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FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 5901

Supplemental Standards of Ethical Conduct for Employees of the Federal Labor Relations Authority

AGENCY: Federal Labor Relations Authority (FLRA).

ACTION: Final rule.

SUMMARY: The Federal Labor Relations Authority (FLRA), with the concurrence of the Office of Government Ethics (OGE), is adopting as final, without change, the interim FLRA rule that supplements the executive-branch-wide Standards of Ethical Conduct (Standards) issued by OGE and, with certain exceptions, requires FLRA employees to obtain approval before engaging in outside employment.

DATES: This final rule is effective March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Rosa M. Koppel, Solicitor, at *rkoppel@flra.gov*, fax: (202) 343–1007.

SUPPLEMENTARY INFORMATION: The FLRA published, with OGE concurrence, an interim rule in 75 FR 79261, on December 20, 2010, governing the conduct of FLRA employees and requested comments. No comments were received. The FLRA has determined, with OGE concurrence, to adopt the interim rule as final without change. The interim rule being adopted as final provides that an FLRA employee, other than a special Government employee, must obtain approval before engaging in outside employment. The rule defines outside employment and sets out the procedure for seeking approval. The rule also provides that the Designated Agency Ethics Official (DAEO) or alternate DAEO may exempt certain categories of employment from the prior approval requirement.

For a detailed section analysis of this final rule, see the preamble of the interim rule as published in 75 FR 79261.

Regulatory Flexibility Act

The FLRA has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. chapter 6, that this rulemaking will not have a significant economic impact on a substantial number of small entities because it primarily affects FLRA employees.

Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. chapter 35, does not apply because this rulemaking does not contain information collection requirements subject to the approval of the Office of Management and Budget.

Congressional Review Act

The FLRA has determined that this rule is not a rule as defined in 5 U.S.C. 804, and thus, does not require review by Congress.

List of Subjects in 5 CFR Part 5901

Conflict of interest, Government employees.

Authority and Issuance

Accordingly, the Federal Labor Relations Authority, with the concurrence of the Office of Government Ethics, is adopting the interim rule adding 5 CFR chapter XLIX, consisting of part 5901, which was published at 75 FR 79261 on December 20, 2010, as a final rule without change.

Dated: March 9, 2011.

Carol Waller Pope,

Chairman, Federal Labor Relations Authority.

Approved: March 11, 2011.

Robert I. Cusick,

Director, Office of Government Ethics.

[FR Doc. 2011–6335 Filed 3–17–11; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1150

[Docket No. DA–08–07: AMS–DA–08–0050]

RIN 0581–AC87

National Dairy Promotion and Research Program; Final Rule on Amendments to the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This document implements amendments to the Dairy Promotion and Research Order (Order). This action is pursuant to the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) and the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill). The 2002 Farm Bill mandates that the Order be amended to implement an assessment on imported dairy products to fund promotion and research and to add importer representation, initially two members, to the National Dairy Promotion and Research Board (Board). The 2008 Farm Bill specifies a mandatory assessment rate of 7.5 cents per hundredweight of milk, or equivalent thereof, on dairy products imported into the United States. This final rule, in accordance with the 2008 Farm Bill, also amends the term "United States" in the Dairy Production Stabilization Act of 1983 (Act) to mean all States, the District of Columbia, and the Commonwealth of Puerto Rico. Producers in these areas will be assessed 15 cents per hundredweight for all milk produced and marketed.

DATES: *Effective Dates:* These amendments are effective April 1, 2011 except for § 1150.152(b) which is effective August 1, 2011.

FOR FURTHER INFORMATION CONTACT: Whitney Rick, USDA, AMS, Dairy Programs, Promotion and Research Branch, Stop 0233–Room 2958–S, 1400 Independence Avenue, SW., Washington, DC 20250–0233, (202) 720–6909, *Whitney.Rick@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This final rule is being issued pursuant to the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4501–4514), Public Law 98–180, enacted November 29, 1983, as amended May 13, 2002, by Public Law

107–171 and further amended June 18, 2008, by Public Law 110–246. Prior Documents in this proceeding: Proposed Rule and Opportunity to File Comments, Including Written Exceptions, on Proposed Amendments to the Order: Issued May 12, 2009; published May 19, 2009 (74 FR 23359).

Executive Orders 12866 and 13563

This rule has been determined to be significant pursuant to Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. The updated cost-benefit analysis for this final rule is available at *http://www.ams.usda.gov/dairyimportassessment.*

A requirement of 7 U.S.C. 4514 and 6407 requires the U.S. Department of Agriculture to conduct an independent analysis of the dairy checkoff programs. The independent analysis, conducted by Cornell University, has consistently shown that the program has had a positive and statistically significant impact on per capita dairy consumption. Specifically, generic advertising and promotion of dairy products increases both the quantities consumed and prices. For 2008, it was estimated the farm milk price was $0.21 to $0.26 per hundredweight higher and the quantity demanded was 2.3 percent higher because of the program. Results from this analysis show that the average Benefit-Cost Ratios for the Dairy Program was 5.49 (nonfat solids basis) and 7.07 (milk fat basis) from 1998 through 2008. This means that each dollar invested in generic dairy marketing by dairy farmers during the period would return between $5.49 and $7.07, on average, in net revenue to farmers. Additionally, the Report to Congress estimates the elasticity of advertising to be .034 on a nonfat basis and 0.027 on a fat basis. For further details, see *http://www.ams.usda.gov/AMSv1.0/FindaReporttoCongress.*

Assessments to U.S. dairy producers under the Order are relatively small compared to producer revenue. If dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico had paid assessments of $0.15 per hundredweight of milk marketed in 2008, it is estimated that $1.1 million would have been paid. This is about 0.5 percent of the $195 million total value of milk produced and marketed in these areas.

The total of assessments collected from importers under the National Dairy Promotion and Research Program are expected to be relatively small compared to the value of dairy imports. If importers had been assessed $0.075 per hundredweight, or equivalent thereof, for imported dairy products in 2008 as specified in this rule, it is estimated that about $4.9 million would have been paid. This is about 0.2 percent of the $2.6 billion value of the dairy products imported in 2008.

Examination of import volumes for 2008 indicates that tariff rate quotas (TRQs) constrain dairy imports in varying degrees. TRQs do not seem to be a significant hindrance to the volume imported for many dairy products. Significant quantities of dairy products imported are not subject to TRQs.

The U.S. Dairy Export Council, a subsidiary of the Board, directs a global ingredients program and promotes dairy ingredients domestically and U.S. dairy ingredients internationally. Through importer representation on the Board and possible establishment of qualified dairy product promotion, research, or nutrition education programs (qualified programs) by importers, imported products could be promoted to a greater extent than under the current program.

Civil Rights Analysis

The potential civil rights implications of this rule on affected parties have been considered to ensure that no person or group shall be discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status, or protected genetic information. This review included persons that are employees of the entities that are subject to these regulations. This final rule does not require affected entities to relocate or alter their operations in ways that could adversely affect such persons or groups. Moreover, the amendments would not exclude from participation any persons or groups, deny any persons or groups the benefits of the program, or subject any persons or groups to discrimination.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not intended to have a retroactive effect. Section 4512(a) of the Act provides that nothing in the National Dairy Promotion and Research Program (National Program) may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

The Dairy Production Stabilization Act of 1983 (Act) authorizes the National Program. The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 4509 of the Act, any person subject to the Order may file with the Secretary a petition stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not in accordance with the law and requesting a modification of the Order or to be exempted from the Order. A person subject to an Order is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

Executive Order 13132

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. USDA has determined that this final rule conforms with the Federalism principles set forth in the Executive Order, and that this final rule does not have Federalism implications.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this final rule will not have a significant economic impact on a substantial number of small entities. The purpose of the Regulatory Flexibility Act is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened.

The Dairy Production Stabilization Act of 1983 authorizes a national program for dairy product promotion, research and nutrition education. Congress found that it is in the public interest to authorize the establishment of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace

and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

As directed by the 2008 Farm Bill, approximately 360 producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico will become subject to the provisions of the Order as of the effective date of this final rule. The Small Business Administration [13 CFR 121.201] defines small dairy producers as those having annual receipts of not more than $750,000 annually. Most of the producers who will become subject to the provisions of the Order are considered small entities.

Assessments to dairy producers under the Order are relatively small compared to producer revenue. If dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico had paid assessments of $0.15 per hundredweight of milk marketed in 2008, it is estimated that $1.1 million would have been paid. This is about 0.5 percent of the $195 million total value of milk produced and marketed in these areas.

The assessment for dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico will be collected by persons who pay the producers for milk produced and marketed, and the money will be remitted to the Board.[1] These responsible persons, usually milk handlers, incur the costs of calculating the assessment due from each dairy producer; forwarding a form monthly to the Board; and sending checks or other negotiable instruments of legal tender to the Board and designated qualified programs. The responsible persons maintain any records that are necessary to account for the collection of the 15-cent assessment. Books and records for producers and persons collecting assessments subject to the Order shall be maintained for two years beyond the fiscal period of their applicability. These books and records would be made available to employees or agents of the Board or the Department for inspection during normal business hours if necessary for verification purposes.

For the purpose of the Regulatory Flexibility Act, a dairy products manufacturer is a small business if it has fewer than 500 employees. For purposes of determining a milk handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant is considered a large business even if the local plant has fewer than 500 employees. While the number of anticipated responsible persons collecting assessments under the Order in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico are not known, it is expected that most would be considered small businesses.

According to U.S. Customs and Border Protection (CBP), there were about 3,000 importers of dairy products listed in § 1150.152 (b) in 2007 and 2008. Although data is not available concerning the sizes of these firms, it is reasonable to assume that most of them would be considered small businesses. Although many types of businesses import dairy products, the most common classification for dairy product importers is Grocery and Related Product Merchant Wholesalers (North American Industry Classification System, category 4244). The Small Business Administration [13 CFR 121.201] defines such entities with fewer than 100 employees as small businesses. According to 2006 statistical data from the U.S. Census Bureau, 95.2 percent of these types of businesses had fewer than 100 employees (*http://www.census.gov/econ/susb/*).

This final rule imposes minimal reporting and recordkeeping requirements on importers subject to the Order. Books and records for importers subject to the Order shall be maintained for two years beyond the calendar year in which the import occurs. These books and records would be made available only to the Secretary for inspection during normal business hours if necessary for verification purposes. The proposed rule would have required importers subject to the Order to make books and records available to the Board, but this will not be required as a result of changes in this final rule. This rule requires importers to calculate assessments due based upon documentation concerning the cow's milk solids content of the imported products. Products shall be assessed at the rate of $0.01327 per kilogram of cow's milk solids.

In many cases, the importer would have this documentation on hand as part of normal business practice. Importers must maintain books and records sufficient to verify that products have been properly classified according to the Harmonized Tariff Schedule (HTS). For some HTS codes, this includes books and records indicating that the milk solids content falls within a certain range. Default assessment rates listed in the proposed rule are eliminated in this final rule.

Assessments to importers under the Order are expected to be relatively small compared to the value of dairy imports. If importers had been assessed $0.075 per hundredweight of milk, or equivalent thereof, on imported dairy products in 2008, as specified in this rule, it is estimated that about $4.9 million would have been paid. This is about 0.2 percent of the $2.6 billion value of the imported dairy products.

This final rule provides for organizations that conduct qualified programs to receive assessment funds as designated by individual importers. Additionally, this final rule includes a provision that permits importers and organizations of importers, as approved by the Secretary, to nominate importer representatives to the Board. Such organizations would generally consist of importers who are considered mostly small entities.

Paperwork Reduction Act

Information collection requirements and recordkeeping provisions contained in 7 CFR part 1150 have been previously approved by the Office of Management and Budget and assigned OMB Control Number 0581–0093 under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Section 1601 of the 2002 Farm Bill (Pub. L. 107–171) and section 1601 of the 2008 Farm Bill (Pub. L. 110–246) exempt this rule from the Paperwork Reduction Act. Although exempted, the requirements of the Paperwork Reduction Act were considered in developing the provisions of this final rule. The information collection requirements are minimal but essential to carry out the intent of the Dairy Production Stabilization Act of 1983. The final amended Order provisions have been carefully reviewed and every effort has been made to minimize recordkeeping costs or requirements.

Under the final amended Order provisions, importers will be responsible to pay assessments. CBP will serve as the collecting agent for assessments on imported dairy products and will remit the assessments to the Board. Importers will be required to provide records to the Secretary on occasions when additional information is needed as evidence of compliance, or in cases when the importer seeks a reimbursement of assessments. Such records must be retained for at least two years beyond the calendar year of their applicability.

Additionally, each person making payment to a producer for milk produced in the United States and marketed for commercial use collects an assessment for all such milk handled.

[1] Any producer that sells milk directly to consumers shall remit the assessment directly to the Board.

These responsible persons calculate the assessments due from each dairy producer. Under the final amended Order provisions, responsible persons making payments to dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico will be required to collect and remit assessments and file reports with the Board. The Order imposes certain recordkeeping requirements on responsible persons; however, information required under the Order could be compiled from currently maintained records. Any producer marketing milk of that producer's own production directly to consumers is a responsible person. Such records must be retained for at least two years beyond the calendar year of their applicability.

The forms by which producer information is to be collected require the minimum information necessary to effectively carry out the requirements of the Order. There are no training requirements for individuals filling out reports and remitting assessments to the Board. The forms are designed to be simple and easy to understand, placing as small a burden as possible on the persons required to file the information.

The timing and frequency of collecting information are intended to meet the needs of the National Program while minimizing the amount of work necessary to fill out the required reports. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers and responsible persons who are subject to the provisions of the Order. Therefore, there is no practical method for collecting the required producer information without the use of these forms.

The assessment places a minimal burden on newly regulated producers or importers who seek to direct monies to qualified programs. The amount of time required to designate to a qualified program is estimated to be 15 minutes to prepare a written request. Qualified programs are certified by the Secretary to receive assessment money from producers and importers for the purpose of promoting dairy products.

The amended Order provisions would place a minimal burden on newly regulated producers or importers who seek nomination to serve on the Board. Importers and producers would be required to complete a background information form for submission to the Secretary. The estimated time for completing the form is 30 minutes, which includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the form. Additionally, there would be minimal burden on importer organizations that voluntarily request to be approved by the Secretary to participate in the National Program by making nominations to the Board. The estimated time for reporting this is 30 minutes.

Currently, a producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) certificate and thus only produces products that are eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, shall be exempt from the payment of assessments. The final rule provides that an importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation, would likewise be exempt from the payment of assessments. The Order places a minimal burden on a producer or importer applying for such an exemption. The producer or importer must provide a request to the Board, on a form provided by the Board, at any time initially and annually thereafter. The documentation is the same for importers as for producers.

In addition, there are some requirements for information from importers that are occasional. For example, if an importer files for reimbursement or applies for reimbursement of assessments from the Secretary for an overpayment, circumstances dictate the time that it would take for the importer to gather the information necessary to make the claim. Assembling and transmitting the necessary documentation to the Secretary would place a minimal burden on importers.

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

Background

The Dairy Production Stabilization Act of 1983 (Act) authorizes the Order for dairy product promotion, research, and nutrition education as part of a comprehensive strategy to increase human consumption of milk and dairy products and to reduce milk surpluses. The National Program functions to strengthen the dairy industry's position in the marketplace by maintaining and expanding domestic and foreign consumption of fluid milk and dairy products.

Section 1505 of the 2002 Farm Bill requires that the Order be amended to implement a mandatory assessment on dairy products imported into the United States and that the assessment be submitted to CBP at the time entry documents are filed.

Section 1507 of the 2008 Farm Bill amended the term "United States" in section 4502(1) of the Act to mean all of the States, the District of Columbia, and the Commonwealth of Puerto Rico. This amendment requires that Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico be added to the existing regions of the Board and that producers in these areas be assessed 15 cents per hundredweight on all milk produced and marketed commercially.

Section 10607 of the 2002 Farm Bill provides for an exemption from payment of assessments by organic milk producers and importers of organic dairy products. Section 1150.157 of the Order currently provides the specific requirements necessary for producers to receive the exemption. *See* 70 FR 2744 for a complete discussion of implementation of the provisions of section 10607 of the 2002 Farm Bill as it relates to promotion and research programs for other agricultural commodities. The same reasoning in 70 FR 2744 is applied in this final rule and, accordingly, provides for an exemption for dairy importers.

A producer that operates under an approved National Organic Program (NOP) (7 CFR part 205) certificate and thus only produces products that are eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, would be exempt from the payment of assessments. An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205), and is not a split operation, also would be exempt from the payment of assessments. To receive the exemption, producers and importers of products labeled as 100 percent organic, and who do not produce or market any non-organic products, would provide a request to the Board, on a form provided by the Board, at any time initially and annually thereafter.

Additionally, the 2002 Farm Bill amendments authorize importers to have representation on the Board. Initially, importers are required to be represented by two importers appointed by the Secretary. Thereafter, importer representation on the Board will be adjusted at least once every three years, if necessary, to reflect the volume of imports relative to domestic production of milk. The amendments also specify

that importer assessments may not be used for foreign market promotion and that they be implemented in a manner consistent with United States trade obligations.

The 2002 Farm Bill specifies that the assessment be 15 cents per hundredweight, or equivalent thereof, on dairy products imported into the United States. However, this rate was changed with the 2008 Farm Bill; section 1507 specifies that the assessment will be 7.5 cents per hundredweight of milk, or the equivalent thereof. The assessment is equivalent to one-half the payment domestic dairy farmers are required to remit.

Finally, the 2002 Farm Bill amended the policy statement in the Act to make it clear that the purpose of the program is to expand the consumption of dairy products, whether produced domestically or imported. A program that promotes the substitution of a dairy product from one source with a dairy product from another source would not be consistent with this policy. Likewise, the Board and the Department will consider carefully whether any brand advertising or promotion would have a detrimental effect on other brands of dairy products before giving approval. No program would be approved if it would negatively affect similar domestic or imported dairy products.

Subtitle F of Title 1 of the 2002 Farm Bill at section 1601 and Subtitle F of Title 1 of the 2008 Farm Bill at section 1601 provide for the implementation timeframe and the promulgation of these regulations without regard to the Paperwork Reduction Act (44 U.S.C. chapter 35); the Statement of the Policy of the Secretary of Agriculture, effective July 24, 1971 (36 FR 13804); and the notice and comment provisions of section 533 of Title 5, United States Code. However, due to the interest of affected parties, a proposed rule was published in the **Federal Register** [74 FR 3359] on May 19, 2009, inviting comments. Interested parties were provided 30 days to comment on the proposed amendments.

The Department received 189 comments from individuals, trade organizations, importer organizations, domestic dairy producers, domestic and foreign dairy cooperatives, foreign governments, domestic and foreign dairy companies, a foreign dairy promotion board, State governments, attorneys, and international trading companies. The issues raised in the comments that resulted in the greatest changes from the proposed rule concerned the use of default assessment rates and concerns over confidentiality and business information associated with compliance, enforcement, and recordkeeping. Other provisions changed or clarified in the final rule relate to milk solids content; Harmonized Tariff Schedule codes; qualified programs; referendum provisions; organic exemptions; duties of the board; and definitions of CBP, importer, and qualified programs.

The 2002 Farm Bill mandates that the import assessment be implemented in a manner consistent with United States trade obligations. USDA has consulted with the Office of the United States Trade Representative to ensure that this final rule is consistent with the international trade obligations of the Federal Government.

Summary of Comments and Changes From the Proposed Rule

Default Assessment Rates

Under the proposed rule, an importer with adequate documentation concerning the milk solids content of an imported dairy product would pay an assessment based upon milk solids content. Further, the proposed rule stated that an importer without adequate documentation concerning the milk solids content of an imported dairy product would pay a default assessment rate per HTS code. For most products, the default assessment rate for each HTS code would have been based upon estimated maximum milk solids content.

Several commenters objected to the proposal to set default rates at the maximum milk solids content for most products. The commenters argued that this would be unequal treatment for importers in comparison to domestic producers. The Department does not agree with the commenters' unequal treatment assertions. However, the Department has determined that in order to provide one clear and consistent method for importers to calculate the assessment, to simplify program administration, and to best effectuate the purposes of the Act, default assessment rates should not be included in the Order provisions. Accordingly, importers will be required to pay based upon cow's milk solids content of imported dairy products.

Since the mandatory 7.5-cents assessment is per one hundred pounds of milk, this final rule applies a standard rate of assessment per unit of milk solids. On average during the period January 2006 through December 2007, a hundredweight of U.S. producer milk contained 12.45 pounds of milk solids (3.68 percent butterfat and 8.77 percent nonfat milk solids). Since the assessment rate stated in the 2008 Farm Bill is 7.5 cents per hundredweight of milk or its equivalent, this final rule establishes the assessment rate per volume of imported milk solids as $0.00602 per pound ($0.075/12.45 pounds) or $0.01327 per kg (1 kg = 2.204623 pounds.) This rate shall be applied to the cow's milk solids content for any imported product listed in the table displayed in section 1150.152(b)(1).

Several commenters also indicated that in some cases it is overly burdensome for the importer to obtain documentation concerning the milk solids content of the imported dairy products. The Department disagrees with these comments. Where documentation of cow's milk solids content is not presently available, the importer could ask the seller or manufacturer to provide such information. Cow's milk solids product content could be communicated to the importer through an invoice, packing slip, bill of lading, laboratory test results, a letter from the manufacturer on the manufacturer's letterhead, or similar documents.

Compliance and Enforcement

Several commenters recommended that the final rule be amended to include provisions restricting access to confidential business information provided in connection with import assessments. As proposed, the rule gave the Board the discretion to verify milk solids content reported by importers to the CBP to determine if additional money is due the Board or if an amount is due to an importer. The commenters noted that the verification of milk solids content of some products requires more specific information on product composition than is currently required under applicable labeling and import regulations. Specifically, one commenter noted that verifying the calculation of the milk solids content of a particular product requires revealing the exact proportion of constituent components of that product, and as such, verification reports are likely to contain confidential, proprietary, and commercially sensitive data. In light of this, this section is modified to require the Secretary, not the Board, to verify information reported by importers.

Section 1150.171(b) of the proposed rule would require importers of dairy products to submit reports as requested by the Board or the Department as necessary to verify that provisions pursuant to § 1150.152(b) have been carried out correctly, including verification that correct amounts were paid based upon milk solids content of

the imported dairy products pursuant to § 1150.152(b). The proposed rule indicated that each importer of dairy products shall maintain and make available for inspection by employees of the Board and the Secretary such books and records to verify that provisions pursuant to § 1150.152(b) have been carried out correctly, including verification that correct amounts were paid based upon milk solids content of the import dairy products. As noted in the earlier discussion regarding provisions restricting access to confidential business information provided in connection with import assessments, these sections are hereby modified so that only the Secretary has access to confidential information. With this rule, CBP shall forward assessments directly to the Board. CBP shall provide information concerning the payments of individual importers to USDA instead of the Board. Additionally, each importer of dairy products shall maintain and make available for inspection by the Secretary, not the Board, such books and records as needed to verify provisions pursuant to § 1150.152(b) have been carried out correctly.

Costs and Benefits; National Treatment; and U.S. Trade Obligations

Several commenters argued that import assessments would amount to unfair treatment because some imported products will not benefit to the same extent as others. While not all imported dairy products are promoted, or receive little promotion, the same situation similarly exists with domestic dairy production; the Board does not specifically promote all dairy products. This is evidenced in the cost-benefit analysis, noting that the Board does not specifically advertise or promote ice cream, even though dairy farmers pay a 15-cent per hundredweight assessment for milk used in the production of ice cream. Other examples would be food preparations, infant formula, and milk chocolate, all of which contain dairy products. Thus, the import assessment will be collected on all specified imported dairy products and imported products containing cow's milk solids, whether or not the Board chooses to promote such products. The National Program provides benefits relative to all dairy products, whether or not they are specifically promoted. With increased dairy consumption, the market for milk solids tightens. Prices are higher for the entire array of products that contain milk solids, both domestic and imported. Even products that are not directly promoted through the National Program receive this benefit.

It is important to note that not all domestic producers or importers would receive benefits equally. Some importers may benefit more than others due to the portfolio of dairy products promoted by the Board. An equivalent case can be made for domestic dairy producers. A dairy producer in a region with high cheese production may benefit from cheese promotions more than a dairy producer in a low cheese production area. Some commenters argued that dairy producers would receive equal benefits from the National Program because most of the milk is pooled under the Federal milk marketing order system or a similar State program. However, the Federal milk marketing order system and similar State programs do not cover all milk marketed and do not set the prices that dairy producers receive; rather, they require handlers to pay minimum prices. Handlers may, and often do, pay producers or their cooperative more than minimum prices required by the pools. Furthermore, pools in different regions of the country vary in milk utilization, and thus minimum prices required by the pools may reflect different levels of benefits from the National Program.

One commenter noted that the current dairy promotion program primarily promotes fluid milk sales, and to a lesser degree, sales of American-style cheeses. The commenter also stated that the U.S. does not import fluid milk from Mexico, and that Mexican-style cheese imported into the U.S. is far different than American-style cheeses. To that end, the commenter noted that imports of dairy products from Mexico are primarily specialized proteins (and specialty cheese) which are mainly used in food products that are not dairy products and that the current promotion program would not benefit them or the products they import. Similarly, another commenter noted that a large proportion of imported dairy products into the U.S. are ingredients with a variety of applications, some dairy and some non-dairy in nature. It was argued that these imported ingredients will not benefit from the promotion program, particularly when used in non-dairy products.

With respect to the aforementioned comments, and as correctly noted by one of the commenters, domestic producers are assessed per hundredweight on all milk produced and marketed commercially, and the disposition or final usage of the raw milk is not a fact in determining the assessment. Likewise, the Farm Bills require an assessment on imported dairy products, regardless of the final disposition of the product or usage. Additionally, contrary to the comments provided by some commenters; the current National Program does promote dairy ingredients by marketing dairy ingredient benefits to food and beverage manufacturers and to help launch new or improved products. The National Program offers a variety of insights on ingredient marketing, nutrition, processing and testing. In 2008, the National Program spent approximately $4.9 million on ingredient research and promotion. Furthermore, importers would benefit from potentially higher prices. Also, with the changes to the provision of the Order made by this final rule, imported dairy products and ingredients could be promoted to a greater extent than with the current National Program.

Several commenters also indicated that 2007, the year considered by the cost-benefit analysis for the proposed rule, was an anomalous year. Had data from other years been examined, the commenters indicated the Department would have observed that Tariff Rate Quotas (TRQs) would have been of a greater restraint. For the final rule, the cost-benefit analysis has been updated based upon data from 2008. Similarly, the Department found that TRQs seem to constrain dairy imports in varying degrees for some products, but not for others.

With respect to TRQs, one commenter proposed that importers be refunded for any year in which the TRQ fill rate for a particular product exceeds 85 percent. At this level, the commenter asserted that imports are constrained, limiting the benefits of the National Program. It is important to note that TRQs are rarely 100-percent filled due to licensing requirements of imported dairy products. However, the fact that a TRQ is filled or nearly filled is not a clear indication that importers do not receive benefits from the National Program. It is reasonable to conclude that some TRQs would have had lesser fill rates without the National Program. Furthermore, importers potentially benefit from the generally higher prices brought about by the National Program. For these reasons, the commenter's proposal is not adopted.

In varying degrees of detail, several opponents of the proposed rule claimed that implementation of an assessment on imported dairy products would be a potential violation of the national treatment obligations under the World Trade Organization (WTO). Opponents of the import assessment asserted several reasons, including several references to potential violations of the General Agreement on Trade and Tariffs (GATT). As required by Section 4503(d)

of the Act, the Secretary has consulted with the Office of the United States Trade Representative (USTR) to ensure that the Order is implemented in a manner consistent with the international trade obligations of the Federal Government.

Neutral Promotion of Dairy Products With Respect to Origin

With the passage of the 2002 Farm Bill, the policy statement in the Act was amended to make it clear that the purpose of the National Program is to expand the consumption of dairy products, whether produced domestically or imported. A program that promotes the substitution of a dairy product from one source with a dairy product from another source for consumption in the U.S. market is not consistent with this policy. Several commenters suggested that the proposed changes only generally remove the requirement that programs promote products of the United States, but indicated the changes are not sufficiently clear that going forward that they must be neutral with respect to country of origin. Additionally, the commenters suggested that the Board and Dairy Management Inc. (DMI), the staffing and management organization for the National Program, would have to ensure that any of its activities, including salaries and expenses from conducting export promotion marketing or coordination and management of export promotion, that are funded all or in-part by the Board would be neutral with respect to State or country of origin, including any promotion tools. Further, the commenters suggested that the Order require AMS to certify the neutrality of all policies and activities of the National Program prior to the distribution of any importer assessment monies to the Board. Several commenters also raised concerns that the "Real Seal" and other programs that are only available to domestic products, if not eliminated or completely revised, would, in their view, adversely affect conditions of competition for imports, thereby potentially violating GATT Article III:4.

AMS provides the day-to-day oversight for all activities related to the National Program. AMS oversight activities include reviewing and approving DMI and the Board's budgets, budget amendments, contracts, advertising campaigns, investment plans, and all materials developed for public distribution. Additionally, AMS ensures that all expenditure of promotion funds is consistent with the Act and the Order, and the Agency's other responsibilities relate to nominating and appointing Board members, amending the orders, conducting referenda, and conducting periodic program audits. Further, AMS representatives attend full Board meetings, committee meetings, and other staff and member meetings of consequence to the National Program. Given AMS's extensive oversight activity and policies relating to program review, it is neither necessary nor appropriate to implement additional provisions at this time to ensure appropriate expenditure of funds with respect to neutrality. Additionally, as of the effective date of these amendments, all of the National Program's activities will be consistent with respect to neutrality and country of origin. Several commenters accurately noted that by striking the words "produced in the United States" from the definition of milk, programs like the "Real Seal" and "3-A-Day" partners, and promotional offers will become available to international dairy brands and importers. Such programs will no longer be allowed to refer specifically to domestically produced dairy products if funded by the Board. Also research carried out with assessment funds would be available to all of the importers subject to the assessment.

Additionally, commenters raised concerns about other specific National Program activities, such as the promotion of American artisanal cheese and "The New Look of School Milk" program. As of the effective date of these amendments, all of these activities must comply with the new policy statement with respect to neutrality and country of origin.

Separately, several commenters raised the concern of whether or not the prohibitions and restrictions with respect to neutrality apply to qualified programs and the promotion of State brands. Section 4512(a) of the Act (Administrative Provisions) states "Nothing in this subchapter may be construed to preempt or supersede any other program relating to dairy product promotion organized and adopted under the laws of the United States or any State." This statutory policy provides qualified programs with as much freedom to continue their present operation and is consistent with a coordinated effort. As such, the policy is retained and qualified programs may continue to promote State brands. Research has shown that promotion of State brands, to the extent they reflect a type of brand, can increase dairy category sales and is consistent with the intent of the Act to raise the demand and consumption for dairy products generally. Review and/or approval authority of the Board and the Department regarding branded advertising or promotion by qualified State or regional programs will remain as it presently exists and is not modified under this proceeding. Several commenters questioned whether this proceeding would impact the ability of qualified programs to build demand for locally produced milk and dairy products; it does not. Similarly, this does not impact the ability of importer qualified programs to build demand for imported dairy products.

One commenter questioned whether the provision striking the use of the words "produced in the United States" was contrary to the recently implemented Country of Origin Labeling (COOL) legislation (7 U.S.C. 1638–1638d). COOL provisions require certain food retailers (supermarkets and grocery stores) to provide additional information (country of origin information) to consumers on specific food items at the point of purchase. COOL does not apply to dairy products. The COOL program is not related to this proceeding and there are no applicable provisions or requirements that overlap with this final rule.

Export and Foreign Market Promotion

As provided in the 2008 Farm Bill, the Board's budget may provide for the expenditure of revenues available to the Board to develop international markets for, and to promote within such markets, the consumption of dairy products produced or manufactured in the United States through 2012. Several commenters questioned how importers would be assured that their assessments would not be used to fund development of foreign markets for U.S. products. Commenters also suggested that allowing up to 100 percent of domestic producer assessments to go into export promotion could result in allowing import assessments to pay more than their "share" of domestic promotion thereby subsidizing the export promotion activities. They also noted that if uncapped levels of domestic assessments are allowed to go into export promotion, import assessments could fund a disproportionate share, up to 100 percent, of the domestic program and therefore, underwrite the domestic gains to producers.

Accordingly, some commenters proposed that USDA should track imported dairy products on a milk equivalent basis as a percentage of domestic commercial disappearance. The commenters noted that if imports are 5 percent of the domestic market, for instance, then the Board must fund 95 percent of domestic promotion from

U.S. dairy producers. Other commenters suggested that the Order should state that the funds for foreign market promotion in any year cannot exceed the level of the year prior to the beginning of import assessments, plus the level of increase in producer checkoff contribution in the previous year. These proposals are not adopted because the Act specifically states that the Order shall provide the authority for the Board to expend in the maintenance and expansion of foreign markets an amount not to exceed the amount collected from the United States producers for a fiscal year. Dairy product market share is not the authorized measure in determining the amount of the Board's expenditure on export and foreign market promotion.

Section 4501(b) of the Act states that domestic promotion under the National Program must include imported dairy products, and section 4504(e)(2) of the Act states that with respect to foreign market efforts, "* * * the Board's budget may provide for the expenditure of revenues available to the Board to develop international markets for, and to promote within such markets, the consumption of dairy products produced or manufactured in the United States." For clarification, with this final rule, section 1150.140(n) has been expanded to indicate that the duties of the Board are to encourage the coordination of programs of promotion, research, and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand: (1) Domestic markets and domestic uses for fluid milk and dairy products produced in the United States or imported into the United States; and (2) foreign markets and foreign uses for fluid milk and dairy products produced in the United States.

Notwithstanding the aforementioned, the USDA Report to Congress as required in section 4514(4) of the Act must provide an accounting for the receipt and disbursement of all funds received by the Board. This includes funds received from importers. AMS will require the Board to provide an accounting and evaluation of all activities targeted at the promotion of imported dairy products to be included in its annual Report to Congress.

Products To Be Assessed

Commenters argued that the proposed rule included assessments on products that fall outside the scope of accepted international definitions for dairy products. Several commenters suggested limiting the number of products to be assessed to those in Chapter 4 of the HTS, referring to the Explanatory Notes (ENs) for the definitions in the "General" section for Chapter 4.[2] The Department does not agree that the ENs define dairy products, but rather they simply define the products that are to be covered under Chapter 4. One commenter indicated that the only products that should be included are those that would be defined as a milk product or a composite milk product under Codex Alimentarius standards. The Codex Alimentarius Commission was established in 1963 to reduce trade barriers and facilitate trade in safe foods of a defined quality. The WTO utilizes the Codex standards with the goals of formulating and harmonizing international food standards, ensuring their global compliance, and resolving trade disputes. The Codex milk and milk product standards cover a number of dairy products, including but not limited to butter, milkfat products, evaporated milk, condensed milk, edible casein products, milk powders, dairy fat spreads, whey cheeses, processed cheeses, and numerous varieties of natural cheeses. However, the definitions of "milk and milk products" in the Codex standards are not germane to the definition of "dairy products" in the final rule as these products will be assessed consistent with the definition of dairy products as defined by the Act. Therefore, this suggestion also is not adopted.

In this final rule, 265 of the 266 HTS codes listed in section 1150.152(b) of the proposed rule are adopted. HTS code number 1901.90.9082 is for corn-soya milk blends that do not contain over 5.5 percent by weight of butterfat and are not considered dairy products as described in additional note 1 to Chapter 4 of the HTS. After consultation with CBP, it is concluded that products imported under this HTS code would not likely contain milk solids. Accordingly, products imported under this HTS code are not included in the import assessment.

Proposal for Payments To Be Remitted to USDA

Several interested parties suggested alternatives that would require import assessments first to be remitted to the Department rather than to the Board after submission to CBP. These alternatives are not adopted. Section 4504(g)(6)(A) of the Act specifically states that the order shall provide that each importer of imported dairy products shall pay an assessment to the Board in the manner prescribed by the Order.

Establishment and Membership/Term of Office

The Order is administered by a 36-member Board appointed by the Secretary representing 13 geographic regions of the United States. In order to complement the current geographical make up of the existing regions, the proposed rule indicated that each of the four new jurisdictions be added to the region of closest geographic proximity. No comments were received in opposition to this proposal, and it is adopted as proposed.

Therefore, Alaska is added to Region 1, currently comprised of Oregon and Washington; Hawaii is added to Region 2, currently California; and the District of Columbia and the Commonwealth of Puerto Rico are added to Region 10, currently comprised of Florida, Georgia, North Carolina, South Carolina and Virginia. Each person making payment to a producer in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico for milk produced and marketed for commercial use, is required to collect an assessment on all milk handled for the account of the producer at the rate of 15 cents per hundredweight and must remit the assessment to the Board. Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, must remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight. Each person responsible for the remittance of the assessment for milk marketings from producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico must remit to the Board not later than the last day of the month following the month in which the milk was marketed.

Several interested parties raised concern regarding proposed importer representation on the Board. In accordance with the Act, the proposed rule indicates that importers will initially be represented by two importer representatives. Assessments collected from importers will be held in escrow until importer representatives are appointed. The interested parties proposed that the Order should provide for permanent representation of at least two importers or importer representatives on the Board. This proposal is not adopted. The 2002 Farm

[2] In understanding the language of the HTS, ENs, which are drafted by the World Customs Organization, may be utilized. Although not dispositive, ENs provide a commentary on the scope of each heading of the HTS, and are the official interpretation of the Harmonized System at the international level. (See the U.S. Treasury decision number 80 from 1989, 54 FR 35127, 35128, August 23, 1989).

Bill specifies that the Secretary shall review once every three years the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years. On the basis of the review, the Secretary shall reapportion the importer representation on the Board to reflect the proportional share of the U.S. market by domestic production and imported dairy products. As noted in the proposed rule, in order to provide a basis for comparison of domestic production of dairy products to imported products, estimated total milk solids will be used. Statistics for total milk solids of domestic dairy products are published annually by USDA National Agricultural Statistics Service. The calculation of total milk solids for imported products for reapportionment purposes would be the same as the calculation of total milk solids for assessment purposes.

In response to commenter's requests for specific information regarding importer representation and appointment to the Board, the Secretary will issue a separate notice in the **Federal Register** and a news release seeking nominations for importer representatives to the Board at a future date to be determined. The Secretary will appoint two individuals from those nominated to serve as the initial importer representatives on the Board. In order to properly stagger the two terms, the importer representative terms of office dates [Section 1150.132(a)(2)] are modified and one importer representative will serve a term ending October 31, 2013, and one importer representative will serve a term ending October 31, 2014.

Importer nominations may be submitted by individual importers of dairy products and by organizations representing dairy importers, as approved by the Secretary. Nominees must be importers of dairy products and subject to the assessment to fund the National Program. The primary considerations in determining if organizations adequately represent importers of dairy products shall be whether its membership consists primarily of importers of dairy products and whether a substantial interest of the organization is in the importation of dairy products and the promotion of the nutritional attributes of dairy products. Individual importers submitting nominations to represent importers on the Board must establish, to the satisfaction of the Secretary that the person submitting the nomination is an importer of dairy products. Approval of importers and organizations representing importers will occur in a manner prescribed by the Secretary. An importer means a person that imports dairy products into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles dairy products outside of the United States for sale in the United States, and who is listed as the importer of record for such dairy products.

Several interested parties also raised concerns regarding sufficient importer representation on the Board's Executive Committee. The Board's current Executive Committee is comprised of all members of the Board. Section 1150.140(b) of this rule specifically provides that the Board's Executive Committee be comprised of membership that equally reflect each of the different geographic regions in the United States in which milk is produced and importer representation on the Board. Accordingly, this provision is made final without modifications.

One commenter questioned importer representation of two seats on the Board, citing that domestic producers in regions 1, 8, 10, and 13 collectively represent a significant number of producers and production and accordingly are afforded only one seat. The Act and the Order are clear with respect to the formulas used to determine the number of members from each region of the Board. The number of members for each region on the Board is determined by dividing the total pounds of milk produced in the United States for the calendar year previous to the date of review by 36, which provides a factor of pound of milk per member, and then dividing the total pounds of milk for each region by such factor. With respect to importer representation, the law states clearly that importers initially shall be represented by two members.

Several commenters requested additional information and guidance as to how decisions are made by the Board or how conflicts are resolved with respect to conflicting promotions. Currently, joint committees of the Board are responsible for setting program priorities, planning activities and projects, and evaluating results. With respect to decisions, the Board's current by-laws state that any action of the Board requires the concurring votes of at least a majority of those present and voting. Importer representatives on the Board will take part in this process upon appointment.

Importer Contributions to Qualified Programs

Several interested parties recommended that USDA hold in escrow any funds earmarked by an importer for contribution to a qualified program until importer programs are qualified by the Secretary. Further, several commenters noted that the proposed rule does not specify how assessments above the 5 cents are to be directed if a qualified program is not designated. Commenters also noted that the purposes of the rule would be best met if the qualified portion were held until it could be disbursed pro rata to all qualified programs relating to imported products.

Currently, if a producer does not designate or if the producer's paying handler does not establish that producer's participation in a qualified program, the full assessment is remitted to the Board. Similarly, if an importer does not designate or if participation in a qualified program is not established, the Board would retain the full assessment. Accordingly, the commenters' suggested alternative provisions to hold the qualified programs' portion relating to imported products and disburse pro rata, or until an importer qualified program is established, would not be appropriate and are not adopted.

The proposed rule stated that importers will be required to submit 7.5 cents per hundredweight of milk, or equivalent thereof, on imported dairy products to the Board, of which an importer may direct the Board to forward up to 2.5 cents per hundredweight of milk, or equivalent thereof, to a qualified program. Commenters stated that domestic milk producers are required to send only one-third of their assessment to the Board, whereas importers would be required to contribute two-thirds of their assessment to the Board. The commenters also suggested that as proposed, the Order does not comply with international obligations that dictate fairness and "equal treatment" towards imported products. One commenter argued that importers will disproportionally support operations of the Board, while domestic U.S. milk producers will disproportionately enjoy the benefits of Board promotions.

The proposed provisions specify that the rate of assessment is 7.5 cents per hundredweight, or equivalent thereof, on imported dairy products, but that an importer can instruct the Board to direct up to 2.5 cents per hundredweight for contributions to a qualified program. The Act requires domestic producers to

pay 15 cents per hundredweight to the Board, and allows them to receive a credit up to 10 cents per hundredweight of the assessment when contributing to qualified programs. In effect, this provision requires that all domestic producers contribute 5 cents per hundredweight of milk to the Board. Likewise, this rule requires importers to pay an equivalent amount to the Board. With this final rule, an importer may inform the Secretary to direct the Board to forward up to 2.5 cents per hundredweight of milk, or the equivalent thereof, to a qualified program. As indicated by one commenter, importers are not required to provide any greater assessment to the overall national promotion program than are domestic producers. Alternatives to allow an importer to direct two-thirds of the 7.5 cents per hundredweight of milk, or equivalent thereof, to a qualified program are not adopted.

One commenter questioned whether or not the amount of money designated for importer organizations to conduct promotion, research, or nutrition education programs will equate with the same level of assessments collected with respect to imported product. Importers only are permitted to designate up to 2.5 cents of the 7.5 cents per hundredweight of milk, or milk equivalent thereof, to qualified programs. By law, 5 cents must go to the Board, and therefore the amount of money designated for importer organizations cannot equal the same level of assessments collected on imported dairy products.

The final rule differs from the proposed rule with respect to an importer's designation to a qualified program. With the proposed rule, the importer would have instructed the Board to forward payments to a qualified program. With this final rule, the importer will notify the Secretary to direct the Board to forward payments to a qualified program. The Secretary will compute the funds due each qualified program. This change was made in order to maintain confidentiality of importer records concerning import quantity volumes and quantities of milk solids imported.

One commenter noted that the proposed rule states that any organization which conducts a dairy product promotion and research or nutrition education program authorized by Federal or State law may apply for certification so that producers may receive credit for contributions to such programs, and whether the credit treatment should also be extended to imported product where producers in the country of origin have contributed to generic dairy promotional programs. As indicated in the proposal, the credit only applies to contributions to programs operating under Federal or State laws of the United States or that have been an active and ongoing producer program before enactment of the Act. Therefore, no provisions are included to extend credit allowances for contributions to dairy product promotion programs in foreign countries.

Importer Establishment of Qualified Programs

Several commenters noted that while the proposed rule modifies the Order language regarding qualified programs to include those financed primarily by importers, the process by which a program becomes qualified imposes a great burden on importers. These commenters stated that the requirement that the qualified program be authorized under State or Federal law, or has been active and on-going prior to enactment of the Act, will be difficult for importers to achieve since there are no such importer organizations that predate the Act. Additionally, several commenters indicated that authorization under State or Federal law requires that the program be specifically enabled by a state legislature or Congress. One commenter proposed specific language modifying section 1150.153 to include new provisions applicable specifically for importers, noting the Act does not provide any detailed definition of State and regional programs. Additionally, several commenters suggested that the Department revisit this section, citing whether the authority for the Secretary to give credit to national organizations exists under the Order.

The Order currently provides in § 1150.153 that any organization which conducts a State or regional dairy product promotion, research, or nutrition education program that has been active and ongoing before enactment of the Act, or is operated under the laws of the United States or any State, may apply to the Secretary for certification so that producers may receive credit for contributions to such programs towards assessments owed by the producer.

The proposed rule provided that an organization authorized by Federal or state law or an organization that had been active and ongoing before enactment of the Act may apply to the Secretary for certification of qualification so that producers or importers may direct contributions to such programs. While AMS disagrees with any suggestion in the comments that the proposed provisions regarding qualified programs were not authorized by statute or consistent with the Order, we conclude, taking into account comments received, that section 1150.153 should be further revised to add reference to any importer organizations that conduct dairy product promotion, research, or nutrition education programs. Organizations seeking to become an importer qualified program need only submit an application provided by USDA to the Secretary and meet the four criteria as outlined in section 1150.153 to be approved. The process is equivalent to the process used by domestic organizations seeking to become a qualified dairy producer program. The revision would provide a more practical and reasonable option for importers to direct contributions to such programs. Miscellaneous clarifying changes are made to sections 1150.152, 1150.153, and the definition of qualified program in section 1150.153 to retain existing order language with regard to producer organizations to more clearly state provisions concerning qualified programs and credits for producers and for importers.

Referendum

Several commenters suggested that in order for the Department to provide due process for those importers of dairy products and dairy producers in Alaska, Hawaii, the District of Columbia, and the Commonwealth of Puerto Rico that will become subject to the assessment, a referendum must be held to determine whether or not those affected parties support implementation of the assessment. Commenters assert that implementation of the assessment without conducting a referendum is a violation of the Equal Protection guarantees of the Fifth Amendment. Expressing a different view, several commenters also noted that the Congressional mandate to require an assessment on both domestic production and on imported dairy products has been a matter of law in the United States since 2002.

The Act specifies the circumstances under which a referendum may be conducted. Section 4507(b) of the Act states, "* * * after September 30, 1985, the Secretary may conduct a referendum at any time, and shall hold a referendum on request of a representative group comprising 10 per centum or more of the number of producers and importers subject to the order, to determine whether the producers and importers subject to the order, favor the termination or suspension of the order." The Act does not provide for the

conduct of a referendum on proposed changes to the Order, as stated by a number of commenters. The 2002 and 2008 Farm Bills provide for the promulgation and implementation of these regulations without regard to notice and comment provisions of section 533 of Title 5, United States Code. Accordingly, no changes are made as a result of the comments received.

The proposed rule did not include necessary changes to include importers under "Subpart—Procedure for Conduct of Referenda in Connection with the Dairy Promotion and Research Order." With this final rule, the appropriate changes have been made.

Definitions

The proposed rule included definitions for three new terms and definition revisions of three terms to reflect the provisions of the Act. The terms "United States" and "milk" are reproduced verbatim from the Act. The terms "CBP" and "importer" were modified slightly from the language of the Act for clarity. The term "qualified program" was modified to reflect that importer programs may be established that are not necessarily State or regional in scope. The definition of "qualified program" has been changed from the proposed rule in that it refers to section 1150.153, which has changes from the proposed rule as previously discussed.

Several commenters objected to the removal of "produced in the United States" from the term milk, due to the impact this change necessitates in the requirement that dairy products be promoted neutrally and without respect to origin. Additionally, commenters objected to modification of the term "United States" which would necessitate inclusion of producers in Hawaii, Alaska, the District of Columbia, and the Commonwealth of Puerto Rico in the program without providing a referendum on amendments to the program as other U.S. contributors were given. For the reasons stated in previous discussions of comments, the definition changes to the Order are not changed as a result of the comments received.

Organic Exemption

Several commenters suggested that the current organic exemption, as applied to domestic dairy producers, would almost never be available to imports because importers rarely import organic products exclusively, but rather a combination of organic and non-organic products. Consequently, those commenters suggested the proposed Order include a provision to exempt organic dairy product imports from the assessment. The 2002 Farm Bill, section 10607 states, "A person that produces and markets solely 100 percent organic products, and that does not produce any conventional or nonorganic products, shall be exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm." In the final rule (70 FR 2744, January 14, 2005), AMS determined that the phrase "produces and markets" should apply to the function the person performs that compels the payment of an assessment. For importers, this means to import the commodity. Accordingly, this final rule subjects dairy importers to similar provisions and is consistent with other research and promotion programs for other agricultural commodities. The proposal to exempt organic dairy product imports is not adopted. However, after further review, this final rule adds an additional provision to the organic exemption provisions in section 1150.157 to allow for a reimbursement of assessments collected by the CBP. This provision is similar to the added provision regarding reimbursement of assessments collected on U.S. produced milk solids or milk solids other than cow's milk discussed in the following section. A clarifying change also is made to this section.

Exclusion of Milk Solids of U.S. Origin

Under the proposed rule, milk solids of U.S. origin would have been excluded from the calculation of dairy import assessments. However, after additional consideration, AMS determined that it is more reasonable and appropriate to include milk solids of U.S. origin in the calculation of dairy importer assessments and allow importers to apply for reimbursement from the Secretary. This final rule includes new language in section 1150.155 to state that any importer of dairy products against whose imports an assessment has been collected under section 1150.152(b) and who believes that such assessment or any portion of such assessment was made on U.S.-produced milk solids or milk solids other than cow's milk may apply to the Secretary for a reimbursement. The importer would be required to submit proof to the Secretary that the import was produced with U.S.-produced milk solids or milk solids other than cow's milk.

Effective Date

A commenter representing customs brokers and forwarders indicated that it will take considerable time for customs brokers to make software changes necessary to calculate import assessments. According to the commenter, brokers are typically allotted 90 days to make any program changes. Upon further consideration and taking into account that CBP collects importer assessments, we believe that 120 days is reasonable. Therefore, the effective date for implementing 1150.152(b), Importer Assessments, shall be the first day of the month following 120 days after publication of this rule.

Miscellaneous Order Provisions

As noted in the discussion of Neutral Promotion of Dairy Products with Respect to Origin, the Board will be required to make available all domestic promotion programs and materials to all assessed parties. One commenter proposed an additional provision be added to section 1150.140 [Duties of the Board] to clearly state that all domestic promotional programs be available to all assessed parties. Section 1150.139(e) of the Order gives the Board the authority to disseminate information to producers or eligible organizations through programs or by direct contact utilizing the public postage system or other system. The proposed rule modified this subsection of the Order to extend the Board's information dissemination authority to include importers and importer organizations. An additional provision as recommended by the commenter is not necessary and is therefore not adopted.

In paragraph 1150.152(a)(6) and section 1150.187, obsolete language and references have been deleted.

Additionally, for good cause, AMS has determined that it is necessary to set an effective date of less than 30 days for adoption of the provisions regarding nomination and appointment of importer representatives to the Board. This will enable the Secretary to solicit, appoint, and seat importers representatives on the Board in an efficient and expedient manner.

List of Subjects in 7 CFR Part 1150

Dairy products, Milk, Promotion, Research.

For the reasons set forth in the preamble, 7 CFR part 1150 is amended as follows:

PART 1150—DAIRY PROMOTION PROGRAM

■ 1. The authority citation for 7 CFR part 1150 continues to read as follows:

Authority: 7 U.S.C. 4501–4514 and 7 U.S.C. 7401.

■ 2. Section 1150.106 is revised to read as follows:

§ 1150.106 United States.

United States means all of the States, the District of Columbia, and the Commonwealth of Puerto Rico.

■ 3. Section 1150.109 is revised to read as follows:

§ 1150.109 Qualified program.

Qualified program means any dairy product promotion, research or nutrition education program which is certified as a qualified program pursuant to § 1150.153.

■ 4. Section 1150.111 is revised to read as follows:

§ 1150.111 Milk.

Milk means any class of cow's milk.

■ 5. Sections 1150.120 through 1150.122 are added to read as follows:

§ 1150.120 Imported dairy product.

Imported dairy product means any product that is imported into the United States under any of the Harmonized Tariff Schedule (HTS) classification numbers listed in § 1150.152(b)(1).

§ 1150.121 Importer.

Importer means a person that imports imported dairy products into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles dairy products outside of the United States for sale in the United States, and who is listed as the importer of record for such dairy products.

§ 1150.122 CBP.

CBP means the United States Customs and Border Protection of the Department of Homeland Security.

■ 6. Section 1150.131 is revised to read as follows:

§ 1150.131 Establishment and membership.

(a) There is hereby established a National Dairy Promotion and Research Board.

(b) Thirty-six members of the Board shall be United States producers. For purposes of nominating producers to the Board, the United States shall be divided into thirteen geographic regions and the number of Board members from each region shall be as follows:

(1) One member from region number one comprised of the following States: Alaska, Oregon and Washington.

(2) Eight members from region number two comprised of the following States: California and Hawaii.

(3) Four members from region number three comprised of the following States: Arizona, Colorado, Idaho, Montana, Nevada, Utah and Wyoming.

(4) Four members from region number four comprised of the following States: Arkansas, Kansas, New Mexico, Oklahoma and Texas.

(5) Two members from region number five comprised of the following States: Minnesota, North Dakota and South Dakota.

(6) Five members from region number six comprised of the following State: Wisconsin.

(7) Two members from region number seven comprised of the following States: Illinois, Iowa, Missouri and Nebraska.

(8) One member from region number eight comprised of the following States: Alabama, Kentucky, Louisiana, Mississippi and Tennessee.

(9) Three members from region number nine comprised of the following States: Indiana, Michigan, Ohio and West Virginia.

(10) One member from region number ten comprised of the following States: Commonwealth of Puerto Rico, District of Columbia, Florida, Georgia, North Carolina, South Carolina, and Virginia.

(11) Two members from region number eleven comprised of the following States: Delaware, Maryland, New Jersey and Pennsylvania.

(12) Two members from region number twelve comprised of the following State: New York.

(13) One member from region number thirteen comprised of the following States: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

(c) Two members of the Board shall be importers who are subject to assessments under § 1150.152(b).

(d) The Board shall be composed of milk producers and importers appointed by the Secretary either from nominations submitted pursuant to § 1150.133 or in accordance with § 1150.136. A milk producer may be nominated only to represent the region in which such producer's milk is produced.

(e) At least every five years, and not more than every three years, the Board shall review the geographic distribution of milk production volume throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of regions and/or a modification of the number of producer members from regions in order to best reflect the geographic distribution of milk production volume in the United States.

(f) At least once every three years, after the initial appointment of importer representatives on the Board, the Secretary shall review the average volume of domestic production of dairy products compared to the average volume of imports of dairy products into the United States during the previous three years and, on the basis of that review, if warranted, reapportion the importer representation on the Board to reflect the proportional shares of the United States market served by domestic production and imported dairy products. The basis for comparison of domestic production of dairy products to imported products shall be estimated total milk solids. The calculation of total milk solids of imported dairy products for reapportionment purposes shall be the same as the calculation of total milk solids of imported dairy products for assessment purposes.

(g) In determining the volume of milk produced and total milk solids of dairy products produced in the United States, the Board and Secretary shall utilize the information received by the Board pursuant to § 1150.171(a) and data published by the Department.

■ 7. In § 1150.132, paragraph (a) is revised to read as follows:

§ 1150.132 Term of office.

(a) The members of the Board shall serve for terms of three years, except that:

(1) The members appointed to the initial Board shall serve proportionately, for terms of one, two and three years.

(2) The 2 importer members initially appointed to the Board shall serve until October 31, 2013, and October 31, 2014.

* * * * *

■ 8. In § 1150.133, paragraphs (a), (c), and (d) are revised, and a new paragraph (e) is added to read as follows:

§ 1150.133 Nominations.

* * * * *

(a) The Secretary shall solicit nominations for producer representation on the Board from all eligible organizations. For nominations of producers, if the Secretary determines that a substantial number of producers are not members of, or their interests are not represented by, such eligible organizations, the Secretary shall also solicit nominations from such producers through general farmer organizations or by other means.

* * * * *

(c) An eligible producer organization may submit nominations only for positions on the Board that represent regions in which such eligible organization can establish that it represents a substantial number of producers. If there is more than one Board position for any such region, the organization may submit nominations for each position.

(d) Where there is more than one eligible organization representing

producers in a specific geographic region, the organizations may caucus and jointly nominate producers for each position representing that region on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary nominations for each appointment to be made to represent that region.

(e) Nominations for representation of importers may be submitted by:

(1) Organizations that represent importers of dairy products, as approved by the Secretary. The primary considerations in determining if organizations adequately represent importers of dairy products shall be whether its membership consists primarily of importers of dairy products and whether a substantial interest of the organization is in the importation of dairy products and the promotion of the nutritional attributes of dairy products; and

(2) Individual importers of dairy products. Individual importers submitting nominations to represent importers on the Board must establish to the satisfaction of the Secretary that the persons submitting the nominations are importers of dairy products.

■ 9. In § 1150.134, the introductory text and paragraph (b) are revised to read as follows:

§ 1150.134 Nominee's agreement to serve.

Any producer or importer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

* * * * *

(b) Disclose any relationship with any organization that operates a qualified program or has a contractual relationship with the Board; and

* * * * *

■ 10. Section 1150.135 is revised to read as follows:

§ 1150.135 Appointments.

From the nominations made pursuant to § 1150.133, the Secretary shall appoint the members of the Board on the bases of representation provided for in §§ 1150.131(b) and 1150.131(c).

■ 11. In § 1150.139, paragraph (e) is revised to read as follows:

§ 1150.139 Powers of the Board.

