individual account plans, of whom 17 million were participants in plans that offered employer securities. In terms of magnitude, this means approximately one fourth of all participants in individual account plans could have invested in company stock. The Department believes that these participants and beneficiaries are entitled to the investment-related information for employer securities required by paragraph (d) as modified under paragraph (i) of the final rule.

Consequently, the Department has developed a special provision for investments in, or primarily in, employer securities as defined in section 407 of ERISA, and has also exempted these investments from certain aspects of the final rule. In making these modifications to the proposal, the Department recognized that while certain designated investment alternatives consist primarily of investments in employer securities that are held as shares, other alternatives that invest primarily in employer securities may also hold cash management investments for liquidity purposes, so that participants and beneficiaries acquire units of participation in a fund (*i.e.,* a unitized fund) rather than actual shares when they allocate their contributions to this investment alternative.

With regard to the supplemental information that must be provided to participants and beneficiaries through an Internet Web site address, the Department has modified the proposed rule to exempt these qualifying employer securities from the requirements of paragraph (d)(1)(v)(C) concerning the disclosure of an investment's principal strategies and risks, and instead is requiring an explanation under paragraph (i)(1)(i) of the final rule as to the importance of a well-balanced and diversified investment portfolio. The Department expects that plan administrators will use the language provided in the Department's Field Assistance Bulletin 2006–03 (FAB 2006–03) to satisfy this requirement. The FAB language provides: "To help achieve long-term retirement security, you should give careful consideration to the benefits of a well-balanced and diversified investment portfolio. Spreading your assets among different types of investments can help you achieve a favorable rate of return, while minimizing your overall risk of losing money. This is because market or other economic conditions that cause one category of assets, or one particular security, to perform very well often cause another asset category, or another particular security to perform poorly. If you invest more than 20% of your retirement savings in any one company or industry, your savings may not be properly diversified. Although diversification is not a guarantee against loss, it is an effective strategy to help you manage investment risk."

As stated in paragraph (i)(1)(ii) of the final rule, the Department is also exempting these qualifying employer securities from the Internet Web site requirements relating to portfolio turnover required under paragraph (d)(1)(v)(D).

Many commenters also pointed to the proposal's fee and expense information requirement, which is preserved in paragraph (d)(1)(iv)(A)(*2*) of the final rule, to disclose an investment's total annual operating expenses, expressed as a percentage, as problematic; essentially, these commenters maintained that an expense ratio is irrelevant or non-calculable for investments consisting primarily of employer securities. The Department has considered these comments and has exempted, in paragraph (i)(1)(iv) of the final rule, qualifying employer

[21] Davis, James Allan; Smith, Tom W.; and Marsden, Peter V. *General social surveys, 1972–2006: cumulative codebook/*Principal Investigator, James A. Davis; Director and Co-Principal Investigator, Tom W. Smith; Co-Principal Investigator, Peter V. Marsden.—Chicago: National Opinion Research Center, 2007. 2,552 pp., 28 cm.—(National Data Program for the Social Sciences Series, no. 18).

securities from the requirement to disclose an expense ratio, provided such designated investment alternative is not a unitized fund. As a corollary to this exemption, these investments are also relieved, under paragraphs (i)(1)(iii) and (v), respectively, of the final rule, from the requirements of paragraph (d)(1)(iv)(A)(*2*) relating to fee and expense information and the requirements of paragraph (d)(1)(iv)(A)(*3*) relating to the expense ratio expressed as a dollar amount per $1,000 invested.

Some commenters expressed concern with the requirement that such investments disclose performance data expressed as average annual total return for specified periods. The Department has determined to modify the definition of average annual total return, which is otherwise applicable under paragraph (h)(3) of the final rule, for qualifying employer securities that are publicly traded on a national exchange or generally recognized market, provided such designated investment alternative is not a unitized fund, in paragraph (i)(1)(vi) of the final rule. For this purpose, average annual total return is defined in paragraph (i)(1)(vi)(B) to mean the change in value of an investment in one share of stock on an annualized basis over a 1, 5, or 10 year period, assuming dividend reinvestment; such a return measurement is commonly referred to as total shareholder return. This return is calculated by taking the sum of the dividends paid during the measurement period, plus the difference between a stock price (consistent with section 3(18) of ERISA) at the end and the beginning of the measurement period divided by the stock price at the beginning of the measurement period. For example, and ignoring the reinvestment of dividends for simplicity, if a share is $100 at the beginning of the measurement period and $115 at the close, and dividends paid totaled $5 over the period, the disclosed return would be 20% (5 + 115 − 100/100).

Similarly, in paragraph (i)(1)(vi)(C) of the final rule, the Department is modifying the definition of average annual total return for qualifying employer securities that are not publicly traded on a national exchange or generally recognized market, provided such designated investment alternative is not a unitized fund, to require disclosure of return information calculated using principles similar to those for the return calculation of publicly traded securities under paragraph (i)(1)(vi)(B). The Department anticipates that in many cases dividends will not have been paid on such securities and that the plan administrators will use Form 5500 plan valuation data in calculating this return. The new reference to ERISA section 3(18) expresses the Department's intent that the "stock price" used in these calculations be consistent with the fair market value methodologies that the plan administrator is already using under current law with respect to the value of employer stock held by the plan.

b. Special Rules for Annuities

As discussed above, the Department, in response to comments, has made two changes to the final rule to better ensure the disclosure of both investment and annuity related information to plan participants and beneficiaries. These changes appear in the final rule at paragraphs (d)(1)(vii) and (i)(2). Paragraph (i)(2) of the final rule sets forth the information that must be disclosed about annuity options. Paragraph (i)(2) applies to any designated investment alternative consisting of a contract, fund or product that affords participants or beneficiaries the option to allocate contributions toward the current purchase of a stream of retirement income payments guaranteed by an insurance company. Paragraph (i)(2) addresses commenters' concerns with stand-alone annuity options under which current participant contributions purchase a fixed-dollar stream of income commencing at a future point in time, typically at retirement age ("fixed-deferred annuity"). Paragraph (d)(1)(vii), as discussed more fully above, addresses commenters' concerns with annuity options that are contained within variable annuity contracts, under which participants and beneficiaries have a right to purchase an annuity with their accumulated plan savings at a rate specified in the contract ("variable annuity"). Moreover as noted above, the requirements in paragraph (i)(2) of the final rule explicitly apply to variable annuities as required by the cross reference in paragraph (d)(1)(vii) of the final rule.

When applicable, the paragraph (i)(2) special rule provides that the plan administrator must, in lieu of the investment-related information described in paragraph (d)(1)(i) through (vi) of the final rule, provide each participant or beneficiary basic information about the benefits and costs of the annuity, as well as an Internet Web site address to lead participants and beneficiaries to additional information. Since both variable and fixed-deferred annuities are subject to the comparative format requirement in paragraph (d)(2) of the final rule, the plan administrator must furnish the content information described in paragraph (i)(2)(i) through (vi) of this special rule in a comparative chart or similar format. The Department believes that maintaining the comparative chart requirement will enable participants to undertake a comparison of annuity options when a plan includes two or more annuity options as designated investment alternatives.

c. Special Web Site Rules for Fixed-Return Investments

As discussed above, the proposal, in paragraph (d)(1)(i)(B), required disclosure of an Internet Web site for each designated investment alternative offered under the plan. In response to concerns about this Web site requirement, which were discussed earlier in this preamble, the final rule, at paragraphs (d)(1)(v)(A) through (F), has been revised to clarify the specific items of information that must be made available at the required Web site address. In developing these revisions, however, the Department concluded that many of the revised content requirements in paragraphs (d)(1)(v)(A) through (F) simply do not apply to designated investment alternatives with respect to which the return is fixed for the term of the investment, *e.g.,* portfolio turnover rate. The final rule, therefore, includes special rules that clarify and limit the information that that must be made available at the required Web site address for each designated investment alternative with respect to which the return is fixed for the term of the investment. These special rules, at paragraph (i)(3) of the final regulation, require disclosure of, among other things, name of the investment's issuer; objectives or goals (*e.g.,* to provide stability of principal and guarantee a minimum rate of interest); performance data updated on at least a quarterly basis (or more frequently if required by other applicable law); and fee and expense information.

d. Special Rules for Target Date or Similar Funds

The Department intends to publish a separate notice of proposed rulemaking that would supplement the otherwise applicable disclosures in this rule for designated investment alternatives that are target date-type funds. Accordingly, the Department has reserved paragraph (i)(4) for inclusion of such guidance.

C. Final Amendment to § 2550.404c–1

This notice also includes a final amendment to the regulation under section 404(c) of ERISA, 29 CFR 2550.404c–1. This amendment generally is unchanged from the proposal, except for the minor modification discussed below. This amendment to section 2550.404c–1(b), (c), and (f) integrates the disclosure requirements in the amended section 404(c) regulation with the disclosure requirements in the final regulation section 2550.404a–5 to avoid having different disclosure rules for plans intended to comply with the ERISA section 404(c) requirements. Similar to the proposal, this amendment eliminates references to disclosures that are now encompassed in section 2550.404a–5 and incorporates in paragraph (b)(2)(i)(B)(*2*) of the 404(c) regulation a cross-reference to the final rule, thereby establishing a uniform disclosure framework for all participant-directed individual account plans.

The final 404(c) regulation has been modified in one respect from the proposal. Specifically, the Department eliminated the reference to "[i]dentification of any designated investment managers" previously required in paragraph (b)(2)(i)(B)(*2*) of the proposed amendment. Commenters noted that identification of designated investment managers also was required pursuant to paragraph (c)(1)(i)(E) of proposed section 2550.404a–5. The Department did not intend to create a duplicative requirement and has therefore eliminated the requirement from the 404(c) regulation; identification of any designated investment managers will be continue to be required for 404(c) plans because (pursuant to paragraph (b)(2)(i)(B)(*2*) of the final 404(c) regulation, published herein) such plans must satisfy all of the disclosure requirements of the new regulation under section 404(a), which includes identification of any designated investment managers.

Finally, as discussed further in the preamble to the proposal, at 73 FR 43018, the Department reiterates its view that a fiduciary breach or an investment loss in connection with the plan's selection or monitoring of a designated investment alternative is not afforded relief under section 404(c) because it is not the result of a participant's or beneficiary's exercise of control.[22] The Department has added, in paragraph (d)(2)(iv) of the final 404(c) amendment, a statement that "paragraph (d)(2)(i) of this section does not serve to relieve a fiduciary from its duty to prudently select and monitor any designated investment manager or designated investment alternative offered under the plan."

[22] *See also* 57 FR 46906, n. 27 (preamble to § 2550.404c–1) (Oct. 13, 1992).

D. Effective and Applicability Dates; Transition Issues

A significant number of commenters expressed concern about the establishment of an effective date that would not allow plans sufficient time to review and implement the new disclosure requirements. Commenters suggested that the Department should allow affected persons twelve to eighteen months to revise their recordkeeping and other systems to ensure that the required information is being captured and to prepare all of the necessary disclosure materials, including any coordination of these new requirements with existing disclosures. In an effort to balance the importance of the required information to plan participants with the practical burdens and costs attendant to compliance with a new disclosure regime, the Department is adopting these final rules with a 60-day effective date, but deferring the application of the new rules for at least 12 months. In this regard, the final rule will be applicable as of the beginning of the first plan year which starts on or after the first day of the thirteenth month following the date of publication. The Department believes that the delayed applicability date will afford plans sufficient time to ensure an efficient and effective implementation of the new rules. *See* paragraph (j)(1) and (2).

The Department also provided transition relief, in paragraph (j)(3) of the final rule, to assist parties in complying with the final rule. Specifically, paragraph (j)(3)(i) provides that notwithstanding the effective and applicability dates for the final rule, the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investment must be furnished no later than 60 days after the rule's applicability date to participants and beneficiaries who had the right to direct the investment of assets held in, or contributed to, their individual accounts, on the applicability date.