* * * * *

(e) To disseminate information to producers, producer organizations, importers, and importer organizations through programs or by direct contact utilizing the public postage system or other systems;

* * * * *

■ 12. In § 1150.140, paragraphs (b) and (n) are revised to read as follows:

§ 1150.140 Duties of the Board.

* * * * *

(b) To appoint from its members an executive committee whose membership shall equally reflect each of the different geographic regions in the United States in which milk is produced and importer representation on the Board, and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

* * * * *

(n) To encourage the coordination of programs of promotion, research and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand:

(1) domestic markets and domestic uses for fluid milk and dairy products produced in the United States or imported into the United States; and

(2) foreign markets and foreign uses for fluid milk and dairy products produced in the United States.

■ 13. In § 1150.151, new paragraph (c) is added to read as follows:

§ 1150.151 Expenses.

* * * * *

(c) The Board is authorized to expend up to the amount of the assessments collected from United States producers to promote dairy products produced in the United States in foreign markets.

■ 14. Section 1150.152 is revised to read as follows:

§ 1150.152 Assessments.

(a) *Domestic Assessments.* (1) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use, or the equivalent thereof, and shall remit the assessment to the Board.

(2) Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof.

(3) In determining the assessment due from each producer pursuant to § 1150.152(a)(1) and (a)(2), a producer who is participating in a qualified program(s) under § 1150.153 shall receive a credit for contributions to such program(s), but not to exceed 10 cents per hundredweight of milk marketed.

(4) In order for a producer described in § 1150.152(a)(1) to receive the credit authorized in § 1150.152(a)(3), either the producer or a cooperative association on behalf of the producer must establish to the person responsible for remitting the assessment to the Board that the producer is contributing to a qualified program under § 1150.153. Producers who contribute to a qualified program directly (other than through a payroll deduction) must establish with the person responsible for remitting the assessment to the Board, with validation by the qualified program, that they are making such contributions.

(5) In order for a producer described in § 1150.152(a)(2) to receive the credit authorized in § 1150.152(a)(3), the producer and the applicable qualified program must establish to the Board that the producer is contributing to the qualified program.

(6) The collection of assessments pursuant to § 1150.152(a)(1) and (a)(2) shall begin with respect to milk marketed on and after the effective date of this section and shall continue until terminated by the Secretary.

(7) Each person responsible for the remittance of the assessment pursuant to § 1150.152(a)(1) and (a)(2) shall remit the assessment to the Board not later than the last day of the month following the month in which the milk was marketed.

(8) Money remitted to the Board shall be in the form of a negotiable instrument made payable to "National Dairy Promotion and Research Board." Remittances and reports specified in § 1150.171(a) shall be mailed to the location designated by the Secretary or the Board.

(b) *Importer Assessments.* (1) Each importer of dairy products identified in the following table, except for as provided for in § 1150.157, is responsible for paying an assessment of 7.5 cents per hundredweight of U.S. milk, or equivalent thereof. The importer shall use the assessment rate of $0.01327 per kilogram (kg) of milk solids to calculate and pay the assessment.

HTS Nos. for dairy import assessment	HTS Nos. for dairy import assessment	HTS Nos. for dairy import assessment
0401.10.0000	0406.10.3400	0406.90.1200
0401.20.2000	0406.10.3800	0406.90.1600
0401.20.4000	0406.10.4400	0406.90.1800
0401.30.0500	0406.10.4800	0406.90.3100
0401.30.2500	0406.10.5400	0406.90.3200
0401.30.5000	0406.10.5800	0406.90.3300
0401.30.7500	0406.10.6400	0406.90.3600
0402.10.1000	0406.10.6800	0406.90.3700
0402.10.5000	0406.10.7400	0406.90.4100
0402.21.0500	0406.10.7800	0406.90.4200
0402.21.2500	0406.10.8400	0406.90.4600
0402.21.3000	0406.10.8800	0406.90.4800
0402.21.5000	0406.20.1500	0406.90.4900
0402.21.7500	0406.20.2400	0406.90.5200
0402.21.9000	0406.20.2800	0406.90.5400
0402.29.1000	0406.20.3110	0406.90.6600
0402.29.5000	0406.20.3190	0406.90.6800
0402.91.1000	0406.20.3300	0406.90.7200
0402.91.3000	0406.20.3600	0406.90.7400
0402.91.7000	0406.20.3900	0406.90.7600
0402.91.9000	0406.20.4400	0406.90.7800
0402.99.1000	0406.20.4800	0406.90.8200
0402.99.3000	0406.20.5100	0406.90.8400
0402.99.4500	0406.20.5300	0406.90.8600
0402.99.5500	0406.20.6100	0406.90.8800
0402.99.7000	0406.20.6300	0406.90.9000
0402.99.9000	0406.20.6500	0406.90.9200
0403.10.1000	0406.20.6700	0406.90.9300
0403.10.5000	0406.20.6900	0406.90.9400
0403.10.9000	0406.20.7100	0406.90.9500
0403.90.0400	0406.20.7300	0406.90.9700
0403.90.1600	0406.20.7500	0406.90.9900
0403.90.2000	0406.20.7700	1517.90.5000
0403.90.4110	0406.20.7900	1517.90.6000
0403.90.4190	0406.20.8100	1702.11.0000
0403.90.4500	0406.20.8300	1702.19.0000
0403.90.5100	0406.20.8500	1704.90.5400
0403.90.5500	0406.20.8700	1704.90.5800
0403.90.6100	0406.20.8900	1806.20.2090
0403.90.6500	0406.20.9100	1806.20.2400
0403.90.7400	0406.30.0500	1806.20.2600
0403.90.7800	0406.30.1400	1806.20.2800
0403.90.8500	0406.30.1800	1806.20.3400
0403.90.9000	0406.30.2400	1806.20.3600
0403.90.9500	0406.30.2800	1806.20.3800
0404.10.0500	0406.30.3400	1806.20.8100
0404.10.1100	0406.30.3800	1806.20.8200
0404.10.1500	0406.30.4400	1806.20.8300
0404.10.2000	0406.30.4800	1806.20.8500
0404.10.5010	0406.30.5100	1806.20.8700
0404.10.5090	0406.30.5300	1806.20.8900
0404.10.9000	0406.30.6100	1806.32.0400
0404.90.1000	0406.30.6300	1806.32.0600
0404.90.3000	0406.30.6500	1806.32.0800
0404.90.5000	0406.30.6700	1806.32.1400
0404.90.7000	0406.30.6900	1806.32.1600
0405.10.1000	0406.30.7100	1806.32.1800
0405.10.2000	0406.30.7300	1806.32.6000
0405.20.2000	0406.30.7500	1806.32.7000
0405.20.3000	0406.30.7700	1806.32.8000
0405.20.4000	0406.30.7900	1806.90.0500
0405.20.6000	0406.30.8100	1806.90.0800
0405.20.7000	0406.30.8300	1806.90.1000
0405.20.8000	0406.30.8500	1806.90.1500
0405.90.1020	0406.30.8700	1806.90.1800
0405.90.1040	0406.30.8900	1806.90.2000
0405.90.2020	0406.30.9100	1806.90.2500
0405.90.2040	0406.40.4400	1806.90.2800
0406.10.0400	0406.40.4800	1806.90.3000
0406.10.0800	0406.40.5400	1901.10.1500
0406.10.1400	0406.40.5800	1901.10.3000
0406.10.1800	0406.40.7000	1901.10.3500
0406.10.2400	0406.90.0810	1901.10.4000
0406.10.2800	0406.90.0890	1901.10.4500

HTS Nos. for dairy import assessment
1901.20.0500
1901.20.1500
1901.20.2000
1901.20.2500
1901.20.3000
1901.20.3500
1901.20.4000
1901.20.4500
1901.20.5000
1901.90.2800
1901.90.3400
1901.90.3600
1901.90.4200
1901.90.4300
1901.90.7000
2105.00.1000
2105.00.2000
2105.00.3000
2105.00.4000
2106.90.0600
2106.90.0900
2106.90.2400
2106.90.2600
2106.90.2800
2106.90.3400
2106.90.3600
2106.90.3800
2106.90.6400
2106.90.6600
2106.90.6800
2106.90.7200
2106.90.7400
2106.90.7600
2106.90.7800
2106.90.8000
2106.90.8200
2202.90.1000
2202.90.2400
2202.90.2800
3501.10.1000
3501.10.5000
3501.90.6000
3502.20.0000

(2) The assessment on imported dairy products shall be paid by the importer to CBP at the time of entry summary for any products identified in § 1150.152(b)(1).

(3) The assessments collected by CBP pursuant to § 1150.152(b)(2) of this section shall be transferred to the Board in compliance with an agreement between CBP and the Secretary.

(4) The Secretary, at his or her discretion, shall verify the information reported by importers to CBP to determine if additional money is due the Board or an amount is due to an importer based on the quantity imported and the milk solids content per unit. In the case of money due to an importer from the Board, the Board will issue payment promptly to the importer. In the case of money due from the importer to the Board, the Secretary will send an invoice for payment directly to the importer. The remittance will be due to the Secretary upon receipt of the invoice. The Secretary will promptly forward such payments received to the Board.

(5) If an importer elects to have funds remitted to a qualified program(s), the importer shall inform the Secretary of such designation by sending a letter to an address provided by the Secretary. Importer remittances for qualified program(s) shall not exceed 2.5 cents per hundredweight of milk, or equivalent thereof, of the 7.5 cents per hundredweight of milk, or equivalent thereof, paid by the importer pursuant to § 1150.152(b)(1). The Secretary shall compute the funds due for each qualified program designated by importers and direct the Board to forward such funds to each qualified program.

(6) Assessments collected on imported dairy products shall not be used for foreign market promotion of United States dairy products.

(7) Any money received by the Board pursuant to § 1150.152(b)(1) before the Secretary appoints the initial importer representatives to the Board shall not be spent by the Board but shall be held in escrow until such appointment.

(8) The collection of assessments pursuant to § 1150.152(a) and (b) shall continue until terminated by the Secretary.

■ 15. In § 1150.153, revise the section heading and paragraphs (a) (b)(2), (b)(3), (b)(4), and (b)(5), and remove the phrase "State or regional" from paragraphs (c) introductory text, (c)(2), (c)(2)(i), (c)(2)(ii), and (c)(2)(iii), and (c)(2)(iv) to read as follows:

§ 1150.153 Qualified dairy product promotion, research or nutrition education programs.

(a) Any producer organization that conducts a State or regional dairy product promotion, research or nutrition education program, authorized by Federal or State law; or has been an active and ongoing producer program before enactment of the Act; or is an importer organization that conducts a promotion, research, or nutrition education program may apply to the Secretary for certification of qualification so that:

(1) Producers may receive credit pursuant to § 1150.152(a)(3) for contributions to such program; and

(2) The Board may remit payments designated by importers pursuant to § 1150.152(b)(5).

(b) * * *

(2) Except for producer programs operated under the laws of the United States or any State, and except for importer programs, have been active and ongoing before enactment of the Act;

(3) For producer organizations, be financed primarily by producers, either individually or through cooperative associations, or for importer organizations, be financed primarily by importers;

(4) Not use a private brand or trade name in its advertising and promotion of dairy products unless the Board recommends and the Secretary concurs that such preclusion should not apply;

(5) Certify to the Secretary that any requests from producers or importers for refunds under the program will be honored by forwarding to either the Board or a qualified program designated by the producer or importer that portion of such refunds equal to the amount that otherwise would be applicable to that program pursuant to § 1150.152(a)(3) or (b)(5); and

* * * * *

■ 16. Section 1150.155 is revised to read as follows:

§ 1150.155 Adjustment of accounts.

(a) Whenever the Board or the Department determines through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board in accordance with 1150.152(a), such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in § 1150.152(a). Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months.

(b) Any importer of dairy products against whose imports an assessment has been collected under § 1150.152(b) who believes that such assessment or any portion of such assessment was made on milk solids of U.S. origin or milk solids other than cow's milk may apply to the Secretary for a reimbursement. The importer would be required to submit satisfactory proof to the Secretary that the importer paid the assessment for milk solids from milk produced from the U.S. or milk solids other than cow's milk solids. The Secretary will instruct the Board to send such reimbursement to the importer.

■ 17. In § 1150.156, paragraph (a) is revised to read as follows:

§ 1150.156 Charges and penalties.

(a) *Late-payment charge.* Any unpaid assessments due to the Board pursuant to § 1150.152 shall be increased 1.5 percent each month beginning with the day following the date such assessments

were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid.

(1) For the purpose of this section, any assessment pursuant to § 1150.152(a) that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

(2) For the purpose of this section, any assessment not collected by CBP at the time entry summary documents are filed by the importer is considered to be past due. If CBP does not collect an assessment from an importer, the importer shall be responsible for paying the assessment and any late charges to the Secretary in the form of a negotiable instrument made payable to "USDA." The payment shall be mailed to a location designated by the Secretary or sent in an electronic form approved by the Secretary.

* * * * *

■ 18. Section 1150.157 is revised to read as follows:

§ 1150.157 Assessment exemption.

(a) A producer described in § 1150.152(a)(1) and (a)(2) who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (h) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) To apply for exemption under this section, a producer pursuant to § 1150.152 (a)(1) and (a)(2) shall submit a request for exemption to the Board on a form provided by the Board at any time initially and annually thereafter on or before July 1 as long as the producer continues to be eligible for the exemption.

(c) A producer request for exemption shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), a signed certification that the applicant meets all of the requirements specified in paragraph (a) of this section for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary.

(d) If a producer described in § 1150.152(a)(1) and (a)(2) complies with the requirements of this section, the Board will grant an assessment exemption and issue a Certificate of Exemption to the producer within 30 days. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer described in paragraph (c) of this section shall provide a copy of the Certificate of Exemption to each person responsible for remitting assessments to the Board on behalf of the producer pursuant to § 1150.152(a).

(f) The person responsible for remitting assessments to the Board pursuant to § 1150.152(a) shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board pursuant to § 1150.172(a).

(g) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic dairy products—on a form provided by the Board—at any time initially and annually thereafter as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (c) of this section. If the importer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the importer. The Board will issue the importer a 9-digit alphanumeric Harmonized Tariff Schedule (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation.

(h) The exemption will apply not later than the last day of the month following the Certificate of Exemption issuance date.

(i) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

(j) Importers who are exempt from assessment in paragraph (g) of this section shall be eligible for reimbursement of assessments collected by the CBP and may apply to the Secretary for a reimbursement. The importer would be required to submit satisfactory proof to the Secretary that the importer paid the assessment on exempt organic products.

■ 19. Section 1150.171 is revised to read as follows:

§ 1150.171 Reports.

(a) Each producer marketing milk of that producer's own production directly to consumers and each person making payment to producers and responsible for the collection of the assessment under § 1150.152(a) shall be required to report at the time for remitting assessments to the Board such information as may be required by the Board or by the Secretary. Such information may include but not be limited to the following:

(1) The quantity of milk purchased, initially transferred or which, in any other manner, are subject to the collection of the assessment;

(2) The amount of assessment remitted;

(3) The basis, if necessary, to show why the remittance is less than the number of hundredweights of milk multiplied by 15 cents; and

(4) The date any assessment was paid.

(b) Importers of dairy products shall submit reports as requested by the Secretary as necessary to verify that provisions pursuant to § 1150.152(b) have been carried out correctly, including verification that correct amounts were paid based upon milk solids content of the imported dairy products pursuant to § 1150.152(b)(1).

■ 20. Section 1150.172 is revised to read as follows:

§ 1150.172 Books and records.

(a) Each producer who is subject to this subpart, and other persons subject to § 1150.171(a), shall maintain and make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued

hereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

(b) Each importer of dairy products shall maintain and make available for inspection by the Secretary such books and records to verify that provisions pursuant to § 1150.152(b) have been carried out correctly, including verification that correct amounts were paid based upon milk solids content of the imported dairy products. Such records shall be retained for at least two years beyond the calendar period of their applicability. Such information may include but not be limited to invoices, packing slips, bills of lading, laboratory test results, and letters from the manufacturer on the manufacturer's letterhead stating the milk solids content of imported dairy products.

■ 21 Section 1150.187 is revised to read as follows:

§ 1150.187 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in §§ 1150.133, 1150.152, 1150.153, 1150.171, 1150.172, and 1150.273 of these regulations (7 CFR part 1150) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. chapter 35 and have been assigned OMB Control Number 0581–0093 as appropriate.

Dated: March 14, 2011.

David R. Shipman,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2011–6322 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 326 and 334

RIN 3064–AD76

Procedures for Monitoring Bank Secrecy Act Compliance and Fair Credit Reporting: Technical Amendments

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is adopting a final rule to update cross-references in its anti-money laundering program and Fair Credit Reporting Act rules, to conform to changes in the numbering of the Department of the Treasury's rules that implement the Bank Secrecy Act.

DATES: Effective March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Division of Risk Management Supervision and Consumer Protection: Debra Novak (202) 898–6641; Legal Division: Carl Gold, Counsel, (202) 898–8702; Richard M. Schwartz, Counsel, (202) 898–7424.

SUPPLEMENTARY INFORMATION: As required by section 8(s) of the Federal Deposit Insurance Act, 12 U.S.C. 1818(s), the FDIC's regulation, 12 CFR 326.8, requires every State nonmember bank to establish and maintain procedures reasonably designed to assure and monitor its compliance with the requirements of the Bank Secrecy Act ("BSA"), 31 U.S.C. 5311 *et seq.,* and the regulations implementing that statute ("BSA regulations"). In addition, the FDIC has regulations, 12 CFR part 334, which implement the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* The Financial Crimes Enforcement Network (FinCEN), an arm of the Department of the Treasury, recently amended the BSA regulations to reorganize and move them from 31 CFR Part 103 to Chapter X of Title 31 of the CFR. 75 FR 65806 *et seq.* (Oct. 26, 2010). Effective March 1, 2010, the BSA regulations governing State nonmember banks (as well as other federally-insured depository institutions) are contained in 31 CFR part 1010 *et seq.*

To conform to this change, the FDIC is amending a general cross-reference to the BSA regulations in 12 CFR 326.8, and specific cross-references to the Customer Identification Program ("CIP"), 31 CFR 103.121, in 12 CFR 326.8, 12 CFR 334.82, and Appendix J to Part 334. The CIP regulation, which is substantively unchanged, is now found at 31 CFR 1020.220.

Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. 553(b) provides that a final regulation may be issued without prior notice or an opportunity for comment when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The FDIC finds that good cause exists as the regulatory amendments are nonsubstantive, and therefore notice and public procedure are unnecessary. 5 U.S.C. 553(d) provides that the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, with some exceptions. Since this is not a substantive rule, the rule is effective immediately upon publication in the **Federal Register**.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required. See 5 U.S.C. 603 and 604. As noted previously in the **SUPPLEMENTARY INFORMATION** section, the FDIC has determined, for good cause, that it is unnecessary to publish a notice of proposed rulemaking for this final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

Paperwork Reduction Act

There are no information collection requirements in this final rule.

List of Subjects in 12 CFR Parts 326 and 334

Banks, banking, Currency, Insured nonmember banks, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the FDIC hereby amends 12 CFR chapter III as follows:

PART 326—MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK SECRECY ACT COMPLIANCE

■ 1. The authority citation for part 326 continues to read as follows:

Authority: 12 U.S.C. 1813, 1815, 1817, 1818, 1819 (Tenth), 1881–1883; 31 U.S.C. 5311–5314 and 5316–5332.2.

■ 2. Revise § 326.8 to read as follows:

§ 326.8 Bank Security Act compliance.

(a) *Purpose.* This subpart is issued to assure that all insured nonmember banks as defined in 12 CFR 326.1 establish and maintain procedures reasonably designed to assure and monitor their compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR Chapter X.

(b) *Compliance procedures—*

(1) *Program requirement.* Each bank shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations issued by the Department of Treasury at 31 CFR Chapter X. The compliance program shall be written, approved by the bank's

board of directors, and noted in the minutes.

(2) *Customer identification program.* Each bank is subject to the requirements of 31 U.S.C. 5318(l) and the implementing regulation jointly promulgated by the FDIC and the Department of the Treasury at 31 CFR 1020.220.

PART 334—FAIR CREDIT REPORTING

■ 3. The authority citation for part 334 continues to read:

Authority: 12 U.S.C. 1818, 1819 (Tenth) and 1831 p–1; 15 U.S.C. 1681a, 1681b, 1681c, 1681m, 1681s, 1681s–3, 1681t, 1681w, 6801 and 6805, Pub. L. 108–159, 117 Stat. 1952.

■ 4. In § 334.82, revise paragraph (c)(2)(i)(A) to read as follows:

§ 334.82 Duties of users regarding address descrepancies.

* * * * *

(c) * * *

(2) * * *

(i) * * *

(A) Obtains and uses to verify the consumer's identity in accordance with the requirements of the Customer Identification Program (CIP) rules implementing 31 U.S.C. 5318(l) (31 CFR 1020.220);

* * * * *

■ 5. In Appendix J to Part 334, revise Section III, paragraph (a) to read as follows:

Appendix J to Part 334—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

* * * * *

III. Detecting Red Flags

* * * * *

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account, for example, using the policies and procedures regarding identification and verification set forth in the Customer Identification Program rules implementing 31 U.S.C. 5318(l) (31 CFR 1020.220); and

* * * * *

Dated at Washington, DC, this 15th day of March 2011.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011–6460 Filed 3–17–11; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM436; Special Conditions No. 25–421–SC]

Special Conditions: Boeing Model 747–8 Airplanes, Systems and Data Networks Security—Isolation or Protection From Unauthorized Passenger Domain Systems Access

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for Boeing Model 747–8 airplanes. This airplane will have novel or unusual design features associated with connectivity of the passenger domain computer systems to the airplane critical systems and data networks. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for these design features. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* April 18, 2011

FOR FURTHER INFORMATION CONTACT: Will Struck, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2764; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Background

On November 4, 2005, The Boeing Company, P.O. Box 3707, Seattle, WA 98124, applied for an amendment to Type Certificate Number A20WE to include the new Model 747–8 passenger airplane. The Model 747–8 is a derivative of the 747–400. The Model 747–8 is a four-engine jet transport airplane that will have a maximum takeoff weight of 970,000 pounds and new General Electric GEnx-2B67 engines. The Model 747–8 will have two flight crew and the capacity to carry 605 passengers.

Type Certification Basis

Under the provisions of Title 14 Code of Federal Regulations (14 CFR) 21.101, Boeing must show that the Model 747–8 (hereafter referred to as the 747–8) continues to meet the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–117, except for §§ 25.809 and 25.812, which will remain at Amendment 25–115. These regulations will be incorporated into Type Certificate No. A20WE after type certification approval of the 747–8.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25) do not contain adequate or appropriate safety standards for the 747–8 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the 747–8 must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in § 11.19, are issued under § 11.38, and become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The Boeing Model 747–8 airplane will incorporate the following novel or unusual design features: Digital systems architecture composed of several connected networks. The network architecture would be used for a diverse set of functions, including:

1. Flight-safety related control, communication, and navigation systems (Aircraft Control Domain),

2. Airline business and administrative support (Airline Information Domain),

3. Passenger information and entertainment systems (Passenger Entertainment Domain), and

4. The capability to allow access to or by external network sources.

Discussion of Comments

Notice of proposed special conditions No. 25–10–01–SC for the Boeing Model 747–8 airplane was published in the **Federal Register** on December 9, 2010 (75 FR 76647). No comments were received and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to Boeing

Model 747–8 airplanes. Should Boeing apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features of the Boeing Model 747–8 airplane. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Boeing Model 747–8 airplane.

The design must prevent all inadvertent or malicious changes to, and all adverse impacts upon, all systems, networks, hardware, software, and data in the Aircraft Control Domain and in the Airline Information Domain from all points within the Passenger Information and Entertainment Domain.

Issued in Renton, Washington, on March 9, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–6323 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM437; Special Conditions No. 25–422–SC]

Special Conditions: Gulfstream Model GVI Airplane; Electronic Flight Control System Mode Annunciation.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Gulfstream GVI airplane. This airplane will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These design features include an electronic flight control system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for these design features. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* April 18, 2011.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Standards Staff, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2011; facsimile (425) 227–1320.

SUPPLEMENTARY INFORMATION:

Background

On March 29, 2005, Gulfstream Aerospace Corporation (hereafter referred to as "Gulfstream") applied for an FAA type certificate for its new Gulfstream Model GVI passenger airplane. Gulfstream later applied for, and was granted, an extension of time for the type certificate, which changed the effective application date to September 28, 2006. The Gulfstream Model GVI airplane will be an all-new, two-engine jet transport airplane with an executive cabin interior. The maximum takeoff weight will be 99,600 pounds, with a maximum passenger count of 19 passengers.

Type Certification Basis

Under provisions of Title 14 Code of Federal Regulations (14 CFR) 21.17, Gulfstream must show that the Gulfstream Model GVI airplane (hereafter referred to as "the GVI") meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–119, 25–122 and 25–124. If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the GVI because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design features, the special conditions would also apply to the other model under the provisions of § 21.101.

In addition to complying with the applicable airworthiness regulations and special conditions, the GVI must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36. The FAA must also issue a finding of regulatory adequacy pursuant to section 611 of Public Law 92–574, the "Noise Control Act of 1972."

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The GVI will have a fly-by-wire electronic flight control system. This system provides an electronic interface between the pilot's flight controls and the flight control surfaces for both normal and failure states, and it generates the actual surface commands that provide for stability augmentation and control about all three airplane axes. Because electronic flight control system technology has outpaced existing regulations (primarily §§ 25.671 and 25.672), a special condition is needed to ensure appropriate mode recognition by the flight crew for events which significantly change the operating mode of the electronic flight control system.

Discussion of Comments

Notice of proposed special conditions No. 25–10–02–SC for Gulfstream GVI airplanes was published in the **Federal Register** on December 13, 2010 (75 FR 77569). Only one comment was received.

Clarification of Conditions That Should Be Annunciated

The commenter, Gulfstream, requested that the special conditions be revised to clarify the conditions in which the mode annunciation should occur. Gulfstream suggested that additional annunciation should not be required when transitioning from one normal operation mode to another in response to flight crew actions, such as extending flaps or landing gear.

We do not agree with the commenter's recommendation. The current verbiage clearly states that the mode annunciation is only required when "normal handling or operational characteristics" of the airplane are significantly changed or degraded. In the scenario that Gulfstream refers to, there would be no change to the "normal handling or operational characteristics." Therefore, no annunciation would be required. No changes were made as a result of this comment and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the GVI. Should Gulfstream apply at a later date for a change to the type certificate to include another model on the same type certificate incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one airplane model. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Gulfstream GVI airplanes.

If the design of the flight control system has multiple modes of operation, a means must be provided to indicate to the flight crew any mode that significantly changes or degrades the normal handling or operational characteristics of the airplane.

Issued in Renton, Washington, on March 9, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–6333 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–24145; Directorate Identifier 2006–NE–06–AD; Amendment 39–16638; AD 2011–07–01]

RIN 2120–AA64

Airworthiness Directives; General Electric Company CF6–45 and CF6–50 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for General Electric Company (GE) CF6–45 and CF6–50 series turbofan engines. That AD currently requires replacing certain forward and aft centerbodies of the long fixed core exhaust nozzle (LFCEN) assembly. This AD adds certain new forward and aft centerbody part numbers (P/Ns) to the list requiring replacement. This AD was prompted by the discovery of more LFCEN forward and aft centerbody P/Ns that require replacement. We are issuing this AD to prevent the forward and aft centerbody of the LFCEN assembly from separating from the engine, causing damage to the engine, and damage to the airplane.

DATES: This AD is effective April 22, 2011.

ADDRESSES: For service information identified in this AD, contact GE–Aviation M/D Rm. 285, One Neumann Way, Cincinnati, OH 45215, telephone 513–552–3272; *e-mail: geae.aoc@ge.com.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

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 address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tomasz Rakowski, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate; *phone:* 781–238–7735; *fax:* 781–238–7199; *e-mail: tomasz.rakowski@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede airworthiness directive (AD) 2009–04–17, Amendment 39–15823 (74 FR 8735, February 26, 2009). That AD applies to the specified products. The NPRM published in the **Federal Register** on January 4, 2011 (76 FR 292). That NPRM proposed to add forward centerbody P/Ns 9076M28G05, G06, and G08, P/Ns 9076M82G01 and G03, and aft centerbody P/Ns 9076M46G02 and G04 to the P/Ns in AD 2009–04–17 that are required to be removed from service.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comment received on the proposal and the FAA's response to the comment.

Request

One commenter, Boeing Commercial Airplanes, pointed out that the McDonnell Douglas airplanes affected by the proposed AD should be listed out as DC–10–15, DC–10–30, DC–10–30F, KC–10, KDC–10, and MD–10–30F. The commenter stated that the proposed AD only listed these airplanes as a series.

We agree. We revised this AD as requested, except we listed KC–10 as KC–10A as it appears in the Type Certificate Data Sheet.

Conclusion

We reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting the AD with the change described previously.

Costs of Compliance

We estimate that this AD will affect 383 GE CF6–45 and CF6–50 series turbofan engines installed on airplanes of U.S. registry. We also estimate that it will take about 44 work hours per engine to perform the actions required by this AD, and that the average labor rate is $85 per work-hour. Required parts will cost about $11,000 per engine. Based on these figures, we estimate the total cost of this AD to U.S. operators to be $5,645,420.

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 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, 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 removing airworthiness directive (AD) 2009–04–17, Amendment 39–15823 (74 FR 8735; February 26, 2009), and adding the following new AD:

2011–07–01 General Electric Company: Amendment 39–16638 ; Docket No. FAA–2006–24145; Directorate Identifier 2006–NE–06–AD.

Effective Date

(a) This airworthiness directive (AD) is effective April 22, 2011.

Affected ADs

(b) This AD supersedes AD 2009–04–17, Amendment 39–15823.

Applicability

(c) This AD applies to the following engines with a long fixed core exhaust nozzle (LFCEN) assembly forward centerbody, part number (P/N) 1313M55G01 or G02, P/N 9076M28G05, G06, G08, G09, or G10, P/N 9076M82G01 or G03, and aft centerbody P/N 1313M56G01, or P/N 9076M46G02, G04, or G05, installed in:

(1) General Electric Company (GE) CF6–45A, CF6–45A2, CF6–50A, CF6–50C, CF6–50CA, CF6–50C1, CF6–50C2, CF6–50C2B, CF6–50C2D, CF6–50E, CF6–50E1, CF6–50E2, and CF6–50E2B turbofan engines, including engines marked on the engine data plate as CF6–50C2–F and CF6–50C2–R.

(2) These engines are installed on, but not limited to, Airbus A300 series, Boeing 747–200B, 747–200C, 747–200F, 747–300 and 747SR, McDonnell Douglas DC–10–15, DC–10–30, DC–10–30F (KC–10A, KDC–10), and MD–10–30F airplanes.

Unsafe Condition

(d) This AD was prompted by the discovery of more LFCEN forward and aft centerbody P/Ns that require replacement. We are issuing this AD to prevent the forward and aft centerbody of the LFCEN assembly from separating from the engine, causing damage to the engine, and damage to the airplane.

Compliance

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

(1) Within 18 months after the effective date of this AD, replace forward centerbody, P/N 1313M55G01 and G02, P/N 9076M28G05, G06, G08, G09, and G10, P/N 9076M82G01 and G03, and aft centerbody P/N 1313M56G01, P/N 9076M46G02, G04, and G05 with a forward and aft centerbody that has been modified using the Accomplishment Instructions, Section 3, of GE Service Bulletin (SB) No. CF6–50 S/B 78–0244, Revision 1, dated March 13, 2008, CF6–50 S/B 78–0244, dated July 30, 2007, or CF6–50 S/B 78–0242, dated September 26, 2005.

Centerbody Installation Prohibition

(2) After 18 months from the effective date of this AD, do not install any engine with forward centerbody, P/N 1313M55G01 or G02, P/N 9076M28G05, G06, G08, G09, or G10, P/N 9076M82G01 or G03, or aft centerbody P/N 1313M56G01, P/N 9076M46G02, G04, or G05 on any airplane.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(g) For more information about this AD, contact Tomasz Rakowski, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate; *phone:* 781–238–7735; *fax:* 781–238–7199; *e-mail: tomasz.rakowski@faa.gov.*

(h) For service information identified in this AD, contact GE–Aviation M/D Rm. 285, One Neumann Way, Cincinnati, OH 45215, telephone 513–552–3272; *e-mail: geae.aoc@ge.com.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on March 14, 2011.

Peter A. White,

Acting Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–6300 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0176; Directorate Identifier 2011–NE–05–AD; Amendment 39–16636; AD 2011–06–11]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc (RR) RB211–Trent 900 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), 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) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An uncontained engine failure has recently occurred on a Rolls-Royce RB211 Trent 900 involving release of high energy debris and resulting in damage to the aeroplane. Analysis of the available elements from the incident investigation shows that an oil fire in the High Pressure/Intermediate Pressure (HP/IP) structure cavity may have initiated a sequence of events leading to rupture of the drive arm of the IP Turbine (IPT) disc and subsequent overspeed and burst of that same disc.

We are issuing this AD to prevent overspeed of the intermediate pressure turbine, which could result in loss of disc integrity, an uncontained failure of the engine, and damage to the airplane.

DATES: This AD becomes effective April 4, 2011.

We must receive comments on this AD by April 18, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* 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.

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 (*phone:* (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.

FOR FURTHER INFORMATION CONTACT: Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park; Burlington, MA 01803; *e-mail: alan.strom@faa.gov; phone:* (781) 238–7143; *fax:* (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0262, dated December 13, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> An uncontained engine failure has recently occurred on a Rolls-Royce RB211 Trent 900 involving release of high energy debris and resulting in damage to the aeroplane. Analysis of the available elements from the incident investigation shows that an oil fire in the High Pressure/Intermediate Pressure (HP/IP) structure cavity may have initiated a sequence of events leading to rupture of the drive arm of the IP Turbine (IPT) disc and subsequent overspeed and burst of that same disc.
>
> Rolls-Royce has developed a modification of the Engine Electronic Controller (EEC) software, featuring an IPT Overspeed Protection System (IPTOS). The purpose of the IPTOS functionality is to detect engine conditions that may potentially lead to an IP turbine overspeed, and shut down the engine before the level of overspeed reaches the disc burst speed.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Rolls-Royce plc has issued Trent 900 Series Propulsion Systems Alert Service Bulletin No. RB.211–73–AG639, dated December 3, 2010. The actions described in this service information 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 the United Kingdom, and is approved for operation in the United States. Pursuant to our bilateral agreement with the United Kingdom, EASA has notified us of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all information provided by the EASA, and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

FAA's Determination of the Effective Date

Since no domestic operators use this product, notice and opportunity for public comment before issuing this AD are unnecessary. Therefore, we are adopting this regulation immediately.

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–2011–0176; Directorate Identifier 2011–NE–05–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 with FAA personnel concerning this 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).

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, 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:

2011–06–11 Rolls-Royce plc (RR): Amendment 39–16636; Docket No. FAA–2011–0176; Directorate Identifier 2011–NE–05–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective April 4, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to RR model RB211–Trent 970–84, 970B–84, 972–84, 972B–84, 977–84, 977B–84, and 980–84 turbofan engines. These engines are installed on, but not limited to, Airbus A380 series airplanes.

Reason

(d) An uncontained engine failure has recently occurred on a Rolls-Royce RB211 Trent 900 involving release of high energy debris and resulting in damage to the aeroplane. Analysis of the available elements from the incident investigation shows that an oil fire in the High Pressure/Intermediate Pressure (HP/IP) structure cavity may have initiated a sequence of events leading to rupture of the drive arm of the IP Turbine (IPT) disc and subsequent overspeed and burst of that same disc.

Rolls-Royce has developed a modification of the Engine Electronic Controller (EEC) software, featuring an IPT Overspeed Protection System (IPTOS). The purpose of the IPTOS functionality is to detect engine conditions that may potentially lead to an IP turbine overspeed, and shut down the engine before the level of overspeed reaches the disc burst speed.

We are issuing this AD to prevent overspeed of the intermediate pressure turbine, which could result in loss of disc integrity, an uncontained failure of the engine, and damage to the airplane.

Actions and Compliance

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

(1) Within 10 flight cycles after the effective date of this AD, incorporate software 10.6 to the EEC.

(2) Guidance on incorporating software 10.6 can be found in Rolls-Royce plc Trent 900 Series Propulsion Systems Alert Service Bulletin (SB) No. RB.211–73–AG639, dated December 3, 2010.

Prior Software Version Prohibition

(3) After incorporation of software 10.6, do not incorporate any software version prior to 10.6 to the EEC.

FAA AD Differences

(f) This AD differs from the Mandatory Continuing Airworthiness Information (MCAI) as follows:

(1) MCAI European Aviation Safety Agency (EASA) AD 2010–0262, dated December 13, 2010, requires that after EEC modification of an installed engine as required by that AD, do not intermix with any EEC software standards prior to modification 73–F328 (standard 9.2.1) on that airplane. This AD does not, because there are no U.S. registered airplanes with RB211–Trent 900 engines.

(2) MCAI EASA AD 2010–0262, dated December 13, 2010, states that from the effective date of the AD, no engine may be installed in an airplane unless the engine has incorporated the new software. This AD does not, because there are no U.S. registered airplanes with RB211–Trent 900 engines.

(3) MCAI EASA AD 2010–0262, dated December 13, 2010, allows incorporation of later approved versions of EEC software standards that will include IPTOS functionality. This AD does not. Instead, we prohibit software installation prior to version 10.6.

Alternative Methods of Compliance (AMOCs)

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

Related Information

(h) Refer to MCAI EASA AD 2010–0262, dated December 13, 2010, and Rolls-Royce plc Trent 900 Series Propulsion Systems Alert SB No. RB.211–73–AG639, dated December 3, 2010, for related information.

(i) Contact Rolls-Royce plc, P.O. Box 31, Derby, DE24 8BJ, United Kingdom; *phone:* 44 1332 242424; *fax:* 44 1332 249936, for a copy of the service information referenced in this AD.

(j) Contact Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: alan.strom@faa.gov; phone:* (781) 238–7143; *fax:* (781) 238–7199, for more information about this AD.

Material Incorporated by Reference

(k) None.

Issued in Burlington, Massachusetts, on March 11, 2011.

Peter A. White,

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

[FR Doc. 2011–6154 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0938; Airspace Docket No. 10–ANE–108]

Amendment of Class E Airspace; Newport, VT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at Newport, Vermont. The Newport Non-Directional Beacon (NDB) has been decommissioned and new Standard Instrument Approach Procedures (SIAPs) have been developed for Newport State Airport. This action enhances the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: *Effective date:* 0901 UTC, June 30, 2011. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Richard Horrocks, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5588.

SUPPLEMENTARY INFORMATION:

History

On November 29, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace 700 feet above the surface, at Newport, VT (75 FR 73015) Docket No. FAA–2010–0938. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 amends Class E airspace extending upward from 700 feet above the surface to support new SIAPs developed at Newport State Airport, Newport, Vermont. Airspace reconfiguration is necessary due to the decommissioning of the Newport NDB and cancellation of the NDB approach. Controlled airspace is necessary for the safety and management of IFR operations at the airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (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); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace at Newport, Vermont.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANE VT E5 Newport, VT [AMENDED]

Newport State Airport, VT

(Lat. 44°53′20″ N., long. 72°13′45″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Newport State Airport and within 1.8 miles each side of the 159° bearing from the airport extending from the 6.4-mile radius to 10.9 miles south of Newport State Airport.

Issued in College Park, Georgia, on March 8, 2011.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–6352 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1007; Airspace Docket No. 10–ANE–109]

Establishment of Class E Airspace; Wolfeboro, NH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E Airspace at Wolfeboro, NH, to accommodate a new Area Navigation (RNAV) Global Positioning System (GPS) special Instrument Approach Procedure (SIAP) serving Huggins Hospital Heliport. This action enhances the safety and airspace management of Instrument Flight Rules (IFR) operations within the National Airspace System.

DATES: Effective 0901 UTC, June 30, 2011. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Richard Horrocks, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5588.

SUPPLEMENTARY INFORMATION:

History

On December 28, 2010, the FAA published in the **Federal Register** a Notice of Proposed Rulemaking to establish Class E airspace at Wolfeboro, NH (75 FR 81518). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes the Class E airspace extending upward from 700 feet above the surface at Wolfeboro, NH, to provide controlled airspace required to support the RNAV (GPS) special standard instrument approach procedures developed for Huggins Hospital Heliport. This action is necessary for the safety and management of IFR operations at the heliport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (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); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace at Wolfeboro, NH.

Lists of Subjects in 14 CFR Part 71:

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANE NH E5 Wolfeboro, NH [New]

Huggins Hospital Heliport, NH
(Lat. 43°34′56″ N., long. 71°12′06″ W.)
Point in Space Coordinates
(Lat. 43°35′15″ N., long. 71°11′19″ W.)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of the Point in Space Coordinates (lat. 43°35′15″ N., long. 71°11′19″ W.) serving Huggins Hospital Heliport.

Issued in College Park, Georgia, on March 8, 2011.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–6353 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1008; Airspace Docket No. 10–ANE–110]

Establishment of Class E Airspace; Colebrook, NH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E Airspace at Colebrook, NH, to accommodate a new Area Navigation (RNAV) Global Positioning System (GPS) special Standard Instrument Approach Procedure (SIAP) serving the Upper Connecticut Valley Hospital Heliport. This action enhances the safety and airspace management of Instrument Flight Rules (IFR) operations within the National Airspace System.

DATES: Effective 0901 UTC, June 30, 2011. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Richard Horrocks, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5588.

SUPPLEMENTARY INFORMATION:

History

On December 28, 2010, the FAA published in the **Federal Register** a Notice of Proposed Rulemaking to establish Class E airspace at Upper Connecticut Valley Hospital Heliport, Colebrook, NH (75 FR 81516). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes the Class E airspace extending upward from 700 feet above the surface at Colebrook, NH, to provide controlled airspace required to support the RNAV (GPS) special standard instrument approach procedures developed for Upper Connecticut Valley Hospital Heliport. This action is necessary for the safety and management of IFR operations at the heliport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (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); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace at Colebrook, NH.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANE NH E5 Colebrook, NH [NEW]

Upper Connecticut Valley Hospital Heliport, NH
(Lat. 44°54′14″ N., long. 71°28′52″ W.)

Point in Space Coordinates
(Lat. 44°54′26″ N., long. 71°29′54″ W.)

That airspace extending upward From 700 Feet above the surface within a 6-mile radius of the Point in Space Coordinates (lat. 44°54′26″ N., long. 71°29′54″ W.) serving the Upper Connecticut Valley Hospital Heliport.

Issued in College Park, Georgia, on March 8, 2011.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–6354 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1009; Airspace Docket No. 10–ANE–111]

Establishment of Class E Airspace; Lancaster, NH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E Airspace at Lancaster, NH, to accommodate a new Area Navigation Global Positioning System RNAV special Standard Instrument Approach Procedure (SIAP) serving the Weeks Medical Center Heliport. This action enhances the safety and airspace management of Instrument Flight Rules (IFR) operations within the National Airspace System.

DATES: Effective 0901 UTC, June 30, 2011. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Richard Horrocks, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P. O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5588.

SUPPLEMENTARY INFORMATION:

History

On December 28, 2010, the FAA published in the **Federal Register** a Notice of Proposed Rulemaking to establish Class E airspace at Lancaster, NH (75 FR 81517). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes the Class E airspace extending upward from 700 feet above the surface at Lancaster, NH, to provide controlled airspace required to support the special standard instrument approach procedures developed for Weeks Medical Center Heliport. This action is necessary for the safety and management of IFR operations at the heliport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (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); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace at Lancaster, NH.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANE NH E5 Lancaster, NH [NEW]

Weeks Medical Center Heliport, NH
(Lat. 44°29′07″ N., long. 71°33′17″ W.)
Point in Space Coordinates
(Lat. 44°29′33″ N., long. 71°34′41″ W.)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of the Point in Space Coordinates (lat. 44°29'33"N., long. 71°34'41"W.) serving the Weeks Medical Center Heliport.

Issued in College Park, Georgia, on March 8, 2011.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–6355 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0961; Airspace Docket No. 10–ANM–12]

Modification of Class E Airspace; Bryce Canyon, UT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action will modify Class E airspace at Bryce Canyon, UT. Additional controlled airspace is necessary to accommodate aircraft using Area Navigation (RNAV) Global

Positioning System (GPS) standard instrument approach procedures at Bryce Canyon Airport. This will improve the safety of Instrument Flight Rules (IFR) aircraft executing RNAV GPS standard instrument approach procedures at Bryce Canyon Airport.

DATES: Effective date, 0901 UTC, June 30, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

History

On December 9, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish additional controlled airspace at Bryce Canyon, UT (75 FR 76650). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. The FAA received two comments. One commenter suggested adding airspace to the eastern boundary of the 1,200 foot AGL airspace description. The FAA found merit in this comment, and will incorporate this change in the final rule. The second commenter was concerned with the possible impact of noise on the Bryce Canyon National Park. This rule will only modify the existing airspace to the extent necessary to increase flight safety. The FAA does not believe this will create any change in the intensity, frequency of flight activity, or existing patterns of noise generation. With the exception of editorial changes and the changes described above, this rule is the same as that proposed in the NPRM.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by amending the Class E airspace for the Bryce Canyon, UT area, adding additional controlled airspace extending upward from 700 feet above the surface to accommodate IFR aircraft executing RNAV (GPS) standard instrument approach procedures at Bryce Canyon Airport. This action is necessary for the safety and management of IFR operations at the airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (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); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes additional controlled airspace at Bryce Canyon Airport, Bryce Canyon, UT.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ANM UT E5 Bryce Canyon, UT [Modified]

Bryce Canyon Airport, UT
(Lat. 37°42′23″ N., long. 112°08′45″ W.)

That airspace extending upward from 700 feet above the surface within 8 miles each side of the 047° and 227° bearing from the airport, extending 18 miles northeast and 15.9 miles southwest of the airport. That airspace extending upward from 1,200 feet above the surface bounded by a line beginning at lat. 38°21′00″ N., long. 112°34′00″ W.; to lat. 38°21′00″ N., long. 112°24′00″ W.; to lat. 38°12′00″ N., long. 112°15′00″ W.; to lat. 38°20′00″ N., long. 111°56′00″ W.; to lat. 38°18′00″ N., long. 111°41′00″ W.; to lat. 38°00′00″ N., long. 111°34′00″ W.; to lat. 37°45′00″ N., long. 111°02′00″ W.; to lat. 37°17′00″ N., long. 111°18′00″ W.; to lat. 37°19′00″ N., long. 111°48′00″ W.; to lat. 37°22′00″ N., long. 112°14′00″ W.; to lat. 37°13′00″ N., long. 112°33′00″ W.; to lat. 37°14′00″ N., long. 112°39′00″ W.; to lat. 37°29′00″ N., long. 112°42′00″ W.; to lat. 37°41′00″ N., long. 112°53′00″ W.; thence to point of origin.

Issued in Seattle, Washington, on March 10, 2011.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2011–6350 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0079]

Drawbridge Operation Regulation; Townsend Inlet, Avalon, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulations governing the operation of the Townsends Inlet Bridge across, mile 0.3, at Avalon, NJ. The deviation is necessary to facilitate the cleaning and painting of the structure. This deviation allows the bridge to remain in the closed position for the deviation period.

DATES: This deviation is effective from 5 a.m. on March 1, 2011 to 5 p.m. on April 30, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0079 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0079 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 rule, call or e-mail Mr. Terrance A. Knowles, Environmental Protection Specialist, Fifth District; Coast Guard; telephone 757–398–6587, e-mail *Terrance.A.Knowles@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Cape May County Bridge Commission (CMCBC), who owns and operates this bascule drawbridge, has requested a temporary deviation from the current operating schedule to facilitate the cleaning and painting of the bridge structure. Under the regular operating schedule required by 33 CFR 117.757, the bridge opens on signal, except from 9:15 a.m. to 2:30 p.m. on the fourth Sunday in March of every year, the draw need not open for vessels. If the fourth Sunday falls on a religious holiday, the draw need not open from 9:15 a.m. to 2:30 p.m. on the third Sunday of March of every year. From 11 p.m. on December 24 until 11 p.m. on December 25, the draw need open only if at least two hours notice is given.

The Townsend Inlet Bridge, mile 0.3, in Avalon, NJ, has a vertical clearance in the closed position of 23 feet above mean high water. Vessels that can transit under the bridge without an opening may do so at any time. Under this temporary deviation, CMCBC will maintain the bridge in the closed position to vessels beginning at 5 a.m. on March 1, 2011 until and including 5 p.m. on April 30, 2011.

In 2010, during the months of March and April, the bridge has opened for vessels 62 and 45 times, respectively. The majority of the vessels for which the bridge opened were tugs and barges being used for beach replenishment.

The Coast Guard will inform users of the waterway through our Local and Broadcast Notices to Mariners of the closure periods for the bridge so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

Vessels have two alternate routes by transiting either eight miles to the south through Hereford Inlet or eight miles to the north through Corson Inlet. The drawbridge will be able to open in the event of an emergency.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: March 7, 2011.

Waverly W. Gregory, Jr.,

Chief, Bridge Administration Branch, Fifth Coast Guard District.

[FR Doc. 2011–6338 Filed 3–17–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0150]

Drawbridge Operation Regulations; Annisquam River and Blynman Canal, Gloucester, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the SR127 Bridge at mile 0.0 across the Annisquam River and Blynman Canal. The deviation is necessary to facilitate a public event, the Yucan One-Mile Road Race, which will cross the SR127 Bridge. This deviation allows the bridge to remain in the closed position during the deviation period.

DATES: This deviation is effective from 8:45 a.m. through 10 a.m. on April 9, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0150 and are available online at *http://www.regulations.gov,* inserting USCG–2011–0150 in the "Keyword" 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 rule, call or e-mail Mr. John McDonald, Project Officer, First Coast Guard District, *john.w.mcdonald@uscg.mil,* or telephone (617) 223–8364. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The SR127 Bridge, across the Annisquam River/Blynman Canal, mile 0.0, at Gloucester, Massachusetts, has a vertical clearance in the closed position of 7 feet at mean high water and 16 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.586.

The owner of the bridge, Massachusetts Department of Transportation, requested a temporary deviation from the regulations to facilitate the Yucan One-Mile Road Race which will pass across the SR127 Bridge.

Under this temporary deviation the SR127 Bridge may remain in the closed position between 8:45 a.m. and 10 a.m. on April 9, 2011. Vessels that can pass under the bridge in the closed position may do so at any time.

The Gloucester Harbor Master and the local marinas were notified and no objections were received.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: March 8, 2011.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2011–6342 Filed 3–17–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0149]

Drawbridge Operation Regulations; Bass River, Beverly, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Hall Whitaker Bridge at mile 0.6 across the Bass River

at Beverly, Massachusetts. The deviation is necessary to facilitate structural repairs. This deviation allows the bridge to remain in the closed position during the deviation period.

DATES: This deviation is effective from 6 p.m. on March 25, 2011 through 6 p.m. on March 27, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0149 and are available online at *http://www.regulations.gov,* inserting USCG–2011–0149 in the "Keyword" 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 rule, call or e-mail Mr. John McDonald, Project Officer, First Coast Guard District, *john.w.mcdonald@uscg.mil,* or telephone (617) 223–8364. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Hall Whitaker Bridge, across the Bass River at Beverly, Massachusetts, has a vertical clearance in the closed position of 5 feet at mean high water and 14 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.588.

The owner of the bridge, Massachusetts Department of Transportation, requested a temporary deviation from the regulations to facilitate emergency repairs at the bridge. A routine structural inspection revealed deterioration on two steel floor beams at the bridge. The two beams must be replaced as soon as possible in the interest of public safety.

Under this temporary deviation the Hall Whitaker Bridge may remain in the closed position from 6 p.m. on March 25, 2011 through 6 p.m. on March 27, 2011. Vessels that can pass under the bridge in the closed position may do so at any time.

The Beverly Harbor Master and the local marinas were notified and no objections were received.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: March 8, 2011.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2011–6339 Filed 3–17–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0882; FRL–9281–4]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Adoption of the Revised Lead Standards and Related Reference Conditions and Update of Appendices; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, EPA is withdrawing the direct final rule to approve revisions to Virginia's State Implementation Plan (SIP). These SIP revisions add the primary and secondary lead standards of 0.15 micrograms per cubic meter (μg/m3), related reference conditions, and update the list of appendices under "Documents Incorporated by Reference." In the direct final rule published on January 26, 2011 (76 FR 4537), we stated that if we received any adverse comments by February 25, 2011, the rule would be withdrawn and would not take effect. EPA received an adverse comment within the comment period. EPA will address the comment received in a subsequent final action based upon the proposed action also published on January 26, 2011 (76 FR 4579). EPA will not institute a second comment period on this action.

DATES: The direct final rule published at 76 FR 4537, January 26, 2011, is withdrawn as of March 18, 2010.

ADDRESSES: EPA has established docket number EPA–R03–OAR–2010–0882 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Irene Shandruk, (215) 814–2166, or by e-mail at *shandruk.irene@epa.gov.*

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 8, 2011.

Shawn M. Garvin,

Regional Administrator, Region III.

Accordingly, the amendments to the table in 40 CFR 52.2420, published on January 26, 2011 (76 FR 4537) on page 4539 is withdrawn as of March 18, 2011.

[FR Doc. 2011–6227 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2010–0934; A–1–FRL–9281–5]

Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Determination of Attainment of the 1997 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: The EPA is taking final action to determine that the Boston-Manchester-Portsmouth (SE), New Hampshire moderate 1997 8-hour ozone nonattainment area has attained the 1997 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. This determination is based upon complete, quality-assured, certified ambient air monitoring data that show the area has monitored attainment of the 1997 8-hour ozone NAAQS for the 2007–2009 monitoring period. Preliminary data available for the 2010 ozone season is consistent with continued attainment. Under the provisions of EPA's ozone implementation rule, the requirements for this area to submit an attainment demonstration, a reasonable further progress plan, contingency measures, and other planning State Implementation Plans related to attainment of the 1997 8-hour ozone NAAQS shall be suspended for so long as the area continues to attain the 1997 ozone NAAQS. In addition, EPA is taking final action to determine that this area has attained the 1997 ozone NAAQS as of June 15, 2010, its applicable attainment date.

DATES: *Effective Date:* This rule is effective on April 18, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2010–0934. 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., 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 Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact 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 legal holidays.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, telephone number (617) 918–1664, fax number (617) 918–0664, e-mail *Burkhart.Richard@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. What actions is EPA taking?
II. What is the effect of these actions?
III. Final Actions
IV. Statutory and Executive Order Reviews

I. What actions is EPA taking?

EPA is taking final action to determine that the Boston-Manchester-Portsmouth (SE), New Hampshire moderate 8-hour ozone nonattainment area has attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based upon complete, quality-assured and certified ambient air monitoring data that show the area has monitored attainment of the 1997 ozone NAAQS for the 2007–2009 monitoring period. In addition, preliminary data for 2010 shows this area continues to meet the 1997 ozone NAAQS.

Based on the air quality data cited above, EPA is also taking final action to determine, under section 181(b)(2)(A) of the Clean Air Act (CAA), that this area has attained the 1997 ozone NAAQS by its applicable attainment date (June 15, 2010).

On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm. On January 6, 2010, EPA again addressed this 2008 revised standard and proposed to set the primary 8-hour ozone standard within the range of 0.060 to 0.070 ppm, rather than at 0.075 ppm. EPA is working to complete reconsideration of the standard. If EPA establishes a new primary ozone standard as a result of the reconsideration, it would fully replace the standard set in 2008. Thus, implementation requirements for the 2008 standard would no longer apply. EPA would then proceed with designations with respect to the new standard. Today's rulemaking relates only to the 1997 8-hour ozone standard and is not affected by the ongoing process of reconsidering the revised 2008 standard. This action addresses only the 1997 8-hour ozone standard of 0.08 ppm, and does not address any subsequently revised 8-hour ozone standard.

Other specific details related to the determinations and the rationale for EPA's final actions are explained in the Notice of Proposed Rulemaking (NPR) for these actions published on December 6, 2010 (75 FR 75656) and will not be restated here. No comments were received on the NPR.

II. What is the effect of these actions?

The effect of this action is to reaffirm EPA's prior determination of attainment for this area (*See* 73 FR 14387 (March 18, 2004)), and thus, pursuant to 40 CFR. 51.918, to continue the suspension of New Hampshire's obligation to make certain SIP submissions for this area.

Under the provisions of EPA's ozone implementation rule (*see* 40 CFR 51.918), the determination that the area is attaining the standard suspends the requirements for the Boston-Manchester-Portsmouth (SE), New Hampshire moderate ozone nonattainment area to submit an attainment demonstration, a reasonable further progress plan, section 172(c)(9) contingency measures, and any other planning State Implementation Plans (SIPs) related to attainment of the 1997 8-hour ozone NAAQS for so long as the area continues to attain the 1997 ozone NAAQS.

This action does not constitute a redesignation to attainment under CAA section 107(d)(3), because the area does not have an approved maintenance plan as required under section 175A of the CAA, nor a determination that the area has met the other requirements for redesignation. The classification and designation status of the area remains moderate nonattainment for the 1997 8-hour ozone NAAQS until such time as EPA determines that it meets the CAA requirements for redesignation to attainment. If EPA subsequently determines, after notice-and-comment rulemaking in the **Federal Register**, that the area has violated the 1997 8-hour ozone standard, the basis for the suspension of these requirements would no longer exist, and the area would thereafter have to address the pertinent requirements.

In addition, in accordance with CAA section 181(b)(2)(A), EPA is determining that the Boston-Manchester-Portsmouth (SE), New Hampshire 1997 8-hour ozone nonattainment area has attained the 1997 ozone NAAQS by its applicable attainment date of June 15, 2010. The effect of this determination of attainment by the area's attainment date is to discharge EPA's obligation under section 181(b)(2)(A), and to establish that, in accordance with that section, the area will not be reclassified for failure to attain by its applicable attainment date.

III. Final Actions

EPA is determining that the Boston-Manchester-Portsmouth (SE), New Hampshire 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard based on three years of complete, quality-assured and certified ozone monitoring data from 2007–2009. Preliminary data available for 2010 are consistent with continued attainment. As provided in 40 CFR 51.918, this determination suspends the requirements for New Hampshire to submit an attainment demonstration, a reasonable further progress plan, contingency measures under section 172(c)(9), and any other planning SIP related to attainment of the 1997 8-hour ozone NAAQS for this area, for so long as the area continues to attain the 1997 ozone standard. In addition, pursuant to CAA section 181(b)(2)(A), EPA is determining that the Boston-Manchester-Portsmouth (SE), New Hampshire 8-hour ozone nonattainment area has attained the 1997 8-hour ozone NAAQS by its applicable attainment date (June 15, 2010).

IV. Statutory and Executive Order Reviews

These actions make a determination of attainment based on air quality, and result in the suspension of certain Federal requirements, and do not impose additional requirements beyond those imposed by state law. 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 economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Are not significant regulatory actions 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, these actions do 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 these actions 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 May 17, 2011. 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 in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 8, 2011.

H. Curtis Spalding,

Regional Administrator, EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations 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 EE—New Hampshire

■ 2. Section 52.1534 is amended by adding paragraph (e) to read as follows:

§ 52.1534 Control strategy: Ozone.

* * * * *

(e) Determination of Attainment. Effective April 18, 2011, EPA is determining that the Boston-Manchester-Portsmouth (SE), New Hampshire 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard based on 2007–2009 monitoring data. Under the provisions of EPA's ozone implementation rule (*see* 40 CFR 51.918), this determination suspends the reasonable further progress and attainment demonstration requirements of section 182(b)(1) and related requirements of section 172(c)(9) of the Clean Air Act for as long as the area does not monitor any violations of the 1997 8-hour ozone standard. If a violation of the 1997 ozone NAAQS is monitored in the Boston-Manchester-Portsmouth (SE), New Hampshire 8-hour ozone nonattainment area, this determination shall no longer apply. In addition, this area met its June 15, 2010 attainment deadline for the 1997 ozone standard.

[FR Doc. 2011–6306 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–R09–OAR–2011–0213; FRL–9283–4]

Delegation of National Emission Standards for Hazardous Air Pollutants for Source Categories; State of Arizona, Maricopa County Air Quality Department; State of California, Santa Barbara County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is amending certain regulations to reflect the current delegation status of national emission standards for hazardous air pollutants (NESHAP) in Arizona and California. Several NESHAP were delegated to the Maricopa County Air Quality Department and the Santa Barbara County Air Pollution Control District within the past 12 months. The purpose of this action is to update the listing in the Code of Federal Regulations.

DATES: This rule is effective on May 17, 2011 without further notice, unless EPA receives adverse comments by April 18, 2011. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2011–0213, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or delivery:* Andrew Steckel (AIR–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that

you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Mae Wang, EPA Region IX, (415) 947–4124, *wang.mae@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

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I. Background

A. Delegation of NESHAP

Section 112(l) of the Clean Air Act, as amended in 1990 (CAA), authorizes EPA to delegate to State or local air pollution control agencies the authority to implement and enforce the standards set out in the Code of Federal Regulations, Title 40 (40 CFR), Part 63, National Emission Standards for Hazardous Air Pollutants for Source Categories. On November 26, 1993, EPA promulgated regulations, codified at 40 CFR Part 63, Subpart E (hereinafter referred to as "Subpart E"), establishing procedures for EPA's approval of State rules or programs under section 112(l) (*see* 58 FR 62262). Subpart E was later amended on September 14, 2000 (*see* 65 FR 55810).

Any request for approval under CAA section 112(l) must meet the approval criteria in 112(l)(5) and Subpart E. To streamline the approval process for future applications, a State or local agency may submit a one-time demonstration that it has adequate authorities and resources to implement and enforce any CAA section 112 standards. If such demonstration is approved, then the State or local agency would no longer need to resubmit a demonstration of these same authorities and resources for every subsequent request for delegation of CAA section 112 standards. However, EPA maintains the authority to withdraw its approval if the State does not adequately implement or enforce an approved rule or program.

B. Maricopa County Delegations

On March 2, 2000, EPA published a direct final action delegating to the Maricopa County Air Quality Department (Maricopa County) several NESHAP and approving Maricopa County's delegation mechanism for future standards (*see* 65 FR 11231). That action explained the procedure for EPA to grant future delegations to Maricopa County by letter, with periodic **Federal Register** listings of standards that have been delegated. On March 5, 2010, and April 5, 2010, Maricopa County requested delegation of the following NESHAP contained in 40 CFR Part 63:

- Subpart WWWWW—National Emission Standards for Hospital Ethylene Oxide Sterilizers
- Subpart YYYYY—NESHAP for Area Sources: Electric Arc Furnace Steelmaking Facilities
- Subpart ZZZZZ—NESHAP for Iron and Steel Foundries Area Sources
- Subpart BBBBBB—NESHAP for Source Category: Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities
- Subpart CCCCCC—NESHAP for Source Category: Gasoline Dispensing Facilities
- Subpart DDDDDD—NESHAP for Polyvinyl Chloride and Copolymers Production Area Sources
- Subpart EEEEEE—NESHAP for Primary Copper Smelting Area Sources
- Subpart FFFFFF—NESHAP for Secondary Copper Smelting Area Sources
- Subpart GGGGGG—NESHAP for Primary Nonferrous Metals Area Sources—Zinc, Cadmium, and Beryllium
- Subpart HHHHHH—NESHAP: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources
- Subpart LLLLLL—NESHAP for Acrylic and Modacrylic Fibers Production Area Sources
- Subpart MMMMMM—NESHAP for Carbon Black Production Area Sources
- Subpart NNNNNN—NESHAP for Chemical Manufacturing Area Sources: Chromium Compounds
- Subpart OOOOOO—NESHAP for Flexible Polyurethane Foam Production and Fabrication Area Sources
- Subpart PPPPPP—NESHAP for Lead Acid Battery Manufacturing Area Sources
- Subpart QQQQQQ—NESHAP for Wood Preserving Area Sources
- Subpart RRRRRR—NESHAP for Clay Ceramics Manufacturing Area Sources
- Subpart SSSSSS—NESHAP for Glass Manufacturing Area Sources
- Subpart TTTTTT—NESHAP for Secondary Nonferrous Metals Processing Area Sources

On May 6, 2010, EPA granted delegation to Maricopa County for these NESHAP, along with any amendments to previously-delegated NESHAP, as of July 1, 2008. Subsequently, on October 7, 2010, Maricopa County requested delegation of the following NESHAP contained in 40 CFR Part 63:

- Subpart WWWWWW—NESHAP: Area Source Standards for Plating and Polishing Operations
- Subpart XXXXXX—NESHAP Area Source Standards for Nine Metal Fabrication and Finishing Source Categories
- Subpart YYYYYY—NESHAP for Area Sources: Ferroalloys Production Facilities
- Subpart ZZZZZZ—NESHAP: Area Source Standards for Aluminum, Copper, and Other Nonferrous Foundries

On December 14, 2010, EPA granted delegation to Maricopa County for these NESHAP, along with any amendments to previously-delegated NESHAP, as of July 1, 2009. Today's action is serving to notify the public of the May 6, 2010, and December 14, 2010, delegations and to codify these delegations into the Code of Federal Regulations.

C. Santa Barbara County Delegations

On October 6, 2003, the California Air Resources Board (CARB) submitted on behalf of nine California districts a request for delegation of all Federal section 112 standards that apply to area sources, with the exception of the dry cleaning and chromium electroplating

standards for which State or local rules have already been approved (*see* 61 FR 25397 and 64 FR 12762). This request was approved on December 19, 2003 (*see* 68 FR 70726). In that approval, it was explained that future requests by other districts could be approved by letter, followed by a **Federal Register** notice to codify the delegations into the CFR.

On April 1, 2010, the Santa Barbara County Air Pollution Control District (Santa Barbara County) asked CARB to make a delegation request on their behalf for CAA section 112 area source standards. CARB submitted the request on behalf of the district on May 20, 2010. On July 30, 2010, EPA Region IX approved this request by letter, granting the Santa Barbara County the authority to implement and enforce existing area source standards unchanged as promulgated by EPA.

II. EPA Action

A. Maricopa County

Today's document serves to notify the public of the delegation of NESHAP to Maricopa County on May 6, 2010, and December 14, 2010. Today's action will codify these delegations into the CFR.

B. Santa Barbara County

This document serves to notify the public that, with the exception of the dry cleaning and chromium electroplating standards, EPA granted delegation of unchanged Federal section 112 area source standards to Santa Barbara County on July 30, 2010. Today's action will codify these delegations into the CFR. Santa Barbara County will also receive delegation of any future area source standards or revisions 90 days after promulgation of these standards or revisions, unless the district chooses to decline delegation of a particular future standard by notifying the EPA Region IX office in writing. If no such notification is received, the delegation will go into effect 90 days after promulgation of the standard or revision, without any additional action from the district or EPA. Additionally, as mentioned in 74 FR 12591 (March 25, 2009), and pursuant to 40 CFR sections 63.9(a)(4)(ii) and 63.10(a)(4)(ii), EPA Region IX waives the requirement that notifications or reports for delegated area source standards be submitted to EPA as well as Santa Barbara County.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve delegation requests that comply with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7412(l); 40 CFR 63.91(b). Thus, in reviewing delegation 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 disproportionate human health or environmental effects with practical, appropriate, 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 delegations are 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 17, 2011. 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements (*see* section 307(b)(2)).

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of Section 112 of the Clean Air Act, as amended, 42 U.S.C. 7412.

Dated: March 3, 2011.

Deborah Jordan,

Director, Air Division, Region IX.

Title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for Part 63 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart E—Approval of State Programs and Delegation of Federal Authorities

■ 2. Section 63.99 is amended as follows:

■ a. By revising the table in paragraph (a)(3)(i);

■ b. By revising paragraphs (a)(5)(i)(B)(*11*) and (*12*); and

■ c. By adding paragraph (a)(5)(i)(B)(*13*).

§ 63.99 Delegated Federal authorities.

(a) * * *

(3) * * *

(i) * * *

DELEGATION STATUS FOR PART 63 STANDARDS—ARIZONA

Subpart	Description	ADEQ [1]	MCAQD [2]	PDEQ [3]	PCAQCD [4]
A	General Provisions	X	X	X	X
F	Synthetic Organic Chemical Manufacturing Industry	X	X	X	X
G	Synthetic Organic Chemical Manufacturing Industry: Process Vents, Storage Vessels, Transfer Operations, and Wastewater.	X	X	X	X
H	Organic Hazardous Air Pollutants: Equipment Leaks	X	X	X	X
I	Organic Hazardous Air Pollutants: Certain Processes Subject to the Negotiated Regulation for Equipment Leaks.	X	X	X	X
J	Polyvinyl Chloride and Copolymers Production	X	X	X	.....
L	Coke Oven Batteries	X	X	X	X
M	Perchloroethylene Dry Cleaning	X	X	X	X
N	Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks.	X	X	X	X
O	Ethylene Oxide Sterilization Facilities	X	X	X	X
Q	Industrial Process Cooling Towers	X	X	X	X
R	Gasoline Distribution Facilities	X	X	X	X
S	Pulp and Paper	X	X	X	.....
T	Halogenated Solvent Cleaning	X	X	X	X
U	Group I Polymers and Resins	X	X	X	X
W	Epoxy Resins Production and Non-Nylon Polyamides Production	X	X	X	X
X	Secondary Lead Smelting	X	X	X	X
Y	Marine Tank Vessel Loading Operations	.....	.....	.....	.....
AA	Phosphoric Acid Manufacturing Plants	X	X	X	.....
BB	Phosphate Fertilizers Production Plants	X	X	X	.....
CC	Petroleum Refineries	X	X	X	X
DD	Off-Site Waste and Recovery Operations	X	X	X	X
EE	Magnetic Tape Manufacturing Operations	X	X	X	X
GG	Aerospace Manufacturing and Rework Facilities	X	X	X	X
HH	Oil and Natural Gas Production Facilities	X	X	X	.....
JJ	Wood Furniture Manufacturing Operations	X	X	X	X
KK	Printing and Publishing Industry	X	X	X	X
LL	Primary Aluminum Reduction Plants	X	.....	X	.....
MM	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills.	X	X	X	.....
OO	Tanks—Level 1	X	X	X	X
PP	Containers	X	X	X	X
QQ	Surface Impoundments	X	X	X	X
RR	Individual Drain Systems	X	X	X	X
SS	Closed Vent Systems, Control Devices, Recovery Devices and Routing to a Fuel Gas System or a Process.	X	X	X	.....
TT	Equipment Leaks—Control Level 1	X	X	X	.....
UU	Equipment Leaks—Control Level 2	X	X	X	.....
VV	Oil-Water Separators and Organic-Water Separators	X	X	X	X
WW	Storage Vessels (Tanks)—Control Level 2	X	X	X	.....
XX	Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations.	X	X	X	.....
YY	Generic MACT Standards	X	X	X	.....
CCC	Steel Pickling	X	X	X	.....
DDD	Mineral Wool Production	X	X	X	.....
EEE	Hazardous Waste Combustors	X	X	X	.....
GGG	Pharmaceuticals Production	X	X	X	.....
HHH	Natural Gas Transmission and Storage Facilities	X	X	X	.....
III	Flexible Polyurethane Foam Production	X	X	X	.....
JJJ	Group IV Polymers and Resins	X	X	X	X
LLL	Portland Cement Manufacturing Industry	X	X	X	.....
MMM	Pesticide Active Ingredient Production	X	X	X	.....
NNN	Wool Fiberglass Manufacturing	X	X	X	.....
OOO	Manufacture of Amino/Phenolic Resins	X	X	X	.....
PPP	Polyether Polyols Production	X	X	X	.....
QQQ	Primary Copper Smelting	X	X	X	.....
RRR	Secondary Aluminum Production	X	X	X	.....
TTT	Primary Lead Smelting	X	X	X	.....
UUU	Petroleum Refineries: Catalytic Cracking, Catalytic Reforming, and Sulfur Recovery Units.	X	X	X	.....
VVV	Publicly Owned Treatment Works	X	X	X	.....
XXX	Ferroalloys Production	X	X	X	.....

DELEGATION STATUS FOR PART 63 STANDARDS—ARIZONA—Continued

Subpart	Description	ADEQ [1]	MCAQD [2]	PDEQ [3]	PCAQCD [4]
AAAA	Municipal Solid Waste Landfills	X	X	X	
CCCC	Manufacturing of Nutritional Yeast	X	X	X	
DDDD	Plywood and Composite Wood Products	X	X	X	
EEEE	Organic Liquids Distribution (non-gasoline)	X	X	X	
FFFF	Miscellaneous Organic Chemical Manufacturing	X	X	X	
GGGG	Solvent Extraction for Vegetable Oil Production	X	X	X	
HHHH	Wet-Formed Fiberglass Mat Production	X	X	X	
IIII	Surface Coating of Automobiles and Light-Duty Trucks	X	X		
JJJJ	Paper and Other Web Coating	X	X	X	
KKKK	Surface Coating of Metal Cans	X	X	X	
MMMM	Miscellaneous Metal Parts and Products	X	X	X	
NNNN	Large Appliances	X	X	X	
OOOO	Printing, Coating, and Dyeing of Fabrics and Other Textiles	X	X	X	
PPPP	Surface Coating of Plastic Parts and Products	X	X		
QQQQ	Wood Building Products	X	X	X	
RRRR	Surface Coating of Metal Furniture	X	X	X	
SSSS	Surface Coating of Metal Coil	X	X	X	
TTTT	Leather Finishing Operations	X	X	X	
UUUU	Cellulose Products Manufacturing	X	X	X	
VVVV	Boat Manufacturing	X	X	X	
WWWW	Reinforced Plastics Composites Production	X	X	X	
XXXX	Tire Manufacturing	X	X	X	
YYYY	Stationary Combustion Turbines	X	X	X	
ZZZZ	Stationary Reciprocating Internal Combustion Engines	X	X		
AAAAA	Lime Manufacturing Plants	X	X	X	
BBBBB	Semiconductor Manufacturing	X	X	X	
CCCCC	Coke Oven: Pushing, Quenching and Battery Stacks	X	X	X	
DDDDD	Industrial, Commercial, and Institutional Boiler and Process Heaters.	X	X		
EEEEE	Iron and Steel Foundries	X	X	X	
FFFFF	Integrated Iron and Steel	X	X	X	
GGGGG	Site Remediation	X	X	X	
HHHHH	Miscellaneous Coating Manufacturing	X	X	X	
IIIII	Mercury Emissions from Mercury Cell Chlor-Alkali Plants	X	X	X	
JJJJJ	Brick and Structural Clay Products Manufacturing	X	X	X	
KKKKK	Clay Ceramics Manufacturing	X	X	X	
LLLLL	Asphalt Roofing and Processing	X	X	X	
MMMMM	Flexible Polyurethane Foam Fabrication Operation	X	X	X	
NNNNN	Hydrochloric Acid Production	X	X	X	
PPPPP	Engine Test Cells/Stands	X	X	X	
QQQQQ	Friction Products Manufacturing	X	X	X	
RRRRR	Taconite Iron Ore Processing	X	X	X	
SSSSS	Refractory Products Manufacturing	X	X	X	
TTTTT	Primary Magnesium Refining	X	X	X	
WWWWW	Hospital Ethylene Oxide Sterilizers		X	X	
YYYYY	Area Sources: Electric Arc Furnace Steelmaking Facilities		X	X	
ZZZZZ	Iron and Steel Foundries Area Sources		X	X	
BBBBBB	Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities.		X	X	
CCCCCC	Gasoline Dispensing Facilities		X	X	
DDDDDD	Polyvinyl Chloride and Copolymers Production Area Sources		X	X	
EEEEEE	Primary Copper Smelting Area Sources		X	X	
FFFFFF	Secondary Copper Smelting Area Sources		X	X	
GGGGGG	Primary Nonferrous Metals Area Sources—Zinc, Cadmium, and Beryllium.		X	X	
HHHHHH	Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources.		X	X	
LLLLLL	Acrylic and Modacrylic Fibers Production Area Sources		X	X	
MMMMMM	Carbon Black Production Area Sources		X	X	
NNNNNN	Chemical Manufacturing Area Sources: Chromium Compounds		X	X	
OOOOOO	Flexible Polyurethane Foam Production and Fabrication Area Sources.		X	X	
PPPPPP	Lead Acid Battery Manufacturing Area Sources		X	X	
QQQQQQ	Wood Preserving Area Sources		X	X	
RRRRRR	Clay Ceramics Manufacturing Area Sources		X	X	
SSSSSS	Glass Manufacturing Area Sources		X	X	
TTTTTT	Secondary Nonferrous Metals Processing Area Sources		X	X	
WWWWWW	Area Source Standards for Plating and Polishing Operations		X		
XXXXXX	Area Source Standards for Nine Metal Fabrication and Finishing Source Categories.		X		
YYYYYY	Area Sources: Ferroalloys Production Facilities		X		

DELEGATION STATUS FOR PART 63 STANDARDS—ARIZONA—Continued

Subpart	Description	ADEQ [1]	MCAQD [2]	PDEQ [3]	PCAQCD [4]
ZZZZZZ	Area Source Standards for Aluminum, Copper, and Other Non-ferrous Foundries.	.....	X	.....	.....

[1] Arizona Department of Environmental Quality.
[2] Maricopa County Air Quality Department.
[3] Pima County Department of Environmental Quality.
[4] Pinal County Air Quality Control District.

(5) * * *

(i) * * *

(B) * * *

(*11*) Santa Barbara County Air Pollution Control District.

(*12*) Ventura County Air Pollution Control District.

(*13*) Yolo-Solano Air Quality Management District.

* * * * *

[FR Doc. 2011–6425 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–HQ–OAR–2007–0562; EPA–HQ–OAR–2010–0163; FRL–9261–3]

RIN–2060–AQ30

Additional Air Quality Designations for the 2006 24-Hour Fine Particle National Ambient Air Quality Standards, 110(k)(6) Correction and Technical Correction Related to Prior Designation, and Decisions Related to the 1997 Air Quality Designations and Classifications for the Annual Fine Particles National Ambient Air Quality Standards

Correction

In rule document 2011–2269 appearing on pages 6056–6066 in the issue of Thursday, February 3, 2011, make the following corrections:

§ 81.303 [Table Corrected]

■ 1. On page 6064, in the table for Arizona, in the last row, in the last column labeled "Type", "Unclassifiable/Attainment" should read ".....".

■ 2. On page 6065, in the table for Arizona, in the first row, in the last column labeled "Type", "Unclassifiable/Attainment" should read ".....".

[FR Doc. C1–2011–2269 Filed 3–17–11; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 98

[EPA–HQ–OAR–2011–0191; FRL–9283–7]

RIN 2060–AQ87

Final Regulation Extending the Reporting Deadline for Year 2010 Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating this final rule to extend until September 30, 2011 the reporting deadline for year 2010 data required under the Mandatory Reporting of Greenhouse Gases Rule. This deadline extension will, in the first year of the Greenhouse Gas Reporting Program, allow time for needed refinement of the electronic data reporting system, stakeholder testing of the reporting system and feedback to EPA, and reporter access to the reporting system in advance of the reporting deadline. This rule changes only the deadline for reporting for 2011; it does not change the reporting deadline for future years and does not change what data must be reported.

DATES: This final rule is effective on March 18, 2011.

ADDRESSES: *Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal 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: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9263; fax number: (202) 343–2342; e-mail address: *GHGReportingRule@EPA.gov.*

Worldwide Web (WWW). In addition to being available in the docket, an electronic pre-publication copy of this final rule will also be available through the WWW. Following the Administrator's signature, a copy of this action will be posted on EPA's greenhouse gas reporting rule Web site at *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.*

SUPPLEMENTARY INFORMATION: *Acronyms and Abbreviations.* The following acronyms and abbreviations are used in this document.

APA Administrative Procedure Act
CAA Clean Air Act
CBI Confidential Business Information
CEMS continuous emission monitoring system(s)
CFR Code of Federal Regulations
CRA Congressional Review Act
e-GGRT Electronic Greenhouse Gas Reporting Tool
EPA U.S. Environmental Protection Agency
FR Federal Register
GHG greenhouse gas
NAICS North American Industry Classification System
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
RFA Regulatory Flexibility Act
UMRA Unfunded Mandates Reform Act
U.S.C. United States Code
WWW Worldwide Web

Organization of this Document. The following outline is provided to aid in locating information in this preamble.

I. Background
II. Summary of the Final Rule
A. Facilities Affected
B. Amendment
III. Rationale for the Final Rule
IV. Need for a Final Rule
V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act (RFA)
D. Unfunded Mandates Reform Act (UMRA)
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

Does this action apply to me? The Administrator determined that this action is subject to the provisions of Clean Air Act (CAA) section 307(d). See CAA section 307(d)(1)(V) (the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine"). This action amends existing regulations. Entities affected by this action are owners or operators of facilities that are direct emitters or suppliers of greenhouse gases (GHGs) and are required to report these emissions under 40 CFR part 98 (hereinafter referred to as "reporters"), which include those listed in Table 1 of this preamble:

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	NAICS	Examples of affected facilities
General Stationary Fuel Combustion Sources.		Facilities operating boilers, process heaters, incinerators, turbines, and internal combustion engines:
	321	Manufacturers of lumber and wood products.
	322	Pulp and paper mills.
	325	Chemical manufacturers.
	324	Petroleum refineries, and manufacturers of coal products.
	316, 326, 339	Manufacturers of rubber and miscellaneous plastic products.
	331	Steel works, blast furnaces.
	332	Electroplating, plating, polishing, anodizing, and coloring.
	336	Manufacturers of motor vehicle parts and accessories.
	221	Electric, gas, and sanitary services.
	622	Health services.
	611	Educational services.
	325193	Ethyl alcohol manufacturing facilities.
	311611	Meat processing facilities.
	311411	Frozen fruit, juice, and vegetable manufacturing facilities.
	311421	Fruit and vegetable canning facilities.
Electricity Generation	221112	Fossil-fuel fired electric generating units, including units owned by Federal and municipal governments and units located in Indian Country.
Adipic Acid Production	325199	Adipic acid manufacturing facilities.
Aluminum Production	331312	Primary Aluminum production facilities.
Ammonia Manufacturing	325311	Anhydrous and aqueous ammonia manufacturing facilities.
Cement Production	327310	Portland Cement manufacturing plants.
Ferroalloy Production	331112	Ferroalloys manufacturing facilities.
Glass Production	327211	Flat glass manufacturing facilities.
	327213	Glass container manufacturing facilities.
	327212	Other pressed and blown glass and glassware manufacturing facilities.
HCFC–22 Production and HFC–23 Destruction.	325120	Chlorodifluoromethane manufacturing facilities.
Hydrogen Production	325120	Hydrogen manufacturing facilities.
Iron and Steel Production	331111	Integrated iron and steel mills, steel companies, sinter plants, blast furnaces, basic oxygen process furnace shops.
Lead Production	331419	Primary lead smelting and refining facilities.
	331492	Secondary lead smelting and refining facilities.
Lime Production	327410	Calcium oxide, calcium hydroxide, dolomitic hydrates manufacturing facilities.
Municipal Solid Waste Landfills	562212	Solid waste landfills.
	221320	Sewage treatment facilities.
Nitric Acid Production	325311	Nitric acid manufacturing facilities.
Petrochemical Production	32511	Ethylene dichloride manufacturing facilities.
	325199	Acrylonitrile, ethylene oxide, methanol manufacturing facilities.
	325110	Ethylene manufacturing facilities.
	325182	Carbon black manufacturing facilities.
Petroleum Refineries	324110	Petroleum refineries.
Phosphoric Acid Production	325312	Phosphoric acid manufacturing facilities.
Pulp and Paper Manufacturing	322110	Pulp mills.
	322121	Paper mills.
	322130	Paperboard mills.
Silicon Carbide Production	327910	Silicon carbide abrasives manufacturing facilities.
Soda Ash Manufacturing	325181	Alkalies and chlorine manufacturing facilities.
	212391	Soda ash, natural, mining and/or beneficiation.
Titanium Dioxide Production	325188	Titanium dioxide manufacturing facilities.
Zinc Production	331419	Primary zinc refining facilities.
	331492	Zinc dust reclaiming facilities, recovering from scrap and/or alloying purchased metals.
Municipal Solid Waste Landfills	562212	Solid waste landfills.
	221320	Sewage treatment facilities.
Suppliers of Coal-based Liquid Fuels	211111	Coal liquefaction at mine sites.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY—Continued

Category	NAICS	Examples of affected facilities
Suppliers of Petroleum Products	324110	Petroleum refineries.
Suppliers of Natural Gas and Natural Gas Liquids.	221210	Natural gas distribution facilities.
	211112	Natural gas liquid extraction facilities.
Suppliers of Industrial Greenhouse Gases.	325120	Industrial gas manufacturing facilities.
Suppliers of Carbon Dioxide	325120	Industrial gas manufacturing facilities.

Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. Types of facilities other than those listed in the table could also be subject to reporting requirements. To determine whether you are affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 98, subparts C through PP, excluding subparts I, J, L, M, T, W, DD, FF, II, JJ, and KK. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Judicial Review. Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by May 17, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purpose of judicial review nor does it extend the time within which petitions for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Any person seeking to submit a Petition for Reconsideration should submit it to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20004, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. This action may not be challenged later in proceedings to enforce its requirements. (*See* CAA section 307(b)(2)).

I. Background

On October 30, 2009, EPA published the Mandatory GHG Reporting Rule (40 CFR part 98) for collecting information regarding GHGs from a broad range of industry sectors (74 FR 56260). Under 40 CFR part 98 (hereinafter referred to as "Part 98") and its subsequent amendments, EPA is collecting data from certain facilities and suppliers. The data to be reported consists of GHG emissions information as well as other data, including information necessary to characterize, quantify, and verify the reported emissions. For reporters required to submit 2010 GHG data under Part 98, the original reporting deadline was March 31, 2011.

As explained in the preamble to the 2009 reporting rule, the GHG Reporting Program requires electronic reporting through a centralized data system (40 CFR 98.5). Electronic reporting facilitates efficient and effective review of the large volume of data anticipated to be reported. The data system, called the Electronic Greenhouse Gas Reporting Tool (e-GGRT), guides reporters through registration and provides an option for reporting using step-by-step Web forms or through bulk transmission of data using a standard extensible markup language (XML) format. Development of the reporting tool has involved translating the detailed industry-specific reporting requirements of Part 98 into a user-friendly software program. The registration module of the tool has been available since December 2010. EPA has been developing the subpart reporting modules since the final requirements for Part 98 were issued.

Since the final rule establishing Part 98 was published in October 2009, we have published several rule amendments. These include addition of facility- and parent-level reporting requirements (75 FR 57669, September 22, 2010); technical corrections and other amendments (75 FR 66434, October 28, 2010); changes partially in response to petitions for review and reconsideration (75 FR 79092, December 17, 2010); and interim changes in response to industry concerns about potential public availability of sensitive data (75 FR 81338, December 27, 2010). Though e-GGRT development began in 2009, each amendment or addition to the Part 98 reporting requirements has also necessitated changes to the data reporting system.

In the preamble to Part 98, we described our intention to make the electronic reporting system, along with training and instructional materials, available to reporters before the reporting deadline. (*See, e.g.,* 74 FR 56282.) This would allow those reporters to become familiar with the tool, to request any needed guidance from EPA, and to receive EPA guidance and training in advance of the reporting deadline, as occurred with the registration module released in December 2010. In the preamble to Part 98, we also described our intention to engage stakeholders in testing of the data reporting system (*see, e.g.,* 74 FR 56358), which would allow EPA to use stakeholder feedback to refine the final version of the reporting system.

To that end, EPA is issuing this final rule extending the Part 98 reporting deadline in the first year of the reporting program to allow time for needed data system refinement, stakeholder testing of the data system and feedback to EPA, and reporter access to e-GGRT in advance of the reporting deadline.

II. Summary of the Final Rule

A. Reporters Affected

This action affects only reporters that are subject to the source category-specific reporting requirements in 40 CFR part 98, subparts C through PP, excluding subparts I, J, L, M, T, W, DD, FF, II, JJ, and KK. This includes only reporters covered by the Part 98 subparts published on October 30, 2009, which require these facilities and suppliers to begin monitoring emissions on January 1, 2010 and to submit their first annual GHG report (covering calendar year 2010 emissions) by March 31, 2011. The list of affected source categories is provided in Table 2 of this preamble.[1]

[1] Certain source categories were revised in an action published on Dec. 17, 2010 (75 FR 79092).

TABLE 2—SOURCE CATEGORIES COVERED BY THIS ACTION

Source category	40 CFR part 98 subpart	**Federal Register** notice
General Stationary Fuel Combustion Sources	C	74 FR 56260, 75 FR 79092.
Electricity Generation	D	74 FR 56260, 75 FR 79092.
Adipic Acid Production	E	74 FR 56260, 75 FR 66434.
Aluminum Production	F	74 FR 56260, 75 FR 79092.
Ammonia Manufacturing	G	74 FR 56260, 75 FR 79092.
Cement Production	H	74 FR 56260, 75 FR 66434.
Ferroalloy Production	K	74 FR 56260, 75 FR 66434.
Glass Production	N	74 FR 56260, 75 FR 66434.
HCFC–22 Production and HFC–23 Destruction	O	74 FR 56260, 75 FR 66434.
Hydrogen Production	P	74 FR 56260, 75 FR 66434, 75 FR 79092.
Iron and Steel Production	Q	74 FR 56260, 75 FR 66434.
Lead Production	R	74 FR 56260.
Lime Manufacturing	S	74 FR 56260, 75 FR 66434.
Miscellaneous Uses of Carbonate	U	74 FR 56260.
Nitric Acid Production	V	74 FR 56260, 75 FR 66434, 75 FR 79092.
Petrochemical Production	X	74 FR 56260, 75 FR 79092.
Petroleum Refineries	Y	74 FR 56260, 75 FR 79092.
Phosphoric Acid Production	Z	74 FR 56260, 75 FR 66434.
Pulp and Paper Manufacturing	AA	74 FR 56260, 75 FR 79092.
Silicon Carbide Production	BB	74 FR 56260.
Soda Ash Manufacturing	CC	74 FR 56260, 75 FR 66434.
Titanium Dioxide Production	EE	74 FR 56260, 75 FR 66434.
Zinc Production	GG	74 FR 56260, 75 FR 66434.
Municipal Solid Waste Landfills	HH	74 FR 56260, 75 FR 66434.
Suppliers of Coal-based Liquid Fuels	LL	74 FR 56260.
Suppliers of Petroleum Products	MM	74 FR 56260, 75 FR 66434.
Suppliers of Natural Gas and Natural Gas Liquids	NN	74 FR 56260, 75 FR 66434, 75 FR 79092.
Suppliers of Industrial Greenhouse Gases	OO	74 FR 56260, 75 FR 79092.
Suppliers of Carbon Dioxide	PP	74 FR 56260, 75 FR 79092.

B. Amendment

This amendment to Part 98 extends the regulatory deadline for reporters to report their 2010 GHG data from the current regulatory deadline of March 31, 2011 until September 30, 2011. This deadline extension includes the reporting deadline for those data elements used as inputs to emission equations, which was deferred in the Interim Final Regulation Deferring the Reporting Date for Certain Data Elements Required Under the Mandatory Reporting of Greenhouse Gases Rule (75 FR 81338, December 27, 2010). Because the regulatory deadline for reporters of 2010 GHG data to register in e-GGRT by submitting a certificate of representation is at least 60 days before the reporting deadline (40 CFR 98.4(d)), this reporting deadline extension also has the effect of extending the registration deadline to at least 60 days before September 30, 2011. This rule also corrects a typographical error in 40 CFR part 98.3 by redesignating the second paragraph (c)(4)(vi) as paragraph (c)(4)(viii). This final rule does not change any other requirements of Part 98 or extend the reporting deadline for future years.

III. Rationale for the Final Rule

EPA has determined that an extension of the deadline for reporting 2010 GHG data under Part 98 is necessary to help successfully implement the reporting tool and improve reporting and data quality in the first year of the program. EPA deems this reporting deadline extension necessary to allow EPA to test and refine e-GGRT more extensively; give stakeholders the opportunity to test the tool and provide feedback to EPA, allowing us to further refine the tool and better tailor our training and outreach; and give reporters time to become familiar with the tool in advance of the reporting deadline, improving their reporting experience and the quality of the reported data.

IV. Need for a Final Rule

EPA is issuing this final rule under section 307(d)(1) of the Clean Air Act, which states: "The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5." Consistent with this language, EPA is using the good cause exemption under the Administrative Procedure Act (APA) to take the actions set forth in this final rule without prior notice and comment. *See* 5 U.S.C. 553(b)(B). Section 553(b) of the APA generally requires that any rule to which it applies be issued only after the public has received notice of, and had an opportunity to comment on, the proposed rule. However, APA section 553(b)(B) exempts from those requirements any rule for which the issuing agency for good cause finds that providing prior notice and comment would be impracticable, unnecessary, or contrary to the public interest. Thus, any rule for which EPA makes such a finding is exempt from the notice and comment requirements of APA section 553(b).

As explained below, EPA finds good cause to take the actions set forth in this final rule without prior notice and comment because providing prior notice and comment would be impracticable, unnecessary, and contrary to the public interest. Notice and comment on this short deadline extension are impracticable, as EPA likely would not be able to complete a notice and comment rulemaking for a deadline extension before the original March 31, 2011 reporting deadline, thus defeating the purpose of undertaking such a rulemaking. As described in Section I of

this preamble, EPA deems it important to engage stakeholders in testing the Part 98 data reporting system and to use their feedback to refine the system prior to the system's public release. Also as described above, EPA also deems it important to improve the reporting experience and data quality by giving reporters access to the reporting tool far enough in advance of the first year's reporting deadline for reporters to become familiar with the tool and for EPA to tailor outreach and training based on their questions and feedback. The changes to the reporting system required by the various additions and amendments to Part 98, listed in Section I of this preamble, cumulatively prevented EPA from developing the reporting tool in time to complete these activities in advance of the original reporting date. These cumulative effects did not become apparent in time for EPA to extend the reporting deadline through a notice and comment rulemaking process, making that process impracticable and necessitating this final rule. Additionally, in January and February 2011, EPA received far more requests for assistance with registration in e-GGRT, required for all reporters in advance of reporting, than had been expected. The number and diversity of requests for clarification or assistance with registration are strong evidence of the necessity of stakeholder testing and advanced reporter familiarity with the reporting system that only recently came to light.

Further, given the short period of time that this final rule will extend the reporting deadline, and the fact that this rule will extend the deadline only for 2010 data, EPA considers soliciting public comment on this final rule to be unnecessary. This final rule simply provides the Agency with brief additional time to engage stakeholders in testing, incorporate feedback, and make final improvements to the Part 98 electronic reporting tool, as well as to give reporters time to become familiar with the tool in advance of the reporting deadline in the first year of the program. EPA's intent to publish non-confidential 2010 data by the end of 2011 remains unchanged.

EPA also considers soliciting public comment on this final rule, which likely would prevent the rule from being finalized in time to extend the reporting deadline by March 31, 2011, to be contrary to the public interest. EPA is briefly extending the deadline for reporting 2010 data to allow EPA to solicit additional stakeholder feedback and make final improvements to the electronic data reporting tool that are important to the success of the reporting program. These adjustments will improve the tool, improve user experience with the tool and with the reporting program, and ultimately provide higher quality greenhouse gas emissions data to EPA and to the public. Further, even if EPA could complete a notice and comment deadline extension before March 31, 2011, the risk that we would not be able to complete such a rulemaking before the original reporting deadline would create regulatory uncertainty. EPA thus finds good cause to briefly extend the reporting deadline without notice and comment.

EPA is also using the APA's good cause exemption to make this final rule effective on March 18, 2011. *See* 5 U.S.C. 553(d)(3). Section 553(d) of the APA, 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register.** EPA is issuing this final rule under CAA section 307(d)(1), which states: "The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies." Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the purposes underlying APA section 553(d) in making this rule effective on March 18, 2011.

Section 553(d)(3) of the APA allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." As explained below, EPA finds that there is good cause for this rule to become effective on March 18, 2011, even though this results in an effective date fewer than 30 days from date of publication in the **Federal Register**.

The purpose of the 30-day waiting period prescribed in APA section 553(d) is to give affected parties a reasonable time period to adjust their behavior and prepare before the final rule takes effect. This final rule extends a reporting deadline, requiring little preparation or behavior adjustment. A shorter effective date in such circumstances is consistent with the purposes of APA section 553(d), which provides an exception for any action that grants or recognizes an exemption or relieves a restriction. Further, APA section 553(d)(3) provides that if the issuing agency has made a finding of good cause and published its reasoning with the rule, the rule may take effect sooner than 30 days. EPA has determined that good cause exists to extend the reporting deadline for 2010 data until September 30, 2011 in this final rule without prior notice and comment, because prior notice and comment would be impracticable, unnecessary, and contrary to the public interest for the reasons stated above. Accordingly, we find that good cause exists to make this rule effective on March 18, 2011, consistent with the purposes of APA section 553(d)(3).

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This final rule extends the reporting deadline for 2010 data, so it does not increase the reporting burden. However, OMB has previously approved the information collection requirements contained in the regulations promulgated on October 30, 2009, under 40 CFR part 98 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0629. EPA has also submitted the Information Collection Request requirements for four additional Part 98 subparts promulgated on July 12, 2010 to OMB for approval (*see* 75 FR 39756). The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

The 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 effects 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. The rule will not impose any new requirements on small entities that are not currently required by Part 98.

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

The amendment to 40 CFR part 98 does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The amendment only postpones the reporting date for 2010 data under Part 98, so it does not increase the costs for facilities to comply with Part 98. Thus, the action is not subject to the requirements of sections 202 or 205 of UMRA.

In developing Part 98, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address effects of regulatory requirements in the rule that might significantly or uniquely affect small governments. For a summary of EPA's consultations with State and/or local officials or other representatives of State and/or local governments in developing Part 98, see Section VIII.D of the preamble to the final rule (74 FR 56370, October 30, 2009).

E. Executive Order 13132: Federalism

This action 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. However, for a more detailed discussion about how Part 98 relates to existing State programs, please see Section II of the preamble to the final rule (74 FR 56266, October 30, 2009).

This amendment applies to facilities that emit or supply greenhouses gases. It does not apply to government entities unless a government entity owns a facility that directly emits greenhouse gases above threshold levels (such as a landfill), so relatively few government facilities would be affected. This regulation also does not limit the power of States or localities to collect GHG data and/or regulate GHG emissions. Thus, Executive Order 13132 does not apply to this action. For a summary of EPA's consultation with State and local organizations and representatives in developing Part 98, *see* Section VIII.E of the preamble to the final rule (74 FR 56371, October 30, 2009).

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 rule does not result in any changes to the requirements of Part 98 other than postponing the reporting deadline for 2010 GHG data until September 30, 2011. Thus, Executive Order 13175 does not apply to this action. For a summary of EPA's consultations with tribal governments and representatives, *see* section VIII.F of the preamble to the final rule (74 FR 56371, October 30, 2009).

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

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 (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. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The rule does not involve technical standards. Therefore, EPA is not considering 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, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The amendment addresses only reporting procedures.

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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice

and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated above, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of March 18, 2011. 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. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 98

Environmental protection, Administrative practice and procedure, Greenhouse gases, Reporting and recordkeeping requirements.

Dated: March 11, 2011.

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 98—[AMENDED]

■ 1. The authority citation for part 98 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

■ 2. Section 98.3 is amended by:
■ a. Revising paragraph (b) introductory text.
■ b. Redesignating the second paragraph (c)(4)(vi) as paragraph (c)(4)(viii).
■ c. Revising paragraph (c)(4)(vii).
■ d. Revising paragraph (d)(3) introductory text.

§ 98.3 What are the general monitoring, reporting, recordkeeping and verification requirements of this part?

* * * * *

(b) *Schedule.* The annual GHG report for reporting year 2010 must be submitted no later than September 30, 2011. The annual report for reporting years 2011 and beyond must be submitted no later than March 31 of each calendar year for GHG emissions in the previous calendar year. As an example, for a facility or supplier that is subject to the rule in calendar year 2011, the annual report must be submitted on March 31, 2012.

* * * * *

(c) * * *

(4) * * *

(vii) The owner or operator of a facility is not required to report the data elements specified in Table A–6 of this subpart for calendar year 2010 until September 30, 2011.

* * * * *

(d) * * *

(3) *Abbreviated emissions report for facilities containing only general stationary fuel combustion sources.* In lieu of the report required by paragraph (c) of this section, the owner or operator of an existing facility that is in operation on January 1, 2010 and that meets the conditions of § 98.2(a)(3) may submit an abbreviated GHG report for the facility for GHGs emitted in 2010. The abbreviated report must be submitted by September 30, 2011. An owner or operator that submits an abbreviated report must submit a full GHG report according to the requirements of paragraph (c) of this section beginning in calendar year 2012. The abbreviated facility report must include the following information:

* * * * *

■ 3. Table A–6 to subpart A of part 98 is amended by revising the heading to read as follows:

Table A–6 to Subpart A of Part 98—Data Elements That Are Inputs to Emission Equations and for Which the Reporting Deadline Is Changed to September 30, 2011

* * * * *

[FR Doc. 2011–6417 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 16

Chemical Testing

CFR Correction

In Title 46 of the Code of Federal Regulations, Parts 1 to 40, revised as of October 1, 2010, on page 254, in § 16.105, in the definition of *Crewmember,* remove the second paragraph (1) and the second introductory paragraph (2).

[FR Doc. 2011–6524 Filed 3–17–11; 8:45 am]

BILLING CODE 1505–01–D

Proposed Rules

Federal Register
Vol. 76, No. 53
Friday, March 18, 2011

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM450; Special Conditions No. 25–11–08–SC]

Special Conditions: Boeing Model 747–8 Series Airplanes; Stairway Between the Main Deck and Upper Deck

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This notice proposes special conditions for the Boeing Model 747–8 airplane. This airplane will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These design features include a stairway between the main deck and upper deck. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards. Additional special conditions will be issued for other novel or unusual design features of the Boeing 747–8 airplanes.

DATES: Comments must be received on or before May 2, 2011.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM–113), Docket No. NM450, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; or delivered in duplicate to the Transport Airplane Directorate at the above address. All comments must be marked Docket No. NMXX. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Jayson Claar, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2194; facsimile (425) 227–1232.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive as well as a report summarizing each substantive public contact with FAA personnel concerning these proposed special conditions. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this notice between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change the proposed special conditions based on comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On November 4, 2005, The Boeing Company, PO Box 3707, Seattle, WA, 98124, applied for an amendment to Type Certificate Number A20WE to include the new Model 747–8 series passenger airplane. The Model 747–8 is a derivative of the 747–400. The Model 747–8 is a four-engine jet transport airplane that will have a maximum takeoff weight of 975,000 pounds, new General Electric GEnx –2B67 engines, and the capacity to carry 605 passengers.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.101, Boeing must show that the Model 747–8 (hereafter referred as 747–8) meets the applicable provisions of part 25, Amendments 25–1 through 25–120, plus amendment 25–127 for § 25.795(a), except for earlier amendments as agreed upon by the FAA. These regulations will be incorporated into Type Certificate No. A20WE after type certification approval of the 747–8.

In addition, the certification basis includes other regulations, special conditions and exemptions that are not relevant to these proposed special conditions. Type Certificate No. A20WE will be updated to include a complete description of the certification basis for these airplanes.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the 747–8 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model or series that incorporates the same or similar novel or unusual design feature, or should any other model or series already included on the same type certificate be modified to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model or series under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the 747–8 must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in § 11.19, are issued under § 11.38, and become part of the type certification basis under § 21.101.

New or Unusual Design Features

The Boeing Model 747–8 will incorporate the following novel or unusual design features: The 747–8 design offers seating capacity on two separate decks: The main deck with a maximum passenger capacity of 495 and the upper deck with a maximum

passenger capacity of 110. Occupants can move between decks via a staircase located near door 2 on the main deck of the airplane in the forward part of the cabin. With large seating capacities on the main deck and upper deck of the 747–8, the stairway must be designed to support evacuation between decks of the airplane in an in-flight emergency.

Discussion

The regulations governing the certification of the 747–8 do not adequately address the certification requirements for a two-deck passenger airplane. The Airbus A380–800 and all of the earlier Boeing 747 passenger airplane models were certified with seating capacity on two separate decks. When the seating capacity of the upper deck of the Boeing 747 exceeded 24 passengers, the FAA issued Special Condition No. 25–61–NW–1 for a maximum seat capacity of 32 passengers on the upper deck for take-off and landing. A second set of special conditions, Special Condition No. 25–71–NW–3, was issued to include airplanes up to a maximum seating capacity of 45 passengers on the upper deck for take-off and landing. The second set of special conditions was modified to address airplanes with a maximum seating capacity of 110 passengers on the upper deck for take-off and landing. Special Conditions No. 25–326–SC for the Airbus A380–800 allowed a seating capacity on two separate decks: The main deck with a maximum passenger capacity of 542 and the upper deck with a maximum passenger capacity of 308. Although these previously issued special conditions for the A380–800 provided a starting point for developing the 747–8 special conditions, the proposed 747–8 special conditions are specific to the unique aspects of this airplane's design.

The regulations do not adequately address a passenger airplane with separate decks for passenger occupancy, thus the FAA considers this to be a novel design. Therefore, the FAA is proposing that special conditions, in addition to the requirements of §§ 25.803 and 25.811 through 25.813, are required to address the proposed design.

Applicability

As discussed above, these proposed special conditions are applicable to Boeing Model 747–8 airplanes. Should Boeing apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, these proposed special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features of the Boeing Model 747–8 airplane. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these Special Conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Boeing 747–8 airplanes.

1. The stairway must have essentially straight route segments with a landing at each significant change in segment direction.

2. The stairway must have essentially rectangular treads.

3. With the airplane in level attitude and in each attitude resulting from the collapse of one or more legs of the landing gear, the stairway must have entrance, exit, and gradient characteristics that allow the upper deck passengers, with assistance from a crewmember, to merge with passengers on the main deck during an emergency evacuation and exit the airplane through a main deck exit. This must be shown by demonstration, tests, analysis, or any combination thereof.

4. The stairway must accommodate the carriage of an incapacitated occupant from the upper deck to the main deck. The crewmember procedures for such carriage must be established and included in the airplane flight manual.

5. The stairway must be located to provide occupants an adequate descent rate under probable emergency conditions, including a condition in which an occupant falls or is incapacitated while on the stairway.

6. The stairway must be designed and located to minimize damage to its structure during an emergency landing or ditching.

7. General illumination must be provided so, when measured along the center lines of each tread and landing, the illumination is not less than 0.05 foot-candle. This is in lieu of compliance with § 25.812(c), at Amendment 25–116.

8. Means must be provided to assist passengers in locating the stairway in dense smoke conditions as part of compliance with § 25.811(c), at Amendment 25–88.

9. An emergency exit sign meeting § 25.812(b)(1)(i), at Amendment 25–116, must be provided in the upper deck near the stairway visible to passengers approaching along the main aisle as required by § 25.811(d)(1), at Amendment 25–88.

10. Floor proximity lighting required by § 25.812(e), at Amendment 25–120, must be provided along the stairs.

11. When passengers occupy the upper deck, at least one flight attendant must also be present during taxi, take-off, and landing.

12. The stairway must have a handrail on at least one side to allow occupants to steady themselves during foreseeable conditions, including but not limited to, gear collapse on the ground and moderate turbulence in flight. The handrail(s) must be constructed so there is no obstruction on them that will cause the user to release his/her grip or hinder the continuous movement of the hands along the handrail. Handrail(s) must be terminated in a manner that will not interfere with occupants walking by or create a hazard (such as catching clothing). Boeing must demonstrate that the design can accommodate the stature of a fifth percentile female and a ninety-fifth percentile male.

13. The public address system must be intelligible in the stairway during all flight phases.

14. "No smoking" and "return to seat" signs must be installed and visible in the stairway both going up and down and at the stairway entrances.

Issued in Renton, Washington, on March 9, 2011.

K.C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–6340 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1232; Airspace Docket No. 10–AEA–28]

Proposed Amendment of Class E Airspace; Waynesboro, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to Amend Class E Airspace at Waynesboro,

VA, to accommodate new Standard Instrument Approach Procedures (SIAPs) developed for Eagle's Nest Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: 0901 UTC. Comments must be received on or before May 2, 2011. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA, Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U. S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2010–1232; Airspace Docket No. 10–AEA–28, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2010–1232; Airspace Docket No. 10–AEA–28) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Annotators wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2010–1232; Airspace Docket No. 10–AEA–28." The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

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

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to create additional Class E airspace at Waynesboro, VA to accommodate new standard instrument approach procedures developed for Eagle's Nest Airport. Class E airspace extending upward from 700 feet above the surface would be established for the safety and management of IFR operations.

Class E airspace designations are published in Paragraph 6005 of FAA order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (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); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish additional airspace for the Waynesboro, VA Class E airspace area.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AEA VA E5 Waynesboro, VA [Amended]

Eagle's Nest Airport, VA
(Lat. 38°04′37.486″ N., long. 78°56′39.089″ W.)

That airspace extending upward from 700 feet above the surface within a 6.2 mile radius of Eagle's Nest Airport and within 2 miles either side of the 052° course to the airport and extending from the 6.2-mile radius to 15.1 miles southwest of the airport and within 2 miles either side of the 232° course to the airport and extending from the 6.2-mile radius to 15.1 miles northeast of the airport.

Issued in College Park, Georgia, on March 7, 2011.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–6351 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1285; Airspace Docket No. 10–AEA–27]

Proposed Amendment of Class E Airspace; Staunton, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Shenandoah Valley Regional Airport, Staunton, VA. The Bridgewater Non-Directional Beacon (NDB) has been decommissioned and new Standard Instrument Approach Procedures have been developed for the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: 0901 UTC. Comments must be received on or before May 2, 2011.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2010–1285; Airspace Docket No. 10–AEA–27, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Comments should identify both docket numbers (FAA Docket No. FAA–2010–1285; Airspace Docket No. 10–AEA–27) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Annotators wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2010–1285; Airspace Docket No. 10–AEA–27." The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

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

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

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to amend Class E airspace extending upward from 700 feet above the surface at Shenandoah Valley Regional Airport, Staunton, VA, to provide controlled airspace required to support new standard instrument approach procedures for Shenandoah Valley Regional Airport. This action is necessary for the safety and management of IFR operations at the airport.

Class E airspace designations are published in Paragraph 6005 of FAA order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (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); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would amend Class E airspace at Shenandoah Regional Valley Airport, Staunton, VA.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 feet or More Above the Surface of the Earth.

* * * * *

AEA VA E5 Staunton, VA

Shenandoah Valley Regional Airport, VA
(Lat. 38°15′50″ N., long. 78°53′47″ W.)
Bridgewater Air Park, VA
(Lat 38°22′00″ N., long 78°57′37″ W.)

That airspace extending upward from 700 feet above the surface within a 7.6-mile radius of the Shenandoah Valley Regional Airport and within 4 miles either side of the 038° course to the airport extending from the 7.6-mile radius to 16.4 miles southwest of the airport and within 4 miles either side of the 218° course to the airport extending from the 7.6-mile radius to 13.5 miles northeast of the airport and within a 8.3-mile radius of the Bridgewater Air Park and within 4 miles either side of the 323° course to the airport extending from the 8.3-mile radius to 11.6 miles southeast of the airport and within 1.5 miles either side of the 158° course to the airport extending from the 8.3-mile radius to 10 miles northwest of the airport.

Issued in College Park, Georgia, on March 9, 2011.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–6328 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0160; Airspace Docket No. 11–AEA–05]

Proposed Establishment of Class E Airspace; Kenbridge, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E Airspace at Kenbridge, VA, to accommodate the additional airspace needed for the Standard Instrument Approach Procedures (SIAPs) developed for Lunenburg County Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: 0901 UTC. Comments must be received on or before May 2, 2011.

ADDRESSES: Send comments on this rule to: U. S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., Washington, DC 20590–0001; *Telephone:* 1–800–647–5527; *Fax:* 202–493–2251. You must identify the Docket Number FAA–2011–0160; Airspace Docket No. 11–AEA–05, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Richard Horrocks, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5588.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2011–0160; Airspace Docket No. 11–AEA–05) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2011–0160; Airspace Docket No. 11–AEA–05." The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

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

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace at Kenbridge, VA to provide controlled airspace required to support the SIAPs developed for Lunenburg County Airport. Class E airspace extending upward from 700 feet above the surface would be established for the safety and management of IFR operations.

Class E airspace designations are published in Paragraph 6005 of FAA order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (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); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish Class E airspace at Lunenburg County Airport, Kenbridge, VA.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AEA VA E5 Kenbridge, VA [NEW]

Lunenburg County Airport, VA
(Lat. 36°57′37″ N., long. 78°11′06″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of the Lunenburg County Airport and within 4 miles each side of the 024° bearing from the airport extending from the 6.8 mile radius to 8.8 miles NE of the airport and within 4 miles each side of the 204° bearing extending from the 6.8 mile radius to 10 miles southwest of the airport.

Issued in College Park, Georgia, on March 8, 2011.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–6330 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0116; Airspace Docket No. 11–ANE–1]

Proposed Establishment of Class E Airspace; Brunswick, ME

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E Airspace at Brunswick, ME, to accommodate new Standard Instrument Approach Procedures developed for Brunswick Executive Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: 0901 UTC. Comments must be received on or before May 2, 2011.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2011–0116; Airspace Docket No. 11–ANE–01, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2011–0116; Airspace Docket No. 11–ANE–1) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Annotators wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2011–0116; Airspace Docket No. 11–ANE–1." The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed

in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

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

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace at Brunswick, ME to provide airspace required to support the standard instrument approach procedures developed for the new Brunswick Executive Airport (BXM).The Brunswick Executive Airport uses the same facilities as the former Brunswick Naval Air Station (NAS). This Class E airspace, therefore, covers largely the same airspace encompassed by the controlled airspace area that was defined for the former Brunswick NAS and was removed in September 2010 upon closure of the NAS. See, 75 FR 57848, Docket No. FAA–2010–0248. This new Class E airspace extending upward from 700 feet above the surface would be established for the safety and management of IFR operations conducted to and from the new BXM airport and the new standard instrument approach procedures (SIAPs) developed for that airport.

Class E airspace designations are published in Paragraph 6005 of FAA order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (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); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish Class E airspace at Brunswick Executive Airport, Brunswick, ME.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ANE ME E5 Brunswick, ME [NEW]

Brunswick Executive Airport, ME
(Lat. 43°53′33″ N., long. 69°56′20″ W.)

That airspace extending upward from 700 feet above the surface within an 8 mile radius of the Brunswick Executive Airport.

Issued in College Park, Georgia, on March 10, 2011.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–6343 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 16, and 38

RIN 3038–AD09

Core Principles and Other Requirements for Designated Contact Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is extending the comment period for proposed regulation 38.502(a) ("Minimum Centralized Market Trading Percentage Requirement"), in light of the recent public release of the off-market volume data referenced by the Commission in the **Federal Register** release for the notice of proposed rulemaking for "Core Principles and Other Requirements for Designated Contract Markets", 75 FR 80572 (Dec. 22, 2010). The comment period is being extended for this regulation to permit interested persons to submit comments on off-market volume data that has recently been made available to the public and to which the Commission referred in its notice of proposed rulemaking.

DATES: Submit comments on or before April 18, 2011.

ADDRESSES: You may submit comments, identified by RIN number, by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.Regulations.gov.* Follow the instructions for submitting comments.

Please submit comments by only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act ("FOIA"), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

FOR FURTHER INFORMATION CONTACT: Nancy Markowitz, Assistant Deputy Director, 202–418–5453, *nmarkowitz@cftc.gov*, or Nadia Zakir, Attorney-Advisor, 202–418–5720, *nzakir@cftc.gov,* Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION: On December 22, 2010, the Commission published in the **Federal Register** a notice of proposed rulemaking, in which it proposed rules, guidance, and acceptable practices, to be applicable to the designation and operation of contract markets, as well as the listing, trading, and execution of swaps on designated contract markets.[2] The notice of proposed rulemaking would implement certain provisions of sections 723, 733, and 735 of the Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The comment period for the proposed rulemaking closed on February 22, 2011.

Since the close of the proposed rulemaking, data has been made publicly available to support the rulemaking, in particular, proposed § 38.502(a), the proposed "minimum centralized market trading percentage requirement." Discussion of this proposed requirement is available in the notice of proposed rulemaking at pages 80588 and 80589 of the **Federal Register** publication. The data has been made available on the Commission's Web site at *http://comments.cftc.gov/FederalRegister/Proposed.aspx?Type=ListAll&Year=2010*, the same location as the Commission's notice of proposed rulemaking. All persons wishing to comment on proposed regulation 38.502(a) ("Minimum Centralized Market Trading Percentage Requirement"), in light of the data that has been made available may do so by submitting comments using one of the methods provided above through April 18, 2011.