Representatives of the banking industry indicated that transitional relief from the requirement to disclose 5- and 10-year performance may be needed for some plans that contain unregistered bank products as designated investment alternatives, if the final regulation were to adopt the "total annual operating expenses" and "average annual total return" definitions set forth in paragraph (h) of the proposed regulation. This is because the methodologies behind these definitions depend on certain data that neither plans nor bank funds were compelled to maintain before this final rule.

Since the final rule contains definitions similar to those in the proposal, the Department was persuaded that transitional relief is necessary. The final regulation, at paragraph (j)(3)(ii), therefore, provides that for plan years beginning before October 2021, if a plan administrator reasonably determines that it does not have the information on expenses attributable to the plan that is necessary to calculate, in accordance with paragraph (h)(3), the 5-year and 10-year average annual total returns for a designated investment alternative that is not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses. For this purpose, the plan administrator may use the most recently reported total annual operating expenses of the designated investment alternative as a substitute for the actual annual expenses during the 5-year and 10-year periods if the plan administrator reasonably determines that doing so will result in a reasonably accurate estimate of the average annual total returns. Nothing in this paragraph (j)(3)(ii) requires disclosure of returns for periods before the commencement of the alternative.

E. Regulatory Impact Analysis

As discussed earlier in this preamble, this final rule establishes a uniform basic disclosure regime for participant-directed individual account plans. Many of the disclosures required by the final rule are similar to those required for participant-directed individual account plans that currently comply with ERISA section 404(c) and the Department's regulations issued thereunder. The Department is uncertain regarding the information that is provided to participants in plans that are not ERISA section 404(c) compliant. Therefore, for purposes of this regulatory impact analysis (RIA), the Department assumes that the final rule's requirements are new for plans that are not ERISA section 404(c) compliant.

Based on the foregoing assumptions, the Department estimates that the average incremental costs and benefits for participants in ERISA section 404(c) compliant plans will be smaller than for those plans that are not. Also, participants in ERISA section 404(c) compliant plans or plans providing similar information only will receive an incremental benefit from the rule's new disclosure requirements, because they already receive some of the information required to be disclosed under the final rule.

1. Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is an action that is likely to result in a rule (1) having an effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Department has determined that this action is "economically significant" under section 3(f)(1) because it is likely to have an effect on the economy of more than $100 million in any one year.

Accordingly, the Department has undertaken, as described below, an analysis of the costs and benefits of the final regulation. The Department continues to believe that the final regulation's benefits justify its costs. The present value of the benefits over the ten-year period 2012–2021 is expected to be about $14.9 billion, with a low estimate of $7.2 billion and a high estimate of $29.9 billion. The present value of the costs over the same time period is expected to be $2.7 billion, with a low estimate of $2.0 billion and a high estimate of $3.3 billion. Overall, the Department estimates that the final regulation will generate a net present value (or net present benefit) of almost $12.3 billion. Table 1 shows the annualized monetized benefits and cost of the regulations and also provides a summary of the benefits and costs. The Department also expects the regulation to produce substantial additional benefits, in the form of improved investment decisions, but the Department was not able to quantify this effect.

TABLE 1—ACCOUNTING TABLE

	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate	Period covered
Benefits:						
Annualized	1,986.1	952.3	3,973.9	2010	7%	2012–2021
Monetized ($millions/year)	1,986.1	952.3	3,973.9	2010	3	2012–2021
Explanation of Monetized Benefits	The regulation's disclosure requirements are expected to reduce participants' time otherwise used for searching for fee and other investment information.					
Qualitative	The Department expects the regulation to produce substantial additional benefits, in the form of improved investment decisions, but the Department was not able to quantify this effect.					
Costs:						
Annualized	353.8	265.5	442.2	2010	7	2012–2021
Monetized ($millions/year)	352.3	264.9	439.7	2010	3	2012–2021
Explanation of Monetized Costs	Plans are likely to incur administrative burdens and costs in order to comply with the requirements of the regulation. The quantified cost estimate includes costs due to legal review of the regulation, consolidation of fee information, creation and maintenance of a Web site, record keeping, production and distribution of disclosures, and material and postage costs.					

2. Need for Regulatory Action

Understanding and comparing investment options available in a 401(k) plan can be complicated and confusing for many participants. The magnitude of complexity and confusion may be defined by reference to the number of available investment options and the materials utilized for communicating investment-related information. Moreover, the process of gathering and comparing information may itself be time consuming. For example, the U.S. Government Accountability Office noted in a recent report that "it is hard for participants to make comparisons across investment options because they have to piece together the fees that they pay, and assessing fees across investment options can be difficult because data are not typically presented in a single document that facilitates comparison."[23]

The final rule's new disclosure requirements will help a large number of plan participants by placing investment-related information in a format that facilitates comparison of investment alternatives. This simplified format will make it easier and less time consuming for participants to find and compare investment-related information. As a result, plan participants should make better investment decisions which will enhance their retirement income security.

Table 2 below shows the number of entities affected by the rule. According to the 2007 Form 5500 data, the latest complete data available, approximately 318,000 participant-directed individual account plans covering over 58.2 million participants reported compliance with ERISA 404(c). Approximately 165,000 participant-directed individual account plans covering about 13.9 million participants reported that they are not ERISA section 404(c) compliant. In total, the rule will impact 483,000 participant-directed individual account plans covering 72 million participants.

[23] U.S. General Accounting Office, *Private Pensions: Information That Sponsors and Participants Need to Understand 401(k) Plan Fees,* p. 15, fn 20. This report may be accessed at *http://www.gao.gov/new.items/d08222t.pdf.*

TABLE 2—NUMBER OF AFFECTED ENTITIES

Plans:	
Number of 404(c) Compliant Plans	318,000
Number of Non-404(c) Compliant Plans	165,000
Number of Participant-directed Plans	483,000
Participants:	
404(c) Plans	58,195,000
Non-404(c) Plans	13,916,000
Number of Participants in Participant-directed Plans	72,111,000

Note: The displayed numbers are rounded and therefore may not add up to the totals.

3. Benefits

The Department believes the final rule will provide two primary benefits: (1) Reduced time for plan participants to collect investment-related information and organize it into a format that allows the information to be compared; and (2) improved investment results for plan participants due to the enhanced disclosures available to them. Each benefit is discussed in further detail below; however, the Department only was able to quantify the search time reduction benefit.

a. Reduction in Participant Search Time

As discussed above, the Department assumes that the final rule's new disclosure requirements will benefit plan participants by reducing the time they spend searching for and compiling fee and expense information into a comparative format. In the RIA of the proposal, the Department estimated that 29 percent of all participants would experience time savings due to the easier access to information and the unified format. However, a commenter pointed out that the Department significantly underestimated the number of participants that will experience time savings. The commenter suggested that all participants who believe that fee, expense and performance information is important for making investment decisions and read materials provided to them most likely will experience time savings. The commenter suggested using a result from the EBRI's 2007 Retirement Confidence Survey [24] which indicates that 73 percent (plus or minus 3 percent) of workers saving for retirement used written materials received at work as a source of information when making retirement savings and investment decisions.[25] The Department agrees with the commenter and has revised its estimates to reflect that out of the 72 million participants affected by the rule, 70 to 76 percent, or nearly 50 to 55 million participants, will benefit from reduced search costs.

Although the Department sought to anchor its analysis on empirical evidence, there are a number of variables that are subject to uncertainty. In particular, although the Department is confident that the new disclosure format will reduce search costs, the Department does not have empirical evidence on the magnitude of these savings. Search time savings will vary widely depending on the type of investment options available through the plan, the completeness of baseline routine voluntary disclosures, the participant's sophistication, among other factors. To illustrate the potential benefits, the Department assumes that participants who are not receiving ERISA section 404(c) compliant disclosures, on average, will save one-and-a-half hours, while participants receiving such disclosures will save one hour on average. The Department also provides a range assuming half the time savings on the low and double the time savings on the high end.

The benefits estimate uses an average wage of $37 for private sector workers participating in a pension plan to estimate how much the average participants would value the time saved. It is based on hourly wages from Panel 4 of the 2004 wave from the Survey of Income Program Participation (SIPP) and on wage growth data for private-sector workers that participate in a pension plan with individual accounts from the Bureau of Labor Statistics (BLS). In the proposal the Department had additionally adjusted the wage rate to account for the difference that plan participants attribute to leisure versus work time. The Department received a comment that the estimate used may not have been representative of participants' value of leisure time and suggested that the Department simply use the average wage rate. The Department agrees and for the purpose of estimating a dollar value of the time uses an average wage rate of about $37.

These assumptions result in annual time savings of approximately 26 to 112 million hours valued at $1.0 to $4.0 billion in 2012. The total present value of this benefit is $7.2 to $29.9 billion using a seven percent discount rate.

b. Reduction in Fees and Expenses

By reducing participants' time required to collect information and organize fee and performance information, the final rule should increase the amount of investment-related information participants consider and the attention devoted to and efficiency of such consideration. This will help participants pick appropriate investment options that will provide the best value to them. Moreover, the increased transparency could strengthen competition between investment products and drive down fees.

In its RIA of the proposal, the Department estimated that fees and expenses are higher than necessary by 11.3 basis points on average. Some commenters on the proposal, as well as some commenters on the Department's proposed exemptions relating to the provision of investment advice by a fiduciary advisor to participants and beneficiaries in participant-directed individual account plans and beneficiaries of individual retirement accounts,[26] dispute this estimate. The commenters point to evidence that the pricing of investment products and related services is competitive and efficient, and contend that there is no credible evidence to the contrary.

The commenters raised several specific challenges to the Department's analysis. First, they contend that the Department's estimate relies inappropriately on dispersion in mutual fund expenses as evidence that such expenses are sometimes higher than necessary and as a basis for estimating the degree to which this is so. Dispersion in expenses reflects differences among the investment products or the services bundled with them, the commenters say, and therefore such dispersion is consistent with competitive, efficient pricing. Second, the commenters argue that the analysis draws incorrect inferences about fees and expenses in DC plans. The analysis overlooks the role of DC plan fiduciaries

[24] Employee Benefit Research Institute Issue Brief #304, April 2007. The survey found that 73 percent of workers saving for retirement used written material received at work as a source of information when making retirement savings and investment decisions.

[25] The survey notes: "In theory, each sample of 1,252 yields a statistical precision of plus or minus 3 percentage points (with 95 percent certainty) of what the results would be if all Americans age 25 and older were surveyed with complete accuracy. There are other possible sources of error in all surveys, however, that may be more serious than theoretical calculations of sampling error. These include refusals to be interviewed and other forms of nonresponse, the effects of question wording and question order, and screening. While attempts are made to minimize these factors, it is impossible to quantify the errors that may result from them."

[26] *See* 73 FR 49895 (August 22, 2008) and 73 FR 49924 (August 22, 2008).

in choosing reasonably priced investments and relies too much on research that examined retail rather than DC plan experience, they say. Third, the commenters highlight what they maintain are technical flaws in some of the research that the Department cited as supporting the conclusion that fees and expenses are sometimes higher than necessary, and they take issue with the Department's interpretation of this research.

In response to these commenters, the Department undertook to refine and strengthen its analysis. First, the Department agrees that the RIA of the proposal relied too heavily on mere dispersion of fees and expenses as a basis for estimating whether and to what degree they might be higher than necessary. The estimate that they are on average 11.3 basis points higher than necessary lacks adequate basis and should be disregarded. Second, the Department agrees that fees and expenses paid by DC plan participants can differ from those paid by retail investors. Any evidence of higher than necessary expenses in the retail sector might suggest similar circumstances in DC plans, but would not demonstrate it. Third, the Department reviewed available research literature in light of the commenters, and refined its analysis and conclusions accordingly, as summarized immediately below.