Issued in Washington, DC, on March 14, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2011–6382 Filed 3–17–11; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

RIN 3038–AD26

Antidisruptive Practices Authority

AGENCY: Commodity Futures Trading Commission.

ACTION: Advance notice of proposed rulemaking; notice of termination.

SUMMARY: On November 2, 2010, the Commodity Futures Trading Commission ("Commission") issued in the **Federal Register** an advance notice of proposed rulemaking ("ANPR"). In this ANPR, the Commission requested public comment to assist it with promulgating rules and regulations to implement the disruptive practices set forth in section 4c(a) of the Commodity Exchange Act ("CEA"), as amended by section 747 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). After considering the comments that were submitted in response to the ANPR, the Commission decided not to issue any regulations at this time relating to new section 4c(a). Instead, the Commission is publishing today elsewhere in the **Federal Register** a proposed order interpreting new section 4c(a)(5). The Commission is also terminating the ANPR issued on November 2, 2010.

DATES: Effective March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Robert Pease, Counsel to the Director of Enforcement, 202–418–5863, *rpease@cftc.gov;* Steven E. Seitz, Attorney, Office of the General Counsel, 202–418–5615, *sseitz@cftc.gov;* or Mark D. Higgins, Counsel to the Director of Enforcement, 202–418–5864, *mhiggins@cftc.gov,* Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION: On July 21, 2010, President Obama signed the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act [2] amended the Commodity Exchange Act ("CEA") [3] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight. Section 747 of the Dodd-Frank Act amends section 4c(a) of the CEA to add a new section entitled "Disruptive Practices."

[1] Commission regulations referred to herein are found at 17 CFR Ch. 1 (2010). They are accessible on the Commission's Web site at *http://www.cftc.gov.*

[2] *See Core Principles and Other Requirements for Designated Contract Markets,* 75 FR 80572, 80588–89, Dec. 22, 2010.

[1] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[3] 7 U.S.C. 1 *et seq.* (2006).

New section 4c(a) expressly prohibits certain trading practices that are disruptive of fair and equitable trading. New section 4c(a) of the CEA makes it unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—

(A) Violates bids or offers;
(B) Demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or
(C) Is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).

Section 747 of the Dodd-Frank Act also amended section 4c(a) by granting the Commission authority to promulgate such "rules and regulations as, in the judgment of the Commission, are reasonably necessary to prohibit the trading practices" enumerated in section 747 "and any other trading practice that is disruptive of fair and equitable trading." The prohibition on the disruptive practices specified in new section 4c(a) will become effective 360 days after the enactment of the Dodd-Frank Act.

On November 2, 2010, the Commission issued an ANPR inviting public comment on all aspects of section 747 of the Dodd-Frank Act.[4] After reviewing the ANPR comments that were submitted, the Commission determined that it should address the disruptive practices by issuing a proposed order interpreting new CEA section 4c(a). Accordingly, this document terminates the ANPR issued on November 2, 2010. The proposed interpretive order referenced above, which incorporates the ANPR comments, is being published today elsewhere in the notice section of the **Federal Register**.

This proposed interpretive order will provide market participants and the public with guidance on the scope of the three statutory disruptive practices set forth in new CEA section 4c(a).

Issued in Washington, DC, on March 14, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2011–6399 Filed 3–17–11; 8:45 am]

BILLING CODE 6351–01–P

[4] *Anti-Disruptive Trading Practices Authority Contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act,* 75 FR 211, Nov. 2, 2010.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–153338–09]

RIN 1545–BJ19

Disclosure of Returns and Return Information to Designee of Taxpayer

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains a proposed regulation pertaining to the period for submission to the IRS of taxpayer authorizations permitting disclosure of returns and return information to third-party designees. Specifically, the proposed regulation extends from 60 days to 120 days the period within which a signed and dated authorization must be received by the IRS (or an agent or contractor of the IRS) in order for it to be effective. The proposed regulation extends the period as some institutions charged with assisting taxpayers in their financial dealings have encountered difficulty in obtaining written authorizations and submitting the authorizations within the 60-day period allowed by the existing regulations. The proposed regulation will affect taxpayers who submit authorizations permitting disclosure of returns and return information to third-party designees. This document also provides notice of a public hearing on the proposed regulation.

DATES: Written or electronic comments must be received by May 17, 2011. Outlines of topics to be discussed at the public hearing scheduled for Thursday, June 9, 2011 at 10 a.m. must be received by Wednesday, May 18, 2011.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–153338–09), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–153338–09), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–153338–09). The public hearing will be held in Auditorium, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulation, contact Amy Mielke, (202) 622–4570; concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this proposed regulation has been previously approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1816.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books and records relating to the collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301). Section 6103(c) of the Internal Revenue Code (Code) authorizes the IRS (or an agent or contractor of the IRS) to disclose returns and return information to such person or persons as the taxpayer may designate in a request for or consent to disclosure. The proposed regulation amends § 301.6103(c)–1 by extending the period for submission to the IRS of taxpayer authorizations permitting disclosure of returns and return information to designees of a taxpayer. Specifically, the proposed regulation extends from 60 days to 120 days the period within which a signed and dated authorization must be received by the IRS (or an agent or contractor of the IRS) in order for it to be effective.

On December 18, 2009, the IRS published Notice 2010–8, 2010–3 IRB 297, which announced an intention to amend the regulation under § 301.6103(c)–1 to expand the time frame for submission of section 6103(c) authorizations. The notice additionally announced interim rules extending from 60 days to 120 days the period within which section 6103(c) authorizations must be received in order to be effective. The interim rules apply to authorizations signed and dated on or after October 19, 2009. Per Notice 2010–

8, the interim rules remain in effect until promulgation of a final regulation under section 6103(c). *See* § 601.601(d)(2)(ii)(*d*).

Explanation of Provisions

The IRS recognizes the importance of limiting the effective period of authorizations provided pursuant to section 6103(c). Reasonable limitation on the effective period of written authorizations helps ensure the currency of the authorization and protects taxpayer privacy. The 60-day period allowed by the existing regulation, however, has proven problematic. Some institutions charged with assisting taxpayers in their financial dealings have encountered difficulty in obtaining written authorizations and submitting the authorizations to the IRS within the 60 days allowed by the existing regulation. To reduce the burden on taxpayers and the institutions and professionals assisting them, the IRS proposes amending the regulation under section 6103(c) to extend from 60 days to 120 days the period within which taxpayer-provided authorizations must be received by the IRS (or an agent or contractor of the IRS) in order to be effective.

Proposed Effective Date

This regulation, as proposed, will be effective upon publication in the **Federal Register** of a Treasury decision adopting this rule as a final regulation. The regulation, once effective, will apply to section 6103(c) authorizations signed on or after October 19, 2009.

Effect on Other Documents

Notice 2010–8, 2010–3 IRB 297, will be obsolete upon publication in the **Federal Register** of a Treasury decision adopting this rule as a final regulation.

Special Analyses

It has been determined that this proposed regulation is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6), requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" that will "describe the impact of the proposed rule on small entities." (5 U.S.C. 603(a)). Section 605 of the RFA provides an exception to this requirement if the agency certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. It is hereby certified that the collection of information in this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that any burden on taxpayers is minimal, since the regulation only applies to taxpayers which request or consent to the disclosure of returns or return information, and since the information collected is only that necessary to carry out the disclosure of returns or return information requested or consented to by the taxpayer (such as the name and taxpayer identification number of the taxpayer, the return or return information to be disclosed, and the identity of the designee). Moreover, it is based upon the fact that the regulation reduces the burden imposed upon taxpayers by the prior regulation by extending the period in which consents may be received by the IRS. Accordingly, a Regulatory Flexibility Analysis is not required.

Comments and Public Hearing

Before this proposed regulation is adopted as a final regulation, consideration will be given to any written comments (a signed original and eight (8) copies) and electronic comments that are timely submitted to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

The public hearing is scheduled for Thursday, June 9, 2011 at 10 a.m., and will be held in Auditorium, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the section of this preamble titled **FOR FURTHER INFORMATION CONTACT**.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by Wednesday, May 18, 2011. A period of 10 minutes will be allotted to each person for the making of comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of this proposed regulation is Amy Mielke, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 301

Administrative practice and procedure, Alimony, Bankruptcy, Child support, Continental shelf, Courts, Crime, Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Investigations, Law enforcement, Oil pollution, Penalties, Pensions, Reporting and recordkeeping requirements, Seals and insignia, Statistics, Taxes.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.6103(c)–1 is amended by revising paragraphs (b)(2) and (f) and adding paragraph (g) to read as follows:

§ 301.6103(c)–1 Disclosure of returns and return information to designee of taxpayer.

* * * * *

(b) * * *

(2) *Requirement that request or consent be received within one hundred twenty days of when signed and dated.* The disclosure of a return or return information authorized by a written request for or written consent to the disclosure shall not be made unless the request or consent is received by the Internal Revenue Service (or an agent or contractor of the Internal Revenue Service) within 120 days following the date upon which the request or consent was signed and dated by the taxpayer.

* * * * *

(f) *Applicability date.* This section is applicable to section 6103(c)

authorizations signed on or after October 19, 2009.

(g) *Effective date.* This section is effective on the date that the final regulations are published in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–6449 Filed 3–17–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0114]

RIN 1625–AA00

Safety Zone; 2011 Hylebos Bridge Restoration, Hylebos Waterway, Tacoma, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Coast Guard is proposing to establish a temporary safety zone extending 50 yards to the north and south of the Hylebos Bridge, Tacoma, WA in both directions along the entire length of the Hylebos Bridge to ensure the safety of the boating public during the Hylebos Bridge restoration project. This safety zone is necessary to protect vessels transiting in the vicinity of the Hylebos Bridge from falling debris resulting from concrete removal performed as part of the bridge restoration.

DATES: Comments and related material must be received by the Coast Guard on or before May 17, 2011. Requests for public meetings must be received by the Coast Guard on or before April 18, 2011.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0114 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Ensign Anthony P. LaBoy, USCG Sector Puget Sound Waterways Management Division, Coast Guard; telephone 206–217–6323, e-mail *SectorPugetSoundWWM@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

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

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0114), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–2011–0114" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2011–0114" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

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

Public Meeting

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

For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact Ensign Anthony P. LaBoy at the telephone number or e-mail address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Basis and Purpose

The Hylebos Bridge restoration involves removal of deteriorated

concrete from the Hylebos Bridge and refinishing the bridge's surface. The project poses a safety risk to any vessel traffic in the vicinity below the bridge due to potential falling debris. The hydro demolition machine that will be used can remove up to 16 inches of concrete in a single pass presenting a major safety hazard to vessels, persons, or property below. This safety zone would be enforced daily from 6 a.m. until 6 p.m. from August 20, 2011 through August 22, 2011, unless canceled sooner by the Captain of the Port.

Discussion of Proposed Rule

The City of Tacoma Public Works has requested a closure of the waterway to prevent property damage and/or personal injury to the maritime public during concrete removal portions of the Hylebos Bridge restoration. The Coast Guard is proposing this safety zone to ensure the safety of the maritime public during concrete removal and will do so by prohibiting any person or vessel from entering or remaining in the safety zone unless authorized by the Captain of the Port, Puget Sound or Designated Representative.

Regulatory Analyses

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

Regulatory Planning and Review

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

The Coast Guard bases this finding on the fact that the safety zone is small in size, short in duration, and maritime traffic will be able to transit this area during times when the zone is not enforced. Maritime traffic may also request permission to transit through the zone from the Captain of the Port, Puget Sound or Designated Representative.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed 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 a portion of the Hylebos Waterway from 6 a.m. until 6 p.m. from August 20, 2011 through August 22, 2011. This safety zone will not have a significant economic impact on a substantial number of small entities, because the safety zone is short in duration, is minimal in size, and maritime traffic will be allowed to transit through the safety zone with the permission of the Captain of the Port, Puget Sound or Designated Representative.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Ensign Anthony P. LaBoy at the telephone number or e-mail address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have

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

Technical Standards

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

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

Environment

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add § 165.T13–177 to read as follows:

§ 165.T13–177 Safety Zone; 2011 Hylebos Bridge Restoration, Hylebos Waterway, Tacoma, Washington.

(a) *Location.* The following area is a safety zone: All waters extending 50 yards to the north and south, along the entire length of the Hylebos Bridge in Tacoma, WA.

(b) *Regulations.* In accordance with the general regulations in 33 CFR Part 165, Subpart C, no person or vessel may enter or remain in the safety zone without permission of the Captain of the Port or Designated Representative. See 33 CFR Part 165, Subpart C, for additional requirements. Vessel operators wishing to enter the zone during the enforcement period must request permission for entry by contacting Vessel Traffic Service Puget Sound on VHF channel 14, or the Sector Puget Sound Joint Harbor Operations Center at (206) 217–6001.

(c) *Authorization.* All vessel operators who desire to transit through or remain in the safety zone must obtain permission from the Captain of the Port or Designated Representative. The Captain of the Port may be assisted by federal, state, or local agencies as needed.

(d) *Enforcement Period.* This rule is enforced daily from 6 a.m. until 6 p.m. from August 20, 2011 through August 22, 2011 unless canceled sooner by the Captain of the Port.

Dated: March 1, 2011.

S.J. Ferguson,

Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.

[FR Doc. 2011–6337 Filed 3–17–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2011–0279; FRL–9283–2]

Approval and Promulgation of Air Quality Implementation Plan; Kansas; Proposed Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-Hour $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to our authority under the Clean Air Act (CAA or Act), EPA is proposing to disapprove the portion of the Kansas CAA "Infrastructure" State Implementation Plan (SIP) submittal addressing significant contribution to nonattainment or interference with maintenance in another State with respect to the 2006 24-hour fine particle ($PM_{2.5}$) National Ambient Air Quality Standards NAAQS). On April 12, 2010, Kansas submitted a State Implementation Plan (SIP) intended to address the infrastructure SIP requirements for "infrastructure." The submittal also included language to address the interstate transport requirements under the CAA. In this action, EPA is proposing to disapprove the portion of the Kansas SIP revision intended to address requirements prohibiting a State's emissions from significantly contributing to nonattainment or interfering with maintenance of the NAAQS in any other State. The rationale for the proposed action is described in this proposal.

DATES: Comments must be received on or before April 18, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R07–OAR–2011–0279 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail: kramer.elizabeth@epa.gov.*

3. *Mail:* Ms. Elizabeth Kramer, Air Planning & Development, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101.

4. *Hand Delivery or Courier:* Deliver your comments to: Ms. Elizabeth Kramer, Air Planning & Development, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101. Such deliveries are only accepted during the Regional Office's normal hours of operation.

Instructions: Direct your comments to Docket ID No. EPA–R07–OAR–2011–0279 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 through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and should be free of any defects or viruses.

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SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This section provides additional information by addressing the following questions:

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8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background for this action?

On December 18, 2006, EPA revised the 24-hour average $PM_{2.5}$ primary and secondary NAAQS from 65 micrograms per cubic meter ($\mu g/m^3$) to 35 $\mu g/m^3$. Section 110(a)(1) of the CAA requires States to submit infrastructure SIPs to address a new or revised NAAQS within 3 years after promulgation of such standards, or within such shorter period as EPA may prescribe.[1] As provided by Section 110(k)(2), within 12 months of a determination that a submitted SIP is complete under 110(k)(1), the Administrator shall act on the plan. As authorized in Section 110(k)(3) of the Act, where portions of the State submittals are severable, within that 12 month period EPA may decide to approve only those severable portions of the submittals that meet the requirements of the Act. When the deficient provisions are not severable from the other submitted provisions, EPA must propose disapproval of the submittals, consistent with Section 110(k)(3) of the Act.

Section 110(a)(2) lists the elements that such new infrastructure SIPs must address, as applicable, including Section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions. On September 25, 2009, EPA issued its "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)" (2009 Guidance). EPA developed the 2009 Guidance to make recommendations to States for making submissions to meet the requirements of Section 110, including 110(a)(2)(D)(i) for the revised 2006 24-hour $PM_{2.5}$ NAAQS.

As identified in the 2009 Guidance, the "good neighbor" provisions in Section 110(a)(2)(D)(i) require each State to submit a SIP that prohibits emissions that adversely affect another State in the ways contemplated in the statute. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. The SIP must prevent sources in the State from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other States; (2) interfere with maintenance of the NAAQS in other States; (3) interfere with provisions to prevent significant deterioration of air quality in other States; or (4) interfere with efforts to protect visibility in other States.

In the 2009 Guidance, EPA indicated that SIP submissions from States pertaining to the "significant contribution" and "interfere with maintenance" requirements of Section 110(a)(2)(D)(i)(I) should contain adequate provisions to prohibit air pollutant emissions from within the State that contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other State. EPA further indicated that the State's submission should explain whether or not emissions from the State

[1] The rule for the revised $PM_{2.5}$ NAAQS was signed by the Administrator and publically disseminated on September 21, 2006. Because EPA did not prescribe a shorter period for 110(a) SIP submittals, these submittals for the 2006 24-hour NAAQS were due on September 21, 2009, three years from the September 21, 2006 signature date.

have this impact and, if so, address the impact. EPA stated that the State's conclusion should be supported by an adequate technical analysis. EPA recommended the various types of information that could be relevant to support the State SIP submission, such as information concerning emissions in the State, meteorological conditions in the State and the potentially impacted States, monitored ambient concentrations in the State, and air quality modeling. Furthermore, EPA indicated that States should address the "interfere with maintenance" requirement independently which requires an evaluation of impacts on areas of other States that are meeting the 2006 24-hour $PM_{2.5}$ NAAQS, not merely areas designated nonattainment. Lastly in the 2009 Guidance, EPA stated that States could not rely on the Clean Air Interstate Rule (CAIR) to comply with CAA Section 110(a)(2)(D)(i) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS.

EPA promulgated the CAIR on May 12, 2005 (*see* 70 FR 25162). CAIR required States to reduce emissions of sulfur dioxide and nitrogen oxides that significantly contribute to, and interfere with maintenance of the 1997 NAAQS for $PM_{2.5}$ and/or ozone in any downwind State. CAIR was intended to provide States covered by the rule with a mechanism to satisfy their CAA Section 110(a)(2)(D)(i)(I) obligations to address significant contribution to downwind nonattainment and interference with maintenance in another State with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. Many States adopted the CAIR provisions and submitted SIPs to EPA to demonstrate compliance with the CAIR requirements in satisfaction of their 110(a)(2)(D)(i)(I) obligations for those two pollutants.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision to vacate and remand both CAIR and the associated CAIR Federal Implementation Plans (FIP) in their entirety. *North Carolina* v. *EPA,* 531 F.3d 836 (DC Cir. Jul. 11, 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Cir. Dec. 23, 2008). The Court thereby left CAIR in place in order to "temporarily preserve the environmental values covered by CAIR" until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to "remedy CAIR's flaws" consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

In order to address the judicial remand of CAIR, EPA has proposed a new rule to address interstate transport pursuant to Section 110(a)(2)(D)(i)(I), the "Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone" (Transport Rule).[2] As part of the proposed Transport Rule, EPA specifically examined the Section 110(a)(2)(D)(i)(I) requirement that emissions from sources in a State must not "significantly contribute to nonattainment" and "interfere with maintenance" of the 2006 24-hour $PM_{2.5}$ NAAQS by other States. The modeling performed for the proposed Transport Rule shows that Kansas significantly contributes to nonattainment and interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas.[3]

On April 12, 2010, EPA received a SIP revision from the State of Kansas intended to address the requirements of Section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS as well as other requirements of Section 110(a)(2). In this rulemaking, EPA is addressing only the requirements that pertain to prohibiting sources in Kansas from emitting pollutants that will significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other States. In its submission, the State of Kansas indicated that emissions from the State do not significantly interfere with the attainment nor maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind States. The submission included a description of relevant State actions intended to address the interstate transport of emissions.

III. What is EPA's evaluation of the State's submittal?

On April 12, 2010, EPA received an Infrastructure SIP revision from the State of Kansas intended to address the requirements of Section 110(a)(2)(D)(i)(I) with respect to the 2006 $PM_{2.5}$ NAAQS. The portion of Kansas' submittal to address the Section 110(a)(2)(D)(i)(I) obligations indicates that the State has implemented several actions to address interstate transport with respect to the 2006 24-hour $PM_{2.5}$ NAAQS.

Kansas' submittal describes how the State believes it meets transport requirements based in part on recent controls established for SO_2 and NO_X emissions from EGUs in the State. Kansas summarizes that the reductions represent a 32% reduction in the total Kansas point source NO_X emissions and a 58% reduction in the total Kansas point source SO_X emissions from the 2005 National Emissions Inventory (NEI). However, EPA's preliminary photochemical modeling for the proposed Transport Rule, to address 110(a)(2)(D)(i)(I), indicates that emissions from the State of Kansas significantly contribute to nonattainment and interfere with maintenance in other States with respect to the 2006 24-Hour $PM_{2.5}$ NAAQS.[4]

EPA's 2009 Guidance stated that a State's SIP submission pertaining to the requirement of Section 110(a)(2)(D)(i)(I) must be supported by an adequate technical analysis.[5] EPA recommended the various types of information that could be relevant to support the State's SIP submission. While Kansas submitted a description of actions that have been implemented to reduce NO_X and SO_2 emissions, the State did not further evaluate or demonstrate with a technical analysis that these measures address the requirements of 110(a)(2)(D)(i)(I) to prohibit Kansas' air pollutant emissions from significantly contributing to nonattainment or interfering with maintenance in other States. EPA believes that the documentation submitted does not address the requirements of 110(a)(2)(D)(i)(I), in part, because the submittal lacks a technical demonstration.

Based upon our evaluation, EPA is proposing that this SIP revision does not meet the requirements of 110(a)(2)(D)(i)(I) of the CAA. Therefore, EPA is proposing disapproval of the portion of Kansas' Infrastructure SIP relating to Interstate Transport, Section 110(a)(2)(D)(i)(I). The submitted

[2] *See* "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule," 75 FR 45210 (August 2, 2010).

[3] *See* Section IV on Defining "Significant Contribution" and "Interference With Maintenance," 75 FR 45229 of "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule," 75 FR 45210 (August 2, 2010).

[4] *See* Section IV on Defining "Significant Contribution" and "Interference With Maintenance," 75 FR 45229 of "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule," 75 FR 45210 (August 2, 2010).

[5] *See* William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards." Memorandum to EPA Air Division Directors, Regions I–X (September 25, 2009).

provisions are severable from each other. Therefore, EPA is proposing to disapprove those provisions which relate to the Section 110(a)(2)(D)(i)(I) demonstration and will act on the remainder of the SIP submission in a subsequent rulemaking.

Also, under Section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C.A. §§ 7501–7515), or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP call), starts a sanctions clock. The provisions in the submittal we are proposing to disapprove were not submitted to meet either of those requirements. Therefore, if EPA takes final action to disapprove this submittal, no sanctions will be triggered.

The full or partial disapproval of a State implementation plan revision triggers the requirement under Section 110(c) that EPA promulgate a FIP no later than 2 years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. The Transport Rule FIP, if finalized in the manner proposed, may address these requirements for the State of Kansas.

IV. What action is EPA proposing?

We are proposing to disapprove a submission from the State of Kansas intended to demonstrate that Kansas has adequately addressed the elements of CAA Section 110(a)(2)(D)(i)(I) that require the State's SIP to contain adequate provisions to prohibit air pollutant emissions from sources within a State from significantly contributing to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in any other State. We are proposing to determine that the Kansas submission does not contain adequate provisions to prohibit air pollutant emissions from within the State that significantly contribute to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other downwind States. Any remaining elements of the submittal, including language to address other CAA Section 110(a)(2) elements, including Section 110(a)(2)(D)(i)(II) regarding interference with measures required in the applicable SIP for another State designed to prevent significant deterioration of air quality and protect visibility, are not addressed in this action. EPA is proposing to disapprove only the provisions which relate to the Section 110(a)(2)(D)(i)(I) demonstration.

V. Statutory and Executive Order Reviews

Under the CAA, 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 act on State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law.

Executive Order 12866, Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq,* because this proposed SIP disapproval under Section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This proposed SIP disapproval under Section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new requirements but simply disapproves certain State requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the Clean Air Act prescribes that various consequences (*e.g.,* higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

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." EPA has determined that the proposed disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or Tribal governments in the aggregate, or to the private sector. This action proposes to disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or Tribal governments, or to the private sector, result from this action.

Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that 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."

This action 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. This action merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. However, today's proposed disapproval does not have federalism implications. Thus, Executive Order 13132 does not apply to this action.

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), because the SIP EPA is proposing to disapprove would not 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. Thus, Executive Order 13175 does not apply to this action.

Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under Section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997).This proposed SIP disapproval under Section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, Section 12(d) (15 U.S.C. 272 note) 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. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

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.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove State choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under Section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it 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.

Statutory Authority

The statutory authority for this action is provided by Sections 110 of the CAA, as amended (42 U.S.C. 7410).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter.

Dated: March 10, 2011.

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2011–6416 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2011–0215; FRL–9283–3]

Approval and Promulgation of Air Quality Implementation Plan; Missouri; Proposed Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-Hour $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to our authority under the Clean Air Act (CAA or Act), EPA is proposing to disapprove the portion of the Missouri CAA Section 110(a)(2) "Infrastructure" State Implementation Plan (SIP) submittal addressing significant contribution to nonattainment or interference with maintenance in another state with respect to the 2006 24-hour fine particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS). On December 18, 2009, Missouri submitted a State Implementation Plan (SIP) intended to address the infrastructure SIP requirements of CAA Section 110(a)(2) for "infrastructure." In this action, EPA is proposing to disapprove the portion of the Missouri SIP revision intended to address Section 110(a)(2)(D)(i)(I) requirements prohibiting a state's emissions from significantly contributing to nonattainment or interfering with maintenance of the NAAQS in any other state. The rationale for the proposed action is described in this proposal.

DATES: Comments must be received on or before April 18, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R07–OAR–2011–0215, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail: kramer.elizabeth@epa.gov.*

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As identified in the 2009 Guidance, the "good neighbor" provisions in Section 110(a)(2)(D)(i) require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated in the statute. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. The SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or (4) interfere with efforts to protect visibility in other states.

In the 2009 Guidance, EPA indicated that SIP submissions from states pertaining to the "significant contribution" and "interfere with maintenance" requirements of Section 110(a)(2)(D)(i)(I) should contain adequate provisions to prohibit air pollutant emissions from within the state that contribute significantly to

[1] The rule for the revised $PM_{2.5}$ NAAQS was signed by the Administrator and publically disseminated on September 21, 2006. Because EPA did not prescribe a shorter period for 110(a) SIP submittals, these submittals for the 2006 24-hour NAAQS were due on September 21, 2009, three years from the September 21, 2006 signature date.

nonattainment or interfere with maintenance of the NAAQS in any other state. EPA further indicated that the state's submission should explain whether or not emissions from the state have this impact and, if so, address the impact. EPA stated that the state's conclusion should be supported by an adequate technical analysis. EPA recommended the various types of information that could be relevant to support the state SIP submission, such as information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state, and air quality modeling. Furthermore, EPA indicated that states should address the "interfere with maintenance" requirement independently which requires an evaluation of impacts on areas of other states that are meeting the 2006 24-hour $PM_{2.5}$ NAAQS, not merely areas designated nonattainment. Lastly in the 2009 Guidance, EPA stated that states could not rely on the Clean Air Interstate Rule (CAIR) to comply with CAA Section 110(a)(2)(D)(i) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS.

EPA promulgated the CAIR on May 12, 2005, (*see* 70 FR 25162). CAIR required states to reduce emissions of sulfur dioxide and nitrogen oxides that significantly contribute to, and interfere with maintenance of the 1997 NAAQS for $PM_{2.5}$ and/or ozone in any downwind state. CAIR was intended to provide states covered by the rule with a mechanism to satisfy their CAA Section 110(a)(2)(D)(i)(I) obligations to address significant contribution to downwind nonattainment and interference with maintenance in another state with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. Many states adopted the CAIR provisions and submitted SIPs to EPA to demonstrate compliance with the CAIR requirements in satisfaction of their 110(a)(2)(D)(i)(I) obligations for those two pollutants.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision to vacate and remand both CAIR and the associated CAIR Federal Implementation Plans (FIP) in their entirety. *North Carolina* v. *EPA,* 531 F.3d 836 (D.C. Cir. Jul. 11, 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. *North Carolina* v. *EPA,* 550 F.3d 1176 (D.C. Cir. Dec. 23, 2008). The Court thereby left CAIR in place in order to "temporarily preserve the environmental values covered by CAIR" until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to "remedy CAIR's flaws" consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

In order to address the judicial remand of CAIR, EPA has proposed a new rule to address interstate transport pursuant to Section 110(a)(2)(D)(i)(I), the "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone" (Transport Rule).[2] As part of the proposed Transport Rule, EPA specifically examined the Section 110(a)(2)(D)(i)(I) requirement that emissions from sources in a state must not "significantly contribute to nonattainment" and "interfere with maintenance" of the 2006 24-hour $PM_{2.5}$ NAAQS by other states. The modeling performed for the proposed Transport Rule shows that Missouri significantly contributes to nonattainment and interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas.[3]

On December 28, 2009, EPA received a SIP revision from the State of Missouri intended to address the requirements of Section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS as well as other requirements of Section 110(a)(2). In this rulemaking, EPA is addressing only the requirements that pertain to prohibiting sources in Missouri from emitting pollutants that will significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other states. In its submission, Missouri indicated that several actions have been implemented to address the transport of direct $PM_{2.5}$ and also $PM_{2.5}$ precursors of Nitrogen Oxides (NO_X) and Sulfur Dioxide (SO_2) over time. The submission included a description of and references to the relevant state rules intended to address the interstate transport of emissions.

III. What is EPA's evaluation of the State's submittal?

Missouri's December 28, 2009, submittal included a description of how the state has implemented rules or is developing rules to meet various requirements to address the long-range transport of pollution. Missouri has a number of rules included in the SIP for the control of NO_X and SO_2 emissions. For example, Missouri's SIP includes rules that control NO_X emissions from Electric Generating Units (10 CSR 10–6.360), from Cement Kilns (10 CSR 10–6.680) and from Large Stationary Internal Combustion Engines (10 CSR 10–6.390). EPA's preliminary photochemical modeling for the proposed Transport Rule considered these rules and still indicates that emissions from the State of Missouri significantly contribute to nonattainment and interfere with maintenance in other states with respect to the 2006 24-hour $PM_{2.5}$ NAAQS.[4]

EPA's 2009 Guidance stated that a state's SIP submission pertaining to the requirement of Section 110(a)(2)(D)(i)(I) must be supported by an adequate technical analysis.[5] EPA recommended the various types of information that could be relevant to support the state's SIP submission. While Missouri submitted a description of state rules that have been implemented to reduce $PM_{2.5}$, NO_X and SO_2 emissions, the state did not further evaluate or demonstrate with a technical analysis that these measures address the requirements of 110(a)(2)(D)(i)(I) to prohibit Missouri's air pollutant emissions from significantly contributing to nonattainment or interfering with maintenance in other states.

Furthermore, the state's submittal also indicates that it is meeting its 110(a)(2)(D)(i)(I) obligations with respect to the 2006 $PM_{2.5}$ NAAQS in part by virtue of its approved CAIR SIP. However, CAIR was promulgated before the 24-hour $PM_{2.5}$ NAAQS were revised in 2006 and does not address interstate transport with respect to the 2006 $PM_{2.5}$ NAAQS.[6] Thus, reliance on CAIR cannot be used to comply with Section 110(a)(2)(D)(i)(I) for the respective 2006

[2] *See* "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule," 75 FR 45210 (August 2, 2010).

[3] *See* Section IV on Defining "Significant Contribution" and "Interference With Maintenance," 75 FR 45229 of "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule," 75 FR 45210 (August 2, 2010).

[4] *See* Section IV on Defining "Significant Contribution" and "Interference With Maintenance," 75 FR 45229 of "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule," 75 FR 45210 (August 2, 2010).

[5] *See* William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards." Memorandum to EPA Air Division Directors, Regions I–X, (September 25, 2009).

[6] Further, as explained above and in the Transport Rule proposal, the D.C. Circuit in *North Carolina* v. *EPA* found that EPA's quantification of states' significant contribution and interference with maintenance in CAIR was improper and remanded the rule to EPA. CAIR remains in effect only temporarily.

NAAQS. Several states recognize that some of the controls planned for or already installed on sources within the state (to meet CAIR provisions) satisfied the Section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. However, states will not be able to permanently rely upon the emissions reductions predicted by CAIR, because CAIR was remanded to EPA and EPA is in the process of developing a Transport Rule (which it has proposed as a replacement for the remanded CAIR) to address the concerns outlined in its decision remanding CAIR. For these reasons, EPA would not be able to approve Missouri's SIP submission pertaining to the requirements under Section 110(a)(2)(D)(i)(I) because it relies, in part, on CAIR for emission reduction measures.

Based upon our evaluation, EPA is proposing that this SIP revision does not meet the requirements of 110(a)(2)(D)(i)(I) of the CAA. Therefore, EPA is proposing disapproval of the portion of Missouri's Infrastructure SIP relating to Interstate Transport, Section 110(a)(2)(D)(i)(I). The submitted provisions are severable from each other. Therefore, EPA is proposing to disapprove those provisions which relate to the Section 110(a)(2)(D)(i)(I) demonstration and will act on the remainder of the SIP submission in a subsequent rulemaking.

Also, under Section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C.A. §§ 7501–7515), or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP call), starts a sanctions clock. The provisions in the submittal we are proposing to disapprove were not submitted to meet either of those requirements. Therefore, if EPA takes final action to disapprove this submittal, no sanctions will be triggered.

The full or partial disapproval of a state implementation plan revision triggers the requirement under Section 110(c) that EPA promulgate a FIP no later than 2 years from the date of the disapproval unless the state corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. The Transport Rule FIP, if finalized in the manner proposed, may address these requirements for the State of Missouri.

IV. What action is EPA proposing?

We are proposing to disapprove a submission from the State of Missouri intended to demonstrate that Missouri has adequately addressed the elements of CAA Section 110(a)(2)(D)(i)(I) that require the state's SIP to contain adequate provisions to prohibit air pollutant emissions from sources within a state from significantly contributing to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in any other state. We are proposing to determine that the Missouri submission does not contain adequate provisions to prohibit air pollutant emissions from within the state that significantly contribute to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other downwind states. Any remaining elements of the submittal, including language to address other CAA Section 110(a)(2) elements, including Section 110(a)(2)(D)(i)(II) regarding interference with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility, are not addressed in this action. EPA is proposing to disapprove only the provisions which relate to the Section 110(a)(2)(D)(i)(I) demonstration.

V. Statutory and Executive Order Reviews

Under the CAA, 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 act on state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law.

Executive Order 12866, Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* because this proposed SIP disapproval under Section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This proposed SIP disapproval under Section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new requirements but simply disapproves certain state requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the Clean Air Act prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

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. EPA has determined that the proposed

disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This action proposes to disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that 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."

This action 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. This action merely disapproves certain state requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. However, today's proposed disapproval does not have federalism implications. Thus, Executive Order 13132 does not apply to this action.

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), because the SIP EPA is proposing to disapprove would not 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. Thus, Executive Order 13175 does not apply to this action.

Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under Section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This proposed SIP disapproval under Section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain state requirements for inclusion into the SIP.

Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, Section 12(d) (15 U.S.C. 272 note) 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. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

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.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapproves certain state requirements for inclusion into the SIP under Section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it 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.

Statutory Authority

The statutory authority for this action is provided by Sections 110 of the CAA, as amended (42 U.S.C. 7410).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter.

Dated: March 10, 2011.

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2011–6418 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–R09–OAR–2011–0213; FRL–9283–5]

Delegation of National Emission Standards for Hazardous Air Pollutants for Source Categories; State of Arizona, Maricopa County Air Quality Department; State of California, Santa Barbara County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to section 112(l) of the 1990 Clean Air Act, EPA granted delegation of specific national emission standards for hazardous air pollutants (NESHAP) to the Maricopa County Air Quality Department on May 6, 2010, and December 14, 2010, and to the Santa Barbara County Air Pollution Control District on July 30, 2010. EPA is proposing to revise the Code of Federal Regulations to reflect the

current delegation status of NESHAP in Arizona and California.

DATES: Any comments on this proposal must arrive by April 18, 2011.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2011–0213, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (AIR–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Mae Wang, EPA Region IX, (415) 947–4124, *wang.mae@epa.gov.*

SUPPLEMENTARY INFORMATION: This document concerns the delegation of unchanged NESHAP to the Maricopa County Air Quality Department, and the Santa Barbara County Air Pollution Control District. In the Rules and Regulations section of this **Federal Register**, EPA is amending regulations to reflect the current delegation status of NESHAP in Arizona and California. EPA is taking direct final action without prior proposal because the Agency believes this action is not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in a subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: March 3, 2011.

Deborah Jordan,

Director, Air Division, Region IX.

[FR Doc. 2011–6424 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapters I Through VII

[FRL–9283–9; EPA–HQ–OA–2011–0154, –0155, –0156, –0157, –0158, –0159, –0160, –0161, –0162, –0163, –0164, –0165, –0166, –0167, –0168]

Extension of Comment Period: EPA's Plan for Retrospective Review Under Executive Order 13563

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period.

SUMMARY: On February 23, 2011, EPA published in the **Federal Register** a document seeking public input on the design of a plan to use for periodic retrospective review of its regulations (76 FR 9988). This input is being solicited in response to Executive Order 13563, "Improving Regulation and Regulatory Review," wherein all federal agencies are directed to conduct a "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome and to modify, streamline, expand, or repeal them in accordance with what has been learned."

DATES: Comments should be submitted no later than April 4, 2011.

ADDRESSES: You may submit your comments, identified by Docket ID No. EPA–HQ–OA–2011–0154, –0155, –0156, –0157, –0158, –0159, –0160, –0161, –0162, –0163, –0164, –0165, –0166, –0167 or –0168 by any one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: ImprovingRegulations.SuggestionBox@epa.gov*
- *Fax:* 202–566–9744
- *Mail:* Send a copy of your comments and any enclosures to: Improving Regulations Docket, Environmental Protection Agency, EPA Docket Center, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* Improving Regulations Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OA–2011–0154, –0155, –0156, –0157, –0158, –0159, –0160, –0161, –0162, –0163, –0164, –0165, –0166, –0167, –0168. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov.* The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section II of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Improving Regulations Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Improving Regulations Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: For further information on this document, please contact Stuart Miles-McLean, Office of Regulatory Policy and Management (1803A), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: 202–564–6581; fax number: 202–564–7322; e-mail address: *ImprovingRegulations.SuggestionBox@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA extending its comment period for feedback on the design of its retrospective review plan under Executive Order 13563 to April 4, 2011. To assist you in focusing your comments or recommendations, EPA has provided various categories relating to issue/impact, program area, or a multipurpose general area. These categories are not intended to restrict the issues that you may wish to address. The following list provides the category of each docket. If you wish to submit comments, please select one of the appropriate dockets listed below or send by mail as described in the **ADDRESSES** section above.

1. Integration and Innovation

Submit a comment on "Improving Regulations: Integration and Innovation" at docket # EPA–HQ–OA–2011–0161.

2. Environmental Justice/Children's Health/Elderly

Submit a comment related to "Improving Regulations: EJ, Children & Elderly" at docket # EPA–HQ–OA–2011–0168.

3. Science/Obsolete/Technology Outdated

Submit a comment on "Improving Regulations: Science/Obsolete/Technology Outdated" at docket # EPA–HQ–OA–2011–0162.

4. State, Local and Tribal Governments

Submit a comment related to "Improving Regulations: State, Local and Tribal governments" at docket # EPA–HQ–OA–2011–0163.

5. Least Burdensome/Flexible Approaches

Provide comment on "Improving Regulations: Least Burden/Flexible Approaches" at docket # EPA–HQ–OA–2011–0165.

6. Benefits and Costs

Submit a comment related to benefits and costs in "Improving Regulations: Benefits and Costs" at docket # EPA–HQ–OA–2011–0158.

7. Small Business

Submit a comment related to "Improving Regulations: Small Business" at docket # EPA–HQ–OA–2011–0164.

8. Compliance

Submit a comment related to "Improving Regulations: Compliance" at docket # EPA–HQ–OA–2011–0166.

9. Economic Conditions/Market

Submit a comment about "Improving Regulations: Economic Conditions/Market" at docket # EPA–HQ–OA–2011–0167.

10. Program Area: Air

Submit a comment about "Improving Regulations: Air" at docket # EPA–HQ–OA–2011–0155.

11. Program Area: Pesticides

Submit a comment about "Improving Regulations: Pesticides" at docket # EPA–HQ–OA–2011–0157.

12. Program Area: Toxic Substances

Submit a comment about "Improving Regulations: Toxic Substances" at docket # EPA–HQ–OA–2011–0159.

13. Program Area: Waste

Submit a comment about "Improving Regulations: Waste" at docket # EPA–HQ–OA–2011–0160.

14. Program Area: Water

Submit a comment about "Improving Regulations: Water" at docket # EPA–HQ–OA–2011–0154.

15. Use the "Improving Regulations: General" docket # EPA–HQ–OA–2011–0156 to submit an idea for how best to promote retrospective analysis of rules. This docket may also be used for any comment that:

- Pertains to more than one issue/impact and/or program area.
- Doesn't relate to any of the other docket categories listed in this section.

EPA welcomes comment and feedback from all parties on the issues listed herein. The Agency is collecting this information for its planning purposes and is not bound to further action or response. All submissions will be made publically available on *http://www.regulations.gov.*

Dated: March 15, 2011.

Michael Goo,

Associate Administrator, Office of Policy.

[FR Doc. 2011–6413 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1305

RIN 0970–AC46

Head Start Program

AGENCY: Office of Head Start (OHS), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would amend Head Start program regulations to codify statutory eligibility requirements for Head Start and Early Head Start program enrollment and strengthen procedures to determine, verify, certify, and maintain records regarding eligibility for Head Start and Early Head Start program enrollment. It also proposes to create new requirements for the person seeking services to certify in a signed and dated statement that the documents and information that the person provided concerning eligibility are accurate to the best of the person's knowledge, as well as new requirements for program staff who make the eligibility determination to certify in a signed and dated statement that the information on eligibility in the file is accurate to the

best of the person's knowledge, and based on that information, the person has determined the pregnant woman or child to be eligible for services. In addition, it proposes to create a new requirement for agencies to establish policies and procedures describing the actions that will be taken against staff who violate eligibility determination requirements and requires agencies to provide training related to eligibility requirements and the legal consequences of committing fraud. The intent of this rule is to reduce substantially the risk that children or pregnant women who are ineligible for participation in Head Start or Early Head Start programs are enrolled in these programs.

DATES: In order to be considered, comments on this proposed rule must be received on or before April 18, 2011.

ADDRESSES: Interested persons are invited to submit comments to the Office of Head Start, 1250 Maryland Avenue, SW., Washington, DC 20024, Attention: Colleen Rathgeb, Office of Head Start, or electronically via the Internet at *http://www.regulations.gov.* If you submit a comment, please include your name and address, identify the docket number for this rulemaking (ACF–2010–XXXXX), indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, or delivery to the address above, but please submit your comments and material by only one means. A copy of this Notice of Proposed Rulemaking may be downloaded from *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Colleen Rathgeb, Office of Head Start, 202–205–7378 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

This Notice of Proposed Rulemaking is published under the authority granted to the Secretary of Health and Human Services by section 644(c) of the Head Start Act, as amended by the Improving Head Start for School Readiness Act of 2007, as well as sections 645(a)(1)(A) and 645A(c) of the Act.

II. Comment Procedures

The Head Start Act provides for a period of at least 30 days for public comment. In making any modifications to this Notice of Proposed Rulemaking, we will not consider comments received beyond the 30-day comment period. To make sure your comments are fully addressed, we suggest the following:

- Be specific rather than general;
- Address only issues raised by the proposed rule;
- Explain reasons for any objections or recommended changes;
- Propose specific alternative language, as appropriate; and
- Reference the specific section of the proposed rule being addressed.

III. Background

The Head Start program is a national program that promotes school readiness of low-income children by enhancing their cognitive, social, and emotional development through the provision of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary.

The Head Start program provides grants to local public and private non-profit and for-profit agencies to provide comprehensive child development services to economically disadvantaged children and families, with a special focus on helping preschoolers develop the skills they need to be successful in school. In FY 1995, the Early Head Start program was established to serve families of economically disadvantaged children from birth to three years of age and pregnant women from such families in recognition of the mounting evidence that the earliest years matter a great deal to children's growth and development.

On December 12, 2007, the President signed the Improving Head Start for School Readiness Act of 2007, Public Law 110–134. The law reauthorized the Head Start program through September 30, 2012, and built on the program's many successes. The reauthorization addressed the needs of children and families by focusing efforts on building increased systems of accountability, improving quality, and expanding program access. The 2007 reauthorization also made several changes to the eligibility criteria and related policies for participation in Head Start and Early Head Start programs described in Section 645 and 645A of the Act. The Act included homeless children as a category of individuals who are deemed to be from low-income families and therefore categorically eligible for enrollment in Head Start and Early Head Start, but who were not included explicitly in the previous version of the Act. Homeless children are among the most disadvantaged children in the country. Since the reauthorization, grantees have been informed of these changes through a Program Instruction and various policy clarifications related to categories of individuals that are categorically eligible and the definition of homeless child to be used to determine eligibility. However, the current regulations do not specify how agencies are required to verify or certify that a child is homeless.

The proposed revisions to 45 CFR 1305.2 and 1305.4 directly respond to the findings of a recent investigation by the Government Accountability Office (GAO) that the Head Start program is at risk of having over-income children enrolled while legitimate under-income and categorically eligible children are put on wait lists. GAO presented its preliminary results about its ongoing investigation in testimony entitled, "Head Start: Undercover Testing Finds Fraud and Abuse at Selected Head Start Centers" before the House Education and Labor Committee on May 18, 2010, which is available at: *http://www.gao.gov/new.items/d10733t.pdf.* GAO published its final report on September 28, 2010, which reiterated many of the findings disclosed in the May testimony and discussed new findings related to specific fraud allegations at two Head Start grantees. This report is available at: ;*http://www.gao.gov/products/GAO-10-1049.*

Specifically, in its investigation, GAO followed up on received allegations of fraud and abuse involving two Head Start grantees, including that Head Start centers allegedly manipulated recorded income to make over-income applicants appear under-income; encouraged families to report that they were homeless when they were not; enrolled more than 10 percent of over-income children allowed by the Head Start Act; and counted children as enrolled in more than one center at a time. In its final report, GAO states that it was able to substantiate that "children were enrolled in both the grantee and delegate sites," indicating that the grantee did not comply with the Head Start requirement to report an unduplicated count of its funded enrollment numbers. After further investigation of the programs alleged to have enrolled ineligible children by designating them as "homeless," GAO was unable to substantiate the fraud claim because not all of the records reviewed contained sufficient information to determine whether a given family was homeless. However, GAO noted that the lack of requirements related to verifying and documenting a child's homeless status raised concerns about the risk of fraud in the Head Start program.

In order to ascertain if this type of fraud was occurring at other Head Start

centers, GAO attempted to register fictitious children as part of 15 undercover test scenarios at centers in six States and the District of Columbia. GAO found that in eight instances, staff at the Head Start centers fraudulently misrepresented information, including disregarding part of the families' income to register over-income children into under-income slots. The undercover tests revealed that seven Head Start employees lied about applicants' employment status or misrepresented their earnings. GAO concluded that "this leaves Head Start at risk that over-income children may be enrolled while legitimate under-income children are put on wait lists." GAO also noted that "at no point during our registrations was information submitted by GAO's fictitious parents verified, leaving the program at risk that dishonest persons could falsify earnings statements and other documents in order to qualify."

Upon learning of GAO's investigation, we immediately took numerous actions within our statutory and regulatory authority to respond to GAO's findings and to bolster program integrity efforts across the Head Start and Early Head Start programs; prevent future fraud and mismanagement; and ensure that every slot is reserved for an eligible child. For example, ACF issued a Program Instruction on May 10, 2010, entitled, "Income Eligibility for Enrollment" (ACF–PI–HS–10–01), which reminds grantees of their legal obligations to verify the eligibility of each child served and determine eligibility in accordance with the Head Start statute and regulations, as well as the serious consequences for falsifying eligibility determinations. The Program Instruction is available at: *http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/PIs/2010/resour_pri_002_051010.html.* On May 17, 2010, the Secretary of HHS, Kathleen Sebelius, sent a letter to every Head Start and Early Head Start grantee in the country to underscore the serious nature of GAO's allegations and notify them that HHS is intensifying its oversight and enforcement actions. This letter is available at: *http://www.hhs.gov/news/press/2010pres/05/head_start_letter.html.* We also have begun to conduct more unannounced monitoring visits to Head Start grantees; have created a Web-based "hotline" that will allow those with information of impropriety of any kind to report directly to the Secretary of HHS; have begun to increase oversight and reviews of programs with identified risk factors; and will continue to use our authority to suspend or terminate grantees where pervasive fraud or misuse of funds is found.

However, we believe GAO's findings necessitate the implementation of new enrollment procedures, as proposed by this regulation, in order to reiterate and strengthen the requirements. Therefore, we are proposing new requirements for Head Start and Early Head Start agency staff regarding verification, documentation, and certification of the information submitted by the applicants prior to determining if a pregnant woman or child is eligible for participation in a Head Start or Early Head Start program. This proposed regulation will ensure that taxpayer dollars are spent in conformance with the purpose and requirements of the Head Start Act and that the neediest children and families in our country benefit from the program's services. The purpose of the program, as stated in section 636 of the Head Start Act, is to "promote the school readiness of low-income children" and provide "low-income children and their families of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary." As stated in sections 645 and 645A of the Head Start Act and Part 1305 of the current Head Start regulations, the eligibility requirements of the program require that, with limited exceptions, participants must be either "income eligible," meaning the pregnant woman or family's income is equal to, or less than, the income guidelines (the "official poverty line") or "categorically eligible," meaning that the individuals are eligible for participation in a Head Start or Early Head Start program even if the income of the pregnant woman or family exceeds the income guidelines due to being a member of one of the specific categories of individuals authorized under the Act and current regulations—being eligible for public assistance; being a homeless child; or being a child in foster care. While the Head Start Act provides authority for grantees to enroll a certain portion of pregnant women and children who are not income or categorically eligible, the statute nonetheless makes clear that the primary target populations for the Head Start and Early Head Start programs are low-income and categorically eligible children and their families, and, in the case of Early Head Start, low-income pregnant women. Therefore, most of the enrollment slots are reserved for pregnant women and children who are income or categorically eligible.

In particular, we believe GAO's findings regarding the apparent fraudulent enrollment of ineligible children in Head Start slots that are reserved for children who are income and categorically eligible necessitate the implementation of new enrollment procedures to ensure eligible children receive Head Start services in a timely fashion and to prevent harm resulting from being denied access to these services. In the case of Head Start, if an eligible child misses all or a part of the year of Head Start services because an ineligible child is enrolled in a slot intended for the eligible child, the eligible child suffers real harm by being deprived of an essential educational experience needed to prepare him or her for success in elementary school. In the case of Early Head Start, if an eligible infant or toddler misses all or a part of the year of Early Head Start services, the child suffers harm by being denied participation in a program that has been shown by research to help children perform significantly better on a range of measures of cognitive, language, and social-emotional development than those in a randomly assigned control group and potentially to reduce the risk of poor cognitive, language, and school outcomes later on in life.

GAO identified the lack of verification requirements as a concern related to enrollment fraud as they found evidence that "Head Start staff encouraged parents to report that they were homeless when they were not in order to qualify them for the program." Therefore, we believe it is essential to issue this proposed rule to prevent cases of fraud in which staff intentionally enroll children based on being homeless, despite knowing they are ineligible. Specifically, this proposed regulation reflects the status of homeless children as categorically eligible for participation in Head Start and Early Head Start in order to conform to the Head Start Act and specifies how agency staff must verify, certify, and document in a child's record how they explored a claim by a child's parent, guardian, or other person(s) seeking services for the child who has knowledge of the family's situation that the child is homeless.

We note that since GAO's findings were released, we have kept the Head Start grantee community, Congress, and the general public apprised of our increased focus on program integrity and our planned changes in operating procedures. In addition, these proposed requirements would place a minimal burden on grantees. For example, this proposed regulation would add a requirement for grantees to maintain source documents in each child and pregnant woman's record; grantees

already are required to review these source documents for the purposes of income eligibility determination, so the proposed new requirement would be to review source documents for categorical eligibility, as well as maintain copies of all source documents used to determine eligibility in each pregnant woman and child's eligibility determination record.

IV. Discussion of Regulatory Provisions

As discussed, the findings of a recent investigation by GAO identified weaknesses in existing eligibility verification and documentation requirements that allegedly resulted in the enrollment of ineligible children. The proposed revisions to § 1305.2 and § 1305.4 are intended to reiterate and strengthen Head Start and Early Head Start agency procedures for determining eligibility for program enrollment, including procedures to verify, certify, and document such eligibility, and eliminate such weaknesses. In addition, the regulation proposes to create a new requirement for pregnant women and parents, guardians, or other person(s) seeking services for the child who have knowledge of the family's situation to certify that they have submitted factual and accurate documents to be used to verify their eligibility. The regulation proposes to create new requirements for program staff who make the eligibility determination to certify that the information relied on in making the decision is accurate to the best of his or her knowledge. The regulation proposes to initiate new requirements for agencies to establish policies describing the actions that will be taken against agency staff who intentionally violate Federal and agency eligibility determination regulations, policies, and procedures. The regulation also proposes new requirements for agencies to provide training related to eligibility requirements and the legal consequences of committing fraud. The proposed revisions also change the definitions of "Head Start eligible," "income guidelines," and "low-income family" and add a definition of "homeless children" to conform to statutory requirements and provisions.

Note that we use the term "we" throughout the regulatory text and preamble. The term "we" means the Secretary of the Department of Health and Human Services in consultation with the Assistant Secretary for Children and Families and other officials within the Department. Likewise, the term "Act" refers to the Head Start Act, as amended.

Section 1305.2—Definitions

This regulation proposes to modify the definitions of "Head Start eligible," "income guidelines," and "low-income family" to comply with statutory requirements and provisions. The current definitions contain outdated information regarding eligibility guidelines and/or incorrect statutory citations that we believe must be updated in order to ensure all grantees have correct and clear information related to participant eligibility and enrollment. Otherwise, the Head Start program will be vulnerable to incorrect eligibility and enrollment determinations. To provide clarification for grantees, we also propose to add the definition of "homeless children" as paragraph (i) from section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), which was added as a definition in section 637(11) of the Head Start Act in the 2007 reauthorization, and to redesignate the subsequent definitions accordingly.

The current definition of "Head Start eligible" states that: "A child that meets the requirements for age and family income as established in this regulation or, if applicable, as established by grantees that meet the requirements of section 645(a)(2) of the Head Start Act. Up to 10 percent of the children enrolled may be from families that exceed the low-income guidelines. Indian Tribes meeting the conditions specified in 45 CFR 1305.4(b)(3) are excepted from this limitation." This definition does not reflect current statutory eligibility requirements. For example, the rule that "up to 10 percent of the children enrolled may be from families that exceed the low-income guidelines" was changed when the 2007 reauthorization created several other eligibility provisions. In addition, the definition does not include "Early Head Start" in the lead-in language. Therefore, the new definition of "Head Start and Early Head Start eligible" at § 1305.2(g) is proposed to read as follows: "Head Start or Early Head Start eligible means a pregnant woman or child who meets the requirements for age and family income or categorical eligibility or, if applicable, the requirements established by a grantee under section 645(a)(2) of the Head Start Act or by a Head Start program operated by an Indian Tribe under 45 CFR § 1305.4(d)."

As indicated, we propose to add a definition in § 1305.2 of "homeless children." The 2007 reauthorization expanded eligibility to include homeless children as categorically eligible for participation in Head Start. The definition of "homeless children" also was added to section 637(11) of the Head Start Act, which states that "[t]he term "homeless children" has the meaning given the term "homeless children and youth" in section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2))." To improve clarity for grantees and enable them to have the necessary references related to eligibility determination in one regulation, we propose to include a definition of "homeless children" based on the McKinney-Vento Homeless Assistance Act as § 1305.2(i) to mean individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of 42 U.S.C. 11302(a)(1)); and include (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement; (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of 42 U.S.C. 11302(a)(2)(C)); (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and (iv) migratory children (as such term is defined in 20 U.S.C. 6399) who qualify as homeless for the purposes of this part because the children are living in circumstances described in paragraphs (i) through (iii).

The current definition of "income guidelines" at § 1305.2(j) references an outdated section of the Head Start Act. The current definition defines "income guidelines" as "the official poverty line specified in section 652 of the Head Start Act." However, the official poverty line in the Act now is referenced in the definitions section (section 637(19)) of the Head Start Act. Therefore, we propose to update § 1305.2(j) to reference the correct Head Start Act citation and to redesignate it as paragraph (k). The proposed new definition of income guidelines at § 1305.2(k) means the official poverty line specified in section 637(19) of the Head Start Act. The U.S. Department of Health and Human Services publishes the income guidelines each year in the **Federal Register**; they also are available at *http://aspe.hhs.gov/poverty/.*

The current definition of "low-income family" at § 1305.2(l) states that low-

income family means a family whose total annual income before taxes is equal to, or less than, the income guidelines. The definition also states that, for the purpose of eligibility, a child from a family that is eligible for public assistance or a child in foster care is eligible even if the family income exceeds the income guidelines. Public assistance and foster care, as well as being a homeless child, are classified as the three types of "categorical eligibility" that are authorized by current statute and regulations and further specified in this regulation. We propose to remove the public assistance and foster care categories of recipients currently included in the definition of "low-income family" to prevent confusion and mistakes because agencies are not required to verify family income in these cases. We also propose to redesignate paragraph (l) as paragraph (m). The proposed definition of "low-income family" at § 1305.2(m) only refers to eligibility based on the income guidelines and reads as follows: "Low-income family means a family whose total income before taxes is equal to, or less than, the income guidelines."