Expense Sensitivity—Surveys and studies strongly suggest gaps in awareness of and sensitivity to expenses.[27] Other studies consider whether investors with different levels of sophistication make different decisions about fees. If more sophisticated investors are more sensitive to fees, less sophisticated ones might be paying more than would be optimal. Alternatively, they might be paying more in order to obtain sophisticated help. Much literature suggests a negative relationship between sophistication and expenses paid,[28] but some does not.[29] Overall this literature leaves open the question of whether investment prices are sometimes inefficiently high, but suggests that even if prices are efficient investors may make poor purchasing decisions. The Department believes that many individual investors, including DC plan participants, historically have not factored expenses optimally into their investment choices.

Sector Differences—Some studies lend insight to the question of whether investment prices are efficient by comparing prices paid or performance in different market segments.[30] The Department believes that taken together, this literature suggests that there are unexplained differences in prices and performance across sectors but fails to demonstrate conclusively whether such differences are systematically attributable to inefficiently high investment prices.

Market Power—At least one study suggests that mutual funds may wield market power to mark up prices to inefficient levels.[31]

What Expenses Buy—A number of studies consider the degree to which expense dispersion is a function of product features and bundled services, and if it is, whether that dispersion is justified by differences in observable attendant financial benefits such as performance. Some of this literature also considers the degree to which investors choose investments where expenses are so justified. In the Department's view this literature taken together suggests that a substantial portion of expense dispersion is attributable to distribution expenses, including compensation of intermediaries and advertising.[32] It casts doubt on whether such expenses are duly offset by observable financial benefits. Most studies are consistent with the possibility that such expenses are at least partly offset by unobserved benefits such as reduced search costs and other support for novice and unsophisticated investors, but most are also consistent with the possibility that some expenses are not so offset and that investors, especially unsophisticated ones, sometimes pay inefficiently high prices.[33] The authors of some studies expressly interpret their failure to identify offsetting financial benefits as evidence that prices are inefficiently high. Some suggest that conflicted intermediaries may serve their own and

[27] *See e.g.,* James J. Choi *et al., Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds,* National Bureau of Economic Research Working Paper W12261 (May 2006); Jeff Dominitz *et al., How Do Mutual Funds Fees Affect Investor Choices? Evidence from Survey Experiments* (May 2008) (unpublished, on file with the Department of Labor); and John Turner & Sophie Korczyk, *Pension Participant Knowledge About Plan Fees,* AARP Pub ID: DD–105 (Nov. 2004). Commenters point out that net flows are concentrated in mutual funds with low expenses. However it is unclear whether this reflects investor fee sensitivity or brand name recognition and successful marketing by large, established funds whose low fees are attributable to economies of scale.

[28] Sebastian Müller & Martin Weber, *Financial Literacy and Mutual Fund Investments: Who Buys Actively Managed Funds?,* Social Science Research Network Abstract 1093305 (Feb. 14, 2008) find that more financially literate investors pay lower front-end loads but similar management fees, and suggest that investors who know about management fees appear not to care about them. Jeff Dominitz *et al., How Do Mutual Funds Fees Affect Investor Choices? Evidence from Survey Experiments* (May 2008) (unpublished, on file with the Department of Labor) find that financially literate individuals are better able to estimate fees, and better estimates are associated with more optimal investment choices. Brad M. Barber *et al., Out of Sight, Out of Mind, The Effects of Expenses on Mutual Fund Flows,* Journal of Business, Volume 79, Number 6, 2095–2119 (2005) find that repeat investors are more sensitive to load fees than expense ratios, but commenters point out that this finding may be an artifact of industry load setting practices.

[29] Mark Grinblatt *et al., Are Mutual Fund Fees Competitive? What IQ–Related Behavior Tells Us,* Social Science Research Network Abstract 1087120 (Nov. 2007) find that investors with different IQs pay similar fees, which "suggests that fees are set competitively."

[30] John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest,* The Journal of Corporate Law, Volume 26, 609–673 (Spring 2001) found that the price paid by mutual funds for equity fund management is higher than that paid by pension funds. Based on this and other evidence they argue that mutual fund fees are often excessive. John C. Coates & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy,* Social Science Research Network Abstract 1005426 (Aug. 2007) challenge Freeman and Brown's methods and conclusions, arguing that these differences in prices are attributable to differences in services for which Freeman and Brown did not account. They offer evidence that fees are competitive. Alicia H. Munnell *et al., Investment Returns: Defined Benefits* vs. *401(k) Plans,* Center for Retirement Research Issue Brief Number 52 (Sept. 2006) find higher returns in DB plans than in DC plans and offer that "part of the explanation may rest with higher fees" that are paid by DC plan participants. Rob Bauer & Rik G.P. Frehen, *The Performance of U.S. Pension Funds,* Social Science Research Network Abstract 965388 (Jan. 2008) find that DC and DB plans both perform close to benchmarks while mutual funds underperform, and point to hidden costs in mutual funds as the most likely reason. Diane Del Guercio & Paula A. Tkac, *The Determinants of the Flow of Funds of Managed Portfolios: Mutual Funds vs. Pension Funds,* The Journal of Financial and Quantitative Analysis, Volume 37, Number 4, 523–557 (Dec. 2002) find that "in contrast to mutual fund investors, pension clients punish poorly performing managers by withdrawing assets under management and do not flock disproportionately to recent winners."

[31] Guo Ying Luo, *Mutual Fund Fee-Setting, Market Structure and Mark-Ups,* Economica, Volume 69, Number 274, 245–271 (May 2002) exploits differences in market concentration across different narrow mutual funds categories, and finds that mark-ups average 30 percent of fees across all categories of no load funds and more than 70 percent across load funds (assuming a 5-year holding period).

[32] The literature also attributes much expense dispersion to differences in the cost of managing different types of funds. For example, active equity management is more expensive than passive and management of foreign or small cap equity funds is more expensive than management of large cap domestic equity funds. Investors therefore might optimally diversify across funds with different levels of investment management expense. Some studies question whether active management delivers observable financial benefits commensurate to the associate expense. For example, Kenneth R. French, *The Cost of Active Investing,* Social Science Research Network Abstract 1105775 (Apr. 2008) finds that investors spend 0.67 percent of aggregate U.S. stock market value each year searching for superior return, and characterizes this as society's cost of price discovery.

[33] Both of these hypotheses are also consistent with literature finding a negative link between sophistication and expenses.

fund managers' interests, thereby generating inefficiently high profits for either or both. Others disagree, believing that investors efficiently derive a combination of financial and intangible benefits for their expense dollars.[34]

In light of this literature and public commenters, the Department believes that the available research provides an insufficient basis to confidently determine whether or to what degree participants pay inefficiently high investment prices. Market conditions that may lead to inefficiently high prices—namely imperfect information, search costs and investor behavioral biases—certainly exist in the retail IRA market and likely exist to some degree in particular segments of the DC plan market. The Department believes there is a strong possibility that at least some participants pay inefficiently high investment prices. If so, the Department would expect these actions to reduce that inefficiency. This would increase participants' welfare by transferring surplus from producers of investment products and services to them and by reducing dead weight loss. The Department additionally believes that even where investment prices are efficient, participants often make bad investment decisions with respect to expenses—that is, they buy investment products and services whose marginal cost exceed the associated marginal benefit to them.[35] The Department expects these actions to reduce such investment errors, improving participant and societal welfare. However, the Department has no basis

[34] The following is a sampling of findings and interpretations reported in various studies that the Department reviewed. The Department observes that some of these studies have been published in peer-reviewed journals, while others have not. Some are working papers subject to later revision. Some research is visibly supported by industry or other interests, and some may be independent. Very little of this research separately examines DC plan investing. Nearly all of it examines mutual fund markets to the exclusion of certain competing insurance company or bank products. Some of it examines foreign experience. The Department believes it must be cautious in drawing inferences from this research as to whether investment prices paid by participants are efficient.

Daniel B. Bergstresser *et al., Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry,* Social Science Research Network Abstract 616981 (Sept. 2007) find that investors who pay to purchase funds via intermediaries realize inferior returns, and say this result is consistent with either intangible benefits for investors or inefficiently high prices due to conflicts.

Ralph Bluethgen *et al., Financial Advice and Individual Investors' Portfolios,* Social Science Research Network Abstract 968197 (Mar. 2008) find that advisers (who are mostly compensated by commission) improve diversification and allocation across classes while increasing fees and turnover. They say these findings are consistent with "honest advice."

Susan Christoffersen *et al., The Economics of Mutual-Fund Brokerage: Evidence from the Cross Section of Investment Channels,* Science Research Network Abstract 687522 (Dec. 2005) identify some financial benefits reaped by investors who pay to invest through intermediaries.

Sean Collins, *Fees and Expenses of Mutual Funds, 2006,* Investment Company Institute Research Fundamentals, Volume 16, Number 2 (June 2007) reports that mutual fund fees and expenses are declining.

Sean Collins, *Are S&P 500 Index Mutual Funds Commodities?,* Investment Company Institute Perspective, Volume 11, Number 3 (Aug. 2005) argues that S&P 500 index funds are not uniform commodities. For example, they are distributed in different ways. He finds that 91 percent of the variation in these funds' expense ratios can be explained by a combination of fund asset size, investor account size, fee waivers and separate fees, and investor advice that is bundled into expense ratios. He argues that these funds competitively pass economies of scale along to investors, and reports that assets and flows are concentrated in low-cost funds.

Henrik Cronqvist, *Advertising and Portfolio Choice,* Social Science Research Network Abstract 920693 (July 26, 2006) finds that fund advertising steers investors toward "portfolios with higher fees, more risk, more active management, more 'hot' sectors, and more home bias." He suggests that "with the use of advertising, funds can differentiate themselves and therefore charge investors higher fees than the lowest-cost supplier in the industry."

Daniel N. Deli, *Mutual Fund Advisory Contracts: An Empirical Investigation,* The Journal of Finance, Volume 57, Number 1, 109–133 (Feb. 2002) finds that differences in investment advisers' marginal compensation reflect differences in their marginal product, difficulty in measuring adviser performance, control environments, and scale economies. Based on this finding, he suggests that investment prices are efficient and recommends caution in any regulatory effort to influence such prices.

Edwin J. Elton *et al., Are Investors Rational? Choices Among Index Funds,* The Journal of Finance, Volume 59, Number 1, 261–288 (Feb. 2004) find that flows into high expense (and therefore predictably low performance) S&P 500 index mutual funds are higher than would be expected in an efficient market. They conclude that because investors are not perfectly informed and rational, inferior products can prosper. Commenters, however, contend that because the authors scaled flows by fund size and smaller funds have higher expenses, these findings exaggerate the degree to which flows are directed to high expense funds.

Javier Gil-Bazo & Pablo Ruiz-Verdú, *Yet Another Puzzle? Relation Between Price and Performance in the Mutual Fund Industry,* Social Science Research Network Abstract 947448 (March 2007) find that "funds with worse before-fee performance charge higher fees." They hypothesize that lower performing funds lose sophisticated investors to higher performing funds, then are left with relatively unsophisticated investors who are not as responsive to price.

John A. Haslem *et al., Performance and Characteristics of Actively Managed Retail Equity Mutual Funds with Diverse Expense Ratios,* Financial Services Review, Volume 17, Number 1, 49–68 (2008) find that funds with lower expenses have superior returns. John A. Haslem *et al., Identification and Performance of Equity Mutual Funds with High Management Fees and Expense Ratios,* Journal of Investing, Volume 16, Number 2 (2007) find that certain performance measures vary negatively with fees and, on that basis, suggest that mutual funds do not compete strongly on price and that expenses are too high.

Sarah Holden & Michael Hadley, *The Economics of Providing 401(k) Plans: Services, Fees and Expenses 2006,* Investment Company Institute Research Fundamentals, Volume 16, Number 4 (Sept. 2007) report that 401(k) mutual fund investors tend to pay lower than average expenses and that 401(k) assets are concentrated in low cost funds.

Ali Hortacsu & Chad Syverson, *Product Differentiation, Search Costs, and Competition in the Mutual Fund Industry: A Case Study of S&P 500 Index Funds,* Quarterly Journal of Economics, 403 (May 2004) document dispersion in S&P 500 Index Fund expense ratios, and report that low-cost funds have a dominant, but falling, market share. They conclude that an influx of novice investors who must defray search costs explains dispersion in expenses and flows to high expense funds.

Todd Houge & Jay W. Wellman, *The Use and Abuse of Mutual Fund Expenses,* Social Science Research Network Abstract 880463 (Jan. 2006) find that load funds charge higher 12b–1 and management fees. They attribute this to abusive market segmentation that extracts excessive fees from unsophisticated investors.

Giuliano Iannotta & Marco Navone, *Search Costs and Mutual Fund Fee Dispersion,* Social Science Research Network Abstract 1231843 (Aug. 2008) analyze the effect of search costs on mutual fund fees with data on broad U.S. domestic equity funds. They estimate the portion of the expense ratio that is not justified by the quality of service provided, by the cost structure of the investment company, or by the specificities of the clientele served by the fund and find that its dispersion is lower for highly visible funds and for funds that invest heavily in marketing. In the case of the U.S. mutual fund market, they argue, the dispersion of this residual demonstrates the extent to which some firms can charge a "non-marginal" (that is higher than competitive) price.

Marc M. Kramer, *The Influence of Financial Advice on Individual Investor Portfolio Performance,* Social Science Research Network Abstract 1144702 (Mar. 2008) finds that advised investors take less risk and thereby reap lower returns. Risk-adjusted performance is similar. Adjusting further for investor characteristics, advised investors perform slightly worse.

Erik R. Sirri & Peter Tufano, *Costly Search and Mutual Fund Flows,* The Journal of Finance, Volume 53, Number 5, 1589–1622 (Oct. 1998) find that investors are "fee sensitive in that lower-fee funds and funds that reduce fees grow faster." Investors' fee sensitivity is not symmetric, however.

Edward Tower & Wei Zheng, *Ranking Mutual Fund Families: Minimum Expenses and Maximum Loads as Markers for Moral Turpitude,* Social Science Research Network Abstract 1265103 (Sept. 2008) find a negative relationship between expense ratios and gross performance.

The *Division of Investment Management: Report on Mutual Fund Fees and Expenses,* U.S. Securities and Exchange Commission (Dec. 2000), at *http://www.sec.gov/news/studies/feestudy.htm* describes mutual fund fees and expenses and identifies major factors that influence fee levels but does not assess whether prices are efficient.

Xinge Zhao, *The Role of Brokers and Financial Advisors Behind Investment Into Load Funds,* China Europe International Business School Working Paper (Dec. 2005), at *http://www.ceibs.edu/faculty/zxinge/brokerrole-zhao.pdf* finds that funds with higher loads receive higher flows, and suggests that conflicted intermediaries enrich themselves at investors' expense.

[35] It is possible that the converse could sometimes occur: Participants might fail to buy efficiently priced products and services whose marginal cost lags the associated marginal benefit to them. In that case advice, by correcting this error, might lead to higher expenses, but would still improve welfare. Because research suggests that participants are insensitive to fees rather than excessively sensitive to them the Department believes that this converse situation is likely to be rare.

on which to quantify such errors or improvements.

In addition to the benefits that participants will derive from the disclosure of investment-related information in a comparative format, they also will benefit from a retrospective disclosure of plan administrative fees actually charged to their accounts in the prior quarter. Previous RFI comments from participant advocates, plan sponsors and service providers support such a disclosure requirement.[36] However, one comment to the contrary on behalf of service providers was received by the Department in response to the proposal. The commenter expressed concern that "the value of quarterly statements to the participant does not justify the cost of providing the data." [37] The Department continues to believe, as it did in connection with the proposal, that participants who are trying to plan for retirement are entitled to a comprehensive disclosure that includes not only information about fee and expenses that may occur depending on investment options selected, but also information on other fees that were actually assessed against their accounts in the previous quarter. Information about actual charges to participants' accounts may, among other things, help participants understand their current reported account balance, detect errors in prior charges by the plan, handle general household budgeting and retirement planning, and insure that the charges are reasonable. In addition, this information already should be available in some form as part of ordinary plan recordkeeping that tracks participant account balances.

4. Costs

The Department estimates that the regulation may result in the following additional administrative burdens and costs [38] for plans (or plan sponsors).[39]

a. Costs Due to Upfront Review and Updating of Plan Documents

In the RIA of the proposal, the Department estimated costs of about $30.3 million for participant-directed individual accounts plans to review the regulation upfront and to prepare the disclosures. Using updated in-house labor rates for professional and clerical employees, the Department has increased the estimated costs to about $35.0 million in 2012. Costs to update plan documents to take into account plan changes, such as new investment alternatives, changes in general plan administrative expenses, and changes in individual expenses are estimated to be approximately $20.3 million in subsequent years.

b. Costs Due to Production of Quarterly Dollar Amount Disclosures

The final regulation will require plan administrators to send out disclosures about administrative charges to participants' accounts and engage in recordkeeping on both a plan-wide as well as a participant-specific basis. The Department estimates that the cost to produce the actual dollar disclosure is approximately $30.5 million for 2012 [40] and $10.7 million in subsequent years.

c. Costs Due to Assembling Required Information for Chart and Web Site

Additional administrative burdens and costs are likely to arise because of the need for plans to consolidate information from more than one source to prepare the required comparative chart. In the proposal, the Department estimated that it takes a person with a financial background about one hour per plan to consolidate the information from multiple sources for the comparative chart. The Department acknowledges that some plans with non-mutual fund designated investment alternatives may require more time to prepare the required information for the chart and the Web site. Therefore, the Department has quintupled the time estimate to five hours per plan, on average, for the first year and quadrupled the time estimate to four hours per plan, on average, for subsequent years. This results in estimated costs for the consolidation of fee information from multiple sources of approximately $151.5 million in 2012 and $121.2 million in subsequent years.[41]

d. Costs Due to the Web Site Requirement

The regulation does not require plans to create and maintain a Web site. Rather, paragraph (d)(1)(v) of the rule requires plan administrators to disclose on the required comparative chart an Internet Web site address that is sufficiently specific to lead participants to supplemental information about each investment option offered under the plan. The Department received comments that many non-mutual fund products may not presently maintain a Web site, therefore additional costs will be incurred. In response to these comments, the Department has quantified the cost of creating and maintaining a Web site, below as an upper bound.

For purposes of quantifying the cost of creating and maintaining a Web site, the Department assumes that about 50 percent of plans, or employers sponsoring such plans, already maintain a Web site where plan information may be found.[42] For these plans, some information will likely be required to be added to existing Web sites, which will have to be updated periodically. The Department assumes that 241,000 plans, or employers sponsoring such plans, already maintain Web sites with plan-related information and that for each such plan on average, an IT professional will spend one hour updating the Web site for the required information. In addition, the Department assumes that the plan will update the information about three additional times during the year, which will require one-half hour of an IT professional's time for each update. The estimated 241,000 plans that do not currently maintain a Web site with plan information will require, on average, two hours of an IT professional's time to create a basic Web site and one-half hour to update the information on the Web site three times in the first year.[43] In addition, the 241,000 plans presently without Web sites will have to rent server space. This is estimated to cost plans, on average, $240 a year, resulting in an aggregate cost of $159.4 million in the first year to create and update Web sites.

In subsequent years, only new plans will incur the cost of developing a Web

[36] These comments on the RFI can be found under *http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html.*

[37] Comments on the proposal can be found under *http://www.dol.gov/ebsa/regs/cmt-fiduciaryrequirements.html.*

[38] The Department's estimate of these costs are highly uncertain, discussed in more detail in the Uncertainty section, reflecting especially uncertainty about the average time plans will spend on performing their task.

[39] For purposes of this analysis the Department assumes that these costs are borne by plans, even though they might be initially incurred by service providers.

[40] The Department did not account for additional paper costs, given that no additional pages need be added as long as this information is included as part of the quarterly benefit statement.

[41] This number also includes a small update of the in-house wage rate for a financial professional.

[42] The Department lacks representative survey information on the number of plans that have a Web site, but believes that an average rate of 50 percent is reasonable. In estimating this rate, the Department has taken into account that plans that offer only non-mutual fund options might not have Web sites currently and that plans that offer a combination of mutual funds and non-mutual fund investment options are less likely to have Web sites than plans offering only mutual funds. In addition, commenters estimated that about half of plans use a third party administrator or independent record keeper. Due to this uncertainty, the Department's estimate of the resulting costs is also highly uncertain.

[43] The hourly labor cost of an IT professional is assumed to be $70.

site. Existing plans are assumed to update the information on the Web site four times per year requiring one-half hour of an IT professional's time for each update. Plans also will incur server space rental cost estimated at $240 per plan, resulting in a total cost in each subsequent year of $142.6 million.

e. Costs of Distribution and Materials for Disclosures

The final rule's required disclosures, as well as any materials the plan receives regarding voting, tender or similar rights ("pass-through materials"), are usually sent to plan participants on an annual or quarterly basis.[44] Using updated in-house wage rates, this leads to an estimate of about $39.2 million in labor costs.[45] Plans will also bear materials and postage costs of about $9.0 million in 2012. The Department believes that plans have pass-through materials readily available for participants who must receive such disclosures; therefore, it has attributed no cost to gather this information.

In total, the Department estimates that in 2012, participant-directed individual account plans will incur increased administrative costs of approximately $424.6 million.

f. Discouragement of Some Employers From Sponsoring a Retirement Plan

Increased administrative burdens may discourage some employers, particularly small employers, from sponsoring a retirement plan. For small plan sponsors, the administrative burden is felt disproportionately because of their limited resources. Small business owners who do not have the resources to analyze plan fees or to hire an analyst may be discouraged from offering a plan at all.

Regulatory burden is one among many reasons small businesses do not to sponsor a retirement plan. According to the 2000, 2001, and 2002 Employee Benefit Research Institute (EBRI)'s Small Employer Retirement Surveys, about 2.7 percent of small employers cited "too many government regulations" as the most important reason they do not offer a retirement plan.[46] A commenter on the proposed rule supported this assertion, but did not provide a specific estimate of its impact. Due to very limited data on this issue, the Department is not able to quantify its impact.[47]

g. Summary of Costs

The quantified total costs are shown in Table 3 below. Column (A) reports the estimated costs of up-front review of the regulation, Column (B) reports the costs to update plan documents, and Column (C) reports the cost to produce quarterly dollar amounts for administrative fees charged to participant accounts. The cost to assemble the required information, create and update Web sites, and associated distribution and material costs are reported in columns (D), (E), (F) and (G). The total present value of these costs is estimated at $2.7 billion over the ten year period 2012 to 2021. As discussed in more detail in the uncertainty section below, a range of possible cost estimates was constructed by decreasing and increasing key cost assumptions by 50 percent. This led to a range for the cost estimates of $2.0 to $3.3 million.