Section 1305.4—Determining, Verifying, and Documenting Eligibility

In order to update and strengthen the content of § 1305.4 related to determining, verifying, and documenting Head Start and Early Head Start program eligibility consistent with the changes made through the 2007 reauthorization of the Head Start Act, we propose to revise the heading of § 1305.4, "Age of child and family income eligibility" to read "Determining, verifying, and documenting eligibility."

Because the current regulations regarding eligibility were updated last on March 16, 1998, prior to the 2007 reauthorization of the Head Start Act, these proposed revisions represent the full scope of actions Head Start and Early Head Start agencies are required now by statute to undertake related to determining participant eligibility. We propose to revise § 1305.4 to incorporate the new income eligibility criteria added in the 2007 reauthorization. These proposed determination requirements are described in paragraphs (a) through (d). We believe that the lack of updated and accurate descriptions of eligibility criteria in the current regulations otherwise would contribute to confusion and enrollment determination errors by Head Start and Early Head Start programs.

The current regulations require programs to verify family income (§ 1305.4(c)); identify which documents should be reviewed (§ 1305.4(d)); and establish rules under which an agency must maintain a signed statement by an employee that identifies which documents were examined and stating the child is eligible (§ 1305.4(e)). The current regulations only specify that income eligibility based on having income below the Federal poverty line, has to be verified and do not require that copies of documentation be maintained in the agency records. We believe that the lack of clear up-to-date rules governing eligibility determination, verification, certification, and documentation requirements in the current regulations exposes the Head Start and Early Head Start programs to an unacceptable risk of fraud, as revealed by GAO's investigation.

Therefore, as detailed later in this preamble, in paragraphs (e) to (g), we describe proposed requirements for agency staff to verify income and categorical eligibility and propose specific instructions about the required certification and documentation steps program staff must take. In paragraph (g), the regulation proposes new requirements for pregnant women and person(s) seeking services for individual children to certify that the documents and information that they provided concerning eligibility are accurate to the best of their knowledge, as well as a new requirement for the program staff persons who made the eligibility determination also to certify that the information on eligibility in the file is accurate to the best of their knowledge. Paragraph (g) also proposes to add new requirements related to documentation to ensure that agency staff maintains eligibility determination records for each pregnant woman or child, including copies of all documents submitted by a pregnant woman or persons seeking services on behalf of a child to the program relating to the pregnant woman's or child's eligibility for services and any staff member's notes recording any other information related to eligibility received from any source; documentation establishing that an agency staff member verified the accuracy of the information on eligibility; a record of the category under which the pregnant woman or child was determined eligible; and the required beneficiary and staff certifications. Additionally, paragraph (g) explains the retention and access requirements related to eligibility determination records.

In paragraph (h) we propose a new requirement that all Head Start and Early Head Start agencies must establish policies and procedures describing the actions that will be taken against agency staff who commit intentional violations of Federal and agency eligibility determination requirements, including enrolling pregnant women and children who staff have not documented as eligible to participate in the program.

In paragraph (i), we propose to extend current regulatory training requirements at § 1304.52(l) to specify that such training for all governing body, policy council, management and those staff members who have the responsibility to make eligibility determinations must include an explanation of the legal consequences of committing fraud and information on methods for obtaining facts necessary for complete and accurate eligibility determinations.

Specifically, proposed paragraph (a) reflects the statutory requirements at section 638 of the Act regarding age eligibility for participation in the Head Start program. Following the statute, we begin paragraph (a) by noting the exception stated in section 645(a)(2) of the Head Start Act, which authorizes qualifying communities to develop their own eligibility criteria within statutory limits. Section 645(a)(2) applies to a Head Start program that is operated in a community with a population of 1,000 or less individuals and the following conditions apply: There is no other preschool program in the community; the community is located in a medically underserved area, as designated by the Secretary pursuant to section 330(b)(3) of the Public Health Service Act [42 U.S.C. 254c(b)(3)], and is located in a health professional shortage area, as designated by the Secretary pursuant to section 332(a)(1) of such Act [42 U.S.C. 254e(a)(1)]; the community is in a location which, by reason of remoteness, does not permit reasonable access to preschool and medical services; and not less than 50 percent of the families to be served in the community are eligible under the eligibility criteria established by the Secretary under paragraph in section 645(a)(1) of the Act. A Head Start program in such a locality is required to establish the eligibility criteria to be used, except that no child residing in such community whose family is eligible under such eligibility criteria shall, by virtue of regular eligibility criteria, be denied an opportunity to participate in such program.

Section 645A(c) of the Act provides that to be eligible for participation in Early Head Start programs, an individual must be a pregnant woman or a child under the age of three. Section 645(a)(5)(A) of the Act provides that children who are at least three years old through the age of compulsory school attendance are age eligible for

participation in Head Start programs. The current regulations at § 1305.4(a) describe age eligibility requirements as follows: "To be eligible for Head Start services, a child must be at least three years old by the date used to determine eligibility for public school in the community in which the Head Start program is located, except in cases where the Head Start program's approved grant provides specific authority to serve younger children. Examples of such exceptions are programs serving children of migrant families and Early Head Start programs." However, the paragraph is outdated and needs to be changed in order to reflect current statutory provisions. We believe the lack of thorough and clear descriptions of age eligibility criteria could contribute to confusion and enrollment mistakes by Head Start and Early Head Start programs as they respond to the new verification procedures proposed through this regulation. In addition, in order to clarify which age eligibility requirements apply to Early Head Start participation versus those that apply to Head Start participation, we propose to create two paragraphs to distinguish the different age eligibility requirements for each program.

Since the current paragraph (a) does not refer to the specific age eligibility requirements for Early Head Start programs, we propose in paragraph (a)(1)(i) that to be eligible for Early Head Start services, "a child must be an infant or toddler between the ages of zero and three years old." Current paragraph (a) also does not refer to the age eligibility of pregnant women. Therefore, we propose to add a provision in (a)(1)(ii) to specify that a pregnant woman may be any age in order to be eligible for enrollment in an Early Head Start program.

In proposed paragraph (a)(2), we primarily state the same eligibility requirements currently found in paragraph (a). Specifically, proposed (a)(2) states that "To be age eligible for Head Start services, a child must be at least three years old by the date used to determine eligibility for public school in the community in which the Head Start program is located and not older than the age of required school attendance, except in cases where the Head Start program's approved grant provides specific authority to serve younger children. Examples of such exceptions are programs serving children of migrant and seasonal farmworker families." The date to be used for age determination remains the same as the current regulation. We propose to remove the current exception of Early Head Start programs since we now explain the Early Head Start requirements separately in proposed paragraph (a)(1). We also propose to add reference to "seasonal farmworker families" to reflect statutory terminology.

Under proposed paragraph (b)(1), we describe the statutory income eligibility requirements found in section 645(a)(1) of the Act. As described above with regard to paragraph (a), we begin proposed paragraph (b) with the exception stated in section 645(a)(2) of the Head Start Act, which authorizes qualifying communities to develop their own eligibility criteria. Proposed paragraph (b)(1) reflects the requirements for Head Start and Early Head Start eligibility that pregnant women and age eligible children from low-income families shall be eligible for participation in Head Start and Early Head Start programs.

Proposed paragraph (b)(2) reflects the new statutory authority at section 645(a)(1)(B)(iii)(I) established by the 2007 reauthorization of the Head Start Act. This paragraph explains that to a reasonable extent, but not to exceed 10 percent of participants, participants may include age eligible children and pregnant women in the area served who would benefit from Head Start or Early Head Start programs, but who are not eligible under paragraphs (b)(1) or (c) [income or categorically eligible]. In order to conform to the new statutory authority that was provided in section 645(a)(1)(B)(iii)(I) through the 2007 reauthorization, we reiterate in proposed paragraph (b) that programs may enroll pregnant women or children from over-income families "in the area served who would benefit from such programs."

Proposed paragraph (b)(3) reflects the new statutory authority at section 645(a)(1)(B)(iii)(II) established by the 2007 reauthorization of the Head Start Act. This paragraph explains that from the area served, programs may enroll an additional 35 percent of participants beyond the 10 percent eligible under proposed paragraph (b)(2) that are pregnant women and age eligible children whose families have incomes over 100 percent but below 130 percent of the income guidelines, who do not satisfy the eligibility requirements described under paragraphs (b)(1) or (c) [income or categorically eligible]. We are reiterating the provision in this proposed rule to conform to the new statutory authority that was provided through the 2007 reauthorization.

Proposed paragraph (b)(3)(i) specifies that agencies that choose to serve individuals eligible under this paragraph must establish and implement outreach, prioritization, and enrollment policies and procedures that ensure they are meeting the needs of children and pregnant women eligible based on being a member of a low-income family, as defined in this proposed rule, and enrolling at least 10 percent of children with disabilities who are eligible under proposed paragraph (b)(2), prior to serving the pregnant women and children from families with incomes over 100 percent to 130 percent of the income guidelines.

In order to align the Head Start regulations with the Act, proposed paragraph (b)(3)(ii) also references the annual reporting requirements stated in section 645(a)(1)(B)(iv) of the Act for agencies that choose to serve additional children and pregnant women per the authority granted at section 645(a)(1)(B)(iii)(II) of the Act. The 2007 reauthorization added the reporting requirement under section 645(a)(1)(B)(iv) for all Head Start and Early Head Start agencies that serve additional pregnant women and children under section 645(a)(1)(B)(iii)(II) to document how the grantees enrolling additional over-income children are meeting the needs of children from low-income families, homeless children, children in foster care, and pregnant women and children from families eligible for public assistance, as well as to document that they have implemented outreach and enrollment policies and procedures that ensure the agency is enrolling at least 10 percent of children with disabilities prior to serving children from families with incomes over 100 percent and under 130 percent of the income guidelines.

Proposed paragraph (c) describes the three types of categorical eligibility for Head Start and Early Head Start based on section 645(a)(1)(B)(i) and (ii) of the Act and 45 CFR 1305.4(l).

The first proposed type of categorical eligibility reiterates the eligibility condition stated in section 645(a)(1)(B)(i) of the Act that a child is eligible if the child's family is "eligible or, in the absence of child care, would potentially be eligible for public assistance." In addition, children and pregnant women are eligible under the proposed regulation for Early Head Start based on section 645A(c) of the Head Start Act, which makes the eligibility criteria in section 645(a)(1) of the Act applicable to the enrollment of children and pregnant women in Early Head Start programs. As provided in policy guidance, TANF and SSI are the only two programs that are considered as

public assistance for determining Head Start Eligibility.

The second proposed type of categorical eligibility specifies that a homeless child is eligible for participation, as stated in section 645(a)(1)(B)(ii) of the Act. Section 645A(c) of the Head Start Act makes the eligibility criteria in section 645(a)(1) of the Act applicable to the enrollment of children and pregnant women in Early Head Start programs. As described earlier, the 2007 reauthorization added the provision stating that homeless children are categorically eligible for participation in Head Start. The definition of "homeless children" also was added to section 637(11) of the Head Start Act, which states that "[t]he term "homeless children" has the meaning given the term "homeless children and youth" in section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2))." As stated previously, we propose to add this definition of "homeless children" to § 1305.2(i) to improve clarity for grantees.

The third type of categorical eligibility proposes that children in foster care are eligible for participation, which already is specified in the current definition of "low-income family" in § 1305.2(l) (proposed to be redesignated as § 1305.2(m)). It has been longstanding Head Start policy for foster children to be eligible for participation in Head Start, without regard to their foster family's income. We propose in paragraph (c) to add a reference to the regulatory definition of foster care used for Federal child welfare programs to this Head Start rule to enable grantees to conduct the eligibility determination process accurately and consistently. We propose to reference 45 CFR 1355.20(a), which defines foster care to mean "24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made."

In summary, proposed paragraph (c) provides that pregnant women and age eligible children are categorically eligible for enrollment in Head Start and Early Head Start if: (1) The pregnant woman or the child's family is eligible or, in the absence of child care, would potentially be eligible for public assistance; (2) the child is homeless, as defined in § 1305.2(i); or (3) the child is in foster care.

In proposed paragraph (d), we move the requirements and procedures related to the special income eligibility rules governing Indian Tribes that are reflected currently in § 1305.4(b)(3) and (4) to proposed paragraph (d)(1) through (5). The current paragraph only includes references to income eligibility based on the low-income guidelines, but does not include references to categorical eligibility. Therefore, we also propose to update this paragraph to conform to the statutory authority.

Under the proposed paragraph, a Head Start or Early Head Start program operated by an Indian Tribe may enroll more than 10 percent of its children from families whose incomes exceed the low-income guidelines or are not categorically eligible when:

- All children from Indian and non-Indian families living on the reservation that meet the low-income guidelines or are categorically eligible who wish to be enrolled in the program are served by the program;
- All children from income-eligible or categorically-eligible Indian families native to the reservation living in non-reservation areas, approved as part of the Tribe's service area, who wish to be enrolled in the program are served by the program. In those instances in which the non-reservation area is not served by another Head Start or Early Head Start program, the Tribe must serve all of the income-eligible and categorically-eligible Indian and non-Indian children whose families wish to enroll them in the program prior to serving over-income children;
- The Tribe has the resources within its grant or from other non-Federal sources to enroll children from families whose incomes exceed the low-income guidelines or are not categorically eligible without using additional funds from HHS intended to expand Head Start or Early Head Start services; and
- At least 51 percent of the children to be served by the program are from families that meet the income-eligibility guidelines or are categorically eligible.

Proposed paragraph (d)(5) maintains the content from current § 1305.4(b)(4), but updates the reference in this provision from paragraph (b)(3) to paragraph (d). The paragraph proposes that programs which meet the conditions of paragraph (d) must annually set criteria that are approved by the Policy Council and the Tribal Council for selecting over-income children who would benefit from such a program.

Proposed paragraph (e) would establish requirements for family income to be verified before a child or pregnant woman is determined to be eligible for Head Start or Early Head Start participation based on being a member of a low-income family. We propose adding these income verification requirements to respond to GAO's findings and concerns related to the lack of requirements in many programs to verify, document, and maintain records. This proposed income verification process would reduce the risk GAO cited whereby "dishonest persons could falsify earnings statements and other documents in order to qualify." This responds directly to GAO's recommendation that we establish "more stringent income verification requirements, documentation requirements, or both by Head Start employees responsible for certifying family eligibility, such as maintaining income documentation provided by the applicant (*e.g.,* pay stubs or W–2s)." Moreover, we have communicated to the public and to grantees on several occasions that we would be addressing GAO's findings by strengthening our verification requirements. For example, Secretary Sebelius provided notice to all grantees through her May 17, 2010 letter that we would be developing new regulations "that will address verification requirements."

Proposed paragraph (e) incorporates the current regulatory requirement related to income verification in § 1305.4(c), which requires that family income must be verified by the Head Start or Early Head Start program before determining that a child is eligible based on income guidelines. We propose to continue the longstanding requirement that family income must be verified prior to determining eligibility for enrollment in a Head Start or Early Head Start program. As defined in proposed § 1305.2(b), the term "enrollment" means "the official acceptance of a family by a Head Start program and the completion of all procedures necessary for a child and family to begin receiving services."

Paragraph (e) proposes a new requirement related to a pregnant woman's or family's declaration that the pregnant woman or family has no income. Currently, there are no regulations that specify what actions agencies should take when a pregnant woman or a child's parent, guardian, or other person(s) seeking services for the

child who has knowledge of the family's finances states that the pregnant woman or family has no income to report. We recognize the difficulty Head Start and Early Head Start agencies face in obtaining documentation supporting a declaration that an individual has no income. Therefore, in such cases when a pregnant woman or family reports having no income and submits no documentation proving that the pregnant woman or family has no income, proposed paragraph (e) would require agency staff to document that they explored a pregnant woman or family's declaration that they have no income. For example, programs should gather as much relevant information as possible about the pregnant woman or family; *i.e.,* the location, living arrangements, employment situation, *etc.* of the pregnant woman or family to make as informed a judgment as possible about the pregnant woman or family's eligibility status. Agencies may examine and maintain documentation representing relevant evidence of a pregnant woman or family's low-income status, such as receipt of Supplemental Nutrition Assistance Program (SNAP) or Medicaid benefits, or any other evidence of public or private assistance by which a family with children is meeting its ongoing needs for food, housing, and health care.

Accordingly, under proposed paragraph (e), before a child or pregnant woman is determined to be eligible on the basis of family income, the pregnant woman or the child's parent, guardian, or other person(s) seeking services for the child who has knowledge of the family's finances must submit information to the program concerning the family's income. Under the proposed rule, verification must include examination of documents, such as individual income tax forms, W–2 forms, pay stubs, pay envelopes, or written statements from employers (if individual income tax forms, W–2 forms, pay stubs, or pay envelopes are not available). Income would be required to be compared to the poverty guidelines for the appropriate size of family, and program staff would need to document whether a pregnant woman or child's family qualifies as a low-income family under the income guidelines for the appropriate size of family. Under the proposed rule, when appropriate, in cases in which no documentation regarding the income eligibility of the pregnant woman or child has been received by the agency, or when it is either more efficient or reliable to do so rather than to search for eligibility documentation, programs could seek information from third parties who have first-hand knowledge about the pregnant woman's or child's eligibility, and document the names, titles, and relationship to the applicant in the participant's record. Programs also could seek third party information in cases where documents are not submitted to prove a claim that a pregnant woman or family has no income. We believe all applicants must be given the opportunity to withhold consent related to each third party the program would like to contact. Therefore, we propose that if programs plan to seek third party verification from one or more entities regarding an applicant's eligibility, staff must inform the applicant about each entity that they intend to contact and have the applicant sign a consent form permitting the program to contact each of the specified third parties; this would provide applicants the opportunity to withhold their consent for third party verification from one or more entities. If applicants do not sign the consent form, the Head Start program would not be allowed to contact that entity and the applicant would remain responsible for providing appropriate documentation. We also propose that when programs contact third parties, they should limit the information discussed and questions posed to the third party to the information necessary to obtain the required eligibility information. Programs should be especially sensitive to any potential domestic violence issues prior to seeking verification of the required eligibility information.

In paragraph (f), we propose to require agencies to verify and document categorical eligibility before a pregnant woman or child is determined to be eligible for Head Start or Early Head Start participation. We propose to require the pregnant woman or the child's parent, guardian or other person(s) seeking services for the child who has knowledge of the family's situation to submit information to the program concerning the family's categorical eligibility. As proposed, verification of categorical eligibility by the program must include examination of the relevant documents submitted by the pregnant woman or family for the relevant type of categorical eligibility, as described below. If a pregnant woman or child could qualify for Head Start or Early Head Start participation based on more than one eligibility criterion, then the program should enroll the child under the criterion that is easiest to verify and document; it would not be necessary to verify and document multiple eligibility criteria.

The first requirement in proposed paragraph (f)(1) addresses categorical eligibility based on eligibility for public assistance. This proposal aligns with the requirement currently at § 1305.4(d), which specifies that verification of family income "must include examination of * * * documentation showing current status as recipients of public assistance." Under proposed paragraph (f)(1), we require agency staff to examine any official documents submitted for the purpose of demonstrating that the pregnant woman, the child, or child's parent or guardian, is eligible or, in the absence of child care, would potentially be eligible for public assistance. Based on Federal Head Start grantee monitoring experience, we are aware that some agencies already have developed policies and procedures, or practices, for verifying public assistance eligibility or receipt status. Since the substance of this proposed requirement is based on current practice by many grantees, we do not believe this would impose a large burden.

Under proposed paragraph (f), in cases in which a child is in foster care, we add a new requirement for agency staff to review a copy of a court order, other legal or government-issued document, or a statement of a State, Tribal, or local child welfare official demonstrating the child is in foster care. The current regulations do not require agencies to verify or document foster care status. Based on Federal Head Start grantee monitoring experience, we are aware that some agencies already have developed policies and procedures, or practices, for verifying foster care status through their collaborations with local child welfare agencies. Since the substance of this requirement is based on current practice by many grantees, we do not believe this proposed requirement would impose a large burden.

Proposed paragraph (f) also adds a new provision to address cases when documents are not submitted to provide evidence of a child's status as homeless. Under proposed paragraph (f)(3), in lieu of other source documents, the program could substitute a written statement of a program staff member certifying that he or she has made reasonable effort to confirm a declaration by the parent, guardian, or other person(s) seeking services for the child that the child is a "homeless child," as defined in § 1305.2(i). As stated previously, the 2007 reauthorization added homeless children as a category of individuals that are categorically eligible for enrollment. The current regulations do not specify how agencies should verify

that a child is homeless. We believe it is essential for program integrity, especially in light of GAO's recent investigation into allegations that grantees enrolled children who were known by agency staff not to be homeless, to require that homelessness must be verified, and documentation must be maintained in the agency's files (as described in proposed paragraph (g)), in order to prevent cases of fraud in which staff intentionally enroll children based on being homeless despite knowing they are not. We recognize that obtaining verification and documentation of the circumstances that fall within the Federal definition of homeless children can present unique challenges to Head Start and Early Head Start agencies and to vulnerable families. We would encourage agencies to enroll homeless children based on the families' description of their living situation, if that description meets the definition and documentation is not readily available. Statements that describe the living situation also could be accepted from family members and other individuals that are cohabitating temporarily with the family. As proposed, verification of circumstances and collection of documents should be obtained within a reasonable timeframe. In order to verify homelessness, we would encourage grantees to conduct the following types of efforts: Engage their school district homeless liaisons, private and public shelter providers, HUD Continuums of Care, and other homeless service agencies in their service area to assist in the verification and documentation process. We also would urge agencies to exercise care to ensure that their verification activities do not increase the risk that families may be evicted or suffer other resulting adverse consequences. In addition, we would urge agencies to ensure that these efforts do not impose barriers to the enrollment and participation of homeless children in Head Start programs, an important goal expressed in the Head Start Act.

Paragraph (f) proposes that, before a child or pregnant woman is determined to be eligible on the basis of categorical eligibility, the pregnant woman or the child's parent, guardian, or other person(s) seeking services for the child who has knowledge of the family's situation must provide the program with: (1) A copy of official documents demonstrating current eligibility or receipt of public assistance benefits or services by the pregnant woman's or the child's family; (2) a copy of the court order or other legal or government-issued document or statement of government child welfare official demonstrating the child is in foster care; or (3) a copy of any other source document that establishes categorical eligibility. Under the proposal, in place of the foregoing documents, the program could substitute a written statement of a program staff member certifying that the staff member has made reasonable efforts to confirm a child is homeless, as defined in proposed § 1305.2(i). The lack of documentation of homelessness should not be a barrier to enrollment. Under the proposal, when appropriate, in cases in which no documentation regarding the income eligibility of the pregnant woman or child has been received by the agency, or when it is either more efficient or reliable to do so rather than to search for eligibility documentation, programs could seek information from third parties who have first-hand knowledge about the pregnant woman's or child's eligibility, and document the names, titles, and relationship to the applicant in the participant's record. As proposed, programs also could seek third party information in cases where documents are not submitted to prove a claim that a pregnant woman or family has no income. We propose that if programs plan to seek third party verification from one or more entities regarding an applicant's eligibility, staff must inform the applicant about each entity that they intend to contact. In addition, the applicant would be required to sign a consent form permitting the program to contact specified third parties; this would provide applicants the opportunity to withhold their consent for third party verification from one or more entities. An applicant must be given the opportunity to withhold consent related to each entity the program would like to contact. If applicants do not sign the consent form the Head Start program could not contact that entity and the applicant would remain responsible for providing appropriate documentation. We propose that when programs contact third parties, they should limit the information discussed and questions posed to the third party to the information necessary to obtain the required eligibility information. Programs should be especially sensitive to any potential domestic violence issues prior to seeking verification of the required eligibility information.

In proposed paragraph (g), we strengthen and supplement current regulatory requirements related to eligibility certification and documentation to respond to GAO's finding that "the lack of documentation made it virtually impossible to determine whether only under-income children were enrolled in spots reserved for under-income children" and its recommendations that we establish "more stringent income verification requirements, documentation requirements, or both by Head Start employees responsible for certifying family eligibility, such as maintaining income documentation provided by the applicant (*e.g.,* pay stubs or W–2s)." As previously mentioned, current regulations require a signed statement by an employee of the Head Start program, identifying which documents were examined and stating that the child is eligible to participate in the program, but do not require staff to maintain copies of the documents.

First, this proposed paragraph requires all Head Start and Early Head Start programs to keep an eligibility determination record for each child or pregnant woman as part of the record maintained by the agency on that individual. Proposed paragraph (g)(1) requires this record to include copies of all documents submitted by a pregnant woman or persons seeking services on behalf of a child to the program by such persons or other persons relating to the pregnant woman's or child's eligibility for services and any staff member's notes recording any other information related to eligibility received from any source.

Proposed paragraph (g)(2) requires the record to include a copy of the statements and documents required under proposed paragraphs (e) and (f) (related to income and categorical eligibility). Based on Federal Head Start grantee monitoring experience, we are aware that some agencies already have developed policies and procedures, or practices, for maintaining copies of documents verified during eligibility determination. Since the substance of this requirement is based on current practice by some grantees, we do not believe this proposed requirement would impose a large burden.

Proposed paragraph (g)(3) requires that the record also includes a signed and dated statement by the person seeking services, *i.e.,* the pregnant woman or the child's parent, guardian, or other person seeking services for the child who has knowledge of the family's situation that "the documents and information that the person provided concerning eligibility are accurate to the best of the person's knowledge."

Proposed paragraph (g)(4) requires the record to include documentation establishing that an agency staff member has sought to verify the accuracy of the information on eligibility provided to

the agency by: (i) Conducting an in-person interview with the pregnant woman or the child's parent, guardian, or other person seeking services for the child who has knowledge of the family's situation; and (ii) when appropriate, in cases in which no documentation regarding the income eligibility of the pregnant woman or the child's family or regarding the categorical eligibility of the child based on being homeless has been received by the agency, or when it is either more efficient or reliable to do so rather than to search for eligibility documentation, seeking information from third parties who have first-hand knowledge about the pregnant woman's or child's eligibility, whose names, titles, and affiliations would be recorded in the record. If programs seek third party verification regarding an applicant's eligibility, the record would be required to include the applicant's signed consent form permitting the program to contact each particular third party, as required under proposed paragraphs (e) and (f).

Proposed paragraph (g)(5) requires the eligibility determination record to include documentation of the specific eligibility criterion under which the child or pregnant woman was determined eligible for participation. As stated above, under the proposed rule, if a pregnant woman or child could qualify for Head Start or Early Head Start participation based on more than one eligibility criterion, then the program should enroll the child under the criterion that is easiest to verify and document; it would not be necessary to verify and document multiple eligibility criteria. This includes a record of the income level or relevant eligibility category, as addressed in proposed paragraphs (b) and (c). The first criterion under which the child or pregnant woman could be determined eligible is based on having income below the income guideline for the family size, with the family size used documented, as described in proposed paragraph (b). The second criterion under which the child or pregnant woman could be determined eligible is whether the child's family or pregnant woman is eligible or, in the absence of child care, would potentially be eligible for public assistance, as described in proposed paragraph (c)(1). The third criterion, as stated in proposed paragraph (c)(2), is based on being a homeless child, as defined in proposed § 1305.2(i). The record also would need to include the provision of proposed § 1305.2(i) under which the child was determined to be homeless. The fourth criterion is whether the child is in foster care, as proposed in paragraph (c)(3). The fifth criterion, as proposed in paragraph (b)(2), is being a pregnant woman or child in the area served who would benefit from such programs but who is not eligible otherwise for services (total enrollment in this category not to exceed 10 percent of the enrollment slots). The sixth criterion under which the pregnant woman or child could be determined eligible, which is described in proposed paragraph (b)(3), is whether the pregnant woman or child's family has income over 100 percent to 130 percent of the income guidelines (total enrollment in this category not to exceed 35 percent of the enrollment slots, in addition to any slots filled under paragraph (b)(2)). The final proposed criterion under which the pregnant woman or child could be determined eligible is whether the pregnant woman or child meets alternative eligibility criteria as permitted under § 1305.4(d) or section 645(a)(2) of the Act.

Proposed paragraph (g)(6) also adds a new Head Start staff certification requirement in direct response to GAO's aforementioned recommendation to establish "more stringent income verification requirements, documentation requirements, or both by Head Start employees responsible for certifying family eligibility." The proposed paragraph requires the record to include a signed and dated statement by the program staff person who made the eligibility determination certifying that the information on eligibility in the file is accurate to the best of the person's knowledge, and based on that information, the person has determined the pregnant woman or child to be eligible for services.

Finally, proposed paragraph (g)(7) specifies the record retention and access requirements for the documents and certifications maintained in each child and pregnant woman's record under this paragraph. These record retention and access practices must be consistent with section 647 of the Head Start Act and the uniform administrative requirement regulations regarding HHS grant awards implemented at 45 CFR 74.53 for awards and subawards to institutions of higher education, hospitals, other nonprofit organizations, and commercial organizations and 45 CFR 92.42 for grants and cooperative agreements to State, local, and Tribal governments. Among other requirements, Section 647 states that all grant recipients to "keep such records as the Secretary shall prescribe" and provide "access for the purpose of audit and examination to any books, documents, papers, and records of the recipients that are pertinent to the financial assistance received" under the Head Start Act. A key requirement explained in both 45 CFR 74.53 and 92.42 is that documents shall be retained for a period of three years. Additionally, both of these sections state requirements related to the right of access by the HHS awarding agency, the U.S. Comptroller General, or any of their authorized representatives, to any pertinent books, documents, papers, or other records of recipients in order to make audits, examinations, excerpts, transcripts and copies of such documents. We have included a reference to these longstanding Departmental policies in order to respond to GAO's concerns that agencies were not required to maintain documents related to enrollment. This requirement will ensure that documents and certifications required to be maintained under this paragraph are retained for the appropriate amount of time and are accessible to the Office of Head Start and other Federal agencies, such as the HHS Inspector General and the GAO, as needed for monitoring, audit, investigative, and other purposes.

Proposed paragraph (h) addresses the establishment of agency policies regarding violation of eligibility determination regulations, policies, and procedures. Under this paragraph, we propose that all Head Start and Early Head Start agencies must establish policies and procedures describing the actions that will be taken against agency staff who commit intentional violations of Federal and agency eligibility determination regulations, policies and procedures including enrolling children and pregnant women who staff have not documented as eligible to participate in the program. We believe this proposed requirement is necessary in order to prevent future incidents of fraud like those found in the GAO investigation and to make clear to all agency staff the legal consequences of intentionally committing enrollment fraud.

Proposed paragraph (i), "Training," requires that all Head Start and Early Head Start agencies train all governing body, policy council, management and those staff members who have the responsibility to make participant eligibility determinations on Federal and agency eligibility regulations, policies, and procedures, including verification, certification, and documentation requirements. The requirements in proposed paragraph (i) are an extension of current requirements stated at § 1304.50(g)(1) that grantee and delegate agencies must have written policies that define the roles and responsibilities of the governing body

members and inform them of the management procedures and functions necessary to implement a high-quality program. They also would expand on current requirements stated at § 1304.52(l) that the training and development requirements that grantee and delegate agencies must implement, including to provide an orientation to new staff, consultants, and volunteers; provide training or orientation to Head Start and Early Head Start governing body members; and provide orientation and ongoing training to Head Start and Early Head Start Policy Council and Policy Committee members to enable them to carry out their program governance responsibilities effectively.

We have communicated to the public and to grantees on several occasions that we would be addressing GAO's findings by strengthening our training requirements. For example, we told GAO after it shared its investigation findings that we would "make sure that grantee staff received training regarding the proper way to validate income documentation;" this assurance was documented and shared publicly in GAO's May 18, 2010 testimony in the section entitled "Corrective Action Briefing." In addition, Secretary Sebelius provided notice to all grantees through her May 17, 2010 letter that we would be developing new regulations to address "staff training on eligibility criteria and procedures."

Proposed paragraph (i) specifies that the training must be conducted within 30 days following the effective date of this final rule, and within 30 days of hiring or beginning of tenure of new governing body, policy council, management and those staff members who have the responsibility to make participant eligibility determinations. We propose to require agencies to develop policies regarding how often such training would be provided after the initial training to ensure that governing body, policy council, management and those staff members who have the responsibility to make participant eligibility determinations are aware of all current eligibility determination regulations, policies and procedures. The National Center on Program Management and Fiscal Operations will be developing training assistance on this topic to assist grantees.

We propose to require the training to include explanations of the legal consequences for individuals and agencies that commit fraud related to eligibility determinations, including by intentionally enrolling children or pregnant women that they know are ineligible. Examples of legal consequences to be explained during training include the disallowance of the agency's Head Start or Early Head Start funds; the determination of deficiencies through the monitoring review process; the suspension or termination of the grant; or individual consequences for the staff involved who intentionally commit fraud. We also would require such training to address methods and strategies for obtaining facts necessary for complete and accurate eligibility determinations. These methods and strategies would need to address treating families with dignity and respect and give due regard for possible issues of domestic violence, stigma, and privacy. We propose to require all agencies to maintain ongoing records of training sessions. Examples of information that would need to be documented include: The dates sessions were conducted, instructor names and titles, and attendee names.

V. Paperwork Reduction Act

This proposed rule establishes new information collection requirements in § 1305.4(b), (e), (f), and (g). As required by the Paperwork Reduction Act of 1995, codified at 44 U.S.C. 3507, the Administration for Children and Families will submit a copy of these sections to the Office of Management and Budget (OMB) for review and they will not be effective until they have been approved and assigned a clearance number.

Requirement	Respondents	Annual	Average burden per respondent (hours)	Total burden hours
§ 1305.4(b)(3)(ii)	10	1	2	20
§ 1305.4(e) and (f)	1,600	*(should reflect info collections for each applicant).*	2	3,200
§ 1305.4(g)	1,600	*(should reflect info collections for each applicant).*	2	3,200

We estimate the costs of implementing these proposed requirements would be approximately $132,188 annually. We calculated this estimate by multiplying the average hourly salary for family services coordinators ($20.59) by the estimated total burden hours (6,420).

With respect to these provisions, the Administration for Children and Families will consider comment by the public on this collection of information in the following areas:

- Evaluating whether the proposed collection is necessary for the proper performance of the functions of ACF, including whether the information will have practical utility;
- Evaluating the accuracy of ACF's estimate of the proposed collection of information, including the validity of the methodology and the assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, *e.g.,* permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in this proposed regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the regulations. Written comments to OMB for the proposed information collection should be sent directly to the following: Office of Management and Budget, either by fax to 202–395–6974 or by e-mail to OIRA at *submission@omb.eop.gov.* Please mark faxes and e-mails to the attention of the desk officer for ACF.

VI. Regulatory Flexibility Act

The Secretary certifies that, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), this proposed rule will not result in a significant economic impact on a substantial number of small entities.

This proposed rule primarily is intended to ensure accountability for Federal funds consistent with the purposes of the Head Start Act and is not duplicative of other requirements. We believe this proposed rule implements the aims of the Head Start Act, as amended, to improve the effectiveness of Head Start programs while preserving the ability of Head Start grantees to continue using creativity and innovation to promote the school readiness of low-income children.

Specifically, as noted under the Paperwork Reduction Act section of this preamble, we estimate the cost of implementing the proposed new reporting requirements would be approximately $132,188 annually, which when applied to all 1,600 grantees nationally, results in a cost per grantee of less than $85. In developing this estimate, we assumed that each of the 1,600 Head Start and Early Head Start grantees would spend an additional four hours beyond what they spend currently to conduct the proposed new eligibility verification, certification, and documentation procedures, as required by paragraphs (e) through (g). Included in our estimated annual costs are the minimal costs incurred by those grantees that choose to serve additional pregnant women and children per the authority granted at section 645(a)(1)(B)(iii)(II) of the Head Start Act, and therefore would be required to comply with the annual reporting requirements described in section 645(a)(1)(B)(iv) of the Head Start Act and paragraph (b)(3)(ii) of this proposed rule. Since no grantees have taken the opportunity to serve additional pregnant women and children per the authority granted at section 645(a)(1)(B)(iii)(II) of the Head Start Act to date, our reasonable expectation is that approximately 10 grantees per year might choose to use this authority in the future, at a total estimated cost of $412 per year.

We request public comments on whether we have adequately considered all costs for small entities.

VII. Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this Notice of Proposed Rulemaking is consistent with these priorities and principles. These regulations incorporate statutory changes to the Head Start program enacted in the Improving Head Start for School Readiness Act of 2007 and strengthen procedures to determine, verify, certify, and maintain records regarding eligibility for Head Start and Early Head Start program enrollment. We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the criteria for a significant regulatory action under E.O. 12866.

ACF does not believe there would be a significant economic impact from this proposed regulatory action. Based on our estimate described under the Paperwork Reduction Act section of this preamble, the total cost would fall well below the $100 million threshold. The estimated total cost of implementation of these rules for all grantees is approximately $132,188 annually.

VIII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If an agency must prepare a budgetary impact statement, section 205 requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule consistent with the statutory requirements. Section 203 requires a plan for informing and advising any small government that may be significantly or uniquely impacted. The Department has determined that this proposed rule would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year.

IX. Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. Chapter 8.

X. Executive Order 13132

Executive Order 13132, Federalism, requires that Federal agencies consult with State and local government officials in the development of regulatory policies with federalism implications. This proposed rule will not have substantial direct impact on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

XI. Treasury and General Government Appropriations Act of 1999

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

List of Subjects in 45 CFR Part 1305

Education of disadvantaged, Grant programs/social programs, Individuals with disabilities.

(Catalog of Federal Domestic Assistance Program Number 93.600, Project Head Start)

Dated: September 14, 2010.

David A. Hansell,

Acting Assistant Secretary for Children and Families.

Approved: December 22, 2010.

Kathleen Sebelius,

Secretary.

For the reasons set forth in the preamble, we propose to amend Part 1305 of 45 CFR Chapter XIII as follows:

PART 1305—ELIGIBILITY, RECRUITMENT, SELECTION, ENROLLMENT, AND ATTENDANCE IN HEAD START

1. The authority citation for part 1305 is revised to read as follows:

Authority: 42 U.S.C. 9801 *et seq.,* 5 U.S.C. 553(b).

2. Amend § 1305.2 by:

a. Revising paragraph (g)

b. Redesignating paragraphs (i) through (s) as paragraphs (j) through (t);

b. Adding a new paragraph (i); and

c. Revising newly redesignated paragraphs (k) and (m).

The revisions and addition read as follows:

§ 1305.2 Definitions.

* * * * *

(g) Head Start or Early Head Start eligible means a child or pregnant woman who meets the requirements for age and family income or categorical eligibility or, if applicable, the requirements established by a grantee under section 645(a)(2) of the Head Start Act or by a Head Start program operated by an Indian Tribe under 45 CFR 1305.4(d).

* * * * *

(i) Homeless children:

(1) Means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of 42 U.S.C. 11302(a)(1)); and

(2) Includes—

(i) Children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;

(ii) Children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of 42 U.S.C. 11302(a)(2)(C));

(iii) Children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(iv) Migratory children (as such term is defined in 20 U.S.C. 6399) who qualify as homeless for the purposes of this part because the children are living in circumstances described in paragraphs (i)(2)(i) through (iii) of this section.

* * * * *

(k) Income guidelines means the official poverty line specified in section 637(19) of the Head Start Act.

* * * * *

(m) Low-income family means a family whose total income before taxes is equal to, or less than, the income guidelines.

* * * * *

3. Revise § 1305.4 to read as follows:

§ 1305.4 Determining, verifying, and documenting eligibility.

(a) *Age eligibility.* Except as provided in section 645(a)(2) of the Head Start Act:

(1) To be age eligible for Early Head Start services:

(i) A child must be an infant or toddler between the ages of zero and three years old.

(ii) A pregnant woman may be any age.

(2) To be age eligible for Head Start services, a child must be at least three years old by the date used to determine eligibility for public school in the community in which the Head Start program is located and not older than the age of required school attendance, except in cases where the Head Start program's approved grant provides specific authority to serve younger children. Examples of such exceptions are programs serving children of migrant and seasonal farmworker families.

(b) *Income eligibility.* Except as provided in section 645(a)(2) of the Head Start Act:

(1) Age eligible children and pregnant women from low-income families shall be eligible for participation in Head Start and Early Head programs.

(2) To a reasonable extent, but not to exceed 10 percent of participants, participants may include age eligible children and pregnant women in the area served who would benefit from Head Start or Early Head Start programs, who are not eligible under paragraphs (b)(1) or (c) of this section.

(3) From the area served, an additional 35 percent of participants may include pregnant women and age eligible children whose families have incomes over 100 percent but below 130 percent of the income guidelines who also are not eligible under paragraphs (b)(1) or (c) of this section, if:

(i) Prior to serving the children and pregnant women eligible under paragraph (b)(3) of this section, the agency involved establishes and implements outreach, prioritization, and enrollment policies and procedures that ensure such agency is meeting the needs of children and pregnant women eligible under paragraphs (b)(1) or (c) of this section and children with disabilities eligible under paragraph (b)(2) of this section; and

(ii) Any agency serving additional children and pregnant women under this paragraph must report annually to the Secretary the information required at section 645(a)(1)(B)(iv) of the Head Start Act.

(c) *Categorical eligibility.* Pregnant women and age eligible children are categorically eligible for enrollment in Head Start and Early Head Start if:

(1) The pregnant woman or the child's family is eligible or, in the absence of child care, would potentially be eligible for public assistance;

(2) The child is homeless, as defined in § 1305.2(i); or

(3) The child is in foster care, as defined in § 1355.20(a).

(d) *Special rule for Indian Tribes.* Notwithstanding paragraph (b)(2) of this section, a Head Start or Early Head Start program operated by an Indian Tribe may enroll more than 10 percent of its children from families whose incomes exceed the low-income guidelines or are not categorically eligible when the following conditions are met:

(1) All children from Indian and non-Indian families living on the reservation that meet the low-income guidelines or are categorically eligible who wish to be enrolled in the program are served by the program;

(2) All children from income-eligible or categorically-eligible Indian families native to the reservation living in non-reservation areas, approved as part of the Tribe's service area, who wish to be enrolled in the program are served by the program. In those instances in which the non-reservation area is not served by another Head Start or Early Head Start program, the Tribe must serve all of the income-eligible and categorically-eligible Indian and non-Indian children whose families wish to enroll them in the program prior to serving over-income children.

(3) The Tribe has the resources within its grant or from other non-Federal sources to enroll children from families whose incomes exceed the low-income guidelines or are not categorically eligible without using additional funds from HHS intended to expand Head Start or Early Head Start services; and

(4) At least 51 percent of the children to be served by the program are from families that meet the income-eligibility guidelines or are categorically eligible.

(5) Programs which meet the conditions of this paragraph (d) must annually set criteria that are approved by the Policy Council and the Tribal Council for selecting over-income children who would benefit from such a program.

(e) *Income verification.* Before a pregnant woman or child is determined to be eligible on the basis of family income, the pregnant woman or the child's parent, guardian or other person(s) seeking services for the child who has knowledge of the family's finances must submit information to the program concerning the family's income. Verification must include examination of documents such as individual income tax forms, W–2 forms, pay stubs, pay envelopes, or written statements from employers (if Individual Income Tax Forms, W–2 forms, pay stubs, or pay envelopes are not available). Income must be compared to the poverty guidelines for the appropriate size of family, and program staff must document whether a pregnant woman or child's family qualifies as a low-income family under the income guidelines for the appropriate size of family. When appropriate, in cases in which no documentation regarding the income eligibility of the pregnant woman or child has been received by the agency, or when it is either more efficient or reliable to do so rather than to search for eligibility documentation, programs

may seek information from third parties who have first-hand knowledge about the pregnant woman's or child's eligibility, and document the names, titles, and relationship to the applicant in the participant's record. Programs also may seek third party information in cases where documents are not submitted to prove a claim that a pregnant woman or family has no income. If programs plan to seek third party verification from one or more entities regarding an applicant's eligibility, staff must inform the applicant about each entity that they intend to contact. In addition, the applicant must sign a consent form permitting the program to contact specified third parties; this provides applicants the opportunity to withhold their consent for third party verification from one or more entities. An applicant must be given the opportunity to withhold consent related to each entity the program would like to contact. If applicants do not sign the consent form the Head Start program may not contact that entity and the applicant remains responsible for providing appropriate documentation. When programs contact third parties, they should limit the information discussed and questions posed to the third party to the information necessary to obtain the required eligibility information. Programs should be especially sensitive to any potential domestic violence issues prior to seeking verification of the required eligibility information.

(f) *Verification of categorical eligibility.* (1) Before a pregnant woman or child is determined to be eligible on the basis of categorical eligibility, the pregnant woman or the child's parent, guardian, or other person(s) seeking services for the child who has knowledge of the family's situation must submit information to the program concerning the family's categorical eligibility. Verification of categorical eligibility by the program must include examination of the following documents:

(i) A copy of official documents demonstrating that the pregnant woman or the child, child's parent, or guardian, is eligible, or in the absence of child care, would potentially be eligible for public assistance;

(ii) A copy of the court order or other legal or government-issued document or statement of a government child welfare official demonstrating the child is in foster care; or

(iii) A copy of any other source document that establishes categorical eligibility.

(2) In place of the foregoing documents, the program can substitute a written statement of a program staff member certifying that the staff member has made reasonable efforts to confirm a child is homeless, as defined in § 1305.2(i). The lack of documentation of homelessness should not be a barrier to enrollment. When appropriate, in cases in which no documentation regarding the eligibility of the pregnant woman or child has been received by the agency, or when it is either more efficient or reliable to do so rather than to search for eligibility documentation, programs may seek information from third parties who have first-hand knowledge about the pregnant woman's or child's eligibility, and document the names, titles, and relationship to the applicant in the participant's record. Programs also may seek third party information in cases where documents are not submitted to prove a claim that a pregnant woman or family has no income. If programs plan to seek third party verification from one or more entities regarding an applicant's eligibility, staff must inform the applicant about each entity that they intend to contact and the applicant must sign a consent form permitting the program to contact each of the specified third parties; this provides applicants the opportunity to withhold their consent for third party verification related to each entity the program would like to contact. If applicants do not sign the consent form the Head Start program may not contact that entity and the applicant remains responsible for providing appropriate documentation. When programs contact third parties, they should limit the information discussed and questions posed to the third party to the information necessary to obtain the required eligibility information. Programs should be especially sensitive to any potential domestic violence issues prior to seeking verification of the required eligibility information.

(g) *Records and Certification.* A Head Start or Early Head Start program must keep an eligibility determination record for each pregnant woman or child as part of the record maintained by the agency on that individual, which must include:

(1) Copies of all documents submitted by a pregnant woman or persons seeking services on behalf of a child to the program by such persons or other persons relating to the pregnant woman's or child's eligibility for services and any staff member's notes recording any other information related to eligibility received from any source;

(2) A copy of the statements and documents required under paragraphs (e) and (f) of this section;

(3) A signed and dated statement by the person seeking services certifying that the documents and information that the person provided concerning eligibility are accurate to the best of the person's knowledge;

(4) Documentation establishing that an agency staff member has sought to verify the accuracy of the information on eligibility provided to the agency by:

(i) Conducting an in-person interview with the pregnant woman or the child's parent, guardian, or other person(s), seeking services for the child who has knowledge of the family's situation; and

(ii) When appropriate, in cases in which no documentation regarding the income eligibility of the pregnant woman or the child's family or regarding the categorical eligibility of the pregnant woman or child has been received by the agency, or when it is either more efficient or reliable to do so rather than to search for eligibility documentation, seeking information from third parties who have first-hand knowledge about the pregnant woman's or child's eligibility, whose names, titles, and affiliations will be documented in the record, and the applicant's signed consent form permitting the program to contact each particular third party, as required under paragraphs (e) and (f) of this section;

(5) A record of the eligibility criterion under which the pregnant woman or child was determined eligible as:

(i) Having income below the income guideline for the family size, with the family size used documented;

(ii) Being eligible or, in the absence of child care, being potentially eligible for public assistance;

(iii) Being a homeless child, including the specific provision of § 1305.2(i) under which the child was determined to be homeless;

(iv) Being a child in foster care;

(v) Being a pregnant woman or child in the area served who would benefit from such programs but who is not otherwise eligible for services (total enrollment in this category not to exceed 10 percent of the enrollment slots);

(vi) Being a pregnant woman or child from a family with income over 100 percent but below 130 percent of the income guidelines (total enrollment in this category not to exceed 35 percent of the enrollment slots, in addition to any slots filled under paragraph (b)(2) of this section; or

(vii) Meeting alternative eligibility criteria as permitted under paragraph (d) of this section or section 645(a)(2) of the Head Start Act; and

(6) A signed and dated statement by the program staff person who made the

eligibility determination certifying that the information on eligibility in the file is accurate to the best of the person's knowledge, and based on that information, the person has determined the pregnant woman or child to be eligible for services.

(7) Retention and access practices for the eligibility determination record for each pregnant woman or child described under this paragraph must be consistent with section 647 of the Head Start Act and the uniform administrative requirement regulations regarding HHS grant awards implemented at 45 CFR 74.53 for awards and subawards to institutions of higher education, hospitals, other nonprofit organizations, and commercial organizations and 45 CFR 92.42 for grants and cooperative agreements to State, local, and Tribal governments.

(h) *Establishment of agency policies regarding violation of eligibility determination regulations, policies and procedures.* All Head Start and Early Head Start agencies must establish policies and procedures describing the actions that will be taken against agency staff who commit intentional violations of Federal and agency eligibility determination regulations, policies and procedures, including enrolling pregnant women and children who staff have not documented as eligible to participate in the program.

(i) *Training.* Head Start and Early Head Start agencies must train all governing body, policy council, management and those staff members who have the responsibility to make participant eligibility determinations on Federal and agency eligibility determination regulations, policies and procedures, including verification, certification, and documentation requirements within 30 days following the effective date of this rule, and within 30 days of hiring or beginning of tenure of new governing body, policy council, management and those staff members who have the responsibility to make participant eligibility determinations. Agencies must develop policies regarding how often such training will be provided after the initial training is conducted to ensure that governing body, policy council, management and those staff members who have the responsibility to make participant eligibility determinations are aware of all current eligibility determination regulations, policies and procedures. Agencies shall maintain ongoing records of training. The training must include:

(1) Explanation of the legal consequences for individuals and agencies that commit fraud related to eligibility determination; and

(2) Information on methods and strategies for obtaining facts necessary for complete and accurate eligibility determinations. Such methods and strategies must address treating families with dignity and respect and give due regard for possible issues of domestic violence, stigma, and privacy.

[FR Doc. 2011–6326 Filed 3–17–11; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 11–29, RM–11622; DA 11–335]

Television Broadcasting Services; Nashville, TN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by NewsChannel 5 Network, LLC, the licensee of station WTVF(TV), channel 5, Nashville, Tennessee, requesting the substitution of channel 25 for channel 5 at Nashville. NewsChannel 5 lost service to many of its analog viewers when the station transitioned to digital operations and now requests this channel substitution in order to permanently resume service to these viewers.

DATES: Comments must be filed on or before April 18, 2011, and reply comments on or before May 2, 2011.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Christopher G. Tygh, Esq., Covington & Burling LLP, 1201 Pennsylvania Avenue, Washington, DC 20004–2401.

FOR FURTHER INFORMATION CONTACT: Joyce L. Bernstein, *joyce.bernstein@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 11–29, adopted February 18, 2011, and released February 23, 2011. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC, 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts (other than *ex parte* presentations exempt under 47 CFR 1.1204(a)) are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1208 for rules governing restricted proceedings.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

Federal Communications Commission.

Kevin R. Harding,

Associate Chief, Video Division, Media Bureau.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

§ 73.622(i) [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Tennessee, is amended by adding channel 25 and removing channel 5 at Nashville.

[FR Doc. 2011–5097 Filed 3–17–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 79

[MB Docket No. 11–43; FCC 11–36]

Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission takes an initial step to implement the Twenty-First Century Communications and Video Accessibility Act of 2010, by seeking comment on the mandated reinstatement of video description rules that would apply to MVPDs and network-affiliated broadcasters.

DATES: Comments must be submitted by interested parties on or before April 18, 2011. Reply comments must be submitted no later than May 17, 2011. Written PRA comments on the proposed information collection requirements contained herein must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before May 17, 2011.

ADDRESSES: You may submit comments, identified by MB Docket No. 11–43, FCC 11–36, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site:http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

In addition to filing comments with the Secretary, a copy of any PRA comments on the proposed collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *nfraser@omb.eop.gov* or via fax at 202–395–5167. For detailed instructions for submitting comments and additional information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Lyle Elder, *Lyle.Elder@fcc.gov,* of the Media Bureau, Policy Division, at (202) 418–2120. For additional information concerning the information collection requirements contained in this document, send an e-mail to PRA@fcc.gov or contact Cathy Williams, (202) 418–2918. To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR as shown in the Supplementary Information section below (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: This is a summary of document FCC 11–36, adopted March 2, 2011 and released March 3, 2011. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC, 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

This document contains proposed information collection requirements. As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Public and agency comments are due May 17, 2011.

Comments should address: (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 estimates; (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 the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

OMB Control Number: 3060–xxxx.

Title: Video Description of Video Programming.

Form Number: N/A.

Type of Review: New collection.

Respondents: Individuals or households; Businesses or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 76 respondents; 80 responses.

Estimated Time per Response: 1–5 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary and required to obtain or retain benefits. The statutory authority for this collection of information is contained in 47 U.S.C. 613(f).

Total Annual Burden: 144 hours.

Total Annual Costs: $26,250.

Privacy Act Impact Assessment: Yes. The Privacy Impact Assessment (PIA) was completed on June 28, 2007. It may

be reviewed at: *http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.* The Commission is in the process of updating the PIA to incorporate various revisions made to the SORN.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, "Informal Complaints and Inquiries." As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB–1 "Informal Complaints and Inquiries", in the **Federal Register** on December 15, 2009 (74 FR 66356) which became effective on January 25, 2010.

Needs and Uses: The Commission is seeking approval for this proposed information collection from the Office of Management and Budget (OMB). On March 3, 2011, the Commission released a Notice of Proposed Rulemaking, MB Docket No. 11–43; FCC 11–36. This rulemaking proposed information collection requirements that support the Commission's video description rules that would be codified at 47 CFR 79.3, as required by the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"). In 2000, the Commission adopted rules requiring certain broadcasters and multichannel video program distributors (MVPDs) to carry programming with video description. The United States Court of Appeals for the District of Columbia Circuit vacated the rules due to insufficient authority soon after their initial adoption. The CVAA directs the Commission to reinstate those rules, with certain modifications, on October 8, 2011.

The proposed information collection requirements consist of:

Petitions for exemption based on "economic burden."

Pursuant to proposed 47 CFR 79.3(d), a video programming provider may petition the Commission for a full or partial exemption from the video description requirements based upon a showing that they would be economically burdensome.

Petitions for exemption must by filed with the Commission, placed on Public Notice, and be subject to comment from the public.

Complaints alleging violations of the video description rules.

Section 79.3(e) of the proposed rules provides that a complaint alleging a violation of the video description rules may be transmitted to the Commission by "any reasonable means" that would best accommodate the complainant's disability, and that each complaint must include:

The name and address of the complainant;

The name and address of the broadcast station against whom the complaint is alleged and its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

A statement of facts sufficient to show that the video programming distributor has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

The specific relief or satisfaction sought by the complainant;

The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant's disability); and

A certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

The Commission is seeking OMB approval for the proposed information collection requirements.

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. In compliance with the recently enacted Twenty-First Century Communications and Video Accessibility Act of 2010 (the "Communications and Video Accessibility Act" or "CVAA"),[1] the *Notice of Proposed Rulemaking* ("*NPRM*") proposes and seeks comment on reinstatement of the video description rules adopted by the Commission in 2000. The CVAA directs us to "reinstate [our] video description regulations" with certain modifications.[2] "Video description," sometimes referred to as "audio description," which is the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses in the program's dialogue,[3] makes video programming more accessible to individuals who are blind or visually impaired. The United States Court of Appeals for the District of Columbia Circuit vacated the Commission's video description rules due to insufficient authority soon after their initial adoption.[4] The CVAA now directs the Commission to reinstate those rules with certain modifications.[5] We anticipate that the revised and reinstated rules will afford better access to television programs for individuals who are blind or visually impaired, enabling millions more Americans to enjoy the benefits of television service and participate more fully in the cultural and civic life of the nation.

2. The Commission's rules required large-market broadcast affiliates of the top four national networks and multichannel video programming distributors ("MVPDs") with more than 50,000 subscribers to provide video description.[6] Covered broadcasters were required to provide 50 hours of video-described prime time or children's programming, per quarter, and covered MVPDs were required to provide the same number of hours on each of the five most popular nonbroadcast networks.[7] The rules also required that all network-affiliated broadcasters (commercial or non-commercial) and all MVPDs pass through any video description provided with programming they carried, to the extent that they are technically capable of doing so.[8] As required under the CVAA, we propose to reinstate these rules, with the modifications required by the law, on October 8, 2011, and to require broadcast stations and MVPDs subject to our rules to begin providing the requisite number of hours of programming with video description beginning in the first quarter of 2012.

3. We seek comment on the modifications to the rules required by the CVAA. Notably, these modifications include the exemption of "live or near-live" programming from the rules. We seek comment on the definition of "near-live," and propose that programs produced within 24 hours of their first airing be considered "near-live" under the rules. We also seek information about the number of hours of non-exempt programming provided by the top nonbroadcast programming

[1] Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751 (2010).

[2] CVAA 202(a), Public Law 111–260, 124 Stat. 2751(2010) (to be codified at 47 U.S.C. 613). The regulations were promulgated in *Implementation of Video Description of Video Programming,* MM Docket No. 99–339, Report and Order, 15 FCC Rcd 15230 (2000) ("*2000 Report and Order*"), recon. granted in part and denied in part, 16 FCC Rcd 1251 (2001) ("*Recon*") (attached at Appendix C) and were codified at 47 CFR 79.3.

[3] CVAA at Title II, sec. 202(a), 713(h)(1).

[4] *Motion Picture Ass'n of America, Inc.* v. *Federal Communications Comm.,* 309 F.3d 796 (D.C. Cir. 2002).

[5] CVAA at Title II, sec. 202(a), 713(f)(1–2).

[6] 47 CFR 79.3(b).

[7] *Id.* at § 79.3(b)(1), (3).

[8] *Id.* at § 79.3(b)(2), (4).

networks to enable us to identify which networks will be subject to our rules.

II. Background

4. In 1996, at Congress's direction, the Commission issued a report on the use of video description in video programming.[9] In 2000, the Commission adopted rules requiring certain broadcasters and MVPDs to carry programming with video description.[10] The Commission found that the record demonstrated the importance of video description, stating, for example, that

> [t]he comments of the American Council of the Blind contained more than 250 e-mails and letters of support for rules, which explained how video description enhances the understanding of blind and low vision people of television programming and cultural behavior such as body language, and gives them a feeling of independence. One commenter said that * * * "[w]hether entertaining, educational or cultural, television has become an integral part of American life. I, and other blind and visually impaired people, have always participated in television viewing, but with [video description], we are finally participating equally." Helen Harris, founder of a description service, says that "[v]ideo description effectively bridges the gap between the blind and mainstream society by creating a shared experience which leaves the blind with an increased sense of normalcy in their lives."[11]

Five months after the rules went into effect, they were vacated by the United States Court of Appeals for the District of Columbia Circuit on the ground that the Commission lacked sufficient authority to promulgate video description rules.[12] Nonetheless, some broadcast and nonbroadcast networks have voluntarily continued to provide this important service; for instance, CBS, Fox, PBS, TCM, and TNT all provide description of selected programming. We commend these networks and all others that are voluntarily offering described programming, for recognizing the importance of video description to the members of their audiences who are blind or visually impaired.

5. On October 8, 2010, President Obama signed the CVAA,[13] which increases the access of persons with disabilities to modern communications services and technologies and gives the Commission express authority to adopt video description rules. The statute directs the Commission, as an initial step, to reinstate the previously adopted video description rules, with certain modifications.[14] To fulfill our statutory mandate, we begin the process with requests for comment in this Notice of Proposed Rulemaking. The CVAA imposes other requirements with respect to video description. For example, we are required to submit a report within two years of phasing in the reinstated rules, discussing the status, benefits, and costs of video description on television and Internet-provided video programming.[15] We must file a second report, nine years after the enactment of the CVAA, that provides a detailed review of the video description market and the potential need for expansion of the description mandates.[16] The CVAA also gives us authority to expand the video description hour requirements and the number of markets in which broadcasters are required to provide description if we determine that the benefits of televised description outweigh its costs.[17] We will address these additional requirements and potential expansions in a separate proceeding.

III. Discussion

A. Reinstated Rules

6. Section 713(f)(1) of the Communications Act, as added by the CVAA, states that the Commission shall, after a rulemaking, reinstate its video description regulations contained in the Implementation of Video Description of Video Programming Report and Order (15 F.C.C.R. 15,230 (2000)), recon. granted in part and denied in part, (16 F.C.C.R. 1251 (2001)), modified as provided in paragraph (2).[18]

Consistent with Congress' directive, we will reinstate the Commission's 2000 rules on October 8, 2011 with the modifications required by the CVAA.[19] The most significant elements of those rules are:

- Affiliates of the top four national networks[20] located in the top 25 television markets[21] must provide 50 hours per calendar quarter of video-described prime time and/or children's programming. For this purpose, prime time means 8–11 pm Monday through Saturday, and 7–11 pm on Sunday, except that these times are an hour earlier in the central time zone, and stations in the mountain time zone may choose which "prime time" period to adopt for the purpose of these rules. 47 CFR 79.3(a)(6). In this item, we propose to define children's programming as being directed at children 16 years of age and younger. See paragraph 32, below, and Appendix A. MVPDs with 50,000 or more subscribers must provide 50 hours per calendar quarter of video-described prime time and/or children's programming on each of the top five nonbroadcast networks that they carry. Our ranking of the Top 5 networks will be based on Nielsen national prime time audience share, the number of subscribers reached, and amount of non-exempt programming. See paragraph 12, below.
- To count toward the requirement, the programming must not have been previously aired with video description, on that particular MVPD channel or broadcast station, more than once.[22] The CVAA defines "video programming" in the video description context as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3)." CVAA at Title II, sec. 202(a), 713(h)(2). Section 3 of the Communications Act, as amended in the CVAA, defines consumer-generated media as "content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia

[9] 47 U.S.C. 613 (this section, Video Programming Accessibility, was added to the Communications Act by Section 305 of the Telecommunications Act of 1996); *see also Implementation of Section 305 of the Telecommunications Act of 1996—Video Programming Accessibility,* MM Docket No. 95–176, Report, 11 FCC Rcd 19214 (1996) ("Report"). The Commission had initiated the inquiry in 1995, before enactment of the 1996 Act. *Closed Captioning and Video Description of Video Programming,* MM Docket No. 95–176, Notice of Inquiry,11 FCC Rcd 4912 (1995).

[10] *2000 Report and Order, supra* note 2.

[11] *2000 Report and Order, supra* note 2, at para. 4 (internal citations omitted).

[12] *Motion Picture Ass'n of America, Inc.* v. *Federal Communications Comm.,* 309 F.3d 796 (D.C. Cir. 2002).

[13] Communications and Video Accessibility Act, *supra* note 1.

[14] *Id.* at Title II, sec. 202(a), 713(f)(1) (requiring reinstatement of the rules one year after the date of enactment of the CVAA).

[15] *Id.* at 713(f)(3).

[16] *Id.* at 713(f)(4)(C)(iii).

[17] *Id.* at 713(f)(4)(A), (B), (C)(i), (iv).

[18] *Id.* at 713(f)(1). *See also id.* at 713(f)(2) ("Such regulations shall be modified only as follows * * *").

[19] *See generally 2000 Report and Order* and *Recon, supra* note 2. We incorporate the discussion of these rules in the *2000 Report and Order* and *Reconsideration Order* into the record of this proceeding.

[20] For the purpose of the video description rules, these are ABC, CBS, Fox, and NBC. 47 CFR 79.3(b)(1).

[21] Markets are ranked by Nielsen based on their total number of television households. TVB Market Profiles at *http://www.tvb.org/market_profiles/131627.* Nielsen Media Research, Inc. ("Nielsen") is now known as The Nielsen Company.

[22] 47 CFR 79.3(c)(2); *see also Recon, supra* note 2, at fn. 74 ("Broadcast stations and MVPDs can count a repeat of a previously aired program in the same quarter or in a later quarter, but only once altogether").

content." CVAA at Title I, sec. 101(1), 3 (54). The proposed rules adopt the CVAA definition of video programming.

• Any broadcast station, regardless of its market size, affiliated or otherwise associated with any television network, must "pass through" video description when the network provides it and the station has the technical capability necessary to do so.[23] Similarly, any MVPD, regardless of its number of subscribers, must "pass through" video description when a broadcast station or nonbroadcast network provides it, if it has the technical capability necessary to do so on the channel on which it distributes the broadcast station or nonbroadcast network programming.[24] Any programming aired with description must always include description if re-aired on the same station or MVPD channel.[25]

• Complaints alleging a failure to comply with these rules may be filed with the Commission by any viewer, and the Commission will act to resolve such complaints in consultation with the video programming distributor.[26]

B. Identifying Stations Required To Provide Video Description

7. As discussed above, under the reinstated rules, certain broadcast stations and MVPDs will have an obligation to provide video description of some of the programming they provide. Specifically, affiliates of ABC, CBS, Fox, and NBC that are located in the 25 television markets with the largest number of television households must provide 50 hours per calendar quarter of video-described programming during prime time, or at any time if it is children's programming. To count toward this 50-hour requirement, video-described programming must be airing either the first or second time on the station; that is, a video described program may be counted toward the 50 hours when it is originally aired and once more when it is re-run. Although we anticipate that much of the programming aired with video description will be newly produced, we propose that the reinstated rules permit stations to count any program that they are airing for the first or second time with video description after the reinstated rules become effective, even if the program has previously been aired on that station. Similarly, a station may count programming toward its 50 hour obligation even if that programming has aired elsewhere with description, so long as it is airing with description for the first or second time on that station. The rules are identical for MVPDs with 50,000 or more subscribers, except that they apply to the programming of each of the top five national non-broadcast networks carried by the MVPDs.

8. Although the CVAA requires reinstatement of the rules largely as adopted by the Commission in 2000, the Commission does have some discretion in determining the stations, MVPDs, and networks to which they apply. We therefore seek comment on these issues, as discussed below.

1. Broadcast Stations

9. As established in the 2000 rules, the broadcast stations subject to the requirement to provide video description [27] were those "[c]ommercial television broadcast stations that [were] affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), as of September 30, 2000, and that [were] licensed to a community located in the top 25 DMAs, as determined by Nielsen Media Research, Inc. for the year 2000." [28] We propose to reinstate the rules insofar as they designate ABC, CBS, Fox, and NBC as the broadcast networks affected.[29] Although the original rule refers only to "commercial television broadcast stations," the *2000 Report and Order* is unclear about whether this requirement was intended to be limited to full-power commercial stations, or to apply to commercial low power stations as well. We seek comment on the appropriate scope of the requirement to provide description. The CVAA directs us to "update the list of the top 25 designated market areas." [30] We propose to apply the rules to the Top 25 markets as determined by Nielsen as of January 1, 2011 (*i.e.,* the 2010–2011 DMA rankings), and, within those markets, to require stations affiliated with ABC, CBS, Fox, or NBC to provide video description, regardless of when the affiliation begins. We seek comment on this proposal.

10. The relative size of markets often changes over time. We want to ensure that the rules apply to the top 25 markets, as required by the CVAA. At the same time, we seek to ensure that regulatees and the public at large have adequate advance notice regarding which broadcast stations will be subject to the requirement to provide video description, and to avoid undue disruption for audiences who come to rely upon video described programming. Further, we recognize that a significant amount of video described programming (potentially all the programming required under the rules) will be provided by national network programmers and passed through by local stations, even in the top 25 markets. Because of the "pass-through" obligations of network stations outside the top 25 markets, discussed below, there may be little to no difference in the amount of video described programming available from affiliates of the top 4 networks in larger and smaller markets.[31] In light of these considerations, we seek comment on whether we should reconsider the ranking of the top 25 markets at certain intervals to reflect current market conditions better and, if so, what those intervals should be.

11. The CVAA mandates that the Commission extend the video description requirements to the top 60 markets after filing a report to Congress on the state of the video description market, as discussed above,[32] and no later than six years after the enactment date of the CVAA (*i.e.,* October 8, 2016). If, as we propose in this Notice, the first phase is complete on January 1, 2012, the Report will be submitted to Congress no later than January 1, 2014. Should we identify now the date to be used to determine the top 60 markets and a compliance deadline for stations in markets 26–60, or should we set those dates following the required report to Congress?

2. Top Five National Nonbroadcast Networks

12. In order to implement the requirement that MVPDs provide video description, we must also update the "top 5 national nonbroadcast networks that have at least 50 hours per quarter of prime time programming that is not exempt." [33] The prior rules determined the top nonbroadcast networks using "an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999–September 2000, that reach 50 percent or more of MVPD households." [34] Those rules did not contemplate that any programming would be exempt, which made identification of those networks more

[23] 47 CFR 79.3(b)(2); *see infra* paras. 14–16.

[24] 47 CFR 79.3(b)(4); *see infra* paras. 14–16.

[25] 47 CFR 79.3(c)(3); *see also Recon, supra* note 2, at para. 27 and fn. 83.

[26] 47 CFR 79.3(e).

[27] 47 CFR 79.3(b)(1), (3) (requirement to provide description).

[28] 47 CFR 79.3(b)(1).

[29] *Id.*

[30] CVAA, Title II, sec. 202(a), 713(f)(2)(B).

[31] *See infra* para. 14.

[32] *Id.* at 713(f)(4)(C)(i–ii). *See supra* para. 5.

[33] CVAA, Title II, sec. 202(a), 713(f)(2)(B). "Exempt" programming includes "live or near-live programming." *See infra* para. 21.

[34] 47 CFR 79.3(b)(3).

straightforward than under the new statutory requirements.[35] We propose to update the definition's time period to October 2009—September 2010 (These dates cover the 2009–2010 television season, which will be the most recent full television season from which ratings will have been calculated and be available when the rules are adopted). We also propose to explicitly exclude from the top five any non-broadcast network that does not provide, on average, at least 50 hours per quarter of prime time non-exempt programming, i.e., programming that is not live or near-live.[36] We seek comment regarding this proposal, and particularly seek detailed information from any network that believes it should be excluded from the top five covered networks due to an insufficient amount of non-exempt programming. We note that Nielsen treats some nonbroadcast "channels" as more than one "network" for ratings purposes; for example, Nickelodeon/Nick at Nite and Cartoon Network/Adult Swim. We seek comment as to how we should take this into account when determining which networks are subject to the requirement to provide video description for 50 hours per quarter of prime time or children's programming. According to staff analysis of Nielsen data for the 2009–2010 television season, the top 5 national nonbroadcast networks, based on an average of the national audience share during prime time of nonbroadcast networks, are USA, the Disney Channel, ESPN, TNT, and Nickelodeon's Nick at Nite. FCC Staff Analysis based on data provided by Nielsen. Additional networks, some of which are tied for audience share during the 2009–2010 television season, which have the potential to be covered under the statute if any of the top 5 do not provide the requisite hours of non-exempt programming, include Fox News, TBS, A&E, History, the Cartoon Network's Adult Swim, the Family Channel, and HGTV. Any network that believes it should be excluded from the top five due to an insufficient amount of nonexempt programming should provide notice in the Record before the close of the Comment period. The network's Comments should be accompanied by an affidavit stating how many hours of nonexempt programming it typically airs per quarter (including how many hours of live programming and how many hours of near-live programming, as we propose to define those terms), as well as supporting documentation such as program schedules. Parties that wish to challenge any such claims may do so in their Reply Comments. If the Media Bureau determines that the information submitted is insufficient to determine whether a particular network has at least 50 hours per quarter of non-exempt prime time programming, we authorize the Bureau to seek additional information from the network or networks, consistent with the requirements of the Paperwork Reduction Act.[37]

13. Ratings of nonbroadcast networks often change over time. We want to ensure that the rules apply to the top five national nonbroadcast networks, as required by the CVAA. At the same time, we also want to ensure that regulatees and the public at large have adequate advance notice regarding which networks will be subject to the rules, and to avoid undue disruption for audiences who will come to rely upon video described programming. In light of these considerations, we seek comment on whether we should reconsider the ranking of the top five nonbroadcast networks at certain intervals to better reflect current market conditions and, if so, what those intervals should be.

C. Pass-Through of Video Described Programming

14. As noted above, under our previous video description rule, broadcasters affiliated with any network and all MVPDs were required to pass through any video description that they received from a broadcast or cable network or, in the case of MVPDs, from a broadcast station they carried, whenever they had the technical capability on the relevant channel to pass through the video description, unless they were using the technology necessary to provide such video description for another purpose related to the programming that would conflict with providing the video description.[38] We propose to reinstate this rule without revision. We also note that the must carry provision of the Communications Act requires cable operators to carry "the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers."[39] Although the original rule refers to all "television broadcast stations," the *2000 Report and Order* is unclear about whether this requirement was intended to include low power stations. We seek comment on the appropriate scope of the obligation to pass through description. This obligation is distinct from the requirement to provide video description that we propose to impose on certain broadcasters and MVPDs. First, it applies to all MVPDs and network-affiliated broadcast stations (including non-commercial stations), rather than a subset of large-market entities.[40] Second, broadcast stations and MVPDs with the obligation to provide 50 hours of description must continue to pass through any video description that they receive even after they have provided the 50 required hours of description.[41] Broadcast stations and MVPDs that pass through video-described programming from a network can count that programming toward their 50 hour obligation, so long as it is either aired during prime time or is children's programming, and has not been previously aired more than once since the adoption of our rules. We note that, historically, most video described programming has been provided by the broadcast and non-broadcast networks to the broadcast stations and MVPDs, which pass it through and make it available to consumers.

15. In the *2000 Report and Order,* the Commission required any station or MVPD with the "technical capability" to do so to pass through video description.[42] We said that we would "consider broadcast stations and MVPDs to have the technical capability necessary to support video description if they have virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost."[43] On reconsideration, the Commission adopted an exception to this requirement. When the secondary audio program ("SAP") equipment and channel was being used to provide another program-related service, a station or MVPD did not have to stop providing that service in order to pass through the video description. This was based on the fact that the SAP

[35] *See infra* para. 20, *et seq.*

[36] *See infra* para. 21.

[37] *See infra* note 51.

[38] 3847 CFR 79.3(b)(2), (4).

[39] 3947 U.S.C. 534(b)(3), 47 CFR 76.62(e), (f) (cable); 47 U.S.C. 338(j), 47 CFR 76.66(j) (DBS). *See also Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules and Implementation of the Satellite Home Viewer Improvement Act of 1999,* First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, paras. 60–61 (2001).

[40] *2000 Report and Order, supra* note 2, at para. 30.

[41] *Recon, supra* note 2, at para. 14 (The National Association of Broadcasters recognized that entities that had met their 50 hour obligation were still required to pass description through to viewers).

[42] *2000 Report and Order, supra* note 2, at para. 30.

[43] *Id.*

channel could not be used to provide two services simultaneously.[44] For the same reason, the Commission also adopted this "other program-related service" exception in subsections (c)(3) and (4) of the video description rules (subsequent airings of described programming).[45] In the analog world, the SAP channel gave an entity the technical capability to pass through video description, but the inherent limitations of the technology meant that the entity could not provide video description simultaneously with another secondary audio track. Digital transmission, however, enables broadcasters and MVPDs to provide numerous audio channels for any given video stream. Unlike with SAP, therefore, digital technology allows simultaneous transmission of a variety of program-related secondary audio tracks. Digital video signals can have an enormous number of alternative audio tracks; although as a practical matter that number may be limited by the amount of bandwidth allocated to the programming stream, digital programming can technically include more than three audio tracks.[46] Given this flexibility, is it necessary or appropriate to apply the "other program-related service" exception to digital transmissions?

16. Transmission of multiple audio tracks, even digitally, may require the use of additional equipment by broadcasters and MVPDs. We seek comment on what is needed for broadcast stations and MVPDs to have the "technical capability necessary" to pass through video description of digital programming, the extent to which affected entities already have any necessary equipment or have incentives to upgrade to this equipment for other purposes, and the cost of such equipment and any other necessary upgrades. Specifically, we seek comment on the costs of providing additional audio tracks once an entity is technically capable of providing a secondary digital audio track. What standards should we use to take these costs into account when determining whether a distributor has "the technical capability necessary to pass through the video description"?

D. Phase-In

17. The CVAA requires us to reinstate the revised video description rules "on the day that is 1 year after the date of enactment,"[47] to provide "an appropriate phased schedule of deadlines for compliance,"[48] and to determine "the beginning calendar quarter for which compliance shall be calculated."[49] We propose to adopt and publish modified rules before October 8, 2011 (the date one year after enactment) that will be effective thirty days after publication,[50] except for those requirements subject to Office of Management and Budget (OMB)[51] approval or that are phased-in as described below. We seek comment on this proposed timeline.

18. We propose that on January 1, 2012, 85 days after the reinstatement of the rules,[52] affiliates of the top four networks located in the top 25 markets begin providing 50 hours per calendar quarter of video-described prime time and/or children's programming. Similarly, we propose that on January 1, 2012,[53] MVPDs with 50,000 or more subscribers begin providing 50 hours per calendar quarter of video-described prime time and/or children's programming on each of the top five non-broadcast networks that they carry. We propose that, should any MVPD not serving at least 50,000 subscribers on the effective date of the rules begin to do so at a later date, it must provide video description on the top five non-broadcast networks, in the same manner as MVPDs currently serving 50,000 or more subscribers, beginning no more than three months after reaching 50,000 subscribers. Given that an MVPD should be aware in advance that it is approaching the 50,000 subscriber threshold, we believe three months is adequate time to ensure that it will be able to comply with this requirement. We further propose that compliance with the "50-described hours" requirement be calculated for these broadcasters and MVPDs beginning in the first calendar quarter of 2012.[54] We also propose that broadcasters and MVPDs comply with the pass-through requirement[55] commencing January 1, 2012.

19. We seek comment on these phase-in proposals. Will this compliance schedule provide sufficient time for covered entities to begin providing and passing through video described programming? Given the limited number of hours of video description required at this stage, we do not expect any significant delay in compliance as a result of a need to negotiate with rights holders. We seek comment on this conclusion. We note that although the CVAA deferred certain implementation issues to the Commission, to a great extent the entities that will be subject to our reinstated rules have been aware of the pending requirements since at least the enactment of the CVAA on October 8, 2010.

E. Exemptions

20. The CVAA recognizes the unique difficulties of providing video description for programming that is produced live or shortly before it is first aired, i.e., programming that is "live or near-live." As a result, the statute explicitly states that the regulations we adopt "shall not apply to live or near-live programming," and directs us to take this exemption into consideration when determining whether a non-broadcast network is covered by the video description rules.[56] The CVAA also gives the Commission authority to provide certain other categorical or individual exemptions, and we seek comment on whether and how such exemptions should be provided.

1. Live or Near-Live Programming

21. Section 713(f)(2)(E) of the Communications Act, as added by the CVAA, states that: "[t]he regulations shall not apply to live or near-live programming."[57] We believe that "live" programming is, self-evidently, programming aired substantially simultaneously with its performance. This programming is often non-scripted, and would include, for example, many sporting events and news programs.[58] We are, however, unaware of an accepted definition of "near-live programming." Some television programs, even if not aired "live," are filmed and produced just hours before they are first aired. In addition, we understand that some programs aired live on the East Coast are aired three hours later on the West Coast. By

[44] *Id.* at para. 15.

[45] 47 CFR 79.3(c)(3), (4).

[46] *See* MPEG Compression Standard ISO/IEC 13818–1; Advanced Television Systems Committee A/53, A/52 Standards.

[47] CVAA, Title II, sec. 202(a), 713(f)(1).

[48] *Id.* at 713(f)(2)(F).

[49] *Id.* at 713(f)(2)(B).

[50] The Administrative Procedure Act requires that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date," with certain exceptions. 5 U.S.C. 553(d).

[51] The Paperwork Reduction Act requires that any new regulation imposing a paperwork burden be reviewed and approved by OMB before it becomes effective. The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104–13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[52] The effective date of rules requiring OMB approval may be later.

[53] The effective date of rules requiring OMB approval may be later.

[54] The first quarter of measured compliance with any rules requiring OMB approval may be later.

[55] *See supra* paras. 14–16.

[56] CVAA, Title II, sec. 202(a), 713(f)(2)(B), (E).

[57] *Id.* at 713(f)(2)(E).

[58] *See, e.g.,* Merriam-Webster Dictionary *available at http://www.merriam-webster.com/dictionary/live* ("broadcast directly at the time of production").

including "near-live" programming within the exemption, Congress apparently wished to exempt programs produced such a short time before airing that there is not sufficient time for the creation of video descriptions. We therefore seek comment on a definition of "near-live programming" that will ensure that programming is not covered by the reinstated rules unless there is ample time to create and insert video descriptions in the programming before it is aired. We propose that programming performed and recorded less than 24 hours prior to the time it is first aired be deemed "near-live," and seek comment on this proposal. We seek comment on how long it takes to produce video descriptions, and request that those who prefer a shorter or longer window for near-live programming support their alternative proposals with information regarding the length of time needed to produce video descriptions. How should our rule address the situation where a program is substantially completed before the beginning of the "near-live" window, but edited during that window in ways which do not change the basic content? How commonly does this occur in the production of major network prime time programming? We note that we may modify our definition of "near-live programming" in the future as broadcasters, MVPDs, and programming producers gain experience with integrating video description into their production and transmission cycle and it becomes feasible to incorporate video descriptions closer to the time of transmission of the programming.

2. Other Exemptions

22. Section 713(f)(2)(C) of the Communications Act, as added by the CVAA, states that

> [t]he regulations may permit a provider of video programming or a program owner to petition the Commission for an exemption from the requirements of [the video description provisions] upon a showing that the requirements contained in this section be[sic] economically burdensome.[59]

We propose to reinstate the previously adopted process for requesting an exemption from our rules. We also propose to replace the term "undue burden" in the rules with "economically burdensome," as described in the CVAA, and propose that we use the same factors as applied to the undue burden standard. In the closed captioning context, the Commission has previously found the standards to be quite "closely related."[60] This will allow the video description rules to mirror the "economically burdensome" standard currently used in the closed captioning context. In the CVAA, Congress revised Section 713(d)(3) of the Communications Act, dealing with closed captioning exemptions, to remove the reference to the "undue burden" standard and replace it with a reference to the "economically burdensome" standard. CVAA, Title II, sec. 202(c). The Senate Commerce Committee report, in discussing this provision of the CVAA, states that the Committee "encourages the Commission, in its determination of 'economically burdensome' to use the factors listed in section 713(e)." S. Rep. 111–386, at 14 (2010). Section 713(e) of the Communications Act, which was not amended by the CVAA, lists the factors to be considered when determining if the closed captioning rules create an "undue burden" on a party (these factors are repeated in the Commission's rules at 47 CFR 79.1(f)(2); see paragraph 23, below). Thus, the Committee appears to consider the two standards to be interchangeable, at least in the closed captioning context. We seek comment on this proposal.

23. The Commission previously determined in the closed captioning context that compliance would constitute an "undue burden" for an entity, therefore justifying an individual exemption from the rule, upon a showing that the captioning requirements would result in "significant difficulty or expense" for the petitioner. Commission rules explain that such exemptions may be granted for "a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider." 47 CFR 79.1(f)(1). The factors to be taken into consideration when making an exemption determination under this section are: (1) The nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.[61] What are the circumstances under which the video description rules might be, or might become, "economically burdensome" for covered entities? What are the necessary costs for broadcasters, MVPDs, and the producers of programming to begin providing 50 hours per calendar quarter of video described programming? How are these costs different in digital than in analog transmission? Specifically, are there any considerations unique to particular MVPD delivery technologies, such as DBS or IPTV, that might justify a partial exemption or delay?[62]

24. What are the anticipated ongoing costs, per program or hour described? What, on average, is the total cost to produce a single program or hour of prime time programming on the major networks covered by the requirement to provide video description? Will this requirement add any ongoing costs other than the description itself? Comments from both the purchasers and producers of video description would be of great value in understanding these costs.

25. For those entities subject to the requirement to provide (and not merely pass through) video description, we find it unlikely that the modest requirement of 50 hours per quarter will be economically burdensome; as discussed above, in the first phase this requirement only applies to the top broadcast network affiliates in the biggest markets, MVPDs serving more than 50,000 subscribers, and the most popular nonbroadcast networks. Are there any particular concerns regarding the economic burden of pass-through obligations, which will apply to a much larger number of entities than the requirement to provide video description? We seek comment on these issues.

26. Section 713(f)(2)(D) of the Communications Act, as added by the CVAA, provides that

> [t]he Commission may exempt from the regulations * * * a service, class of services, program, class of programs, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.[63]

We are unaware of a need to exempt any such categories at this time, beyond the

[59] *Id.* at 713(f)(2)(C). We note that Section 713(f)(2)(C) is expressed in permissive terms (e.g., "the regulations may permit"), rather than the mandatory language that appears in other subsections of the legislation. *Compare* 713(f)(2)(A) ("the regulations shall apply"). Accordingly, under subsection (C), the Commission may permit exemptions based on the "economically burdensome" standard, but is not required to do so.

[60] *Closed Captioning and Video Description of Video Programming, et al,* MM Docket No. 95–176, Report and Order, 13 FCC Rcd 3272, para. 143 (1997); *but see* para. 168 (noting the paucity of useful legislative history).

[61] 47 CFR 79.1(f)(2). *See also* 47 U.S.C. 613(e) and *supra* note 68.

[62] For the purposes of this proceeding, we consider Internet Protocol delivery only to the extent it is used by an MVPD. The Act directs the Commission to initiate a future inquiry about video description in video programming distributed via the Internet. CVAA, Title II, sec. 202(a), 713(f)(3)(B).

[63] *Id.* at 713(f)(2)(D).

exemption for "live or near-live" programming discussed above. The Commission will be actively studying the impact of our video description rules over the next several years, as part of our continuing Congressional reporting obligations.[64] As a result, we anticipate that there will be ample opportunity to resolve any problems that impact an entire class of "service, program, or equipment" in future Orders in this proceeding. We seek comment on our proposal not to adopt new categorical exemptions, and on whether there are any classes of "service, program, or equipment" that should be so exempted.

F. Digital Format

27. Section 713(f)(2)(A) of the Communications Act, as added by the CVAA, states that "[t]he regulations shall apply to video programming, as defined in subsection (h), insofar as such programming is transmitted for display on television in digital format."[65] When the video description rules were originally adopted in 2000, digital television was in its relative infancy, and those rules explicitly did not extend to digital transmission of programming.[66] At the time, the Commission indicated that it expected to extend the rules to cover digital broadcasting "after there has been further experience with both digital broadcasting and video description."[67] On June 12, 2009 full-power television broadcasters nationwide completed their transition to digital-only broadcasting,[68] and a number of digital broadcasters and digitally transmitted nonbroadcast networks have been providing video description to viewers for even longer.[69] We propose, therefore, to extend the reinstated rules to cover all video programming, including that transmitted for display on television in digital format. We seek comment on this proposal.

28. A separate issue, exclusive to digital broadcasting, is the ability of digital television broadcasters to transmit multiple streams of programming on a single channel. We propose to consider only programming on the primary programming stream when measuring a broadcast station's compliance with the "50 described hours" requirement, unless the station carries a top-four national network on another stream. How should we apply the rules when a station is affiliated with more than one network? In situations in which a broadcast station carries another top-four network's programming on a secondary stream, we propose to apply the rules in the same manner as if the network programming were carried by a separate station. We seek comment on this proposal. We also propose to impose the pass-through requirement, discussed above, on all network-provided programming carried on all of an affiliated station's programming streams. This approach would ensure the availability of described programming to the widest possible audience. In particular, this requirement would ensure that those who subscribe to an MVPD service that only carries the broadcast station's primary stream would have access to described programming. We seek comment on these proposals.

G. Other Issues

29. *Quality Standards.* We seek comment on whether we should adopt quality standards for video description. Although some quality issues might be subjective (dealing with the content of the narration) and therefore difficult to enforce, others might be addressed in an objective standard. For example, the Commission could adopt a standard requiring that video description not conflict with dialogue or other important audio in the program. Additionally, the Commission could require video description to be synchronous with the action it is describing. Is it necessary for the Commission to adopt these or other standards? If so, what standards would be necessary or appropriate? Does the Commission have authority to adopt such standards and could we do so consistent with the First Amendment? Commenters who support adoption of such quality standards should also propose either standards or existing sources that could serve as the basis for standards. Whether or not the Commission adopts mandatory standards, are there existing sources of such standards? Should the industry develop a list of best practices? We solicit input on what some of these practices might be.

30. *Program Selection.* For informational purposes, we also seek comment on how programs are likely to be chosen for description. Do entities plan to determine which shows to describe based on popularity or input from community advisory groups, or the degree to which a particular program would be enhanced by video description, or do they anticipate taking a different approach to choosing programs for video description? Do the costs or benefits of description change with different types or formats of program? How do entities intend to publicize the availability of video description? Only a subset of programming will contain video description. Therefore, should the Commission require that the availability of video description on certain programs be publicized in a certain manner, and if so, what is the best way to do so and does the Commission have authority to require the covered entities to publicize this information? We seek comment on these questions.

31. *Updated A/53 Standard.* The Commission's Rules incorporate the ATSC digital broadcast standard by reference, but have not been updated to reflect the 2010 revisions to the A/53 standard.[70] The 2007 standard currently in effect under our rules includes two options for transmission of the Visually Impaired ("VI") audio service that would typically carry video descriptions. The first option is compatible with all DTV receivers. The second option requires support in DTV receivers that is rarely implemented. In the latest version of A/53 Part 5 adopted by ATSC, the second option has been eliminated.[71] We propose to update our rules to incorporate A/53 Part 5: 2010 in order to ensure that video description can be received by all DTV receivers. We seek comment on this proposal.

32. *Children's Programming.* Under the proposed rules, broadcast stations and MVPDs required to provide 50 hours of video described programming per quarter may do so during prime time or children's programming.[72] The

[64] *Id.* at 713(f)(3), (4)(C)(iii).

[65] *Id.* at 713(f)(2)(A). *See also id.* at 713(h)(2) ("The term 'video programming' means programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3)."); *see also id.* at Title I, sec. 101, § 3(54) ("The term 'consumer generated media' means content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia content.").

[66] *2000 Report and Order, supra* note 2, at para. 7; *Recon, supra* note 2, at para. 18.

[67] *Id.*

[68] Press Release, Federal Communications Commission, Full-Power TV Broadcasters Go All-Digital (June 13, 2009).

[69] *See supra* para. 4.

[70] 47 CFR 73.682(d).

[71] ATSC Digital Television Standard, Document A/53 Part 5: 2010 (July 6, 2010).

[72] As the Commission explained in the *2000 Report and Order,* Prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time. In addition, as we noted in the *Notice,* the several thousand dollars per hour cost to describe programming is a very small portion of the production budget for the typical prime time program. At the same time, as we noted in the *Notice,* programming with video description may provide a benefit not only to children who are visually disabled, but also to those who are learning

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proposed rules define "prime time" for video description purposes.[73] The Commission's rules define "children's programming" differently in different contexts. For instance, we impose limits on commercial advertising in programming "produced and broadcast primarily for an audience of children 12 years old and younger."[74] Our processing guidelines regarding "educational and informational" programming for children, on the other hand, apply to programming that "furthers the educational and informational needs of children 16 years of age and under."[75] Because older children with vision or other impairments can benefit from video description, we propose to define children's programming in this context as programming directed at children 16 years of age and under. We seek comment on this proposal.

33. *Subsection G.* Section 713(f)(2)(G) of the Communications Act, as added by the CVAA, says that

> [t]he Commission shall consider extending the exemptions and limitations in the reinstated regulations for technical capability reasons to all providers and owners of video programming.[76]

We propose not to take any action under this provision. We seek comment on this proposal.

34. *Non-Substantive Revisions.* In addition to the proposals above, we intend to make necessary non-substantive revisions to the rules. These include revisions and additions to the Definitions section of the prior rules,[77] changes to the second paragraph of the Procedures for Exemptions section[78] to reflect that they apply to video programming "providers" rather than just video programming "distributors,"[79] updates to the Complaint Procedures[80] to reflect the valid current address and name of the Consumer and Governmental Affairs Bureau, and non-substantive wording changes intended to make the meaning of the rules clearer. We seek comment on any other necessary technical revisions to the reinstated rules.

35. *Other Comments Requested.* Finally, we invite comment on any other issues relating to the reinstatement and modification of our Video Description rules.

IV. Procedural Matters

A. Initial Paperwork Reduction Act of 1995 Analysis

36. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

B. Ex Parte Rules

37. *Permit-But-Disclose.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[81] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[82] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

C. Filing Requirements

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

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Effective December 28, 2009, all hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. The filing hours are
8 a.m. to 7 p.m.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

People With Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

39. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW.,

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disabled. Programming with video description has both audio description and visual appeal, and so has the potential to capture the attention of learning disabled children and enhance their information processing skills. Requiring broadcast stations and MVPDs to provide children's or prime time programming with video description thus ensures that the programming reaches the greatest portion of the audience it is intended to benefit the most. Permitting broadcast stations and MVPDs to select between the two provides them flexibility without compromising that goal.

2000 Report and Order, supra note 2, at para. 36 (internal citations omitted).

[73] *Supra* para. 6; *see also* Appendix A.

[74] 47 CFR 73.670, note 2.

[75] 47 CFR 73.671(c).

[76] CVAA, Title II, sec. 202(a), 713(f)(2)(G).

[77] 47 CFR 79.3(a). At a minimum, this will include a definition of "Live or Near-live Programming."

[78] 47 CFR 79.3(d)(2).

[79] The *Recon* changed the scope of the undue burden exemption so that it applied to "providers" rather than just to "distributors," but while 47 CFR 79.3(d)(1) was updated to reflect this change, 47 CFR 79.3(d)(2) was not.

[80] 47 CFR 79.3(e).

[81] *See* 47 CFR 1.1206(b); *see also* 47 CFR 1.1202, 1.1203.

[82] *See* 47 CFR 1.1206(b)(2).

CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

40. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov.*

41. *Additional Information.* For additional information on this proceeding, contact John Norton, *John.Norton@fcc.gov,* or Lyle Elder, *Lyle.Elder@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–2120.

D. Initial Regulatory Flexibility Analysis

42. With respect to the *NPRM,* an Initial Regulatory Flexibility Analysis ("IRFA"), *see generally* 5 U.S.C. 603, follows. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* specified *supra.* The Commission will send a copy of the *NPRM,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[83]

Initial Regulatory Flexibility Analysis

43. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA") [84] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* ("*NPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* as indicated on its first page. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[85] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.[86]

E. Need for, and Objectives of, the Proposals

44. This *NPRM* proposes and seeks comment on reinstatement of the Commission's video description rules, which make television programming more accessible to persons with visual disabilities. The United States Court of Appeals for the District of Columbia Circuit vacated the rules due to insufficient authority soon after initial adoption.[87] With its enactment, the CVAA now directs the Commission to reinstate the rules with certain modifications.[88] The proposed rules require large-market broadcast affiliates of the top four national networks and multichannel video programming distributors ("MVPDs") with more than 50,000 subscribers to provide video description.[89] Covered broadcasters are required to provide 50 hours of video-described prime time or children's programming, per quarter, and covered MVPDs are required to provide the same number of hours on each of the five most popular nonbroadcast networks.[90] This requirement to provide description will effect few, if any, small entities. The rules also require, to the extent technically possible, that all network-affiliated broadcasters (commercial or non-commercial) and all MVPDs pass through any video description provided with programming they carried.[91] This pass-through requirement will effect any small MVPDs and network-affiliated broadcasters. As required under the CVAA, we propose to reinstate these rules on October 8, 2011, and to require broadcast stations and MVPDs subject to our rules to begin full compliance in the first quarter of 2012. We also propose to make certain modifications to the rules, as directed by the CVAA. Notably, these modifications include the exemption of "live or near-live" programming from consideration under the rules. We seek comment on the definition of "near-live," propose that programs produced within 24 hours of their first airing be considered "near-live" in the context of video description, and also seek comment on other possible grounds for exemption from the rules.

F. Legal Basis

45. The authority for the action proposed in this rulemaking is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and Sections 1, 2(a), 4(i), 303, 307, 309, 310, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 303, 307, 309, 310, and 613.

G. Description and Estimate of the Number of Small Entities to Which the Proposals Will Apply

46. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules if adopted.[92] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." [93] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[94] A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[95] The rule changes proposed herein will directly affect small television broadcast stations and small multichannel video program distributors (MVPDs), which include cable operators and satellite video providers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

47. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[96] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound." [97] The Commission has

[83] *See* 5 U.S.C. 603(a). In addition, the *Notice of Proposed Rulemaking* and the IRFA (or summaries thereof) will be published in the **Federal Register.**

[84] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[85] *See* 5 U.S.C. 603(a).

[86] *See id.*

[87] *Motion Picture Ass'n of America, Inc.* v. *Federal Communications Comm.,* 309 F.3d 796 (D.C. Cir. 2002).

[88] Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751 (2010) ("CVAA") at Title II, sec. 202(a), 713(f)(1–2).

[89] 47 CFR 79.3(b).

[90] *Id.* at § 79.3(b)(1), (3).

[91] *Id.* at § 79.3(b)(2), (4).

[92] 5 U.S.C. 603(b)(3).

[93] 5 U.S.C. 601(b).

[94] 5 U.S.C. 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**."

[95] 15 U.S.C. 632.

[96] *See* 13 CFR 121.201, NAICS Code 515120 (2007).

[97] *Id.* This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to

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estimated the number of licensed commercial television stations to be 1,392.[98] According to Commission staff review of the BIA/Kelsey, MAPro Television Database ("BIA") as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations [99] (or about 74 percent) have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390.[100] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [101] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

48. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

49. *Satellite Telecommunications.* Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of $15 million.[102] The most current Census Bureau data are from the economic census of 2007, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of "Satellite Telecommunications" and "Other Telecommunications." Under the "Satellite Telecommunications" category, a business is considered small if it had $15 million or less in average annual receipts.[103] Under the "Other Telecommunications" category, a business is considered small if it had $25 million or less in average annual receipts.[104]

50. The first category of Satellite Telecommunications "comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." [105] For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.[106] Of this total, 464 firms had annual receipts of under $10 million, and 18 firms had receipts of $10 million to $24,999,999.[107] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the NPRM.

51. The second category of Other Telecommunications consists of firms "primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry." [108] For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.[109] Of this total, 2,346 firms had annual receipts of under $25 million.[110] Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

52. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers," [111] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[112] To gauge small business prevalence for the DBS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.[113] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).[114] Each currently offers

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the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[98] *See* News Release, "Broadcast Station Totals as of December 31, 2009," 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) ("*Broadcast Station Totals*"); also available at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf.*

[99] We recognize that this total differs slightly from that contained in *Broadcast Station Totals, supra,* note 15; however, we are using BIA's estimate for purposes of this revenue comparison.

[100] *See Broadcast Station Totals, supra,* note 15.

[101] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 CFR 121.103(a)(1).

[102] *See* 13 CFR 121.201, NAICS code 517410.

[103] *Id.*

[104] *See* 13 CFR 121.201, NAICS code 517919.

[105] U.S. Census Bureau, 2007 NAICS Definitions, "517410 Satellite Telecommunications".

[106] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

[107] *Id.*

[108] U.S. Census Bureau, 2007 NAICS Definitions, "517919 Other Telecommunications", *http://www.census.gov/naics/2007/def/ND517919.HTM.*

[109] *See* 13 CFR 121.201, NAICS code 517919.

[110] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919" (issued Nov. 2010).

[111] *See* 13 CFR 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 7, above.

[112] 13 CFR 121.201, NAICS code 517110 (2007).

[113] *See http://www.factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[114] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video*

subscription services. DIRECTV [115] and EchoStar [116] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

53. *Fixed Microwave Services.* Fixed microwave services include common carrier,[117] private operational-fixed,[118] and broadcast auxiliary radio services.[119] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.[120] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

54. *Cable and Other Program Distribution.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." [121] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.[122] According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.[123] Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.[124] Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the NPRM.

55. *Cable Companies and Systems.* The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[125] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[126] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[127] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.[128] Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the NPRM.

56. *Cable System Operators.* The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." [129] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[130] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[131] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[132] and therefore

Programming, Thirteenth Annual Report,, 24 FCC Rcd 542, 580, para. 74 (2009) ("*13th Annual Report*"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT–00474, 22 FCC Rcd 17776 (IB 2007).

[115] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report,* 24 FCC Rcd at 687, Table B–3.

[116] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving "Sky Angel" service from DISH Network. *See id.* at 581, para. 76.

[117] *See* 47 CFR 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[118] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 CFR parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[119] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

[120] *See* 13 CFR 121.201, NAICS code 517210.

[121] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[122] 13 CFR 121.201, NAICS code 517110 (2007).

[123] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

[124] *See id.*

[125] *See* 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *See Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation,* MM Docket Nos. 92–266, 93–215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

[126] These data are derived from *R.R. Bowker, Broadcasting & Cable Yearbook 2006,* "Top 25 Cable/Satellite Operators," pages A–8 & C–2 (data current as of June 30, 2005); *Warren Communications News, Television & Cable Factbook 2006,* "Ownership of Cable Systems in the United States," pages D–1805 to D–1857.

[127] *See* 47 CFR 76.901(c).

[128] *Warren Communications News, Television & Cable Factbook 2006,* "U.S. Cable Systems by Subscriber Size," page F–2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[129] 47 U.S.C. 543(m)(2); *see also* 47 CFR 76.901(f) & nn.1–3.

[130] 47 CFR 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[131] These data are derived from *R.R. Bowker, Broadcasting & Cable Yearbook 2006,* "Top 25 Cable/Satellite Operators," pages A–8 & C–2 (data current as of June 30, 2005); *Warren Communications News, Television & Cable Factbook 2006,* "Ownership of Cable Systems in the United States," pages D–1805 to D–1857.

[132] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's

Continued

we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

57. *Open Video Services.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[133] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[134] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[135] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 3,188 firms in this previous category that operated for the entire year.[136] Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.[137] Thus, under this size standard, most cable systems are small and may be affected by rules adopted pursuant to the NPRM. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[138] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[139] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

H. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements for Small Entities

58. The *NPRM* seeks comment on rules that would affect small television broadcast stations and MVPDs by requiring them to pass through a secondary audio track, containing video description, with any described programming that is provided by a network. The description need not be passed through if the station or MVPD does not have the technical capability to pass it through, or if the entity is already using all of the secondary audio capacity associated with that program for other program-related material. If any small entities are subject to the separate requirement to "provide" video description, we anticipate that they will do so by passing description through to viewers. This separate requirement will thus impose no distinct burden on small broadcasters or MVPDs. These requirements may in some cases result in the need for engineering services. The *NPRM* seeks comment, in part, on whether the rules could require the purchase of additional equipment.

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

59. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[140] We seek comment on the applicability of any of these alternatives to affected small entities.

60. The requirements proposed in the *NPRM,* including those affecting small broadcasters and MVPDs, are largely mandated by Congress. They would in most cases create minimal economic impact on small entities, and could provide positive economic impact by increasing viewership by persons with visual impairments. The Commission has statutory authority to determine the effective date of the rules, and to exempt parties or classes from operation of any or part of the proposed rules. We invite small entities to submit comment on the impact of the proposed rules, and on how the Commission could further minimize potential burdens on small entities if the proposals provided in the *NPRM,* or those submitted into the record, are ultimately adopted.

J. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

V. Ordering Clauses

61. *It is ordered* that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and Sections 1, 2(a), 4(i), 303, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 303, and 613, *comment is hereby sought* on the proposals described and rules set forth in this *Notice of Proposed Rulemaking.*

62. *It is ordered* that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 73

Civil defense, Communications equipment, Defense communications, Education, Equal employment opportunity, Foreign relations, Mexico, Political candidates, Radio, Reporting and recordkeeping requirements, Television.

47 CFR Part 79

Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission Proposes 47 CFR parts 73 and 79 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

2. Section 73.682 is amended by revising paragraph (d) to read as follows:

§ 73.682 TV Transmission Standards.

* * * * *

finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

[133] 47 U.S.C. 571(a)(3)–(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 06–189, Thirteenth Annual Report, 24 FCC Rcd 542, 606 para. 135 (2009) ("*Thirteenth Annual Cable Competition Report*").

[134] *See* 47 U.S.C. 573.

[135] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[136] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

[137] *See id.*

[138] A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.*

[139] *See Thirteenth Annual Cable Competition Report,* 24 FCC Rcd at 606–07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[140] 5 U.S.C. 603(c)(1)–(c)(4).

(d) *Digital broadcast television transmission standard.* Effective May 29, 2008 transmission of digital broadcast television (DTV) signals shall comply with the standards for such transmissions set forth in ATSC A/52: "ATSC Standard Digital Audio Compression (AC–3)" (incorporated by reference, see § 73.8000), ATSC A/53, Parts 1–4 and 6: 2007 "ATSC Digital Television Standard," (January 3, 2007), and ATSC A/53, Part 5: 2010 "ATSC Digital Television Standard," (July 6, 2010), except for section 6.1.2 ("Compression Format Constraints") of A/53 Part 4: 2007 ("MPEG–2 Video Systems Characteristics") and the phrase "see Table 6.2" in section 6.1.1 Table 6.1 and section 6.1.3 Table 6.3 (incorporated by reference, see § 73.8000), and ATSC A/65C: "ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006," (January 2, 2006) (incorporated by reference, see § 73.8000). Although not incorporated by reference, licensees may also consult ATSC A/54A: "Recommended Practice: Guide to Use of the ATSC Digital Television Standard, including Corrigendum No. 1," (December 4, 2003, Corrigendum No. 1 dated December 20, 2006, and ATSC A/69: "Recommended Practice PSIP Implementation Guidelines for Broadcasters," (June 25, 2002) (Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082 (47 U.S.C. 154, 155, 303)). ATSC A/54A and ATSC A/69 are available from Advanced Television Systems Committee (ATSC), 1750 K Street, NW., Suite 1200, Washington, DC 20006, or at the ATSC Web site: *http://www.atsc.org/standards.html.*

PART 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

1. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613.

2. Section 79.3 is revised to read as follows:

§ 79.3 Video description of video programming.

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

(1) *Designated Market Areas (DMAs).* Unique, county-based geographic areas designated by Nielsen Media Research, a television audience measurement service, based on television viewership in the counties that make up each DMA.

(2) *Video programming provider.* Any video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming.

(3) *Video description.* The insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

(4) *Video programming.* Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media.

(5) *Video programming distributor.* Any television broadcast station licensed by the Commission and any multichannel video programming distributor (MVPD), and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.

(6) *Prime time.* The period from 8 to 11 p.m. Monday through Saturday, and 7 to 11 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10 p.m. Monday through Saturday, and 6 and 10 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11 p.m. Monday through Saturday, and 7 to 11 p.m. on Sunday, or 7 to 10 p.m. Monday through Saturday, and 6 to 10 p.m. on Sunday.

(7) *Live or near-live programming.* Programming performed either simultaneously with, or recorded no more than 24 hours prior to, its first transmission by a video programming distributor.

(8) *Children's Programming.* Television programming directed at children 16 years of age and under.

(b) The following video programming distributors must provide programming with video description as follows:

(1) Commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 25 DMAs, as determined by Nielsen Media Research, Inc. as of January 1, 2011, must provide 50 hours of video description per calendar quarter, either during prime time or on children's programming, on each programming stream on which they carry one of the top four commercial television broadcast networks;

(2) Television broadcast stations that are affiliated or otherwise associated with any television network must pass through video description when the network provides video description and the broadcast station has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description;

(3) Multichannel video programming distributors (MVPDs) that serve 50,000 or more subscribers must provide 50 hours of video description per calendar quarter during prime time or children's programming, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 2009–September 2010, that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under these rules; and

(4) Multichannel video programming distributors (MVPDs) of any size:

(i) Must pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description; and

(ii) Must pass through video description on each nonbroadcast network they carry, when the network provides video description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the video description, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description.

(c) *Responsibility for and determination of compliance.* (1) The Commission will calculate compliance on a per channel, and, for broadcasters, a per stream, calendar quarter basis, beginning with the calendar quarter January 1 through March 31, 2012.

(2) In order to meet its fifty-hour quarterly requirement, a broadcaster or

MVPD may count each program it airs with video description no more than a total of two times on each channel on which it airs the program. A broadcaster or MVPD may count the second airing in the same or any one subsequent quarter. A broadcaster may only count programs aired on its primary broadcasting stream towards its fifty-hour quarterly requirement. A broadcaster carrying one of the top four commercial television broadcast networks on a secondary stream may count programs aired on that stream toward its fifty-hour quarterly requirement for that network only.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description.

(4) Once an MVPD as defined under paragraph (b)(3) of this section:

(i) Has aired a particular program with video description on a broadcast station it carries, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description; or

(ii) Has aired a particular program with video description on a nonbroadcast network it carries, it is required to include video description with all subsequent airings of that program on that same nonbroadcast network, unless it is using the technology used to provide video description for another purpose related to the programming that would conflict with providing the video description.

(5) In evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider showings that any lack of video description was de minimis and reasonable under the circumstances.

(d) *Procedures for exemptions based on economic burden.* (1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements would be economically burdensome.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements to provide programming with video description would be economically burdensome. The term "economically burdensome" means imposing significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for video description would be economically burdensome:

(i) The nature and cost of providing video description of the programming;

(ii) The impact on the operation of the video programming provider;

(iii) The financial resources of the video programming provider; and

(iv) The type of operations of the video programming provider.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternative that might constitute a reasonable substitute for the video description requirements. The Commission will evaluate economic burden with regard to the individual outlet.

(4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings, in accordance with § 0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy. Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.

(8) Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an economic burden exemption from the video description requirements.

(11) During the pendency of an economic burden determination, the Commission will consider the video programming subject to the request for exemption as exempt from the video description requirements.

(e) *Complaint procedures.* (1) A complainant may file a complaint concerning an alleged violation of the video description requirements of this section by transmitting it to the Consumer and Governmental Affairs Bureau at the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. Complaints should be addressed to: Consumer and Governmental Affairs Bureau, 445 12th Street, SW, Washington, DC 20554. A complaint must include:

(i) The name and address of the complainant;

(ii) The name and address of the broadcast station against whom the complaint is alleged and its call letters and network affiliation, or the name and address of the MVPD against whom the complaint is alleged and the name of the network that provides the programming that is the subject of the complaint;

(iii) A statement of facts sufficient to show that the video programming distributor has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

(iv) The specific relief or satisfaction sought by the complainant;

(v) The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant's disability); and

(vi) A certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The answer to a complaint must include a certification that the video programming

distributor attempted in good faith to resolve the dispute with the complainant.

(3) The Commission will review all relevant information provided by the complainant and the video programming distributor and will request additional information from either or both parties when needed for a full resolution of the complaint.

(i) The Commission may rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance. The Commission will not hold the video programming distributor responsible for situations where a program source falsely certifies that programming that it delivered to the video programming distributor meets our video description requirements if the video programming distributor is unaware that the certification is false. Appropriate action may be taken with respect to deliberate falsifications.

(ii) If the Commission finds that a video programming distributor has violated the video description requirements of this section, it may impose penalties, including a requirement that the video programming distributor deliver video programming containing video description in excess of its requirements.

(f) *Private rights of action are prohibited.* Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

[FR Doc. 2011–6240 Filed 3–17–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[DA 11–412]

Possible Revision or Elimination of Rules

AGENCY: Federal Communications Commission.

ACTION: Review of regulations; comments requested.

SUMMARY: This document invites members of the public to comment on the Federal Communication Commission's (FCC's or Commission's) rules to be reviewed pursuant to section 610 of the Regulatory Flexibility Act of 1980, as amended (RFA). The purpose of the review is to determine whether Commission rules whose ten-year anniversary dates are in the year 2009, as contained in the Appendix, should be continued without change, amended, or rescinded in order to minimize any significant impact the rules may have on a substantial number of small entities. Upon receipt of comments from the public, the Commission will evaluate those comments and consider whether action should be taken to rescind or amend the relevant rule(s).

DATES: Comments may be filed on or before May 17, 2011.

FOR FURTHER INFORMATION CONTACT: Sharon K. Stewart, Chief of Staff, Office of Communications Business Opportunities (OCBO), Federal Communications Commission, (202) 418–0990. People with disabilities may contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, *etc.*) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554.

SUPPLEMENTARY INFORMATION: Each year the Commission will publish a list of ten-year old rules for review and comment by interested parties pursuant to the requirements of section 610 of the RFA.

Public Notice

FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. 610

CB Docket No. 09–229

Released:

1. Pursuant to the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. 610, the FCC hereby publishes a plan for the review of rules adopted by the agency in calendar year 1999 which have, or might have, a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objective of section 610 of the RFA, to minimize any significant economic impact of such rules upon a substantial number of small entities.

2. This document lists the FCC regulations to be reviewed during the next twelve months. In succeeding years, as here, the Commission will publish a list for the review of regulations promulgated ten years preceding the year of review.

3. In reviewing each rule in a manner consistent with the requirements of section 610 the FCC will consider the following factors:

(a) The continued need for the rule;

(b) The nature of complaints or comments received concerning the rule from the public;

(c) The complexity of the rule;

(d) The extent to which the rule overlaps, duplicates, or conflicts with other Federal rules and, to the extent feasible, with State and local governmental rules; and

(e) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

4. Appropriate information has been provided for each rule, including a brief description of the rule and the need for, and legal basis of, the rule. The public is invited to comment on the rules chosen for review by the FCC according to the requirements of section 610 of the RFA. All relevant and timely comments will be considered by the FCC before final action is taken in this proceeding.

Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies. Comments filed through the ECFS may be sent as an electronic file via the Internet to *http://www.fcc.gov/cgb/ecfs/.* Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket (proceeding) and "DA" number.

Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message: "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Again, please include the docket (proceeding) and "DA" number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. Again, please include the docket (proceeding) and "DA" number.

The filing hours at this location are 8 a.m. to 7 p.m.

All hand deliveries must be held together with rubber bands or fasteners.

• Any envelopes must be disposed of before entering the building.

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

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

• All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

Comments in this proceeding will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300 or 800–378–3160, facsimile 202–488–5563, or via e-mail at *fcc@bcniweb.com.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

For information on the requirements of the RFA, the public may contact Carolyn Fleming Williams, Senior Deputy Director, Office of Communications Business Opportunities, 202–418–0990 or visit *http://www.fcc.gov/ocbo.*

Federal Communications Commission.

Thomas A. Reed,

Director, Office of Communications Business Opportunities.

Appendix

List of rules for review pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 610, for the ten-year period beginning in the year 1999 and ending in the year 2009. All listed rules are in Title 47 of the Code of Federal Regulations.

PART 1—PRACTICE AND PROCEDURE

Subpart E—Complaints, Applications, Tariffs, and Reports Involving Common Carriers

Brief Description: The rules in Part 1, Subpart E, prescribe the procedures, format, and content of complaints, applications, tariffs, and reports involving common carriers. Section 1.774 sets forth procedures for petitions for pricing flexibility. This rule establishes the content of such petitions and sets forth the procedures for opposing such petitions and for requesting confidentiality. The rule also establishes the time period after which various petitions will be deemed granted if the Commission has not denied the petition.

Need: Section 1.774 was adopted to establish procedures to implement the Commission's pricing flexibility framework by ensuring that the Commission's regulations did not interfere with the operation of competitive markets by removing services from price cap regulation as competition develops.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 155, 225 and 303(r).

Section Number and Title:

1.774 Pricing flexibility.

Subpart F—Wireless Radio Services Applications and Proceedings

Brief Description: Part 1 contains rules pertaining to Commission practices and procedures. Subpart F sets forth the rules governing the authorization and licensing of Wireless Radio Services.

Need: These rules are needed to set forth the general application process and licensing rules for the Wireless Radio Services, including requirements for submitting applications that specify a mailing address for receiving service and correspondence and coordinating the assignment of frequencies near the Canada-United States borders.

Legal Basis: 47 U.S.C. 154, 161, 303 and 332.

Section Number and Title:

1.923(i) Content of applications.
1.928 Frequency coordination, Canada.

Subpart Z—Communications Assistance for Law Enforcement Act [CALEA]

Brief Description: Part 1 contains rules pertaining to Commission practices and procedures. Subpart Z specifies that all carriers subject to CALEA must comply with the assistance capability requirements of CALEA section 103 and the systems security and integrity requirements of CALEA section 105, and also lists the specific capability requirements pertaining to cellular, PCS, and wireline carriers. This subpart contains *inter alia,* rules that require a telecommunications carrier to ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with appropriate legal authorization, appropriate carrier authorization, and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.