TABLE 3—TOTAL DISCOUNTED COSTS OF PROPOSAL REPORTED IN $MILLIONS/YEAR

Year	Up-front review cost	Update plan documents	Production of quarterly dollar amount disclosures	Assembling the required chart and Web site information	Creation/ updating of Web site	Distribution materials costs	Staff cost to distribute disclosures	Total costs
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	A+B+C+D+E+F+G
2012	35.0	0.0	30.5	151.5	159.4	9.0	39.2	424.6
2013	5.1	13.8	10.0	113.3	133.3	8.4	36.6	320.5
2014	4.8	12.9	9.3	105.9	124.6	7.9	34.2	299.6
2015	4.5	12.1	8.7	99.0	116.4	7.4	32.0	280.0
2016	4.2	11.3	8.1	92.5	108.8	6.9	29.9	261.7
2017	3.9	10.5	7.6	86.4	101.7	6.4	27.9	244.5
2018	3.7	9.8	7.1	80.8	95.0	6.0	26.1	228.5
2019	3.4	9.2	6.6	75.5	88.8	5.6	24.4	213.6
2020	3.2	8.6	6.2	70.6	83.0	5.2	22.8	199.6
2021	3.0	8.0	5.8	65.9	77.6	4.9	21.3	186.6
Total with 7% Discounting								2,659.2
Total with 3% Discounting								3,095.1

Note: The displayed numbers are rounded and therefore may not add up to the totals.

h. Uncertainty in the Cost Estimates

Although the Department made adjustments to the analysis in response to comments, the Department remains uncertain regarding the exact magnitude of the costs of these changes. The variables with the most uncertainty in the cost estimates are:

[44] As in the RIA of the proposal, this section does not include distribution or material costs for the disclosures of administrative fees charged to participants' accounts as the Department assumes that this information can be included as part of the quarterly benefit statement.

[45] Some of this information is already required for 404(c) compliant plans and by the Department's Qualified Default Investment Alternative regulation. In addition, a large majority of plans voluntarily provide this information to its participants. As a result, the Department estimates that only 577,000 participants will receive this information for the first time because of the final regulation, and 38% percent of participants will receive the information electronically.

[46] The survey defines small employers as those having up to 100 full-time workers. Other reasons small employers do not offer a retirement plan are that workers prefer wages or other benefits, that a large portion of employees are seasonal, part-time, or high turnover, and that revenue is too low or uncertain. *See http://www.ebri.org/surveys/sers* for more detail.

[47] It also is possible that rather than discouraging employers from sponsoring or continuing to sponsor a retirement plan, increased administrative burden could instead influence some employers to offer less investment options in their participant-directed individual account plans.

• The time required for legal professionals, clerical professionals [48] and accountants to perform their tasks;
• The cost to obtain the actual dollar amounts of participant's administrative and individual expenses; and
• The labor cost to create and maintain Web sites.

To estimate the influence of these variables on the analysis, the Department re-estimated the costs of the final regulation under different assumptions for these uncertain variables. Increasing the variables of concern by 25 percent resulted in a present value of $3.0 billion. Increasing the variables by 50 percent resulted in a present value of $3.3 billion. Increasing the key variables by 75 percent results in a $3.6 billion present value for the final regulation.

5. Net Benefits

As the analysis above shows, our low end benefit estimate of $7.2 billion exceeds our high end cost estimate of $3.3 billion. Thus, the Department remains highly confident in its conclusion expressed in the RIA for the proposal that increased fee disclosure can induce changes in participant behavior and reductions in plan fees. Several public comments on the proposal reinforce these conclusions.

6. Comments and Revisions

The Department received several comments questioning various assumptions on which its estimates of the benefits were based and suggesting that it had underestimated the costs of the proposal. In response to these comments, as discussed above, the Department reevaluated the quantified benefits resulting from a reduction of fees and increased its estimate of the costs to account for the creation and updating of Web sites and the complexity of retrieving the information needed to produce the comparative chart and obtain required supplemental information. In addition, the Department updated its estimates of labor costs.

7. Alternatives

In formulating this final rule, the Department considered several alternative approaches, which are discussed in detail in the RIA of the proposal. The Department did not adopt any of the alternatives discussed in the RIA of the proposal, because it did not receive any sufficiently persuasive comments suggesting that it should. Some commenters suggested alternatives the Department had not considered. For example, a commenter suggested that plans should be allowed to provide supplemental information required to be disclosed by the rule in a written document rather than on a Web site, because many companies do not have access to a Web site. Another, commenter asked the Department to clarify whether the proposal applies to IRAs that provide for employer contributions—that is, "Simplified Employee Pension Retirement Account" (SEP) and "Savings Incentive Match Plan for Employees" (SIMPLE) plans. The Department did not adopt the first commenter's suggestion, but it did clarify in the final rule that SEP and SIMPLE IRAs are excluded from the rule. The Department's decisions regarding these regulatory alternatives are discussed earlier in this preamble.

8. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. At the proposed rule stage, the Department prepared an initial RFA analysis, because it did not have enough information to certify that the rule would not have a significant effect on a substantial number of small entities, although the Department stated that it considered it unlikely that the proposed rule would significantly affect such entities.

In connection with the final rule, the Department has prepared a final RFA in compliance with section 604 of the RFA. For purposes of this analysis, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. The Department used this standard in the proposed rule and consulted with the Small Business Administration Office of Advocacy concerning its use of this standard for RFA purposes and requested public comments on this issue. The Department did not receive any comments that addressed its use of the participant count standard.

The following subsections address specific requirements of the RFA.

a. Need for and Objectives of the Rule

With the proliferation of participant-directed individual account plans, such as 401(k) plans, which afford participants and beneficiaries the opportunity to direct the investment of all or a portion of the assets held in their individual plan accounts, participants and beneficiaries are increasingly responsible for making their own retirement savings decisions. This increased responsibility has led to a growing concern that participants and beneficiaries may not have access to, or if accessible, may not be considering information critical to making informed decisions about the management of their accounts, particularly information on investment choices, including attendant fees and expenses. This rule requires participants and beneficiaries to be provided investment-related information in a form that encourages and facilitates a comparative review among investment options. The Department believes that the rule will provide beneficial information to participants and beneficiaries that will allow them to make informed decisions with regard to investing assets in their individual accounts.

The reasons for and objectives of this final regulation are discussed in detail in Section A of this preamble, "Background," and in section "Need for Regulatory Action" of the Regulatory Impact Analysis (RIA) above. The legal basis for the rule is set forth in the "Authority" section of this preamble, below.

b. Public Comments

A public comment on the proposed rule suggested that the Department underestimated the cost to small service providers to comply with the proposed rule. Specifically, the commenter stated that the Department underestimated the time required for an attorney or other legal professional to review the rule and the disclosures, and the hourly rate for an attorney to perform this service. In response to the first comment, the Department would like to clarify that the time estimate for legal review is an average estimate spread across all plans that must comply with the rule and is not the time estimate that is applicable only to small plans. With regard to the second issue, the Department would like to clarify that the estimated hourly wage rate is not a billable rate; it is an in-house wage rate that includes profit or overhead and is based on the National Occupational Employment Survey (May 2008, Bureau of Labor Statistics) and the Employment Cost Index (June, 2009, Bureau of Labor

[48] The clerical time to distribute disclosures remains unchanged in this sensitivity analysis.

Statistics), which is the most reliable data the Department has to support its cost estimates. The commenter also stated that the Department underestimated the time small plan sponsors will have to spend gathering information to comply with the disclosure requirements of the final rule. As further discussed under the Cost section of the RIA, the Department has increased its estimate of the hours it will to take to gather and consolidate information required for the disclosure from one hour to four hours.

Finally, the commenter implored the Department to apply a delayed effective date for small plans of at least one year following the effective date for large plans in order to allow such plans to develop the systems necessary to comply with the disclosure requirements of the final rule. While the Department did not adopt the commenter's suggestion, as stated above in the preamble, the Department has set January 1, 2012, as the applicability date for calendar year plans to comply with the rule, which should provide plans with sufficient time to develop the necessary systems for compliance.

c. Affected Small Entities

The Department estimates that the final rule will apply to approximately 419,000 small plans covering approximately 9.5 million participants.

d. Estimating Compliance Requirements for Small Entities/Plans

The Department continues to believe that the effects of this final rule will be to increase retirement savings by providing participants and beneficiaries with enhanced information about their plans, which is expected to allow them to make more informed investment decisions. The Department also believes that small plans will benefit from the rule, because it will clarify the information that must be disclosed to plan participants in order for plan fiduciaries to meet their fiduciary duty under ERISA.

While small and large plans will incur administrative costs due to the final rule, these costs are reasonable compared to the benefits and will probably be borne by the participants who will also receive the benefits under the rule. From industry comments, the Department inferred that participants in larger plans, more often than participants in smaller plans, have access to needed investment information. The Department continues to believe that participants in small plans need as much information about their plan investments as participants in larger plans.

Assuming that the plan incurs the average costs for all disclosure activities that are considered in the RIA section above, the following calculation illustrates how large the costs of the disclosures would be for a very small plan (one-participant plan). As can be seen in Table 4, the total cost of compliance for a one-participant plan amounts to less than $873 in the first year and less than that amount in the subsequent years. The costs in 2012 include a review cost of about $73 per plan (one-half hour of a legal professional's time plus one-half hour of a clerical professional's time), labor costs of $314 for consolidating the information for the comparative chart (five hours), costs of, on average, $485 for the creation and maintenance of a Web site, $0.40 per participant for recordkeeping and disclosure of information, additional annual labor cost for distribution of $0.90 in section 404(c) compliant plans or plans that already provide similar information ($1.50 in plans that do not already provide section 404(c) compliant or similar information), and material and postage costs of $0.15 in 404(c) compliant plans or plans that already provide similar information ($2.40 in plans that do not already provide section 404(c) compliant or similar information).

These cost estimates should be considered an estimate of the upper bound on plan expenses. To the extent that small plans rely on third party administrators or independent record keepers that have economies of scale, plan costs could be lower. To the extent that plans use record keepers that already provide plan Web sites changes by the record keeper to comply with the final rule will likely impose few, if any, additional costs for plans. In addition, if plans use investment alternatives like mutual funds that already provide much of the required information, Web site costs would be less, as would the cost to gather information for the Web site and the comparative chart.

Small plans may be able to find lower cost options to comply with the rule. If, for example, server space for the Web site is provided by the service provider at almost no cost and the plan is not required to spend as much time gathering the required information because it chose plan options for which the information is more readily available, a one-participant plan could experience first year costs of $310 and $240 in subsequent years.

TABLE 4—COSTS FOR ONE-PARTICIPANT PLAN (UNDISCOUNTED)

Type of cost	404(c) plans and plans with similar information		Non-404(c) plans without similar information	
	Initial year	Subsequent year	Initial year	Subsequent year
Plan Review	73	36	73	36
Consolidation of Information	314	251	314	251
Cost of Web site	485	380	486	381
Actual Dollar Disclosure	0.40	0.15	0.40	0.15
Labor Cost for Distribution	0.90	0.90	1.50	1.50
Material Cost	0.15	0.15	2.40	2.40
Total	$873	$669	$876	$672

The displayed numbers are rounded and therefore may not add up to the totals.

e. Duplicative, Overlapping, and Conflicting Rules

ERISA section 404(c) and the regulations thereunder contain disclosure requirements for plan fiduciaries of certain participant-directed account plans that are to some extent similar to the ones that are contained in the proposed regulation. As explained in more detail in the Background section of this preamble, the Department amended the regulations under section 404(c) in order to establish a uniform set of basic disclosure requirements and to ensure that all participants and beneficiaries in participant-directed individual account plans have access to the same investment-related information.

In addition, the Department has consulted with the Securities and Exchange Commission to avoid duplicative, overlapping, or conflicting requirements. The Department is unaware of any additional relevant Federal rules for small plans that duplicate, overlap, or conflict with this final rule.

9. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the proposed rule solicited comments on the information collections included therein. The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the proposal for OMB's review. No public comments were received that specifically address the paperwork burden analysis of the information collections.