Need: These rules implement provisions of the Communications Assistance for Law Enforcement Act (CALEA), Public Law 103–414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.). In 1999 the CALEA rules were added to Parts 22, 24 and 64. In 2006, the Commission consolidated the CALEA rules in new Subpart Z. The Commission also substantially modified the CALEA rules in 2006 in order to implement the statutory requirements of Section 103.

Legal Basis: 47 U.S.C. 151, 154(i), 157(a), 229, 301, 303 and 332.

Section Number and Title:

1.20000 Purpose.
1.20001 Scope.
1.20002 Definitions.
1.20003 Policies and provisions for employee control.
1.20004 Maintaining secure and accurate records.
1.20005 Submission of policies and procedures and Commission review.
1.20006 Assistance capability requirements.
1.20007 Additional assistance capability requirements for wireline, cellular, and PCS telecommunications carriers.
1.20008 Penalties.

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

Subpart J—Equipment Authorization Procedures

Brief Description: These rules specify conditions associated with grant of equipment authorization under the Commission's rules.

Need: The rules provide procedures and conditions under which grants can be dismissed, limited and revoked. The rules also specify measurement procedures to be applied generally for radiofrequency devices.

Legal Basis: 47 U.S.C. 154, 302a, 303 and 336.

Section Number and Title:

2.960 Designation of Telecommunications Certification Bodies (TCBs).
2.962 Requirements for Telecommunications Certification Bodies.
2.1033 Application for certification.
2.1204 Import conditions.
2.1205 Filing of required declaration.

PART 5—EXPERIMENTAL RADIO SERVICE (OTHER THAN BROADCAST)

Subpart A—General

Brief Description: The Part 5 rules prescribe the manner in which eligibility, application, licensing and operating procedures and requirements of the radio frequency spectrum may be made available for experimentation.

Need: These rules permit experimentation in new radio technology and applications while ensuring the protection of incumbent services.

Legal Basis: 47 U.S.C. 154, 302 and 303.

Section Number and Title:

5.3 Scope of service.

Subpart B—Applications and Licenses

Brief Description, Need and Legal Basis: See Subpart A above.

Section Number and Title:

5.59 Forms to be used.

5.61 Procedure for obtaining a special temporary authorization.
5.89 School and student authorizations.
5.105 Authorized bandwidth.
5.109 Antenna and tower requirements.

PART 6—ACCESS TO TELECOMMUNICATIONS SERVICE, TELECOMMUNICATIONS EQUIPMENT AND CUSTOMER PREMISES EQUIPMENT BY PERSONS WITH DISABILITIES

Subpart A—Scope—Who Must Comply With These Rules?

Brief Description: Part 6 of the Commission's rules was adopted in 1999. These rules set forth the scope of the manufacturers and telecommunications providers which shall ensure that their equipment and services are accessible to and usable by persons with disabilities, if readily achievable; and define the types of accessibility obligations and processes for enforcement.

Need: Under section 255 of the Communications Act of 1934, as amended, manufacturers and telecommunications service providers shall ensure that people with disabilities have access to telecommunications services and related equipment, if readily achievable. Furthermore, where it is not readily achievable for equipment or services to be made accessible to and usable by individuals with disabilities, the manufacturer or service provider shall ensure that the equipment or services are compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to secure access, if readily achievable. The rules implementing section 255 are designed to increase the accessible products and services available in the marketplace.

Legal Basis: 47 U.S.C. 151–154, 201(b), 208, 251(a)(2), 255 and 303(r).

Section Number and Title:

6.1 Applicability.

Subpart B—Definitions

Brief Description, Need and Legal Basis: *See* Subpart A above.

Section Number and Title:

6.3 Definitions.

Subpart C—Obligations—What Must Covered Entities Do?

Brief Description, Need and Legal Basis: *See* Subpart A above.

Section Number and Title:

6.5 General obligations.
6.7 Product design, development and evaluation.
6.9 Information pass through.
6.11 Information, documentation, and training.

Subpart D—Enforcement

Brief Description, Need and Legal Basis: *See* Subpart A above.

Section Number and Title:

6.15 Generally.
6.16 Informal or formal complaints.
6.17 Informal complaints; form and content.
6.18 Procedure; designation of agents for service.
6.19 Answers to informal complaints.
6.20 Review and disposition of informal complaints.
6.21 Formal complaints, applicability of 1.720 through 1.736 of this chapter.
6.22 Formal complaints based on unsatisfied informal complaints.
6.23 Actions by the Commission on its own motion.

PART 7—ACCESS TO VOICEMAIL AND INTERACTIVE MENU SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES

Subpart A—Scope—Who Must Comply With These Rules?

Brief Description: Part 7 of the Commission's rules was adopted in 1999. These rules set forth the scope of manufacturers and information service providers which shall ensure that their voicemail and interactive menu equipment and services are accessible to and usable by persons with disabilities, if readily achievable; and define the types of accessibility obligations and processes for enforcement.

Need: Under section 255 of the Communications Act, manufacturers and telecommunications service providers shall ensure that people with disabilities have access to telecommunications services and related equipment, if readily achievable. Furthermore, where it is not readily achievable for equipment or services to be made accessible to and usable by individuals with disabilities, the manufacturer or service provider shall ensure that the equipment or services are compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to secure access, if readily achievable. The Commission asserted its ancillary jurisdiction to apply section 255 to providers of voicemail and interactive menu service, and to the manufacturers of equipment that perform those functions. In doing so, the Commission recognized that in order to carry out meaningfully the accessibility requirements of section 255, requirements comparable to those under section 255 should apply to these two information services, which are critical to making telecommunications accessible to and usable by people with disabilities.

Legal Basis: 47 U.S.C. 151–154, 201(b), 208, 251(a)(2), 255 and 303(r).

Section Number and Title:

7.1 Who must comply with these rules?

Subpart B—Definitions

Brief Description, Need and Legal Basis: *See* Subpart A above.

Section Number and Title:

7.3 Definitions.

Subpart C—Obligations—What Must Covered Entities Do?

Brief Description, Need and Legal Basis: *See* Subpart A above.

Section Number and Title:

7.5 General obligations.
7.7 Product design, development, and evaluation.
7.9 Information pass through.
7.11 Information, documentation and training.

Subpart D—Enforcement

Brief Description, Need and Legal Basis: *See* Subpart A above.

Section Number and Title:

7.15 Generally.
7.16 Informal or formal complaints.
7.17 Informal complaints; form and content.
7.18 Procedure; designation of agents for service.
7.19 Answers to informal complaints.
7.20 Review and disposition of informal complaints.
7.21 Formal complaints, applicability of 1.720 through 1.736 of this chapter.
7.22 Formal complaints based on unsatisfied informal complaints.
7.23 Actions by the Commission on its own motion

PART 13—COMMERCIAL RADIO OPERATORS

Brief Description: The Part 13 rules prescribe the manner and conditions under which commercial radio operators are licensed by the Commission.

Need: These rules specify the authority conveyed by Part 13 Commercial Radio Operator licenses and require applicants for Commercial Radio Operator licenses (except applicants for a Restricted Radiotelephone Operator Permit and Restricted Radiotelephone Operator Permit—Limited Use) to specify a mailing address.

Legal Basis: 47 U.S.C. 154 and 303, and applicable treaties and agreements to which the United States is a party.

Section Number and Title:

13.8 Authority conveyed.
13.10 Licensee address.

PART 15—RADIO FREQUENCY DEVICES

Subpart A—General

Brief Description: These rules sets out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an individual license. These rules contain the technical specifications, administrative requirements and other conditions relating to the marketing of part 15 devices.

Need: These rules are necessary to promote the efficient use of the radio spectrum by preventing harmful interference to licensed radio services that share the same spectrum or nearby spectrum as unlicensed devices.

Legal Basis: 47 U.S.C. 154, 302a, 303, 304, 307, 336 and 544a.

Section Number and Title:

15.3 Definitions.
15.37 Transition provisions for compliance with the rules.

Subpart B—Unintentional Radiators

Brief Description, Need and Legal Basis: *See* Subpart A above.
Section Number and Title:

15.101 Equipment authorization of unintentional radiators.
15.121 Scanning receivers and frequency converters used with scanning receivers.

PART 18—INDUSTRIAL, SCIENTIFIC, AND MEDICAL EQUIPMENT

Subpart B—Applications and Authorizations General

Brief Description: These rules specify the technical standards and other requirements for certain equipment or appliances that generate and use locally radiofrequency energy for industrial, scientific, medical purposes, excluding telecommunications applications, to be marketed and operated within the United States.
Need: These rules are needed to regulate industrial, scientific and medical (ISM) equipment that emits electromagnetic energy on frequencies within the radiofrequency spectrum in order to prevent harmful interference to authorized radio communications services.
Legal Basis: 47 U.S.C. 4, 301, 302, 303, 304 and 307.
Section Number and Title:

18.213 Information to the user.

Subpart C—Technical Standards

Brief Description, Need and Legal Basis: *See* entry immediately above.
Section Number and Title:

18.307 Conduction limits.

PART 20—COMMERCIAL MOBILE RADIO SERVICES

Subpart B—Common Carrier Services

Brief Description: These rules set forth the requirements and conditions applicable to commercial mobile radio service providers.
Need: This rule establishes the 218–219 MHz Service as a commercial mobile radio service.
Legal Basis: 47 U.S.C. 154, 160, 201, 251–254, 303 and 332.
Section Number and Title:

20.9(a)(12) Commercial mobile radio service.

PART 22—PUBLIC MOBILE SERVICES

Subpart B—Licensing Requirements and Procedures

Brief Description: The Part 22 rules state the conditions under which radio stations may be licensed and used in the Paging and Rural, Air-Ground, Cellular and Offshore Radiotelephone Services. Subpart B sets forth rules governing the licensing requirements and procedures regarding the operation of cellular radiotelephone systems.
Need: These rules are needed to implement the Commission's competitive bidding authority under 47 U.S.C. 309(j). Section 22.213 informs the public that, after an auction, the Commission will accept long form applications for paging geographic authorizations only from the auction winners and parties seeking partitioned authorizations with auction winners.
Legal Basis: 47 U.S.C. 154, 310, 302, 303, 309 and 332.
Section Number and Title:

22.213 Filing of long-form applications.

Subpart E—Paging and Radiotelephone Service

Brief Description: The Part 22 rules state the conditions under which radio stations may be licensed and used in the Paging and Rural, Air-Ground, Cellular and Offshore Radiotelephone Services. Subpart E sets forth rules governing the licensing and operations of paging and radiotelephone service.
Need: These rules establish requirement for partitioning licenses and disaggregating spectrum, and permit Part 22 licensees to keep certain antenna information on file and produce it upon request, instead of requiring mandatory filing with the Commission.
Legal Basis: 47 U.S.C. 154, 310, 302, 303, 309 and 332.
Section Number and Title:

22.513 Partitioning and disaggregation.
22.529(c) Applications requirements for the Paging and Radiotelephone Service.

Subpart F—Rural Radiotelephone Service

Brief Description: The Part 22 rules state the conditions under which radio stations may be licensed and used in the Paging and Rural, Air-Ground, Cellular and Offshore Radiotelephone Services. Subpart F sets forth rules governing the licensing and operations of rural radiotelephone service.
Need: This rule permits Part 22 licensees to keep certain antenna information on file and produce it upon request, instead of requiring mandatory filing with the Commission.
Legal Basis: 47 U.S.C. 154, 310, 302, 303, 309 and 332.
Section Number and Title:

22.709(f) Rural radiotelephone service application requirements.

Subpart H—Cellular Radiotelephone Service

Brief Description: The Part 22 rules state the conditions under which radio stations may be licensed and used in the Paging and Rural, Air-Ground, Cellular and Offshore Radiotelephone Services. Subpart H sets forth rules governing the licensing and operations of cellular radiotelephone service.
Need: These rules require that analog cellular phones include a separate capability for processing 911 calls that permits those calls to be handled, where necessary, by either cellular carrier in the area, and permit Part 22 licensees to keep certain antenna information on file and produce it upon request, instead of requiring mandatory filing with the Commission.
Legal Basis: 47 U.S.C. 154, 310, 302, 303, 309 and 332.
Section Number and Title:

22.921 911 Call processing procedures; 911-only calling mode.
22.929(d) Application requirements for the Cellular Radiotelephone Service.

PART 25—SATELLITE COMMUNICATIONS

Brief Description: Section 25.200 created a voluntary equipment authorization procedure for certain kinds of mobile earth station terminals.
Need: This rule is not needed. It was removed from the CFR in 2002.
Legal Basis: 47 U.S.C. 701–744.
Section Number and Title:

25.200 Interim Equipment Authorization.

PART 42—PRESERVATION OF RECORDS OF COMMUNICATION COMMON CARRIERS

Brief Description: Part 42 implements sections 219 and 220 of the Communications Act of 1934, as amended, which authorize the Commission to require communications common carriers to keep records and file reports. The Part 42 rules facilitate enforcement of the Communications Act by ensuring the availability of communication common carrier records needed by the Commission to meet its regulatory obligations.
Need: Section 42.10 requires non-dominant interexchange carriers to make available to any member of the public in at least one location, during normal business hours information concerning the rates, terms, and conditions for their international and interstate, domestic, interexchange services. Section 42.10 also requires that non-dominant interexchange carriers that maintain Internet Web sites make this information available online. Section 42.10 was adopted to enable the Commission to meet its statutory duty of ensuring that rates, terms and conditions for these services are just, reasonable, and not unreasonably discriminatory and to investigate and resolve complaints about such services. Although it might be preferable merely to require that the information be made available on the Internet, until such a rule is promulgated, Section 42.10 ensures that the information is available to consumers.
Legal Basis: 47 U.S.C. 154(i), 219 and 220.
Section Number and Title:

42.10 Public availability of information concerning interexchange services.

PART 43—REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

Brief Description: Section 43.51(f) provides the procedures for carriers to request confidential treatment of the filing of contracts covering service on an international route and the rates, terms, and conditions

that govern the settlement of U.S. international traffic.

Need: The filing of contracts by U.S. carriers provides a valuable tool to the Commission to ensure that U.S. carriers do not enter into arrangements that would allow the foreign carrier to exercise its market power to the detriment of U.S. consumers. Public disclosure of such contracts, however, may have a chilling effect on pro-competitive termination arrangements because parties may be more reluctant to conclude arrangements that must be disclosed publicly. This rule balances these two competing concerns of promoting competition, while precluding the abuse of foreign market power by allowing confidential treatment of the contracts.

Legal Basis: 47 U.S.C. 154.

Section Number and Title:

43.51(f) Contracts and concessions.

PART 51—INTERCONNECTION

Subpart D—Additional Obligations of Incumbent Local Exchange Carriers

Brief Description: This subsection generally implements section 251(c) of the Communications Act of 1934, as amended. Section 51.321 requires incumbent local exchange carriers to provide any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon request by a telecommunications carrier, on terms and conditions that are just, reasonable, and non-discriminatory. Paragraph (h) establishes the parameters for the available collocation space reports that incumbent LECs must provide to requesting carriers seeking collocation. Paragraph (i) requires incumbent LECs to remove obsolete, unused equipment upon request in order to make more collocation space available.

Need: These rules are necessary to foster a competitive market in the telecommunications industry, and to promote the deployment of broadband infrastructure and other network investment. These rules also ensure that competitors receive prompt and accurate notice of changes that could affect their ability to interconnect with the incumbent's network.

Legal Basis: 47 U.S.C. 251(a), 251(c)(2) and (3) and 251(d).

Section Number and Title:

51.321(h), (i) Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

Brief Description: This subsection generally implements section 251(c) of the Communications Act of 1934, as amended. Section 51.323 establishes the standards incumbent LECs must meet in order to comply with their obligation to provide physical and virtual collocation. Paragraph k enumerates the requirements for physical collocation via caged, cageless, and adjacent space arrangements.

Need: These rules are necessary to foster a competitive market in the telecommunications industry, and to promote the deployment of broadband infrastructure and other network investment. These rules also ensure that competitors receive prompt and accurate notice of changes that could affect their ability to interconnect with the incumbent's network.

Legal Basis: 47 U.S.C. 251(a), 251(c)(2) and (6) and 251(d).

Section Number and Title:

51.323(k) Standards for physical collocation and virtual collocation.

Brief Description: This subsection generally implements section 251(c) of the Communications Act of 1934, as amended. Section 51.325 requires incumbent LECs to provide public notice regarding network changes generally, and paragraph (a)(3) specifically requires public notice of network changes that will affect the manner in which customer premises equipment is attached to the interstate network.

Need: These rules are necessary to foster a competitive market in the telecommunications industry, and to promote the deployment of broadband infrastructure and other network investment. These rules also ensure that competitors receive prompt and accurate notice of changes that could affect their ability to interconnect with the incumbent's network.

Legal Basis: 47 U.S.C. 251(a), 251(c)(6) and 251(d).

Section Number and Title:

51.325(a)(3) Notice of network changes: Public notice requirement.

PART 54—UNIVERSAL SERVICE

Subpart D—Universal Service Support for High Cost Areas

Brief Description: These rules specify the requirements for the high-cost support mechanism. These rules establish how high-cost support will be calculated and distributed to eligible telecommunications providers.

Need: In implementing statutory requirements for the high-cost program of the universal service support mechanism, these rules ensure that rates in rural, insular and high-cost areas are "reasonably comparable" to rates charged for similar services in urban areas.

Legal Basis: 47 U.S.C. 254(b).

Section Number and Title:

54.307(c) Support to a competitive eligible telecommunications carrier.

54.309 Calculation and distribution of forward-looking support for non- rural carriers.

54.311 Interim hold-harmless support for non-rural carriers.

54.313 State certification of support for non-rural carriers.

Subpart G—Universal Service Support for Health Care Providers

Brief Description: These rules specify the requirements for participation in the Rural Health Care Program of the universal service support mechanism. The rules establish the requirements for eligible health care providers, and the services eligible for discounted support. The rules also establish procedures for the application process, competitive bidding process, and the distribution of support. Finally, these rules establish recordkeeping and auditing requirements.

Need: In implementing statutory requirements for the Rural Health Care support mechanism, these rules ensure that discounts are available to eligible rural health care providers for telecommunications services and monthly Internet access service charges.

Legal Basis: 47 U.S.C. 254(h)(2)(A).

Section Number and Title:

54.609(a)(1) and (2) Calculating support.

54.613 Limitations on supported services for rural health care providers.

Subpart H—Administration

Brief Description: These rules specify the requirements regarding the Universal Service Administrative Company, as the permanent Administrator for the universal service support mechanism. These rules establish the Administrator's functions and responsibilities, as well as the composition of the Administrator's Board of Directors and Committees. These rules also establish requirements regarding contributions and contributor reporting requirements.

Need: In implementing statutory requirements for the universal service support mechanism, these rules provide the framework and requirements for the administration of the program.

Legal Basis: 47 U.S.C. 254.

Section Number and Title:

54.706(d) Contributions.

54.708 De minimis exemption.

54.711 Contributor reporting requirements.

PART 61—TARIFFS

Subpart A—General

Brief Description: The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Communications Act of 1934, as amended, and ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. These rules govern the filing, form, content, public notice periods, and accompanying support materials for tariffs.

Need: Section 61.3 (nn), (oo), and (pp) were adopted to define terms used elsewhere in the Commission's tariff regulations applicable to interstate, domestic, interexchange services.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403.

Section Number and Title:

61.3(nn), (oo), and (pp) Definitions.

Subpart C—General Rules for Nondominant Carriers

Brief Description: The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Communications Act of 1934, as amended, and ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. These rules govern the filing, form, content, public notice periods, and accompanying support materials for tariffs.

Need: The Part 61, Subpart C rules apply to non-dominant carriers. Section 61.18 sets

forth the scope of the Subpart C rules. Section 61.22(c)(2) and (e) were adopted to allow carriers to reduce the administrative burden associated with tariff filings.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403.

Section Number and Title:

61.18 Scope.
61.22(c)(2), and (e) Composition of tariffs.

Subpart D—General Tariff Rules for International Dominant Carriers

Brief Description: The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Communications Act of 1934, as amended, and ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. These rules govern the filing, form, content, public notice periods, and accompanying support materials for tariffs.

Need: The Part 61, Subpart D rules apply to international dominant carriers. Section 61.28 was adopted to specify tariff filing requirements for such carriers to ensure rates are just, reasonable, and not unjustly or unreasonably discriminatory.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403.

Section Number and Title:

61.28 International dominant carrier tariff filing requirements.

Subpart E—General Rules for Dominant Carriers

Brief Description: The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Communications Act of 1934, as amended, and ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. These rules govern the filing, form, content, public notice periods, and accompanying support materials for tariffs.

Need: The Part 61, Subpart E rules apply to dominant carriers. Section 61.31 sets forth the scope of the Subpart E rules. Section 61.38(g) and (f) specify tariff filing procedures designed to allow consumers to determine with which tariffs supporting information is associated. Section 61.42(d)(4)(ii) allows carriers to remove certain tolls from their interexchange baskets under certain conditions.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403.

Section Number and Title:

61.31 Scope.
61.38(g) and (f) Supporting information to be submitted with letters of transmittal.
61.42(d)(4)(ii) Price cap baskets and service categories.

Brief Description: The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Communications Act of 1934, as amended, and ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. These rules govern the filing, form, content, public notice periods, and accompanying support materials for tariffs.

Need: Section 61.46 was adopted to specify to carriers how, in connection with any price cap tariff filing proposing rate changes, the carrier must calculate its Actual Price Index (API) for each affected basket and what revenues and elements must be included in the calculation and appropriate methodologies to be used in making the required calculations. Section 61.47 was adopted to specify the appropriate calculation methodology to determine the Service Band Index (SBI) value for each affected service category, subcategory or density zone when a price cap tariff filing proposes changes to such categories. Section 61.47 also limits the data that may be included in the required calculations. Section 61.49 was adopted to assist carriers by detailing the information to be filed with each price cap tariff filing as appropriate. Section 61.54 was adopted to inform tariff filers of formatting requirements for each tariff filing. Section 61.55 was adopted to provide the detailed information required when price cap carriers file contract-based tariffs pursuant to section 69.727(a). Section 61.58 was adopted to detail the specific number of days required to provide adequate notice of various types of tariff filings.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403.

Section Number and Title:

61.46(i) Adjustments to the API.
61.47(k) Adjustment to the SBI; pricing bands.
61.49(f)(3), (f)(4), (l) Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.
61.54(c)(1)(ii), (c)(3)(ii) Composition of tariffs.
61.55 Contract-based tariffs.
61.58(b), (c), (d), (e)(3) Notice requirements.

Subpart F—Specific Rules for Tariff Publications of Dominant and Nondominant Carriers

Brief Description: The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Communications Act of 1934, as amended, and ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. These rules govern the filing, form, content, public notice periods, and accompanying support materials for tariffs.

Need: Section 61.66 was adopted to set forth the carriers to which Part 61, Subpart F applies. Section 61.69 was adopted to detail consequences when the Commission rejects a tariff. Section 61.74 was adopted to assist carriers by detailing the limited instances when a tariff filing entity may make reference to any other tariff, document or instrument in a tariff publication.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403.

Section Number and Title:

61.66 Scope.
61.69 Rejection.
61.74(e), (f) References to other instruments.

PART 63—EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

Brief Description: Part 63 implements Section 214 of the Act, which provides that no carrier shall undertake the construction of a new line or extension of any line, or shall acquire or operate any line, or extension thereof, without first having obtained a certificate from the Commission that the present or future public convenience and necessity require the construction and/or operation of such extended line. Section 402(b)(2)(a) of the Telecommunications Act of 1996 exempted line extensions and video programming systems from this requirement, and subsection 63.02 implements this exemption.

Need: The purpose of the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Consistent with this broad purpose, Congress enacted Section 402(b)(2)(A), intending to "eliminate the Section 214 approval requirement for extension of lines."

Legal Basis: 47 U.S.C. 214.

Section Number and Title:

63.02 Exemptions for extensions of lines and for systems for the delivery of video programming.

Brief Description: These rules set forth definitions, requirements, and conditions applicable to international Section 214 applications and authorizations to provide global facilities-based and global resale services, including specific information requirements for applications to provide service and required certifications thereof. The rules establish the procedures for streamlined processing of international Section 214 applications, state specific prohibitions to the acceptance of, or the agreement to accept in the future, special concessions by an international Section 214 authorized carrier from a foreign carrier that holds sufficient market power on the foreign end of the route to affect competition adversely in the U.S., and establish a requirement for an authorized carrier or a subsidiary to notify the Commission of name change. The rules also state the requirements and procedures pertinent to pro forma and substantial assignment and transfer of control transactions of international section 214 authorizations. The rules require carriers to file all notifications and other filings electronically through the International Bureau Filing System (IBFS).

Need: These rules are needed to provide the framework applicable to international Section 214 authorizations and establish the general applications, procedures, conditions and restrictions to ensure that carriers and affiliates providing services on international routes meet statutory requirements for designated global facilities-based and global resale telecommunication services.

Legal Basis: 47 U.S.C. 151, 154, 160, 201–205, 214, 218 and 403.

Section Number and Title:

63.09 Definitions applicable to international Section 214 authorizations.
63.10 (c)(5) and (e) Regulatory classification of U.S. international carriers.
63.12(a), (b), (c)(1) Processing of international Section 214 applications.
63.18 (j) through (n) Contents of applications for international common carriers.
63.21(h) and (i) Conditions applicable to all international Section 214 authorizations.
63.22 Facilities-based international common carriers.
63.23 Resale-based international common carriers.
63.24 Assignments and transfers of control.

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Subpart G—Furnishing of Enhanced Services and Customer-Premises Equipment By Communications Common Carriers; Telephone Operator Services

Brief Description: The Part 64, Subpart G rules are designed to protect consumers. These rules help ensure that carriers provide end users with the information necessary, in a clear format, to make informed decisions about their service options.

Need: Section 64.709 was adopted to ensure that operator service providers meet the specific requirements of section 226(h)(1)(A) of the Communications Act of 1934, as amended, when they file informational tariffs detailing their rates and that parties are not exposed to undue risk of fraud.

Legal Basis: 47 U.S.C. 154, 201, 218, 222, 225, 226, 228, 254(k) and 403(b)(2)(B), (c).

Section Number and Title:

64.709 Informational tariffs.

Subpart I—Allocation of Costs

Brief Description: The Part 64, Subpart I rules detail the acceptable cost allocation processes for carriers required to separate their regulated costs from nonregulated costs. These rules help to ensure that carriers compete fairly in nonregulated markets and that regulated ratepayers do not bear the risks and burdens of the carriers' competitive, or nonregulated, ventures.

Need: Section 64.904 was adopted to detail acceptable methods of compliance with the requirement that carriers that must file cost allocation manuals have those filings reviewed by an independent auditor every two years.

Legal Basis: 47 U.S.C. 154, 201, 218, 222, 225, 226, 228, 254(k) and 403(b)(2)(B), (c).

Section Number and Title:

64.904(b) Independent audits.

Subpart K—Changes in Preferred Telecommunications Service Providers

Brief Description: These rules govern the unauthorized switching of subscribers' preferred telecommunications carriers, an activity more commonly known as "slamming." These rules are designed to take the profit out of slamming, and to protect consumers and authorized carriers from unauthorized carrier changes by ensuring that consumers have verified their intent to switch providers when authorizing a carrier change. In 1999, the Commission bolstered its efforts to combat slamming by adding four sections to the slamming rules (section 64.1180 was subsequently removed). Section 64.1130, originally promulgated as 64.1160, details the use of letters of agency as a form of authorizing and/or verifying a subscriber's request to change his or her preferred carrier selection. Section 64.1170 sets forth procedures for reimbursing subscribers who have already paid charges to an unauthorized carrier. Section 64.1190 provides further protection against slamming by enabling a subscriber to "freeze" his or her preferred carrier selection, unless the subscriber gives the carrier from whom the freeze was requested his or her express consent to a change.

Need: These rules are intended to deter and ultimately eliminate unauthorized changes in subscribers telecommunications carriers. The rules absolve subscribers of liability for slamming charges in order to ensure that carriers do not profit from slamming activities, and seek to protect consumers from the confusion and inconvenience they would experience as a result of being slammed.

Legal Basis: 47 U.S.C. 151, 154, 201–205, 258 and 303(r).

Section Number and Title:

64.1130 Letter of agency form and content.
64.1170 Reimbursement procedures where the subscriber has paid charges.
64.1190 Preferred carrier freezes.

Subpart U—Customer Proprietary Network Information

Brief Description: Subpart U implements the provisions of section 222 of the Act concerning customer proprietary network information (CPNI). Section 64.2005 describes the circumstances under which carriers may, and may not, use, disclose or permit access to customer CPNI without prior customer approval. Paragraph (d) allows carriers to use, disclose, or permit access to CPNI to protect the rights or property of the carrier, or to protect users of the carrier's services and other carriers from fraudulent, abusive, or unlawful use of or subscription to such services.

Need: The CPNI regulations in section 222 are largely consumer protection provisions that establish restrictions on carrier use and disclosure of personal customer information. The statutory design expressly recognizes the duty of all carriers to protect customer information and embodies the principle that customers must be able to control information they view as sensitive and personal from use, disclosure, and access by carriers. These rules further Congress' goals of fostering competition in telecommunications markets and ensuring the privacy of customer information.

Legal Basis: 47 U.S.C. 222.

Section Number and Title:

64.2005(d) Use of customer proprietary network information without customer approval.

Subpart X—Subscriber List Information

Brief Description: Section 222(e) of the Communications Act requires carriers providing telephone exchange service to provide subscriber list information to requesting directory publishers "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions." Subpart X implements this statutory provision, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2301 lays out the basis and purpose of the rules in this Subpart, and subsection 64.2305 defines the relevant terms referenced in Subpart X.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222(e).

Section Number and Title:

64.2301 Basis and purpose.
64.2305 Definitions.

Brief Description: Subpart X implements Section 222(e) of the Act, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2309 requires telecommunications carriers that provide telephone exchange service to provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222(e).

Section Number and Title:

64.2309 Provision of subscriber list information.

Brief Description: Subpart X implements Section 222(e) of the Act, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2313 establishes what constitutes providing subscriber list information on a "timely" basis for the purposes of Subsection 64.2309. Subsection 64.2317 establishes the parameters for providing subscriber list information on an "unbundled" basis for the purposes of Subsection 64.2309.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the

development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222(e).

Section Number and Title:

64.2313 Timely basis.

64.2317 Unbundled basis.

Brief Description: Subpart X implements Section 222(e) of the Act, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2321 establishes that telephone exchange service providers meet the "nondiscriminatory rates, terms, and conditions" provision of subsection 64.2309 only if the carrier provides such information at the same rates, terms, and conditions that the carrier provides the information to its own directory publishing operation, its directory publishing affiliate, or other directory publishers. Subsection 64.2325 establishes the requirements for telephone exchange service providers to meet the "reasonable rates, terms, and conditions" provision of Subsection 64.2309.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222(e).

Section Number and Title:

64.2321 Nondiscriminatory rates, terms, and conditions.

64.2325 Reasonable rates, terms, and conditions.

Brief Description: Subpart X implements Section 222(e) of the Act, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2329 establishes the format in which carriers must provide subscriber list information to a requesting directory publisher.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222.

Section Number and Title:

64.2329 Format.

Brief Description: Subpart X implements Section 222(e) of the Act, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2333 establishes who bears the burden of proof in proceedings to resolve disputes over the rates, terms, or conditions that a telephone exchange carrier seeks to impose on a requesting directory publisher.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222(e).

Section Number and Title:

64.2333 Burden of proof.

Brief Description: Subpart X implements Section 222(e) of the Act, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2337 requires third-party directory publishers to use subscriber list information only for the purpose of publishing directories, and defines the term "for the purpose of publishing directories.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222(e).

Section Number and Title:

64.2337 Directory publishing purposes.

Brief Description: Subpart X implements Section 222(e) of the Act, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2341 sets retention periods for carriers to retain written contracts executed for the provision of subscriber list information for directory publishing and to maintain records of any of their rates, terms, and conditions for providing subscriber list information which are not set forth in a written contract.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222(e).

Section Number and Title:

64.2341 Record keeping.

Brief Description: Subpart X implements Section 222(e) of the Act, addressing third-party rights to subscriber list information, which includes listed subscribers' names, addresses and telephone numbers, as well as headings under which businesses are listed in yellow pages directories. Subsection 64.2345 describes primary advertising classifications and when such classifications apply.

Need: Subpart X is intended to implement Section 222(e) of the Act and encourage the development of competition in directory publishing by ensuring that competing directory publishers can obtain subscriber list information from LECs.

Legal Basis: 47 U.S.C. 222(e).

Section Number and Title:

64.2345 Primary advertising classification.

Subpart Y—Truth-In-Billing Requirements for Common Carriers

Brief Description: These rules govern the billing practices of telecommunications service providers. The rules provide that consumer telephone bills must be clearly organized, clearly identify the service provider, and highlight any new providers. In addition, the rules require that bills contain full and non-misleading descriptions of charges that appear therein. Where a bill contains charges for basic local service in addition to other charges, the rules require that the bill distinguish between charges for which non-payment will result in disconnection of basic, local service, and charges for which non-payment will not result in such disconnection. Bills must also contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest, charges on the bill, including a toll-free number by which subscribers may inquire about or dispute any charges on the bill.

Need: These rules are intended to reduce "slamming" and other telecommunications fraud by setting standards for bills for telecommunications service. They are designed to ensure that consumers are provided with the basic information they need to understand their telecommunications bills. They are also intended to provide consumers with the tools they need to make informed choices in a competitive telecommunications marketplace.

Legal Basis: 47 U.S.C. 151, 154(i) and (j), 201–209, 254, 258 and 403.

Section Number and Title:

64.2400 Purpose and scope.

64.2401 Truth-in-Billing Requirements.

PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

Subpart D—Conditions for Terminal Equipment Approval

Brief Description: This rule requires that certain telephone handsets sold in the United States that are hearing aid compatible be labeled with the letters "HAC" permanently affixed to them.

Need: The label is necessary to advise consumers before the purchase of a telephone whether it will be compatible with a hearing aid.

Legal Basis: 47 U.S.C. 151, 154, 201–205, 218, 255 and 610.

Section Number and Title:

68.300(b) Labeling requirements.

PART 69—ACCESS CHARGES

Subpart A—General

Brief Description: The Part 69 rules are designed to implement sections 201 and 202 of the Communications Act of 1934, as amended, and protect consumers by preventing the exercise of market power by incumbent local exchange carriers (LECs). These rules help ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory.

Need: Section 69.4 was adopted to foster competition, move access charges over time to more economically efficient levels and rate structures, preserve universal service, and lower rates by listing the charges to be included in the carrier's carrier charges for access services that are filed by price cap LECs.

Legal Basis: 47 U.S.C. 154, 201–203, 205, 218, 220, 254 and 403.

Section Number and Title:

69.4(d), (i) Charges to be filed.

Subpart H—Pricing Flexibility

Brief Description: The Part 69 rules are designed to implement sections 201 and 202 of the Communications Act of 1934, as amended, and protect consumers by preventing the exercise of market power by incumbent local exchange carriers. These rules help ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory.

Need: Part 69, Subpart H was adopted to codify the Commission's new pricing flexibility rules. The pricing flexibility rules apply to price cap local exchange carriers and were adopted to ensure that the Commission's regulations did not interfere with the operation of competitive markets by removing services from price cap regulation as competition develops. These rules also were adopted to detail the prerequisites to a grant of pricing flexibility.

Legal Basis: 47 U.S.C. 154, 201–203, 205, 218, 220, 254 and 403.

Section Number and Title:

69.701 Application of rules in this subpart.
69.703 Definitions.
69.705 Procedure.
69.707 Geographic scope of petition.
69.709 Dedicated transport and special access service other than channel terminations between LEC end offices and customer premises.
69.711 Channel terminations between LEC end offices and customer premises.
69.713 Common line, traffic-sensitive, and tandem-switched transport services.
69.725 Attribution of revenues to particular wire centers.
69.727 Regulatory relief.
69.729 New services.
69.731 Low-end adjustment mechanism.

PART 73—RADIO BROADCAST SERVICES

Subpart E—Television Broadcast Stations

Brief Description: This rule requires applicants who request a DTV allotment on channel 6 to submit an engineering study that demonstrates no interference will be caused by the allotment to FM radio stations on FM channels 200–220.

Need: This rule prevents unwanted interference in FM channels 200–220.

Legal Basis: 47 U.S.C. 154, 303, 334 and 336.

Section Number and Title:

73.623(f) DTV applications and changes to DTV allotments.

Brief Description: This rule sets forth standards for collecting field strength data to determine television signal intensity at a specific location.

Need: This rule is needed to ensure standard data collection methodology by parties submitting field strength measurements to the Commission.

Legal Basis: 47 U.S.C. 154, 303, 334 and 336.

Section Number and Title:

73.686(d) Field strength measurements.

Subpart H—Rules Applicable to All Broadcast Stations

Brief Description: This rule sets forth standards for filing contingent applications under specific circumstances.

Need: This rule is needed to ensure that frivolous and unacceptable applications are not submitted for processing by the Commission.

Legal Basis: 47 U.S.C. 154, 303, 334 and 336.

Section Number and Title:

73.3517(e) Contingent applications.

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

Subpart A—General

Brief Description: This rule sets forth the requirements for pleadings in multichannel video and cable television service proceedings.

Need: This rule simplifies the Commission's procedural rules for filing petitions and complaints pursuant to part 76.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.6 General pleadings requirements.

Subpart D—Carriage of Television Broadcast Signals

Brief Description: This rule sets forth the requirements for complaints regarding carriage.

Need: This rule simplifies the Commission's procedural rules for filing petitions and complaints pursuant to part 76.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.61(a)(5) Disputes concerning carriage.

Subpart J—Ownership of Cable Systems

Brief Description: This rule sets forth the standard for determining attribution of ownership interests.

Need: This rule clarifies the attribution standards applicable to cable systems.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.501 Note 6 Cross-ownership.

Brief Description: This rule sets forth the standard for determining attribution of ownership interests in vertically integrated programming.

Need: This rule clarifies the attribution standards.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.504 Note 1 Limits on carriage of vertically integrated programming.

Brief Description: These rules set forth the standard for determining attribution of ownership interests when determining the ownership interests of local exchange carriers in a cable operator.

Need: This rule clarifies the attribution standards.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.505 (f) and (g) Prohibition on buy outs.

Subpart N—Cable Rate Regulation

Brief Description: These rules set forth definitions to be used throughout Subpart N.

Need: Subsection (F) defines a small cable operator.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.901(f) Definitions.

Brief Description: These rules set forth the standards for affiliation and attributable interest for the purposes of the conditions in 76.905(b).

Need: This rule clarifies the attribution and affiliation standards.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.905(h) and (i) Standards for identification of cable systems subject to effective competition.

Brief Description: This rule sets forth the standards for filing a petition for a determination of effective competition by a cable operator.

Need: This rule implements provisions of the 1996 Telecommunications Act that

reform several parts of Title VI of the Communications Act of 1934.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.907 Petition for a determination of effective competition.

Brief Description: This rule sets forth the standards for filing a petition for a determination of effective competition by a cable operator.

Need: This rule adopts amendments to the cable attribution and affiliation rules, which determine whether an entity is subject to the Commission's cable regulations, in order to more accurately identify interests that confer on their holders the ability to influence or control the operations of a held entity or create the type of economic incentives that the Commission's rules relating to the provision of cable television services are designed to address.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.922(f)(6)(i) and (ii) Rates for basic service tier and cable programming service tiers.

Brief Description: This rule sets forth the standards for transactions and affiliates when making adjustments on account of external costs and rates set on a cost-of-service basis.

Need: This rule adopts amendments to the cable attribution and affiliation rules, which determine whether an entity is subject to the Commission's cable regulations, in order to more accurately identify interests that confer on their holders the ability to influence or control the operations of a held entity or create the type of economic incentives that the Commission's rules relating to the provision of cable television services are designed to address.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.924(i)(6) and (7) Allocation to service cost categories.

Brief Description: This rule sets forth the standards commercial leased access rates.

Need: This rule adopts amendments to the cable attribution and affiliation rules, which determine whether an entity is subject to the Commission's cable regulations, in order to more accurately identify interests that confer on their holders the ability to influence or control the operations of a held entity or create the type of economic incentives that the Commission's rules relating to the provision of cable television services are designed to address.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.970(c) Commercial leased access rates.

Brief Description: This rule sets forth the standards for geographically uniform cable rates.

Need: This rule implements provisions of the 1996 Telecommunications Act that reform several parts of Title VI of the Communications Act of 1934, including sections on effective competition to a cable system, small cable operator rules, uniform rate requirements, technical standards, and the sunset of the Commission's role in regulating rates on the cable service programming tier.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.984(c)(3) Geographically uniform rate structure.

Brief Description: This rule sets forth the standards for small cable operators to claim exemption from rate regulation.

Need: This rule implements provisions of the 1996 Telecommunications Act which exempt small cable operators meeting certain criteria from some rate regulation.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.990 Small cable operators.

Subpart P—Competitive Availability of Navigation Devices

Brief Description: This rule exempts certain navigation devices from the requirements of sections (a)(1), (b), and (c) of the rule.

Need: This rule implements Section 629 of the Communications Act to achieve commercial availability of set top boxes and other consumer equipment used to receive video signals and other services.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.1204(f) Availability of equipment performing conditional access or security functions.

Subpart Q—Regulation of Carriage Agreements

Brief Description: These rules set forth definitions to be used throughout Subpart Q.

Need: Subsection (b) clarifies the attribution and affiliation standards for program carriage.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.1300(b) Definitions.

Subpart S—Open Video Systems

Brief Description: These rules set forth definitions to be used throughout Subpart S.

Need: Subsection (h) clarifies the attribution and affiliation standards for open video systems.

Legal Basis: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

Section Number and Title:

76.1500(h) Definitions.

PART 80—STATIONS IN THE MARITIME SERVICES

Subpart P—Standards for Computing Public Coast Station VHF Coverage

Brief Description: The Part 80 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for stations in the maritime services. Subpart P sets forth the standards for computing public coast station VHF coverage.

Need: This rule clarifies the co-channel interference protection standards for VHF public coast geographic licensees by limiting a field strength at their service area boundaries to +5 dBu, unless a higher field strength is agreed upon by all the affected VHF public coast station geographic area licensees.

Legal Basis: 47 U.S.C. 154, 303, 307, 309 and 332.

Section Number and Title:

80.773(c) Co-channel interference protection.

PART 87—AVIATION SERVICES

Subpart D—Technical Requirements

Brief Description: The Part 87 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for stations in the aviation services. Subpart D sets forth technical requirements for such stations.

Need: This rule sets forth emission limitations for differential GPS ground stations transmitting in the 112–118 MHz band in order to avoid harmful interference to existing VHF omni-range (VOR) transmissions in the band.

Legal Basis: 47 U.S.C. 154, 303 and 307(e).

Section Number and Title:

87.139(j) Emission limitations.

Subpart G—Aeronautical Multicom Stations

Brief Description: The Part 87 rules set forth the conditions under which portions of the radio spectrum are made available and

licensed for stations in the aviation services. Subpart G sets forth requirements for aeronautical multicom stations.

Need: This rule permits the operation of unicom stations in an unattended, automatic mode, because automated unicoms have the potential to promote air safety and reduce congestion on unicom frequencies.

Legal Basis: 47 U.S.C. 154, 303 and 307(e).

Section Number and Title:

87.219 Automatic operations.

Subpart Q—Stations in the Radiodetermination Service

Brief Description: The Part 87 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for stations in the aviation services. Subpart Q sets forth requirements for stations in the radiodetermination service.

Need: This rule allows entities participating in the FAA's SCAT–I landing and approach system to use unassigned VOR frequencies in the 112–118 MHz band to transmit differential GPS augmentation data to aircraft. Permitting such use improves safety in air navigation by promoting the use of satellite technology for the precision landing of aircraft.

Legal Basis: 47 U.S.C. 154, 303 and 307(e).

Section Number and Title:

87.475(e) Frequencies.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

Subpart B—Public Safety Radio Pool

Brief Description: The Part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart B sets forth requirements for entities holding authorizations in the Public Safety Pool. As a general matter, Section 90.20(d)(66) specifies frequency pairs and equipment requirements for the delivery of medical care services.

Need: In 1999 the Commission "added" subparagraph (v) and (vi) to Section 90.20(d)(66). Subparagraph (v) exempts portable (hand-held) units operated with a maximum output power of 2.5 watts from the multi-channel equipment requirements specified in Sections 90.20(d)(66)(ii), (iii) and (iv). Subparagraph (vi) requires stations located in areas above line A to meet multi-channel equipment requirements only for those frequencies up to the number specified in Section 90.20(d)(66)(ii), (d)(66)(iii), and (d)(66)(iv) that have been assigned and coordinates with Canada in accordance with the applicable U.S.-Canada agreement. We note that the general content of 90.20(d)(66)(v) and (vi), had been codified under 90.20(c) in 1993 when the Commission established the Emergency Medical Service.

Legal Basis: 47 U.S.C. 154(i), 303(r) and 332(a)(2).

Section Number and Title:

90.20(d)(66)(v) and (vi) Public Safety Pool.

Brief Description: The Part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart B sets forth requirements for entities holding authorizations in the Public Safety Pool. This rule prohibits paging operations on certain public safety frequencies.

Need: This rule describes an assignment limitation.

Legal Basis: 47 U.S.C. 154, 303, 309 and 332.

Section Number and Title:

90.20(d)(78) Public Safety Pool.

Subpart C—Industrial/Business Radio Pool

Brief Description: The Part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart C sets forth requirements for entities holding authorizations in the Industrial/Business Pool.

Need: These rules state that applications for certain frequencies in the Industrial/Business Pool require concurrence from the Petroleum Coordinator only if authorization is requested for transmitters in certain states. They also permit railroad licensees in the Industrial/Business Radio Pool to utilize 24.10 GHz to operate safety warning transmitters on locomotives or near railroad crossings for the purpose of alerting motorists to the presence of an approaching train.

Legal Basis: 47 U.S.C. 154, 303, 309 and 332.

Section Number and Title:

90.35(c)(80), (c)(81), and (d)(7) Industrial/Business Pool.

Subpart H—Policies Governing the Assignment of Frequencies

Brief Description: The Part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart H sets forth the policies governing the assignment of frequencies.

Need: These rules specify the policies governing the assignment of frequencies. The rules also limit the number of channels for trunked operations applicants can apply for.

Legal Basis: 47 U.S.C. 154, 303, 309 and 332.

Section Number and Title:

90.173(j) Policies governing the assignment of frequencies.

90.187(e) and (f) Trunking in the bands between 150 and 512 MHz.

Subpart I—General Technical Standards

Brief Description: The part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart I sets forth the rules governing the general technical standards.

Need: This rule sets forth power and antenna height limits.

Legal Basis: 47 U.S.C. 154, 303, 309 and 332.

Section Number and Title:

90.205(q) Power and antenna height limits.

Subpart K—Standards for Special Frequencies or Frequency Bands

Brief Description: The part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart K sets forth the rules governing the standards for special frequencies or frequency bands.

Need: This rule governs the assignment and use of frequencies in the 450–470 MHz band for low power use.

Legal Basis: 47 U.S.C. 154, 303, 309 and 332.

Section Number and Title:

90.267(b), (c) and (d) Assignment and use of frequencies in the 450–470 MHz band for low power use.

Subpart M—Intelligent Transportation Systems Radio Service

Brief Description: The part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart M sets forth requirements for stations in the intelligent transportation systems radio service.

Need: This rule defines Dedicated Short-Range Communications Service (DSRCS) and specifies the coordination requirements for such services.

Legal Basis: 47 U.S.C. 154, 303, 309 and 332.

Section Number and Title:

90.371 Dedicated short range communications service.

PART 95—PERSONAL RADIO SERVICES

Subpart A—General Mobile Radio Service (GMRS)

Brief Description: The Part 95 rules govern the Personal Radio Services, including the General Mobile Radio Service, Family Radio Service, Radio Control Radio Service, Citizens Band Radio Service, 218–219 MHz Service, Low Power Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, and Multi-Use Radio Service. Subpart A applies to the General Mobile Radio Service.

Need: The rule specifies what a General Mobile Radio Service license authorizes.

Legal Basis: 47 U.S.C. 154 and 303.

Section Number and Title:

95.101(d) What the license authorizes.

Subpart D—Citizens Band (CB) Radio Service

Brief Description: The Part 95 rules govern the Personal Radio Services, including the General Mobile Radio Service, Family Radio Service, Radio Control Radio Service, Citizens Band Radio Service, 218–219 MHz Service, Low Power Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, and Multi-Use Radio Service. Subpart D applies to the Citizens Band (CB) Radio Service.

Need: The rule defines the Citizens Band Radio Services.

Legal Basis: 47 U.S.C. 154 and 303.

Section Number and Title:

95.401(d) (CB Rule 1) What are the Citizens Band Radio Services?

Subpart E—Technical Regulations

Brief Description: The Part 95 rules govern the Personal Radio Services, including the General Mobile Radio Service, Family Radio Service, Radio Control Radio Service, Citizens Band Radio Service, 218–219 MHz Service, Low Power Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, and Multi-Use Radio Service. Subpart E contains technical regulations.

Need: The rules specify technical standards for Medical Implant Communications Service transmitters.

Legal Basis: 47 U.S.C. 154 and 303.

Section Number and Title:

95.603(f) Certification required.
95.628 MICS transmitter.
95.631(h) Emission types.
95.633(e) Emission bandwidth.
95.639(f) Maximum transmitter power.

Subpart F—218–219 MHz Service

Brief Description: The Part 95 rules govern the Personal Radio Services, including the General Mobile Radio Service, Family Radio Service, Radio Control Radio Service, Citizens Band Radio Service, 218–219 MHz Service, Low Power Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, and Multi-Use Radio Service. Subpart F sets out regulations governing the licensing and operation of a 218–219 MHz system.

Need: Section 95.807 requires applicants seeking authorizations for systems in the 218–219 MHz Service to specify the regulatory status requested. Section 95.812 specifies the term of a 218–219 MHz service system license. Section 95.823 sets forth rules pertaining to geographic partitioning and spectrum disaggregation of such licenses.

Legal Basis: 47 U.S.C. 154 and 303.

Section Number and Title:

95.807 Requesting regulatory status.
95.812 License term.
95.823 Geographic partitioning and spectrum disaggregation.

Subpart I—Medical Implant Communications (MICS)

Brief Description: The Part 95 rules govern the Personal Radio Services, including the General Mobile Radio Service, Family Radio Service, Radio Control Radio Service, Citizens Band Radio Service, 218–219 MHz Service, Low Power Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, and Multi-Use Radio Service. Subpart I sets forth regulations governing the operation of Medical Implant Communications Service transmitters.

Need: These rules implement the majority of MICS requirements.

Legal Basis: 47 U.S.C. 154 and 303.

Section Number and Title:

95.1201 Eligibility.
95.1203 Authorized locations.
95.1205 Station identification.
95.1207 Station inspection.
95.1209 Permissible communications.
95.1211 Channel use policy.
95.1213 Antennas.
95.1215 Disclosure policies.
95.1217 Labeling requirements.

[FR Doc. 2011–6444 Filed 3–17–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

RIN 0648–XZ59

Endangered and Threatened Species; Proposed Threatened Status for Subspecies of the Ringed Seal

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

ACTION: Notice of public hearing.

SUMMARY: On December 10, 2010, we, NMFS, published a proposed rule to list the Arctic (*Phoca hispida hispida*), Okhotsk (*Phoca hispida ochotensis*), Baltic (*Phoca hispida botnica*), and Ladoga (*Phoca hispida ladogensis*) subspecies of the ringed seal as threatened under the Endangered Species Act of 1973, as amended (ESA). As part of that proposal, we announced a public comment period to end on February 8, 2011, and then extended the comment period to March 25, 2011. NMFS has received requests for public hearings on this issue. In response, in a previous notice we announced public hearings to be held in Anchorage and Barrow, AK. In addition, in this notice NMFS is announcing a separate hearing that will be held in Nome, AK, to provide greater opportunity for public comment.

DATES: A hearing will be held on April 5, 2011, from 4 p.m. to 7 p.m. in Nome, AK. Written comments must be received on or before March 25, 2011, or during the hearing in Nome.

ADDRESSES: The April 5, 2011, hearing will be held at the Mini-Convention Center, 409 River Street, Nome, AK.

Send written comments to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–XZ59, by any one of the following methods:

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

All comments received are a part of the public record. Comments will generally be posted without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

The proposed rule, status review report, and other materials relating to this proposal can be found on the Alaska Region Web site at: *http://alaskafisheries.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: Tamara Olson, NMFS Alaska Region, (907) 271–5006; Kaja Brix, NMFS Alaska Region, (907) 586–7235; or Marta Nammack, Office of Protected Resources, Silver Spring, MD (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On December 10, 2010 (75 FR 77476), we published a proposed rule to list the Arctic, Okhotsk, Baltic, and Ladoga subspecies of the ringed seal as threatened under the ESA. Based on the status of these subspecies, we also proposed protective regulations pursuant to section 4(d) of the ESA for these subspecies to include all of the prohibitions in section 9(a)(1) of the ESA. The original due date for comments on these proposed actions (February 8, 2011) was extended to March 25, 2011 (76 FR 6754; February 8, 2011).

Public Hearings

Joint Commerce-Interior ESA implementing regulations state that the Secretary shall promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to list a species or to designate critical habitat (see 50 CFR 424.16(c)(3)). In response to requests from various parties to hold public hearings in a number of locations in Alaska, we published a notice in the **Federal Register** announcing public hearings to be held in Anchorage and Barrow, AK (76 FR 9733, February 22, 2011). We are announcing a separate hearing in Nome, AK, to provide greater opportunity for public comment. We will accept oral and written comments on both the proposed rule for ringed seals and the proposed rule for bearded seals (75 FR 77496; December 10, 2010) during these hearings.

People wishing to make an oral statement for the record at a public hearing are encouraged to provide a written copy of their statement and present it to us at the hearing. In the event that attendance at the public hearings is large, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us.

Authority: 16 U.S.C. 1533 *et seq.*

Dated: March 15, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–6465 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

RIN 0648–XZ58

Endangered and Threatened Species; Proposed Threatened Status for Distinct Population Segments of the Bearded Seal

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

ACTION: Notice of public hearing.

SUMMARY: On December 10, 2010, we, NMFS, published a proposed rule to list the Beringia and Okhotsk Distinct Population Segments (DPSs) of the bearded seal (*Erignathus barbatus*) as threatened under the Endangered Species Act of 1973, as amended (ESA). As part of that proposal, we announced a public comment period to end on February 8, 2011, and then extended the comment period to March 25, 2011. NMFS has received requests for public hearings on this issue. In response, in a previous notice we announced public hearings to be held in Anchorage and Barrow, AK. In addition, in this notice NMFS is announcing a separate hearing that will be held in Nome, AK, to provide greater opportunity for public comment.

DATES: A hearing will be held on April 5, 2011, from 4 p.m. to 7 p.m. in Nome, AK. Written comments must be received on or before March 25, 2011, or during the hearing in Nome.

ADDRESSES: The April 5, 2011, hearing will be held at the Mini-Convention Center, 409 River Street, Nome, AK.

Send written comments to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–XZ59, by any one of the following methods:

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

All comments received are a part of the public record. Comments will generally be posted without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

The proposed rule, status review report, and other materials relating to this proposal can be found on the Alaska Region Web site at: *http://alaskafisheries.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: Tamara Olson, NMFS Alaska Region, (907) 271–5006; Kaja Brix, NMFS Alaska Region, (907) 586–7235; or Marta Nammack, Office of Protected Resources, Silver Spring, MD (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On December 10, 2010 (75 FR 77496), we published a proposed rule to list the Beringia and Okhotsk Distinct Population Segments (DPSs) of the bearded seal as threatened under the ESA. Based on the status of these DPSs, we also proposed protective regulations pursuant to section 4(d) of the ESA for these DPSs to include all of the prohibitions in section 9(a)(1) of the ESA. The original due date for comments on these proposed actions (February 8, 2011) was extended to March 25, 2011 (76 FR 6755; February 8, 2011).

Public Hearings

Joint Commerce—Interior ESA implementing regulations state that the Secretary shall promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to list a species or to designate critical habitat (see 50 CFR 424.16(c)(3)). In response to requests from various parties to hold public hearings in a number of locations in Alaska, we published a notice in the **Federal Register** announcing public hearings to be held in Anchorage and Barrow, AK (76 FR 9734, February 22, 2011). We are announcing a separate hearing in Nome, AK, to provide greater opportunity for public comment. We will accept oral and written comments on both the proposed rule for bearded seals and the proposed rule for ringed seals (75 FR 77476; December 10, 2010) during these hearings.

People wishing to make an oral statement for the record at a public hearing are encouraged to provide a written copy of their statement and present it to us at the hearing. In the event that attendance at the public hearings is large, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us.

Authority: 16 U.S.C. 1533 *et seq.*

Dated: March 15, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–6466 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket 110112022–1025–02]

RIN 0648–BA45

Atlantic Highly Migratory Species; Modification of the Retention of Incidentally-Caught Highly Migratory Species in Atlantic Trawl Fisheries

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

ACTION: Proposed rule; request for comments; notice of public hearings.

SUMMARY: This proposed rule would modify the permitting and retention requirements for Atlantic highly migratory species (HMS) to address the incidental catch of North Atlantic swordfish in squid trawl fisheries, and the incidental catch of species in the smoothhound shark complex (which includes smooth dogfish and Florida smoothhound (genus *Mustelus*) in all Atlantic trawl fisheries. The action would reduce regulatory discards of incidentally-caught HMS in the *Illex* squid trawl fishery by establishing a new Incidental HMS Squid Trawl permit, and improve reporting and compliance with HMS regulations in Atlantic squid trawl fisheries. The proposed rule would also address regulatory discards of incidentally-caught species in the smoothhound shark complex by establishing a retention limit for smoothhound sharks in all Atlantic trawl fisheries. The proposed actions are necessary to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and to implement the 2006 Consolidated HMS Fishery Management Plan (Consolidated HMS FMP), including objectives in the FMP to monitor and control all components of fishing mortality, both directed and incidental, so as to ensure the long-term sustainability of HMS stocks, and to provide the data necessary for assessing HMS fish stocks and managing HMS, including addressing inadequacies in current data collection and the ongoing collection of economic and bycatch data in Atlantic HMS fisheries.