The Department submitted an ICR to OMB for its request of a new information collection. OMB approved the ICR on October 5, 2010, under OMB Control Number 1210–0090, which will expire on October 31, 2013.

The final rule requires plan- and investment-related fee and expense information to be disclosed to participants and beneficiaries in participant-directed individual account plans. This ICR pertains to two categories of information that are required to be disclosed: "Plan-related" and "investment-related" information. The information collection provisions of the rule are intended to ensure that fiduciaries provide participants and beneficiaries with sufficient information regarding plan fees and expenses and designated investment alternatives to make informed decisions regarding the management of their individual accounts. The calculation of the estimated hour and cost burden of the ICR were discussed in detail in the proposed rule and are summarized below.

The Department estimates that disclosing and distributing plan- and investment-related information to participants and beneficiaries as required by the rule will require approximately 6.6 million burden hours with an equivalent cost of approximately $347 million and a cost burden of approximately $221 million in the first year. In each subsequent year, the total labor burden hours are estimated to be approximately 5.5 million hours with an equivalent cost of approximately $275 million and the cost burden is estimated at approximately $201 million per year.

The Department's estimate of the total burden in the final rule has increased from the proposal due to four factors: (1) Counts of plans and participants were updated to account for more recent data; (2) wage rates were updated to account for more recent data; (3) the hour and cost burden associated with creating and maintaining a Web site to comply with the regulatory requirements was added; and (4) the estimate of the average hour burden to gather information for the comparative chart and Web site was increased. The first two changes resulted only in a slightly higher burden, while the other two changes increased the burden significantly as discussed in more detail below.

Increased burden due to Web site requirement: The estimated burden includes 1.4 million burden hours ($101 million in equivalent costs) in the first year, and 1.1 million burden hours ($76 million equivalent costs) in subsequent years for plans to engage an information technology professional to comply with the rule's requirement for plans to provide a Web site to disclose supplemental information to participants and beneficiaries. The estimated annual cost of the Web site is approximately $116 million. This hour and cost burden associated with providing a plan Web site was not estimated at the proposed rule stage.

Increased burden due to increase in average hour burden estimate of gathering information for the comparative chart and Web site: The estimated burden reported above also includes 1.9 million in added burden hours in the first year ($121 million in added equivalent costs) to consolidate information from multiple sources for the comparative chart and Web site. In the proposal, the Department estimated that this requirement could take, on average, one hour per plan; in response to comments, the final RIA uses an estimate of five hours, on average, per plan in the first year, and four hours, on average in subsequent years.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans.

Affected Public: Business or other for-profit, not-for-profit institutions.

Estimated Number of Respondents: 483,000.

Estimated Number of Annual Responses: 738,207,000.

Frequency of Response: Initially, Annually, Upon Request, Updating.

Estimated Total Annual Burden Hours: 6,583,000 hours in the first year; 5,520,000 in each subsequent year.

Estimated Total Annual Burden Cost: $221,040,000 for the first year; $201,225,000 for each subsequent year.

10. Congressional Review Act

The final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The final rule is a "major rule" as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of $100 million or more.

11. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, the final rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments in the aggregate of more than $100 million, adjusted for inflation, or increase expenditures by the private sector of more than $100 million, adjusted for inflation.

12. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. The final rule does not have federalism implications because it has no 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. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Fiduciaries, Investments, Pensions, Disclosure, Reporting and recordkeeping requirements, and Securities.

■ For the reasons set forth in the preamble, the Department is amending Subchapter F, Part 2550 of Title 29 of the Code of Federal Regulations as follows:

Subchapter F—Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 1. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135; sec. 657, Pub. L. 107–16, 115 Stat.38; and Secretary of Labor's Order No. 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401b–1 also issued under sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), 3 CFR, 1978 Comp. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), 3 CFR, 1978 Comp. 332. Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.407c–3 also issued under 29 U.S.C. 1107. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR, 1978 Comp. p. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), and 3 CFR, 1978 Comp. 332. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

■ 2. Add § 2550.404a–5 to read as follows:

§ 2550.404a–5 Fiduciary requirements for disclosure in participant-directed individual account plans.

(a) *General.* The investment of plan assets is a fiduciary act governed by the fiduciary standards of section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. 1001 *et seq.* (all section references herein are references to ERISA unless otherwise indicated). Pursuant to section 404(a)(1)(A) and (B), fiduciaries must discharge their duties with respect to the plan prudently and solely in the interest of participants and beneficiaries. When the documents and instruments governing an individual account plan, described in paragraph (b)(2) of this section, provide for the allocation of investment responsibilities to participants or beneficiaries, the plan administrator, as defined in section 3(16), must take steps to ensure, consistent with section 404(a)(1)(A) and (B), that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including fees and expenses, and regarding designated investment alternatives, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts.

(b) *Satisfaction of duty to disclose.* (1) In general. The plan administrator of a covered individual account plan must comply with the disclosure requirements set forth in paragraphs (c) and (d) of this section with respect to each participant or beneficiary that, pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to, his or her individual account. Compliance with paragraphs (c) and (d) of this section will satisfy the duty to make the regular and periodic disclosures described in paragraph (a) of this section, provided that the information contained in such disclosures is complete and accurate. A plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

(2) *Covered individual account plan.* For purposes of paragraph (b)(1) of this section, a "covered individual account plan" is any participant-directed individual account plan as defined in section 3(34) of ERISA, except that such term shall not include plans involving individual retirement accounts or individual retirement annuities described in sections 408(k) ("simplified employee pension") or 408(p) ("simple retirement account") of the Internal Revenue Code of 1986.

(c) *Disclosure of plan-related information.* A plan administrator (or person designated by the plan administrator to act on its behalf) shall provide to each participant or beneficiary the plan-related information described in paragraphs (c)(1) through (4) of this section, based on the latest information available to the plan.

(1) *General.* (i) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter:

(A) An explanation of the circumstances under which participants and beneficiaries may give investment instructions;

(B) An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative;

(C) A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights;

(D) An identification of any designated investment alternatives offered under the plan;

(E) An identification of any designated investment managers; and

(F) A description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(ii) If there is a change to the information described in paragraph (c)(1)(i)(A) through (F) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(2) *Administrative expenses.* (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses for general plan administrative services (*e.g.,* legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative, as well as the basis on which such charges will be allocated (*e.g.,* pro rata, per capita) to, or affect the balance of, each individual account.

(B) If there is a change to the information described in paragraph (c)(2)(i)(A) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(ii) At least quarterly, a statement that includes:

(A) The dollar amount of the fees and expenses described in paragraph (c)(2)(i)(A) of this section that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for such services;

(B) A description of the services to which the charges relate (*e.g.,* plan administration, including recordkeeping, legal, accounting services); and

(C) If applicable, an explanation that, in addition to the fees and expenses disclosed pursuant to paragraph (c)(2)(ii) of this section, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (*e.g.,* through revenue sharing arrangements, Rule 12b–1 fees, sub-transfer agent fees).

(3) *Individual expenses.* (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary on an individual, rather than on a plan-wide, basis (*e.g.,* fees attendant to processing plan loans or qualified domestic relations orders, fees for investment advice, fees for brokerage windows, commissions, front- or back-end loads or sales charges, redemption fees, transfer fees and similar expenses, and optional rider charges in annuity contracts) and which are not reflected in the total annual operating expenses of any designated investment alternative.

(B) If there is a change to the information described in paragraph (c)(3)(i)(A) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(ii) At least quarterly, a statement that includes:

(A) The dollar amount of the fees and expenses described in paragraph (c)(3)(i)(A) of this section that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for individual services; and

(B) A description of the services to which the charges relate (*e.g.,* loan processing fee).

(4) *Disclosures on or before first investment.* The requirements of paragraphs (c)(1)(i), (c)(2)(i)(A), (c)(3)(i)(A) of this section to furnish information on or before the date on which a participant or beneficiary can first direct his or her investments may be satisfied by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant those paragraphs and any updates to the information furnished to participants and beneficiaries pursuant to paragraphs (c)(1)(ii), (c)(2)(i)(B) and (c)(3)(i)(B) of this section.

(d) *Disclosure of investment-related information.* The plan administrator (or person designated by the plan administrator to act on its behalf), based on the latest information available to the plan, shall:

(1) *Information to be provided automatically.* Except as provided in paragraph (i) of this section, furnish to each participant or beneficiary on or before the date on which he or she can first direct his or her investments and at least annually thereafter, the following information with respect to each designated investment alternative offered under the plan—

(i) *Identifying information.* Such information shall include:

(A) The name of each designated investment alternative; and

(B) The type or category of the investment (*e.g.,* money market fund, balanced fund (stocks and bonds), large-cap stock fund, employer stock fund, employer securities).

(ii) *Performance data.* (A) For designated investment alternatives with respect to which the return is not fixed, the average annual total return of the investment for 1-, 5-, and 10-calendar year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar year; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future; and

(B) For designated investment alternatives with respect to which the return is fixed or stated for the term of the investment, both the fixed or stated annual rate of return and the term of the investment. If, with respect to such a designated investment alternative, the issuer reserves the right to adjust the fixed or stated rate of return prospectively during the term of the contract or agreement, the current rate of return, the minimum rate guaranteed under the contract, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (*e.g.,* telephone or Web site) the most recent rate of return required under this section.

(iii) *Benchmarks.* For designated investment alternatives with respect to which the return is not fixed, the name and returns of an appropriate broad-based securities market index over the 1-, 5-, and 10-calendar year periods (or for the life of the alternative, if shorter) comparable to the performance data periods provided under paragraph (d)(1)(ii)(A) of this section, and which is not administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

(iv) *Fee and expense information.* (A) For designated investment alternatives with respect to which the return is not fixed:

(1) The amount and a description of each shareholder-type fee (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees, which are not included in the total annual operating expenses of any designated investment alternative) and a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions);

(2) The total annual operating expenses of the investment expressed as a percentage (*i.e.,* expense ratio), calculated in accordance with paragraph (h)(5) of this section;

(3) The total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment (assuming no returns and based on the percentage described in paragraph (d)(1)(iv)(A)(*2*) of this section);

(4) A statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions; and

(5) A statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that participants and beneficiaries can visit the Employee Benefit Security Administration's Web site for an example demonstrating the long-term effect of fees and expenses.

(B) For designated investment alternatives with respect to which the return is fixed for the term of the investment, the amount and a description of any shareholder-type fees and a description of any restriction or limitation that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part.

(v) *Internet Web site address.* An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information regarding the designated investment alternative:

(A) The name of the alternative's issuer;

(B) The alternative's objectives or goals in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(C) The alternative's principal strategies (including a general description of the types of assets held by the investment) and principal risks in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(D) The alternative's portfolio turnover rate in a manner consistent with Securities and Exchange Commission Form N–1A or N–3, as appropriate;

(E) The alternative's performance data described in paragraph (d)(1)(ii) of this section updated on at least a quarterly basis, or more frequently if required by other applicable law; and

(F) The alternative's fee and expense information described in paragraph (d)(1)(iv) of this section.

(vi) *Glossary.* A general glossary of terms to assist participants and beneficiaries in understanding the designated investment alternatives, or an Internet Web site address that is sufficiently specific to provide access to such a glossary along with a general explanation of the purpose of the address.

(vii) *Annuity options.* If a designated investment alternative is part of a contract, fund or product that permits participants or beneficiaries to allocate contributions toward the future purchase of a stream of retirement income payments guaranteed by an insurance company, the information set forth in paragraph (i)(2)(i) through (i)(2)(vii) of this section with respect to the annuity option, to the extent such information is not otherwise included in investment-related fees and expenses described in paragraph (d)(1)(iv).

(viii) *Disclosures on or before first investment.* The requirement in paragraph (d)(1) of this section to provide information to a participant or beneficiary on or before the date on which the participant or beneficiary can first direct his or her investments may be satisfied by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant to paragraph (d)(1) of this section.

(2) *Comparative format.* (i) Furnish the information described in paragraph (d)(1) and, if applicable, paragraph (i) of this section in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan and prominently displays the date, and that includes:

(A) A statement indicating the name, address, and telephone number of the plan administrator (or a person or persons designated by the plan administrator to act on its behalf) to contact for the provision of the information required by paragraph (d)(4) of this section;

(B) A statement that additional investment-related information (including more current performance information) is available at the listed Internet Web site addresses (*see* paragraph (d)(1)(v) of this section); and

(C) A statement explaining how to request and obtain, free of charge, paper copies of the information required to be made available on a Web site pursuant to paragraph (d)(1)(v), paragraph (i)(2)(vi), relating to annuity options, or paragraph (i)(3), relating to fixed-return investments, of this section.

(ii) Nothing in this section shall preclude a plan administrator from including additional information that the plan administrator determines appropriate for such comparisons, provided such information is not inaccurate or misleading.

(3) *Information to be provided subsequent to investment.* Furnish to each investing participant or beneficiary, subsequent to an investment in a designated investment alternative, any materials provided to the plan relating to the exercise of voting, tender and similar rights appurtenant to the investment, to the extent that such rights are passed through to such participant or beneficiary under the terms of the plan.

(4) *Information to be provided upon request.* Furnish to each participant or beneficiary, either at the times specified in paragraph (d)(1), or upon request, the following information relating to designated investment alternatives—

(i) Copies of prospectuses (or, alternatively, any short-form or summary prospectus, the form of which has been approved by the Securities and Exchange Commission) for the disclosure of information to investors by entities registered under either the Securities Act of 1933 or the Investment Company Act of 1940, or similar documents relating to designated investment alternatives that are provided by entities that are not registered under either of these Acts;

(ii) Copies of any financial statements or reports, such as statements of additional information and shareholder reports, and of any other similar materials relating to the plan's designated investment alternatives, to the extent such materials are provided to the plan;

(iii) A statement of the value of a share or unit of each designated investment alternative as well as the date of the valuation; and

(iv) A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets within the meaning of 29 CFR 2510.3–101 and the value of each such asset (or the proportion of the investment which it comprises).

(e) *Form of disclosure.* (1) The information required to be disclosed pursuant to paragraphs (c)(1)(i), (c)(2)(i)(A), and (c)(3)(i)(A) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with paragraph (c)(1)(i) of this section.

(2) The information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) of this section may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).

(3) A plan administrator that uses and accurately completes the model in the Appendix, taking into account each designated investment alternative offered under the plan, will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

(4) Except as otherwise explicitly required herein, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge.

(5) The information required to be prepared by the plan administrator for disclosure under this section shall be written in a manner calculated to be understood by the average plan participant.

(f) *Selection and monitoring.* Nothing herein is intended to relieve a fiduciary from its duty to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.

(g) *Manner of furnishing. Reserved.*

(h) *Definitions.* For purposes of this section, the term—

(1) *At least annually thereafter* means at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(2) *At least quarterly* means at least once in any 3-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(3) *Average annual total return* means the average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N–1A, N–3, or N–4, as appropriate, except that such method of computation may exclude any front-end, deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan.

(4) *Designated investment alternative* means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term "designated investment alternative" shall not include "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(5) *Total annual operating expenses* means:

(i) In the case of a designated investment alternative that is registered under the Investment Company Act of 1940, the annual operating expenses and other asset-based charges before waivers and reimbursements (*e.g.,* investment management fees, distribution fees, service fees, administrative expenses, separate account expenses, mortality and expense risk fees) that reduce the alternative's rate of return, expressed as a percentage, calculated in accordance with the required Securities and Exchange Commission form, *e.g.,* Form N–1A (open-end management investment companies) or Form N–3 or N–4 (separate accounts offering variable annuity contracts); or

(ii) In the case of a designated investment alternative that is not registered under the Investment Company Act of 1940, the sum of the fees and expenses described in paragraphs (h)(5)(ii)(A) through (C) of this section before waivers and reimbursements, for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year—

(A) Management fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return,

(B) Distribution and/or servicing fees as described in the Securities and Exchange Commission Form N–1A that reduce the alternative's rate of return, and

(C) Any other fees or expenses not included in paragraphs (h)(5)(ii)(A) or (B) of this section that reduce the alternative's rate of return (*e.g.,* externally negotiated fees, custodial expenses, legal expenses, accounting expenses, transfer agent expenses, recordkeeping fees, administrative fees, separate account expenses, mortality and expense risk fees), excluding brokerage costs described in Item 21 of Securities and Exchange Commission Form N–1A.

(i) *Special rules.* The rules set forth in this paragraph apply solely for purposes of paragraph (d)(1) of this section.

(1) *Qualifying employer securities.* In the case of designated investment alternatives designed to invest in, or primarily in, qualifying employer securities, within the meaning of section 407 of ERISA, the following rules shall apply—

(i) In lieu of the requirements of paragraph (d)(1)(v)(C) of this section (relating to principal strategies and principal risks), provide an explanation of the importance of a well-balanced and diversified investment portfolio.

(ii) The requirements of paragraph (d)(1)(v)(D) of this section (relating to portfolio turnover rate) do not apply to such designated investment alternatives.

(iii) The requirements of paragraph (d)(1)(v)(F) of this section (relating to fee and expense information) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(iv) The requirements of paragraph (d)(1)(iv)(A)(*2*) of this section (relating to total annual operating expenses expressed as a percentage) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(v) The requirements of paragraph (d)(1)(iv)(A)(*3*) of this section (relating to total annual operating expenses expressed as a dollar amount per $1,000 invested) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(vi)(A) With respect to the requirement in paragraph (d)(1)(ii)(A) of this section (relating to performance data for 1-, 5-, and 10-year periods), the definition of "average annual total return" as defined in paragraph (i)(1)(vi)(B) of this section shall apply to such designated investment alternatives in lieu of the definition in paragraph (h)(3) of this section if the qualifying employer securities are publicly traded on a national exchange or generally recognized market and the designated investment alternative is not a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(B) The term "average annual total return" means the change in value of an investment in one share of stock on an annualized basis over a specified period, calculated by taking the sum of the dividends paid during the measurement period, assuming reinvestment, plus the difference between the stock price (consistent with ERISA section 3(18)) at the end and at the beginning of the measurement period, and dividing by the stock price at the beginning of the measurement period; reinvestment of dividends is assumed to be in stock at market prices at approximately the same time actual dividends are paid.

(C) The definition of "average annual total return" in paragraph (i)(1)(vi)(B) of this section shall apply to such designated investment alternatives consisting of employer securities that are not publicly traded on a national exchange or generally recognized market, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment. Changes in value shall be calculated using principles similar to those set forth in paragraph (i)(1)(vi)(B) of this section.

(2) *Annuity options.* In the case of a designated investment alternative that is a contract, fund or product that permits participants or beneficiaries to allocate contributions toward the current purchase of a stream of retirement income payments guaranteed by an insurance company, the plan administrator shall, in lieu of the

information required by paragraphs (d)(1)(i) through (d)(1)(v), provide each participant or beneficiary the following information with respect to each such option:

(i) The name of the contract, fund or product;

(ii) The option's objectives or goals (*e.g.,* to provide a stream of fixed retirement income payments for life);

(iii) The benefits and factors that determine the price (*e.g.,* age, interest rates, form of distribution) of the guaranteed income payments;

(iv) Any limitations on the ability of a participant or beneficiary to withdraw or transfer amounts allocated to the option (*e.g.,* lock-ups) and any fees or charges applicable to such withdrawals or transfers;

(v) Any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option, such as surrender charges, market value adjustments, and administrative fees;

(vi) A statement that guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability; and

(vii) An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information—

(A) The name of the option's issuer and of the contract, fund or product;

(B) Description of the option's objectives or goals;

(C) Description of the option's distribution alternatives/guaranteed income payments (*e.g.,* payments for life, payments for a specified term, joint and survivor payments, optional rider payments), including any limitations on the right of a participant or beneficiary to receive such payments;

(D) Description of costs and/or factors taken into account in determining the price of benefits under an option's distribution alternatives/guaranteed income payments (*e.g.,* age, interest rates, other annuitization assumptions);

(E) Description of any limitations on the right of a participant or beneficiary to withdraw or transfer amounts allocated to the option and any fees or charges applicable to a withdrawal or transfer; and

(F) Description of any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option (*e.g.,* surrender charges, market value adjustments, administrative fees).

(3) *Fixed-return investments.* In the case of a designated investment alternative with respect to which the return is fixed for the term of the investment, the plan administrator shall, in lieu of complying with the requirements of paragraph (d)(1)(v) of this section, provide an Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information—

(i) The name of the alternative's issuer;

(ii) The alternatives objectives or goals (*e.g.,* to provide stability of principal and guarantee a minimum rate of return);

(iii) The alternative's performance data described in paragraph (d)(1)(ii)(B) of this section updated on at least a quarterly basis, or more frequently if required by other applicable law;

(iv) The alternative's fee and expense information described in paragraph (d)(1)(iv)(B) of this section.

(4) *Target date or similar funds. Reserved.*

(j) *Dates.* (1) *Effective date.* This section shall be effective on December 20, 2010.

(2) *Applicability date.* This section shall apply to covered individual account plans for plan years beginning on or after November 1, 2011.

(3) *Transitional rules.* (i) Notwithstanding paragraphs (b), (c) and (d) of this section, the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investment must be furnished no later than 60 days after such applicability date to participants or beneficiaries who had the right to direct the investment of assets held in, or contributed to, their individual account on the applicability date.

(ii) For plan years beginning before October 1, 2021, if a plan administrator reasonably and in good faith determines that it does not have the information on expenses attributable to the plan that is necessary to calculate, in accordance with paragraph (h)(3) of this section, the 5-year and 10-year average annual total returns for a designated investment alternative that is not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses or the plan administrator may use the most recently reported total annual operating expenses of the designated investment alternative as a substitute for such expenses. When a plan administrator uses a reasonable estimate or the most recently reported total annual operating expenses as a substitute for actual expenses pursuant to this paragraph, the administrator shall inform participants of the basis on which the returns were determined. Nothing in this section requires disclosure of returns for periods before the inception of a designated investment alternative.

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APPENDIX to §2550.404a-5 – Model Comparative Chart

ABC Corporation 401k Retirement Plan

Investment Options – January 1, 20XX

This document includes important information to help you compare the investment options under your retirement plan. If you want additional information about your investment options, you can go to the specific Internet Web site address shown below or you can contact [insert name of plan administrator or designee] at [insert telephone number and address]. A free paper copy of the information available on the Web site[s] can be obtained by contacting [insert name of plan administrator or designee] at [insert telephone number].

Document Summary

This document has 3 parts. Part I consists of performance information for plan investment options. This part shows you how well the investments have performed in the past. Part II shows you the fees and expenses you will pay if you invest in an option. Part III contains information about the annuity options under your retirement plan.

Part I. Performance Information

Table 1 focuses on the performance of investment options that do not have a fixed or stated rate of return. Table 1 shows how these options have performed over time and allows you to compare them with an appropriate benchmark for the same time periods. Past performance does not guarantee how the investment option will perform in the future. Your investment in these options could lose money. Information about an option's principal risks is available on the Web site[s].

Table 1—Variable Return Investments

Name/ Type of Option	Average Annual Total Return as of 12/31/XX				Benchmark			
	1yr.	5yr.	10yr.	Since Inception	1yr.	5yr.	10yr.	Since Inception
Equity Funds								
A Index Fund/ S&P 500 www. website address	26.5%	.34%	-1.03%	9.25%	26.46%	.42%	-.95%	9.30%
					S&P 500			
B Fund/ Large Cap www. website address	27.6%	.99%	N/A	2.26%	27.80%	1.02%	N/A	2.77%
					US Prime Market 750 Index			
C Fund/ Int'l Stock www. website address	36.73%	5.26%	2.29%	9.37%	40.40%	5.40%	2.40%	12.09%
					MSCI EAFE			
D Fund/ Mid Cap www. website address	40.22%	2.28%	6.13%	3.29%	46.29%	2.40%	-.52%	4.16%
					Russell Midcap			
Bond Funds								
E Fund/ Bond Index www. website address	6.45%	4.43%	6.08%	7.08%	5.93%	4.97%	6.33%	7.01%
					Barclays Cap. Aggr. Bd.			
Other								
F Fund/ GICs	.72%	3.36%	3.11%	5.56%	1.8%	3.1%	3.3%	5.75%

www. website address					3-month US T-Bill Index			
G Fund/ Stable Value www. website address	4.36%	4.64%	5.07%	3.75%	1.8%	3.1%	3.3%	4.99%
					3-month US T-Bill Index			
Generations 2020/ Lifecycle Fund www. website address	27.94%	N/A	N/A	2.45%	26.46%	N/A	N/A	3.09%
					S&P 500			
					23.95%	N/A	N/A	3.74%
					Generations 2020 Composite Index*			

*Generations 2020 composite index is a combination of a total market index and a US aggregate bond index proportional to the equity/bond allocation in the Generations 2020 Fund.

Table 2 focuses on the performance of investment options that have a fixed or stated rate of return. Table 2 shows the annual rate of return of each such option, the term or length of time that you will earn this rate of return, and other information relevant to performance.

Table 2—Fixed Return Investments

Name/ Type of Option	Return	Term	Other
H 200X/ GIC www. website address	4%	2 Yr.	The rate of return does not change during the stated term.
I LIBOR Plus/ Fixed-Type Investment Account www. website address	LIBOR +2%	Quarterly	The rate of return on 12/31/xx was 2.45%. This rate is fixed quarterly, but will never fall below a guaranteed minimum rate of 2%. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.
J Financial Services Co./ Fixed Account Investment www. website address	3.75%	6 Mos.	The rate of return on 12/31/xx was 3.75%. This rate of return is fixed for six months. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.

Part II. Fee and Expense Information

Table 3 shows fee and expense information for the investment options listed in Table1 and Table 2. Table 3 shows the Total Annual Operating Expenses of the options in Table 1. Total Annual Operating Expenses are expenses that reduce the rate of return of the investment option. Table 3 also shows Shareholder-type Fees. These fees are in addition to Total Annual Operating Expenses.

Table 3—Fees and Expenses

Name / Type of Option	Total Annual Operating Expenses As a %	Per $1000	Shareholder-Type Fees
Equity Funds			
A Index Fund/ S&P 500	0.18%	$1.80	$20 annual service charge subtracted from investments held in this option if valued at less than $10,000.
B Fund/ Large Cap	2.45%	$24.50	2.25% deferred sales charge subtracted from amounts withdrawn within 12 months of purchase.
C Fund/ International	0.79%	$7.90	5.75% sales charge subtracted from amounts invested.

Stock		
D Fund/ Mid Cap ETF	0.20% $2.00	4.25% sales charge subtracted from amounts withdrawn.
Bond Funds		
E Fund/ Bond Index	0.50% $5.00	N/A
Other		
F Fund/ GICs	0.46% $4.60	10% charge subtracted from amounts withdrawn within 18 months of initial investment.
G Fund/ Stable Value	0.65% $6.50	Amounts withdrawn may not be transferred to a competing option for 90 days after withdrawal.
Generations 2020/ Lifecycle Fund	1.50% $15.00	Excessive trading restricts additional purchases (other than contributions and loan repayments) for 85 days.
Fixed Return Investments		
H 200X / GIC	N/A	12% charge subtracted from amounts withdrawn before maturity.
I LIBOR Plus/ Fixed-Type Invest Account	N/A	5% contingent deferred sales charge subtracted from amounts withdrawn; charge reduced by 1% on 12-month anniversary of each investment.
J Financial Serv Co. / Fixed Account Investment	N/A	90 days of interest subtracted from amounts withdrawn before maturity.

The cumulative effect of fees and expenses can substantially reduce the growth of your retirement savings. Visit the Department of Labor's Web site for an example showing the long-term effect of fees and expenses at http://www.dol.gov/ebsa/publications/401k employee.html. Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

Part III. Annuity Information

Table 4 focuses on the annuity options under the plan. Annuities are insurance contracts that allow you to receive a guaranteed stream of payments at regular intervals, usually beginning when you retire and lasting for your entire life. Annuities are issued by insurance companies. Guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability.

Table 4—Annuity Options

Name	Objectives / Goals	Pricing Factors	Restrictions / Fees
Lifetime Income Option www. website address	To provide a guaranteed stream of income for your life, based on shares you acquire while you work. At age 65, you will receive monthly payments of $10 for each share you own, for your life. For example, if	The cost of each share depends on your age and interest rates when you buy it. Ordinarily the closer you are to retirement, the more it will cost you to buy a share.	Payment amounts are based on your life expectancy only and would be reduced if you choose a spousal joint and survivor benefit. You will pay a 25%

	you own 30 shares at age 65, you will receive $300 per month over your life.	The cost includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the total amount of your contributions, less any withdrawals.	surrender charge for any amount you withdraw before annuity payments begin. If your income payments are less than $50 per month, the option's issuer may combine payments and pay you less frequently, or return to you the larger of your net contributions or the cash-out value of your income shares.
Generations 2020 Variable Annuity Option www. website address	To provide a guaranteed stream of income for your life, or some other period of time, based on your account balance in the Generations 2020 Lifecycle Fund. This option is available through a variable annuity contract that your plan has with ABC Insurance Company.	You have the right to elect fixed annuity payments in the form of a life annuity, a joint and survivor annuity, or a life annuity with a term certain, but the payment amounts will vary based on the benefit you choose. The cost of this right is included in the Total Annual Operating Expenses of the Generations 2020 Lifecycle Fund, listed in Table 3 above. The cost also includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the greater of your account balance or contributions, less any withdrawals.	Maximum surrender charge of 8% of account balance. Maximum transfer fee of $30 for each transfer over 12 in a year. Annual service charge of $50 for account balances below $100,000.

Please visit www.ABCPlanglossary.com for a glossary of investment terms relevant to the investment options under this plan. This glossary is intended to help you better understand your options.

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■ 3. In § 2550.404c–1 revise (b)(2)(i)(B), (c)(1)(ii), and (f)(1), and add (d)(2)(iv) to read as follows:

§ 2550.404c–1 ERISA section 404(c) plans.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed investment decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of this paragraph, a participant or beneficiary will be considered to have sufficient information if the participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

(*1*) An explanation that the plan is intended to constitute a plan described in section 404(c) of the Employee Retirement Income Security Act, and 29 CFR 2550.404c–1, and that the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary;

(*2*) The information required pursuant to 29 CFR 2550.404a–5; and

(*3*) In the case of plans which offer an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security (employer security alternative), a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of employer securities, and the exercise of voting, tender and similar rights, by participants and beneficiaries, and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the procedures (*see* paragraphs (d)(2)(ii)(E)(*4*)(*vii*), (*viii*) and (*ix*) of this section).

* * * * *

(c) * * *

(1) * * *

(ii) For purposes of sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section, a participant or beneficiary will be deemed to have exercised control with respect to voting, tender or similar rights appurtenant to the participant's or beneficiary's ownership interest in an investment alternative, provided that the participant's or beneficiary's investment in the investment alternative was itself the result of an exercise of control; the participant or beneficiary was provided a reasonable opportunity to give instruction with respect to such incidents of ownership, including the provision of the information described in 29 CFR 2550.404a–5(d)(3); and the participant or beneficiary has not failed to exercise control by reason of the circumstances described in paragraph (c)(2) with respect to such incidents of ownership.

* * * * *

(d) * * *

(2) * * *

(iv) Paragraph (d)(2)(i) does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan.

* * * * *

(f) * * *

(1) Plan A is an individual account plan described in section 3(34) of the Act. The plan states that a plan participant or beneficiary may direct the plan administrator to invest any portion of his individual account in a particular diversified equity fund managed by an entity which is not affiliated with the plan sponsor, or any other asset administratively feasible for the plan to hold. However, the plan provides that the plan administrator will not implement certain listed instructions for which plan fiduciaries would not be relieved of liability under section 404(c) (*see* paragraph (d)(2)(ii) of this section). Plan participants and beneficiaries are permitted to give investment instructions during the first week of each month with respect to the equity fund and at any time with respect to other investments. The plan administrator of Plan A provides each participant and beneficiary with the information described in paragraph (b)(2)(i)(B) of this section, including the information that must be provided on or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter pursuant to 29 CFR 2550.404a–5, and provides updated information in the event of any change in the information provided. Subsequent to any investment by a participant or beneficiary, the plan administrator forwards to the investing participant or beneficiary any materials provided to the plan relating to the exercise of voting, tender or similar rights attendant to ownership of an interest in such investment (*see* paragraph (b)(2)(i)(B)(*3*) of this section and 29 CFR 2550.404a–5(d)(3)). Upon request, the plan administrator provides each participant or beneficiary with copies of any prospectuses (or similar documents relating to designated investment alternatives that are provided by entities that are not registered under the Securities Act of 1933 or the Investment Company Act of 1940), financial statements and reports, and any other materials relating to the designated investment alternatives available under the plan in accordance with 29 CFR 2550.404a–5(d)(4)(i) through (iv). Also upon request, the plan administrator provides each participant and beneficiary with other information required by 29 CFR 2550.404a–5(d)(4) with respect to the equity fund, which is a designated investment alternative, including a statement of the value of a share or unit of the participant's or beneficiary's interest in the equity fund and the date of the valuation. Plan A meets the requirements of paragraph (b)(2)(i)(B) of this section regarding the provision of investment information.

* * * * *

Signed at Washington, DC, this 7th day of October 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2010–25725 Filed 10–14–10; 12:45 pm]

BILLING CODE 4510–29–P

Federal Register

Wednesday,
October 20, 2010

Part V

Department of Labor

Employee Benefits Security Administration

154th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting; Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

154th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 154th open meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans will be held on November 3–4, 2010.

The meeting will take place in C5515 Room 1A, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 on November 3, from 1 p.m. to approximately 5 p.m. On November 4, the meeting will start at 9 a.m. and conclude at approximately 3:30 p.m., with a break for lunch. The purpose of the open meeting is for the Advisory Council members to finalize their recommendations to be presented by the Advisory Council to the Secretary. At the November 4 afternoon session, the Council members will receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA) and present their recommendations.

The Council recommendations will be on the following issues: (1) Healthcare Literacy, (2) Disparities for Women and Minorities in Retirement, and (3) Employee Benefit Plan Auditing and Financial Reporting Models. Descriptions of these topics are available on the Advisory Council page of the EBSA Web site at *http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html.*

Organizations or members of the public wishing to submit a written statement may do so by submitting 30 copies on or before October 26, 2010 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue, NW., Washington, DC 20210. Statements also may be submitted as e-mail attachments in text or pdf format transmitted to *good.larry@dol.gov.* It is requested that statements not be included in the body of the e-mail. Relevant statements received on or before October 26, 2010 will be included in the record of the meeting. Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact Larry Good by October 26 at the address indicated.

Signed at Washington, DC, this 15th day of October, 2010.

Michael L. Davis,

Deputy Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2010–26441 Filed 10–18–10; 11:15 am]

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