DATES: Written comments must be received on or before April 17, 2011.

The public hearing dates are:

1. March 21, 2011, 1 p.m. to 3 p.m., Gloucester, MA
2. March 22, 2011, 4:30 p.m. to 6:30 p.m., Barnegat, NJ
3. March 28, 2011, 5 p.m. to 7 p.m., Manteo, NC
4. April 6, 2011, 8:30 a.m. to 10 a.m., Silver Spring, MD
5. April 13, 2011, 11 a.m. to 12 p.m., Annapolis, MD

ADDRESSES: The public hearings will be held at the NMFS Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA, 01930; Ocean County Library (Barnegat Branch), 112 Burr Street, Barnegat, NJ, 08005; Manteo Town Hall, 407 Budleigh St., Manteo, NC, 27954; HMS Advisory Panel (AP) Meeting, Crowne Plaza Hotel, 8777 Georgia Ave., Silver Spring, MD, 20910; Mid-Atlantic Fishery Management Council (MAFMC) Meeting, Historic Inn of Annapolis, 58 State Circle, Annapolis, MD, 21401.

You may submit comments, identified by "0648–BA45," by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at *http://www.regulations.gov*
- *Fax:* 301–713–1917, Attn: Margo Schulze-Haugen
- *Mail:* National Marine Fisheries Service, c/o HMS Management Division, SF/1, 1315 East-West Highway, Silver Spring, MD 20910. Please mark the outside of the envelope "Comments on Proposed Rule to Modify the Retention of Incidentally-Caught HMS in Atlantic Trawl Fisheries."
- *Instructions:* All comments received are part of the public record and generally will be posted to Portal *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive information.

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

Supporting documents, including the draft Environmental Assessment (EA), Regulatory Impact Review (RIR), and Initial Regulatory Flexibility Analysis (IRFA) for this action are available online at the HMS Management Division Web site: *http://www.nmfs.noaa.gov/sfa/hms/.*

FOR FURTHER INFORMATION CONTACT: Richard A. Pearson at 727–824–5399, Steve Durkee at 202–670–6637, or Delisse Ortiz at 301–713–2347.

SUPPLEMENTARY INFORMATION: North Atlantic swordfish and smoothhound shark species are managed under the authority of the Magnuson-Stevens Act, and swordfish are also managed under the authority of the Atlantic Tunas Convention Act (ATCA), which authorizes the Secretary of Commerce (Secretary) to promulgate regulations as may be necessary and appropriate to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT). The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA). On May 28, 1999, NMFS published in the **Federal Register** (64 FR 29090) final regulations, effective July 1, 1999, implementing the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (1999 FMP). On October 2, 2006, NMFS published in the **Federal Register** (71 FR 58058) final regulations, effective November 1, 2006, implementing the 2006 Consolidated HMS FMP, which details the management measures for Atlantic HMS fisheries. The implementing regulations for the Consolidated HMS FMP and its amendments for Atlantic HMS are at 50 CFR part 635.

I. Background

NMFS is issuing this proposed rule to address the permitting requirements for, and retention of, incidentally-caught HMS in Atlantic trawl fisheries. The proposed actions are necessary to achieve domestic management objectives under the Magnuson-Stevens Act and ATCA, and to implement the Consolidated HMS FMP and its amendments. This includes objectives in the FMP to monitor and control all components of fishing mortality, both directed and incidental, so as to ensure the long-term sustainability of HMS stocks, and to provide the data necessary for assessing HMS fish stocks and managing HMS, including addressing inadequacies in current data collection and the ongoing collection of economic and bycatch data in Atlantic HMS fisheries. This proposed rule addresses two separate, but related, issues regarding the retention of incidentally-caught HMS in trawl fisheries to achieve these objectives: (1) The retention of incidentally-caught swordfish in the *Illex* squid trawl fishery; and, (2) the retention of incidentally-caught species in the smoothhound shark complex (including

smooth dogfish and Florida smoothhound (genus *Mustelus*)) in all Atlantic trawl fisheries.

Retention of Incidentally-Caught Swordfish in Squid Trawl Fisheries

Limited access permits (LAPs) in the North Atlantic commercial swordfish fishery were first implemented during 1999–2000. These LAPs were issued based, in part, upon a vessel's swordfish landings history. At the time, some squid trawl vessels qualified for a swordfish LAP, but many did not for a variety of reasons (including a lack of documented swordfish landings or income from swordfish). Under current regulations, vessels intending to legally land North Atlantic swordfish with gear other than handgear, including squid trawl vessels, must be issued a swordfish LAP, a shark LAP, and an Atlantic Tunas Longline LAP (the "HMS permit triple-pack"). The requirement to possess three LAPs was primarily intended for pelagic longline (PLL) vessels, because of the high likelihood of catching swordfish, sharks, and tunas when fishing with PLL gear. Because some squid trawl vessels did not apply for, or qualify for, the "HMS permit triple-pack," these vessels have had to discard any swordfish captured incidentally by their squid trawls. Due to physical trauma, most of the swordfish caught in trawl nets are brought onboard dead or die soon afterwards.

While the use of trawl gear is not authorized for any HMS fisheries, the current regulations provide for the incidental retention of up to 15 swordfish per trip in the squid trawl fishery, provided that the vessel has been issued the "HMS permit triple-pack" that is required to retain swordfish. Under no circumstances, however, may a squid trawl vessel retain sharks (aside from smoothhound sharks) or tunas because trawl gear is not authorized for these species, and there is no exemption for these species for squid trawls. Under the HMS regulations, a vessel is considered to be in the squid trawl fishery when it has no commercial fishing gear other than trawls on board and when squid constitutes not less than 75 percent by weight of the total retained catch. An analysis of the Northeast Vessel Trip Report (VTR) data indicates that swordfish are frequently discarded by squid trawl vessels. Because swordfish are incidentally-caught during normal squid trawl fishing operations, and the regulations allow for retention only if the vessel has been issued the "HMS permit triple-pack," the current permit requirements may be inadvertently contributing to regulatory dead discards of swordfish. When PLL gear is deployed, swordfish, sharks, and tunas are all likely to be caught. However, trawl gear is different from PLL gear, and incidentally-caught swordfish in squid trawl gear constitute a very small component of the overall catch. Therefore, the rationale which prompted NMFS to require the issuance of swordfish, shark, and Atlantic Tunas Longline LAPs in order to land swordfish is not as likely to be applicable to squid trawl vessels as it is for PLL vessels.

Squid trawl vessel owners that were not initially issued the three LAPs required to retain swordfish can currently obtain the permits by purchasing them and transferring the permits to their vessels. However, this is not a practical solution because swordfish are a very small component of the overall catch in the squid trawl fishery and the "HMS permit triple-pack" is often expensive, making it a poor investment for squid trawl vessels, and one that may take several years to recoup. The HMS permit structure is also problematic for squid trawl vessels because swordfish dead discards could be a source of revenue for U.S. fishermen. Swordfish caught incidentally by trawl gear are usually brought on board dead, or die soon afterwards.

NMFS has received an increasing number of comments, primarily from squid trawl vessel owners, requesting reconsideration of the three-permit requirement for squid trawl vessels. The current HMS permit structure (*i.e.,* the "HMS permit triple-pack") is believed by these commenters to be burdensome, confusing, and unnecessary since squid trawl vessels do not fish with PLL gear. Allowing for the retention of incidentally-caught swordfish by squid trawl vessels would also enable a more thorough utilization of the available U.S. swordfish quota, which has been consistently underharvested in recent years. As a result of suggestions received at the 2009 HMS AP meeting and in constituent correspondence, NMFS published an Advanced Notice of Proposed Rulemaking (ANPR) (74 FR 26174, June 1, 2009) requesting comments on, among other items, potential regulatory changes that would increase fishing opportunities to harvest the U.S. swordfish quota. NMFS specifically requested comments on a potential exemption for squid trawl vessels from the multi-permit requirement to retain incidentally-caught swordfish. During the comment period, the majority of the comments supported some type of multi-permit exemption for squid trawl vessels. Consequently, in this proposed rule, NMFS considers various alternatives that would allow squid trawl vessels to retain swordfish without the need for the "HMS permit triple-pack." Following consideration of the comments received on the 2009 ANPR, and at the 2009 and 2010 HMS AP meetings, and in ongoing consultation with MAFMC staff, NMFS proposes to establish a new Incidental HMS Squid Trawl permit available to all vessel owners issued a valid *Illex* squid moratorium permit. It would allow for the retention, possession, and sale of up to 15 swordfish per trip (the current trip limit for squid trawl vessels that have been issued the "HMS permit triple-pack") for all vessels in the squid trawl fishery issued the new permit.

Establishment of a Retention Limit for Incidentally-Caught Smoothhound Sharks in Trawl Fisheries

On June 1, 2010, NMFS published a final rule (75 FR 30484, June 1, 2010) implementing Amendment 3 to the Consolidated HMS FMP (Amendment 3). In Amendment 3 (75 FR 30484, June 1, 2010), NMFS determined that smooth dogfish is an oceanic shark and should be managed under the Secretary's authority because of the wide distribution of smooth dogfish and because their range extends into the jurisdictions of more than one of the five regional Atlantic fishery management councils. NMFS determined that, based on existing data, the smooth dogfish fishery was substantial with average annual landings of 431 mt dressed weight (dw), which was among the highest for any Atlantic species of shark managed by NMFS. It was decided that sound science-based conservation and management was necessary to provide for long-term sustainable yield from the stock.

During the development of Amendment 3, emerging molecular and morphological research determined that Florida smoothhounds (*Mustelus norrisi*) had been historically misclassified as a separate species from smooth dogfish. Additionally, NMFS' Southeast Fisheries Science Center (SEFSC) advised that there were insufficient data at the time to separate smooth dogfish and Florida smoothound stocks, and that they should be treated as a single stock complex until scientific evidence indicated otherwise. Accordingly, because of this taxonomic correction and based upon SEFSC advice, both Florida smoothhounds and smooth dogfish began to be managed as the

smoothhound shark complex in Amendment 3.

Most directed smooth dogfish catch occurs with gillnets and bottom longlines, and incidental catches occur with trawl gear. As such, NMFS implemented a new requirement for a Federal smoothhound permit that is to be effective at the start of the 2012 smoothhound shark fishing season (75 FR 30524, June 1, 2010). The purpose of this action was to collect better fishery data and improve information regarding the life history of the species, among others. Consistent with the stated intent of Amendment 3 to minimize changes to the fishery, trawl gear was not authorized as an HMS gear, but NMFS indicated that vessels with trawl gear could harvest smoothhound shark species at incidental levels, similar to swordfish. Therefore, NMFS is considering in this proposed rule an appropriate retention limit that would allow fishermen to harvest incidentally-caught smoothhound shark species with trawl gear provided that sufficient quantities of target catch are retained. The proposed action would allow persons on board a vessel in a trawl fishery that has been issued a commercial open-access smoothhound permit to retain, possess, land, or sell incidentally-caught smoothhound sharks, but only up to an amount that does not exceed 25 percent, by weight, of the total fish on board or offloaded from the vessel. A vessel is considered to be in a trawl fishery when it has no commercial fishing gear other than trawls on board and when smoothhound sharks constitute no more than 25 percent by weight of the total fish on board or offloaded from the vessel.

In summary, NMFS is proposing measures that would modify the permitting requirements and allowance for incidentally-caught HMS in trawl gears. These actions would reduce regulatory dead discards, consistent with fishery management objectives, by converting discards into landings; improve fishery data collection; provide additional opportunities for the U.S. swordfish quota to be caught; and accommodate the use of traditional fishing gears (*i.e.,* trawls) that incidentally capture North Atlantic swordfish and smoothhound shark species. The complete list of alternatives and their ecological, social, and economic analyses is provided in the draft EA, RIR, and IRFA, and is not repeated here in its entirety. A copy of the draft EA/RIR/IRFA is available from NMFS (*see* **ADDRESSES**).

II. Adjustments to the Permitting Requirements and Retention Limits for Incidentally-Caught Swordfish in Squid Trawl Fisheries

Under the current swordfish retention limit regulations for squid trawl vessels at § 635.24, a squid trawl vessel must be issued a swordfish LAP (other than handgear), a shark LAP, and an Atlantic Tunas Longline LAP to retain, possess, land or sell the allowed incidental retention limit of 15 swordfish per trip. A vessel is considered to be in the squid trawl fishery when it has no commercial fishing gear other than trawl gear on board and when squid constitutes not less than 75 percent by weight of the total fish on board or offloaded from the vessel. In addition, vessel owners issued the "HMS permit triple-pack" are required to sell their swordfish only to federally permitted swordfish dealers, and must report all swordfish landed in Federal logbooks.

As indicated in the Background section of this preamble, these current requirements may be contributing to regulatory dead discards of swordfish by squid trawl vessels which did not apply for, qualify for, or obtain, the three requisite permits needed to retain swordfish. The intent of this proposed action is to reduce wasteful discards in squid trawl fisheries by converting regulatory dead discards of swordfish into landings, and to fully account for swordfish removed from the stock to provide better data for stock assessment purposes and quota monitoring. Relieving squid trawl vessels of the need to be issued three different HMS permits (that were primarily intended for PLL vessels) would also be more efficient, and could improve reporting and compliance with HMS regulations in all squid trawl fisheries.

NMFS is proposing the following alternatives to reduce regulatory dead discards of swordfish incidentally-caught in squid trawl gear: Alternative A1, no action; Alternative A2, the preferred alternative, which would establish a new permit (*i.e.,* Incidental HMS Squid Trawl permit) that would allow *Illex* squid moratorium permit holders to retain up to 15 swordfish per trip; Alternative A3, which would exempt *Illex* squid moratorium permit holders from current HMS permitting requirements and allow them to retain up to 15 swordfish per trip; and, Alternative A4, which would establish either a new permit or an exemption, as applicable, for *Loligo* squid moratorium permit holders to retain up to 15 swordfish per trip.

Overall squid trawl fishing effort is not expected to change under any of the four alternatives regardless of whether vessels are allowed to retain, rather than discard, swordfish captured incidentally while fishing for squid. These vessels are primarily designed to fish for, and land, small pelagic species such as squid, mackerel, and butterfish. Swordfish catches are incidental to catches of these target species. For 2011, the U.S. allowable biological catch for *Illex* squid was set at 24,000 mt, with a domestic annual harvest limit of 23,328 mt. Although *Illex* landings fluctuate on an annual basis, they are limited by these specifications.

Northeast Fisheries Science Center (NEFSC) Observer Data from 1997–2006 indicates that both the directed *Illex* and *Loligo* squid trawl fisheries appear to have relatively low levels of incidentally-caught swordfish, with considerably less catch in the *Loligo* fishery. For *Illex* trips, 12,057 lbs of swordfish were caught, with 7,683 lbs kept and 4,374 lbs discarded (976 tows sampled). For *Loligo* trips, 2,468 lbs of swordfish were caught, with 1,186 lbs kept and 1,282 lbs discarded (4,697 tows sampled). The average number of swordfish discards per *Illex* tow amounts to 0.11/tow, and the average number of swordfish discards per *Loligo* tow amounts to 0.01/tow. Using the average number of discards per tow in the *Illex* fishery and the average tows per trip among large and small vessels results in an average of 3.3 and 1.2 swordfish discards per *Illex* trip, respectively. Using the average number of discards per tow in the *Loligo* fishery and the average tows per trip among large and small vessels results in an average of 0.3 and 0.1 swordfish discards per *Loligo* trip, respectively. The incidental catch of swordfish in squid trawl gear is expected to continue to occur at the same level under all of the alternatives. There is a very high mortality rate of swordfish captured incidentally by squid trawl vessels. The primary difference between alternatives is whether the dead (or dying) swordfish would be allowed to be kept. Thus, ecologically, the impacts associated with all of the alternatives are expected to be neutral, relative to the status quo, as the same amount of squid trawl fishing effort is expected to occur and the same amount of swordfish would likely be killed under all of the alternatives.

The incidental catch of swordfish is much higher in the *Illex* squid trawl fishery than in the *Loligo* squid trawl fishery. This is because the *Loligo* fishery operates inshore during summer months, whereas the *Illex* fishery operates in the offshore mid-Atlantic canyons during the summer where

swordfish are more prevalent. Temporally and spatially, the two squid trawl fisheries are different.

In 2010, there were 365 vessels issued *Loligo* squid moratorium permits (of which 180 were active) and 76 vessels issued *Illex* squid moratorium permits (of which 18 were active). All of the *Illex* squid moratorium permit holders were issued *Loligo* squid moratorium permits. Although Alternative A4 is expected to have neutral ecological impacts because no change in squid trawl fishing effort is anticipated under any of the alternatives, establishing a new permit or a permit exemption for up to potentially 289 additional *Loligo* squid trawl vessels is not necessary to reduce dead discards because these vessels individually have very low swordfish discard rates. Thus, Alternative A4 is not preferred.

The no action alternative would have minor adverse short-term, long-term, and cumulative social and economic impacts because of the continued occurrence of regulatory dead discards of swordfish by squid trawl vessels under this alternative. Although the estimated number of discards is relatively low (less than 450 fish annually), it represents unrealized income and economic waste because the swordfish must be thrown overboard and are usually dead. Alternatives A2–A4 would all provide minor beneficial direct short-term, long-term, and cumulative social and economic impacts because dead swordfish discards would be converted into landings and income for fishermen, and a larger portion of the ICCAT-recommended U.S. swordfish quota would be harvested. Because Alternative A3 would not implement a permit requirement for *Illex* squid trawl fishermen, it would not provide additional fishery management information regarding the number of squid trawl vessels potentially landing swordfish. Thus, Alternative A3 is not preferred.

Alternative A2 is preferred at this time because it would provide socioeconomic benefits for the *Illex* squid trawl fishery, which has the highest interaction rate with swordfish, and is anticipated to result in neutral ecological impacts without the potential for a large increase in overall squid trawl fishing effort. Additionally, Alternative A2 could improve reporting and compliance with HMS regulations in squid trawl fisheries through the requirement to obtain an HMS permit. The proposed action (Alternative A2) is not expected to have any significant ecological impact on the environment, including protected resources, target catches, and non-target catches, beyond those that have been previously analyzed.

III. Establishment of a Retention Limit for Smoothhound Shark Species in Atlantic Trawl Fisheries

Smoothhound sharks were brought under Federal management in 2010 through implementation of Amendment 3 to the Consolidated HMS FMP. As discussed in the Background section of this preamble, NMFS included a new requirement for a federal smoothhound permit that is to be effective at the start of the 2012 fishing season. Consistent with the intent of Amendment 3 to minimize changes in the fishery, NMFS stated that vessels fishing with trawl gear would be allowed to land smoothhound shark species at incidental levels, similar to swordfish.

NMFS proposes the following alternatives to address the retention of smoothhound sharks caught incidentally in trawl gear: Alternative B1, no action; Alternative B2, the preferred alternative, which would allow for the retention of smoothhound sharks caught incidentally in trawl gear, in an amount not to exceed 25 percent of the total catch, by weight; and Alternative B3, which would allow for the retention of smoothhound sharks caught incidentally in trawl gear, in an amount not to exceed 50 percent of the total catch, by weight.

Alternative B1 would not implement management measures in the 2012 fishing year to allow for the retention of smoothhound sharks caught incidentally in trawl gear. Under Amendment 3 to the HMS FMP, trawl gear is not an authorized gear in the smoothhound shark fishery and, in the absence of additional regulations, it would be illegal, beginning with the 2012 fishing season, to retain smoothhound sharks caught with trawl gear.

After Federal smoothhound shark management measures are implemented in 2012, the no action Alternative B1 would require trawl fishermen to discard any incidentally-caught smoothhound sharks. This alternative could have minor beneficial ecological impacts. Unlike swordfish captured in trawl gear, which are thought to have a very low survivorship, smoothhound sharks may be better adapted to survive trawl capture and release. Although difficult to quantify, it is possible that a portion of the discards under no action Alternative B1 would be live discards and, therefore, fishing mortality on the Atlantic smoothhound shark stock could be reduced.

Alternatives B2 and B3 would be expected to have positive ecological impacts when compared to the status quo, since it is currently legal for trawl fishermen to retain an unlimited amount of smoothhound sharks. However, ecological impacts resulting from either Alternative B2 or B3 must also be assessed compared to the no action alternative, B1. Under the no action alternative, trawl fishermen would not be authorized to retain smoothhound sharks beginning in 2012. Therefore, both Alternatives B2 and B3 would result in an increase in the retention of the species and the potential for higher fishing mortality in comparison to the no action alternative. For this reason, both Alternatives B2 and B3 could have minor, direct short-term and long-term negative ecological impacts relative to the no action alternative, because they would allow for some retention of smoothhound sharks. The two alternatives establish different incidental catch thresholds, but both would allow for retention of the species. The potential for higher fishing mortality under Alternative B2 and B3, as compared to the no action alternative (no retention of smoothhound sharks in trawl gear beginning in 2012), could result in minor negative impacts to the stock. However, in comparison to the status quo (currently unlimited retention of smoothhound sharks in trawl gear), Alternatives B2 and B3 could have minor positive impacts to the stock because they limit retention to no more than 25 or 50 percent of the total retained catch on board, respectively. Regardless, it is important to note that the smoothhound shark complex does not show signs of being unhealthy, and catch data has remained consistent over the past 10 years.

In summary, none of the alternatives are expected to result in any change in trawl fishing effort because smoothhound sharks are rarely, if ever, targeted with trawl gear. Smoothhound sharks are usually caught incidentally while trawl fishing for other species, such as summer flounder, scup, croaker, silver hake, and squid. Therefore, any ecological impacts associated with the alternatives, either positive or negative, are expected to be either minor or non-existent.

Social and economic impacts, either positive or negative, are similarly expected to be minor under all of the alternatives. Under Alternative B1, trawl fishermen could collectively lose $56,729 per year between 266 vessels (or approximately $213 per vessel), beginning in 2012. Under Alternatives B2 and B3, however, they would

continue to be allowed to retain and sell incidentally-caught smoothhound sharks. Calculating the exact level of revenue that would continue to be earned through smoothhound shark sales by trawl fishermen is difficult due to incomplete reporting and data. However, based upon the average annual total smoothhound shark trawl revenue estimate of $56,729, and the fact that Alternatives B2 and B3 would continue to allow approximately 89 percent or 97 percent of historical smoothhound trawl trips to occur, respectively, fishermen would experience moderate positive social and economic impacts when compared to the no action alternative. Alternative B2 is preferred at this time because of the NMFS' intention to maintain smoothhound sharks as an incidental catch in the trawl fishery. Allowing no retention (Alternative B1) or up to 50 percent of trawl catches to be smoothhound sharks (Alternative B3) would not be fully consistent with the intent to minimize changes to the smoothhound shark fishery.

IV. Request for Comments

NMFS requests comments on all aspects of this proposed rule. NMFS also requests specific comments regarding the practicality and potential impacts associated with establishing a smoothhound shark retention limit for trawl vessels that is based upon the percent, by weight, of the total catch on board or offloaded from the vessel.

Comments on this proposed rule may be submitted online via *http://www.regulations.gov,* by mail, or by fax. Comments may also be submitted at a public hearing (*see* Public Hearings and Special Accommodations below). NMFS solicits comments on this proposed rule by April 17, 2011 (*see* **DATES** and **ADDRESSES**). NMFS will hold five public hearings for this proposed rule. These hearings will be physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Richard A. Pearson at (727) 824–5399, Steve Durkee at (202) 670–6637, or Delisse Ortiz at (301) 713–2347 at least 7 days prior to the hearing date. The public is reminded that NMFS expects participants at the public hearings to conduct themselves appropriately. At the beginning of each public hearing, a representative of NMFS will explain the ground rules (*e.g.,* alcohol is prohibited from the hearing room; attendees will be called to give their comments in the order in which they registered to speak; each attendee will have an equal amount of time to speak; and attendees should not interrupt one another). The NMFS representative will attempt to structure the meeting so that all attending members of the public will be able to comment, if they so choose, regardless of the controversial nature of the subject(s). Attendees are expected to respect the ground rules, and, if they do not, they will be asked to leave the hearing.

V. Classification

Pursuant to the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that the proposed rule is consistent with the 2006 Consolidated HMS FMP and its amendments, other provisions of the MSA, and other applicable law, subject to further consideration after public comment.

NMFS prepared an EA for this proposed rule that discusses the impact on the environment as a result of this rule. In this proposed action, NMFS considers the establishment of a new Incidental HMS Squid Trawl permit to reduce regulatory dead discards of North Atlantic swordfish in squid trawl fisheries with minimal ecological impacts. The proposed action also considers establishing a retention limit for smoothhound shark species in all Atlantic trawl fisheries to account for the incidental catch of these species. These measures are meant to reduce regulatory dead discards of HMS in trawl fisheries, consistent with fishery management objectives, by converting discards into landings, improving fishery data collection, providing additional opportunities for the U.S. swordfish quota to be caught, and accommodating traditional fishing methods (*i.e.,* trawls) that may incidentally capture swordfish and smoothhound shark species. A copy of the EA is available from NMFS (*see* **ADDRESSES**).

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

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (*see* **ADDRESSES**).

In compliance with section 603(b)(1) of the RFA, the purpose of this proposed rulemaking is, consistent with the Magnuson-Stevens Act, and the 2006 Consolidated HMS FMP and its amendments, to consider modifications to the permitting requirements for squid trawl vessels to retain incidentally-caught swordfish that would otherwise be discarded dead, and to establish smoothhound shark incidental retention limits for all Atlantic trawl vessels.

In compliance with section 603(b)(2) of the RFA, the objectives of this proposed rulemaking are to: (1) Establish a new Incidental HMS Squid Trawl permit to reduce regulatory dead discards of North Atlantic swordfish in squid trawl fisheries; and, (2) establish a retention limit for smoothhound shark species in all Atlantic trawl fisheries to account for the incidental catch of these species.

Section 603(b)(3) requires Federal agencies to provide an estimate of the number of small entities to which the rule would apply. NMFS has determined that all squid trawl vessels that are issued an *Illex* squid moratorium fishing permit and all trawl vessels that would obtain an open access smooth dogfish permit when it becomes required in 2012 are small entities under the Small Business Administration (SBA) size standards. All potentially effected vessels either had average annual receipts less than $4.0 million for fish-harvesting, average annual receipts less than $6.5 million for charter/party boats, 100 or fewer employees for wholesale dealers, or 500 or fewer employees for seafood processors 13 CFR 121.201.

The proposed rule would apply to the 76 current (as of September 2010) *Illex* squid moratorium permit holders, of which 18 are considered "active" (*i.e.,* reported landings in 2009). Rhode Island and New Jersey accounted for 99 percent of *Illex* squid landings in 2009. NMFS cannot provide an estimate of the number of trawl vessels that would obtain an open access permit for smoothhound sharks in 2012, because the permit is currently not required. However, as a proxy, NMFS based its analysis upon vessels participating in the summer flounder and scup fisheries because these trawl fisheries frequently interact with smoothhound sharks. In 2009, approximately 1,100 vessels were issued either a commercial summer flounder permit or a commercial scup permit or both, with 798 vessels landing summer flounder in 2000. Rhode Island, New York, New Jersey, Virginia, and North Carolina are the primary states with landings of summer flounder and scup.

Under section 603 (b)(4) of the RFA, agencies are required to describe any new reporting, record-keeping and other compliance requirements. The proposed Federal permit requirement for an

Incidental HMS Squid Trawl permit would allow NMFS to collect data regarding participants in the fishery and landings through Federal dealer reports. The Federal Incidental HMS Squid Trawl permit requirement would require a similar permit application to the other current HMS permits. The information collected on the application would include vessel information, owner identification and contact information. A modest fee to process the application and annual renewal fee of approximately $20 may be required.

Under section 603(b)(5) of the RFA, agencies are required to identify, to the extent practicable, all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule. Fishermen, dealers, and managers in these fisheries must comply with a number of domestic laws, as well as regulations implementing other FMPs. These include, but are not limited to, the Magnuson-Stevens Act, the Atlantic Tunas Convention Act, the High Seas Fishing Compliance Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, the Paperwork Reduction Act, and the Coastal Zone Management Act. NMFS does not believe that the proposed regulations would duplicate, overlap, or conflict with any relevant regulations, Federal or otherwise.

Under section 603(c) of the RFA, agencies are required to describe any alternatives to the proposed rule which accomplish the stated objectives and which minimize any significant economic impacts. The potential impacts of this proposed action are discussed below and in the EA for the proposed action. Additionally, the RFA lists four general categories of significant alternatives that would assist an agency in the development of significant alternatives (5 U.S.C. 603(c)(1)–(4)). These categories of alternatives are: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and, (4) exemptions from coverage of the rule for small entities *Id.*

In order to meet the objectives of this proposed rule in a manner consistent with all other legal obligations, NMFS cannot exempt small entities or change the reporting requirements for only small entities. Thus, NMFS did not analyze any alternatives for either issue that fall under the first and fourth categories described above. In addition, NMFS intends to clarify and consolidate all reporting and compliance requirements associated with this proposed rule, to the extent practicable (category two above). All federally-permitted squid trawl vessels must currently report all of their landings via a NMFS Northeast Region Fishing Vessel Trip Report (VTR). NMFS intends to continue to utilize this reporting mechanism for all vessels that would be issued an Incidental HMS Squid Trawl permit to report their swordfish landings, although vessels could be selected for additional reporting under this rule if such reporting is determined to be necessary and appropriate. Similarly, the application process for the proposed Incidental HMS Squid Trawl permit would be the same, or similar, to the process used to apply for an *Illex* squid moratorium permit. The only prerequisite for obtaining the proposed new permit would be that the vessel has already been issued a valid *Illex* squid moratorium permit. There are no reporting or compliance requirements associated with establishing a smoothhound shark trawl vessel retention limit that could be consolidated, clarified, or simplified for small entities. Finally, NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson-Stevens Act (category three above).

As described below, for this proposed rule, NMFS considered and analyzed four alternatives to address the retention of incidentally-caught swordfish in squid trawl fisheries (Issue A), and three alternatives to address the retention of incidentally-caught smoothhound sharks in trawl fisheries (Issue B).

The first alternative for Issue A is the no action alternative. This alternative would maintain existing HMS permit requirements and incidental swordfish retention limits in squid trawl fisheries. The second alternative, the preferred alternative, would implement a new permit (referred to as the Incidental HMS Squid Trawl permit) for *Illex* squid moratorium permit holders to retain up to 15 swordfish per trip, the current squid trawl limit. The third alternative would exempt *Illex* squid moratorium permit holders from current HMS permit requirements (*i.e.,* the "HMS permit triple-pack") and allow them to retain up to 15 swordfish when fishing for squid. Finally, the fourth alternative would establish either a new Incidental HMS Squid Trawl permit available to all vessel owners currently issued a *Loligo* squid moratorium permit, or establish an exemption from the need for *Loligo* squid trawl vessels to be issued the "HMS permit triple-pack" to retain swordfish.

For Issue A, the no action alternative (A1) would not result in any additional economic impacts to small entities in the short-term. However, this alternative contributes to a loss of potential income by squid trawl vessels which may occasionally catch a swordfish while it is foraging on squid or in the same physical environment, during normal squid trawl fishing activities. Only five squid trawl vessels out of 180 active *Illex* and *Loligo* squid vessels have been issued the requisite "HMS permit triple-pack" needed to retain swordfish. There are 18 active squid trawl vessels which are issued both an *Illex* and *Loligo* permit (*i.e., Illex*/*Loligo* vessels). It is presumed that the five squid trawl vessels issued the necessary HMS permits are also *Illex*/*Loligo* vessels. This means that the vast majority of squid trawl vessels must discard any incidentally-caught swordfish because they do not have the proper LAPs needed to retain them. Most of the swordfish incidentally caught by squid trawl vessels are brought onboard dead, or die soon afterwards; these dead discards constitute unrealized income and economic waste. NMFS estimates that the no action alternative contributes from $3,849.30–$4,154.40 annually in unrealized income for the 13 active *Illex*/*Loligo* squid trawl vessels that are not issued HMS permits. In aggregate, the total amount of unrealized annual income by the 13 active *Illex/Loligo* squid trawl vessels is estimated to range from $50,041–$54,007, depending upon the number of small and large active squid trawl vessels. Similarly, the total amount of unrealized annual income by the 162 active *Loligo* squid trawl vessels ranges from $57,562–$76,749, depending upon the number of small and large active *Loligo* squid trawl vessels. Each swordfish discard is estimated to be valued at approximately $296.10. Because the no action alternative (A1) contributes to regulatory discards of dead swordfish by squid trawl vessels, thereby causing economic waste, and because current permit requirements (*i.e.,* the "HMS permit triple-pack") are not well-suited for squid trawl vessels, it was not chosen as the preferred alternative.

The preferred alternative, Alternative A2, would implement a new permit (referred to as the Incidental HMS Squid Trawl permit) for *Illex* squid moratorium permit holders to retain up to 15 swordfish per trip, which is the current squid trawl limit. Because

Alternative A2 would allow *Illex* squid trawl vessels to retain swordfish caught incidentally during normal squid trawl fishing activities, thereby converting dead swordfish discards into landings, this alternative is expected to provide some minor economic benefits to *Illex* squid trawl vessels. Specifically, this alternative is estimated to provide a moderate increase in annual revenues from between $3,849.30–$4,154.40 annually for each of the 13 active *Illex*/*Loligo* squid trawl vessels that have not been issued HMS permits. In aggregate, Alternative A2 could produce from $50,041–$54,007 annually in additional revenue amongst the 13 active *Illex*/*Loligo* squid trawl vessels. These estimates were calculated using the average number of swordfish discards per tow from NEFSC observer data, and then extrapolating to determine the average number of swordfish discards per year for active vessels. Also, by implementing a permit requirement, NMFS would obtain important fishery management information, such as the identification of participants in the squid trawl fishery that may occasionally catch swordfish. This information will also help in outreach efforts. The Federal Incidental HMS Squid Trawl permit requirement would require a permit application similar to other current HMS permits. The information collected on the application would include vessel information and owner identification and contact information. A modest fee to process the application and annual renewal fee of approximately $20 may be required. This alternative is preferred because it would convert dead swordfish discards into landings, provide minor economic benefits to some small entities, reduce economic waste, provide additional fishery management information, and is not expected to appreciably alter current levels of fishing effort or have other adverse ecological consequences, including impacts on protected species, target species, non-target species, and essential fish habitat.

Alternative A3 is estimated to have the same minor positive economic impacts on small entities as preferred Alternative A2. However, there would be no costs to vessel owners associated with obtaining a new HMS permit (approximately $20/year). Rather, Alternative A3 would exempt vessels issued an *Illex* squid moratorium permit from HMS permit requirements and allow them to land up to 15 swordfish caught incidentally while squid trawling. All swordfish landings would still have to be reported in the VTR logbook (as currently required), so landings information would be obtained. While this alternative would be less burdensome to industry, it would not help to better identify the universe of vessels participating in the *Illex* squid trawl fishery that may be catching swordfish incidentally. It is currently difficult to separate squid trawl vessels from other vessels in landings databases because the required HMS permits are identical to those issued to longline vessels and other vessels. A removal of HMS permitting requirements for *Illex* squid trawl vessels would exacerbate this situation. Furthermore, it would hamper NMFS's efforts to improve outreach and communications with this small, but important, HMS constituency. Without a permit, NMFS could be deprived of important information regarding trawl vessel swordfish landings and fishery participation. Therefore, because Alternative A3 would not provide additional information for fishery management purposes, it was not selected as the preferred alternative.

Alternative A4 would implement the same requirements for *Loligo* squid trawl vessels that NMFS selects for *Illex* squid trawl fishermen. This alternative is estimated to provide a moderate increase in annual revenues from between $355.32–$473.76 annually for 162 active *Loligo* squid trawl vessels that are not issued HMS permits (*i.e.,* 180 active *Loligo* vessels minus 18 active *Illex*/*Loligo* vessels). In aggregate, the total amount of additional annual income that could be realized under this alternative by the 162 active *Loligo* squid trawl vessels ranges from $57,562–$76,749, depending upon the number of small and large active *Loligo* squid trawl vessels. This alternative would convert dead swordfish discards into landings and could provide minor economic benefits. However, the incidental catch of swordfish in squid trawls is much higher in the *Illex* squid trawl fishery than in the *Loligo* squid trawl fishery. This is because the *Loligo* fishery operates inshore during summer months whereas the *Illex* fishery operates in the offshore mid-Atlantic canyons during the summer where swordfish are more prevalent. Temporally and spatially, the two fisheries are different. Establishing a new permit or a permit exemption for up to potentially 289 additional *Loligo* squid trawl vessels is not necessary to reduce dead discards because these vessels individually have very low swordfish discard rates.

For Issue B, under the no action alternative (B1), beginning in 2012, the retention of smoothhound sharks would be prohibited by trawl vessels without the additional regulatory action that is proposed in this rulemaking. Therefore, Alternative B1 would have moderate direct short-term and long-term negative social and economic impacts starting in 2012. Based on VTR data from 2000–2009, an average of 145,088 lbs dw of smoothhound sharks were caught in trawl gear, retained, and likely sold per year. Using an average ex-vessel price of $0.29 for smoothhound shark meat, $2.02 for smoothhound shark fins, and assuming a fin-to-carcass ratio of five percent, total revenues from smoothhound sharks caught in trawl gear averages $56,729 per year. Thus, in aggregate, under Alternative B1, in 2012 trawl fishermen could collectively lose $56,729 per year across up to 266 vessels. Individually, each vessel could realize approximately $213.26 annually in lost revenue under the no action alternative. This alternative is not preferred because prohibiting the retention of incidentally-caught smoothhound sharks by trawl gear would not be consistent with NMFS's intent in Amendment 3 to minimize changes to the smoothhound fishery by allowing for incidental trawl landings.

Alternative B2, the preferred alternative, would allow for the retention of smoothhound sharks caught incidentally in trawl gear, in an amount not to exceed 25 percent of the total catch, by weight. When compared to the no action alternative, starting in 2012 Alternative B2 would have moderate direct short-term and long-term positive social and economic impacts. Currently, some trawl fishermen supplement fishing revenue with smoothhound shark products. Under the no action alternative in 2012, they would no longer be able to do so. Under Alternative B2, however, they would continue to be allowed to retain and sell incidentally caught smoothhound sharks. Calculating the exact level of revenue that would continue to be earned through smoothhound shark sales by trawl fishermen is difficult due to incomplete reporting and data. However, based upon the average annual total smoothhound shark trawl revenue estimate of $56,729, and the fact that Alternative B2 would continue to allow approximately 89 percent of historical smoothhound trawl trips, fishermen stand to experience moderate positive social and economic impacts compared to Alternative B1 starting in 2012. This alternative is preferred because it maintains 89 percent of historical smoothhound shark trips, but implements a reasonable upper threshold on landings to discourage a directed trawl fishery for smoothhound

sharks. This alternative is consistent with NMFS's intent to maintain smoothhound sharks as an incidental catch in trawl fisheries.

Alternative B3 would allow for the retention of smoothhound sharks caught incidentally in trawl gear, in an amount not to exceed 50 percent of the total catch, by weight. When compared to the no action alternative, Alternative B3 would have moderate direct short-term and long-term positive social and economic impacts beginning in 2012. Currently, some trawl fishermen supplement fishing revenue with smoothhound shark products. Under the no action alternative, they would no longer be able to do so starting in 2012. Under Alternative B3, however, they would continue to be allowed to retain and sell incidentally-caught smoothhound sharks. Calculating the exact level of revenue that would continue to be earned through smoothhound shark sales by trawl fishermen is difficult due to incomplete reporting and data. However, based upon the average annual total smoothhound shark trawl revenue estimate of $56,729, and the fact that Alternative B3 would continue to allow approximately 97 percent of the historical smoothhound trawl trips, fishermen would experience moderate positive social and economic impacts compared to Alternative B1 starting in 2012. This alternative is not preferred because allowing a trawl fishing trip to be up to 50 percent smoothhound sharks would not effectively ensure that a directed trawl fishery for smoothhound sharks does not develop. This alternative would not be consistent with NMFS's intent in Amendment 3 to minimize changes to the smoothhound fishery by allowing only for incidental trawl landings.

In summary, preferred Alternative A2 would have minor direct short-term positive economic impacts. It is estimated to allow 13 active *Illex* squid trawl vessels to retain and sell from 13–14 swordfish per vessel per year that they would otherwise be required to discard, assuming that historical fishing effort and discard rates remain constant. In aggregate, Alternative A2 could produce from $50,041–$54,007 annually in additional revenue amongst the 13 active *Illex*/*Loligo* squid trawl vessels. Similarly, preferred Alternative B2 would have minor direct short-term positive economic impacts, starting in 2012. Trawl vessels would continue to be allowed to retain and sell incidentally caught smoothhound sharks. Calculating the exact level of revenue that would continue to be earned through smoothhound shark sales by trawl fishermen is difficult due to incomplete reporting and data. However, based upon the average annual total smoothhound shark trawl revenue estimate of $56,729, and the fact that Alternative B2 would continue to allow approximately 89 percent of historical smoothhound trawl trips, fishermen would stand to experience moderate positive social and economic impacts compared to the no action alternative starting in 2012.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: March 14, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR part 635 is proposed to be amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

2. In § 635.4, paragraphs (a)(5), (a)(10), (f)(1), and (f)(2), the heading of paragraph (h)(1), and paragraphs (m)(1) and (m)(2) are revised, and paragraphs (h)(1)(iv) and (n) are added to read as follows:

§ 635.4 Permits and fees.

* * * * *

(a) * * *

(5) *Display upon offloading.* Upon offloading of Atlantic HMS, the owner or operator of the harvesting vessel must present for inspection the vessel's HMS Charter/Headboat permit; Atlantic tunas, shark, or swordfish permit; Incidental HMS squid trawl; and/or the shark research permit to the first receiver. The permit(s) must be presented prior to completing any applicable landing report specified at § 635.5(a)(1), (a)(2), and (b)(2)(i).

* * * * *

(10) *Permit condition.* An owner of a vessel with a valid swordfish, shark, HMS Angling, HMS Charter/Headboat, or Incidental HMS squid trawl permit issued pursuant to this part must agree, as a condition of such permit, that the vessel's HMS fishing, catch, and gear are subject to the requirements of this part during the period of validity of the permit, without regard to whether such fishing occurs in the U.S. EEZ, or outside the U.S. EEZ, and without regard to where such HMS, or gear, are possessed, taken, or landed. However, when a vessel fishes within the waters of a state that has more restrictive regulations pertaining to HMS, persons aboard the vessel must abide by the state's more restrictive regulations.

* * * * *

(f) * * *

(1) Except as specified in paragraph (n) of this section, the owner of each vessel used to fish for or take Atlantic swordfish or on which Atlantic swordfish are retained, possessed with an intention to sell, or sold must obtain, in addition to any other required permits, only one of three types of commercial limited access swordfish permits: Swordfish directed limited access permit, swordfish incidental limited access permit, or swordfish handgear limited access permit. It is a rebuttable presumption that the owner or operator of a vessel on which swordfish are possessed in excess of the recreational retention limits intends to sell the swordfish.

(2) The only valid commercial Federal vessel permits for swordfish are those that have been issued under the limited access program consistent with the provisions under paragraphs (l) and (m) of this section, or those issued under paragraph (n) of this section.

* * * * *

(h) * * *

(1) *Atlantic Tunas, HMS Angling, HMS Charter/Headboat, and Incidental HMS squid trawl vessel permits.* * * *

* * * * *

(iv) An applicant for an incidental HMS squid trawl permit must submit, in addition to all other information specified in § 635.4(h)(1), a copy of a valid *Illex* squid moratorium permit, as described at § 648.4(a)(5)(i) of this chapter.

* * * * *

(m) * * *

(1) *General.* Persons must apply annually for a dealer permit for Atlantic tunas, sharks, and swordfish, and for an Atlantic HMS Angling, HMS Charter/Headboat, tunas, shark, swordfish, or Incidental HMS squid trawl vessel permit. Except as specified in the instructions for automated renewals, persons must submit a renewal application to NMFS, along with a copy of the applicable valid workshop certificate or certificates, if required pursuant to § 635.8, at an address designated by NMFS, at least 30 days before a permit's expiration to avoid a lapse of permitted status. NMFS will renew a permit if the specific requirements for the requested permit

are met, including those described in paragraphs (h)(1)(iv) and (l)(2) of this section, all reports required under the Magnuson-Stevens Act and ATCA have been submitted, including those described in § 635.5 and § 300.185 of this title, the applicant is not subject to a permit sanction or denial under paragraph (a)(6) of this section, and the workshop requirements specified in § 635.8 are met.

(2) *Shark and swordfish LAPs.* The owner of a vessel of the U.S. that fishes for, possesses, lands or sells shark or swordfish from the management unit, or that takes or possesses such shark or swordfish as incidental catch, must have the applicable limited access permit(s) issued pursuant to the requirements in paragraphs (e) and (f) of this section, except as specified in paragraph (n) of this section. Only persons holding non-expired shark and swordfish limited access permit(s) in the preceding year are eligible to renew those limited access permit(s). Transferors may not renew limited access permits that have been transferred according to the procedures in paragraph (l) of this section.

(n) *Incidental HMS Squid Trawl permits.* (1) The owner of a vessel in the squid trawl fishery, as described at § 635.24(b)(2), on which Atlantic swordfish are retained, possessed with an intention to sell, or sold must obtain, in addition to any other required permits, an Incidental HMS squid trawl permit.

(2) An Incidental HMS squid trawl permit is valid only when the vessel has on board a valid *Illex* squid moratorium permit, as described at § 648.4(a)(5)(i) of this chapter, and no commercial fishing gear other than trawl gear.

3. In § 635.5, paragraph (a)(1) is revised to read as follows:

§ 635.5 Recordkeeping and reporting.

* * * * *

(a) * * *

(1) *Logbooks.* If an owner of an HMS charter/headboat vessel, an Atlantic tunas vessel, a shark vessel, a swordfish vessel, or a vessel in the squid trawl fishery for which a permit has been issued under § 635.4(b), (d), (e), (f), or (n) is selected for logbook reporting in writing by NMFS, he or she must maintain and submit a fishing record on a logbook form specified by NMFS. Entries are required regarding the vessel's fishing effort and the number of fish landed and discarded. Entries on a day's fishing activities must be entered on the logbook form within 48 hours of completing that day's activities or before offloading, whichever is sooner. The owner or operator of the vessel must submit the logbook form(s) postmarked within 7 days of offloading all Atlantic HMS. If no fishing occurred during a calendar month, a no-fishing form so stating must be submitted postmarked no later than 7 days after the end of that month. If an owner of an HMS charter/headboat vessel, Atlantic tunas vessel, shark vessel, swordfish vessel, or a vessel in the squid trawl fishery permitted under § 635.4(b), (d), (e), (f), or (n) is selected in writing by NMFS to complete the cost-earnings portion of the logbook(s), the owner or operator must maintain and submit the cost-earnings portion of the logbook postmarked no later than 30 days after completing the offloading for each trip fishing for Atlantic HMS during that calendar year, and submit the Atlantic Highly Migratory Species Annual Expenditures form(s) postmarked no later than the date specified on the form of the following year.

* * * * *

4. In § 635.21, paragraphs (e)(3)(i), (e)(4)(i), and (e)(4)(iv) are revised to read as follows:

§ 635.21 Gear operation and deployment restrictions.

* * * * *

(e) * * *

(3) * * *

(i) No person may possess a shark in the EEZ taken from its management unit without a permit issued under § 635.4. No person issued a Federal Atlantic commercial shark permit under § 635.4 may possess a shark taken by any gear other than rod and reel, handline, bandit gear, longline, or gillnet, except that smoothhound sharks taken incidentally while fishing with trawl gear may be retained by vessels issued a Federal commercial smoothhound permit, subject to the restrictions specified in § 635.24(a)(7). No person issued an HMS Angling permit or an HMS Charter/Headboat permit under § 635.4 may possess a shark if the shark was taken from its management unit by any gear other than rod and reel or handline, except that persons on a vessel issued both an HMS Charter/Headboat permit and a Federal Atlantic commercial shark permit may possess sharks taken with rod and reel, handline, bandit gear, longline, or gillnet if the vessel is not engaged in a for-hire fishing trip.

* * * * *

(4) * * *

(i) No person may possess north Atlantic swordfish taken from its management unit by any gear other than handgear or longline, except that such swordfish taken incidentally while fishing with a squid trawl may be retained by a vessel issued a valid Incidental HMS squid trawl permit, subject to restrictions specified in § 635.24(b)(2). No person may possess south Atlantic swordfish taken from its management unit by any gear other than longline.

* * * * *

(iv) Except for persons aboard a vessel that has been issued a limited access North Atlantic swordfish permit or Incidental HMS squid trawl permit under § 635.4, no person may fish for North Atlantic swordfish with, or possess a North Atlantic swordfish taken by, any gear other than handline or rod and reel.

* * * * *

5. In § 635.24, paragraphs (a)(7), (b)(1), and (b)(2) are revised to read as follows:

§ 635.24 Commercial retention limits for sharks and swordfish.

* * * * *

(a) * * *

(7) Only persons who own or operate a vessel that has been issued a Federal commercial smoothhound permit may retain, possess, and land smoothhound sharks if the smoothhound fishery is open per §§ 635.27 and 635.28. Persons aboard a vessel in a trawl fishery that has been issued a commercial smoothhound permit, and are in compliance with all other applicable regulations, may retain, possess, land, or sell incidentally-caught smoothhound sharks, but only up to an amount that does not exceed 25 percent, by weight, of the total catch on board or offloaded from the vessel. A vessel is considered to be in a trawl fishery when it has no commercial fishing gear other than trawls on board and when smoothhound sharks constitute no more than 25 percent by weight of the total fish on board or offloaded from the vessel.

* * * * *

(b) * * *

(1) Persons aboard a vessel that has been issued an incidental LAP for swordfish may retain, possess, land, or sell no more than 30 swordfish per trip in or from the Atlantic Ocean north of 5° N. lat.

(2) Persons aboard a vessel in the squid trawl fishery that has been issued an Incidental HMS squid trawl permit may retain, possess, land, or sell no more than 15 swordfish per trip in or from the Atlantic Ocean north of 5° N. lat. A vessel is considered to be in the squid trawl fishery when it has no commercial fishing gear other than trawls on board and when squid constitute not less than 75 percent by weight of the total fish on board or offloaded from the vessel.

6. In § 635.27, paragraph (c)(1)(i)(B) is revised to read as follows:

§ 635.27 Quotas.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(B) A swordfish from the North Atlantic swordfish stock landed by a vessel for which an incidental catch permit for swordfish or an HMS Angling or Charter/Headboat or Incidental HMS squid trawl permit has been issued, or caught after the effective date of a closure of the directed fishery from a vessel for which a directed fishery permit or a handgear permit for swordfish has been issued, is counted against the incidental catch quota.

* * * * *

7. In § 635.28, the first sentence of paragraph (c)(1)(i)(A) is revised to read as follows:

§ 635.28 Closures.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(A) No more than 15 swordfish per trip may be possessed in or from the Atlantic Ocean north of 5 N. lat. or landed in an Atlantic coastal state on a vessel using or having on board a pelagic longline, or issued an Incidental HMS squid trawl permit. * * *

* * * * *

8. In § 635.71, paragraph (d)(18) is added, and paragraph (e)(8) is revised to read as follows:

§ 635.71 Prohibitions.

* * * * *

(d) * * *

(18) Retain or possess on board a vessel in the trawl fishery smoothhound sharks in an amount that exceeds 25 percent, by weight, of the total fish on board or offloaded from the vessel, as specified at § 635.24(a)(7).

* * * * *

(e) * * *

(8) Fish for North Atlantic swordfish from, possess North Atlantic swordfish on board, or land North Atlantic swordfish from a vessel using or having on board gear other than pelagic longline or handgear, except as specified at § 635.21(e)(4)(i).

* * * * *

[FR Doc. 2011–6266 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 76, No. 53
Friday, March 18, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 14, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: 7 CFR 1902–A, Supervised Bank Accounts.

OMB Control Number: 0575–0158.

Summary of Collection: 7 CFR 1902–A, Supervised Bank Accounts, prescribes the policies and procedures for disbursing loan and grant funds, establishing and closing supervised accounts, and placing Multi-Family housing reserve accounts in supervised accounts. Supervised accounts are accounts with a financial institution in the names of a borrower and the United States Government, represented by Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, (Agency). Section 339 of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1989 and Section 510 of the Housing Act of 1949, as amended, (42 U.S.C. 1480) is the legislative authorities requiring the use of supervised accounts.

Need and Use of the Information: The agency's state and field offices will collect information from borrowers and financial institutions and use the information to monitor compliance with agency regulations governing supervised accounts, such as establishing, maintaining, and withdrawing funds. In addition, the information will be used to ensure that the borrowers operate on a sound basis and use the loan and grant funds for authorized purposes.

Description of Respondents: Business or other for-profit.

Number of Respondents: 20,000.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 26,969.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–6308 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 14, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, D.C. 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utilities Service

Title: Telecommunications System Construction Policies and Procedures.

OMB Control Number: 0572–0059.

Summary of Collection: The Rural Electrification Act of 1936 (RE Act), 7 U.S.C. 901 *et seq.,* was amended in 2002 by Title IV, Rural Broadband Access, by Farm Security and rural Investment Act, which authorizes Rural Utilities Service (RUS) to provide loans and loan guarantees to fund the cost of construction, improvement, or acquisition for facilities and equipment for the provision of broadband service in eligible rural communities in the States and territories of the United

States. Title VI of the RE Act requires that loans are granted only to borrowers who demonstrated that they will be able to repay in full within the time agreed. RUS has established certain standards and specification for materials, equipment and construction to assure that standards are maintained; loans are not adversely affected, and loans are used for intended purposes.

Need and Use of the Information: RUS has developed specific forms for borrowers to use when entering into contracts for goods or services. The information collected is used to implement certain provisions of loan documents about the borrower's purchase of materials and equipment and the construction of its broadband system and is provided on and as needed basis or when the individual borrower undertakes certain projects. The standardization of the forms has resulted in substantial savings to borrowers by reducing preparation of the documentation and the costly review by the government.

Description of Respondents: Business or other for-profit; not-for-profit institutions.

Number of Respondents: 513.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 10,720.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–6310 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 14, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: WIC Local Agency Directory.

OMB Control Number: 0584–0431.

Summary of Collection: The Supplemental Nutrition Program for Women, Infants, and Children (WIC) is authorized by Section 17 of the Child Nutrition Act (CNA) of 1966 (42 U.S.C. 1786), as amended. The Food and Nutrition Service (FNS) of USDA administers the WIC Program by awarding cash grants to State agencies (generally State health departments). The State agencies award sub-grants to local agencies (generally local health departments and nonprofit organizations) to deliver program benefits and services to eligible participants. Local agencies authorized to furnish WIC participants with supplemental foods, nutrition education, breastfeeding promotion and support activities and referral to related health services are subject to change. New local agencies may be selected to operate the WIC Program and local agencies already in operation may be disqualified for continued operation. FNS will collect information using form FNS–648 to report additions and deletions of local agencies operating the WIC Program and local agency address changes, when such changes occur.

Need and Use of the Information: FNS will collect information to maintain a local agency directory that lists the names and addresses of all WIC local agencies. The WIC local agency directory serves as the primary source of data on the number and location of local agencies and is published annually. It is used to refer individuals to the nearest source of WIC Program services and to maintain continuity of program services to migrant and other transient participants. It is also used as a mailing list to provide local agencies with technical assistance manuals and other information.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 90.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 15.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–6321 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Request for Nominations to the Advisory Committee on Biotechnology and 21st Century Agriculture

AGENCY: Office of the Under Secretary, Research, Education, and Economics.

ACTION: Notice of request for nominations to the Advisory Committee on Biotechnology and 21st Century Agriculture.

SUMMARY: The Secretary of Agriculture requests nominations for qualified persons to serve as members of the Advisory Committee on Biotechnology and 21st Century Agriculture (AC21).

DATES: Written nominations must be received by fax or postmarked on or before April 18, 2011.

ADDRESSES: All nomination materials should be sent to Michael Schechtman, Designated Federal Official, Office of the Secretary, USDA, 202B Jamie L. Whitten Federal Building, 14th and Independence Avenue, SW., Washington, DC 20250. Forms may also be submitted by fax to (202) 690–4265, if they are followed by written copies.

FOR FURTHER INFORMATION CONTACT: Questions should be addressed to Michael Schechtman, Designated Federal Official, telephone (202) 720–3817; fax (202) 690–4265; e-mail *AC21@ars.usda.gov.* To obtain form AD–755 ONLY please contact Dianne Fowler, Office of Pest Management Policy, telephone (202) 720–4074, fax (202) 720–3191; e-mail *dianne.fowler@ars.usda.gov.*

SUPPLEMENTARY INFORMATION:

Advisory Committee Purpose: USDA supports the responsible development and application of biotechnology within

the global food and agricultural system. Biotechnology intersects many of the policies, programs and functions of USDA. The charge for the AC21 is two-fold: To examine the long-term impacts of biotechnology on the U.S. food and agriculture system and USDA; and to provide guidance to USDA on pressing individual issues, identified by the Office of the Secretary, related to the application of biotechnology in agriculture. The AC21 will meet in Washington, DC, up to four (4) times per year.

Membership: Under the AC21 Charter, members of the AC21 will be knowledgeable in one or more of the following areas: recombinant-DNA (rDNA) research and applications using plants; rDNA research and applications using animals; rDNA research and applications using microbes; food science; silviculture and related forest science; fisheries science; ecology; veterinary medicine; the broad range of farming or agricultural practices; weed science; entomology; nematology; plant pathology; biodiversity; applicable laws and regulations relevant to agricultural biotechnology policy; risk assessment; consumer advocacy and public attitudes; public health/epidemiology; ethics, including bioethics; human medicine; biotechnology industry activities and structure; intellectual property rights systems; and international trade. Members will be selected by the Secretary of Agriculture in order to achieve a balanced representation of viewpoints to address effectively USDA biotechnology policy issues under consideration.

It is envisioned that the immediate upcoming work of the AC21 will concentrate on providing practical recommendations to the Secretary of Agriculture on ways to strengthen coexistence among different agricultural crop production methods. One specific focus will be on mechanisms that might be employed to help the market balance risks and rewards in different production sectors. Accordingly, Committee membership will concentrate on areas most relevant to those deliberations.

Nominations for AC21 membership must be in writing and provide the appropriate background documents required by USDA policy, including background disclosure form AD–755. Neither the form nor the information it contains may be released to the public, except as authorized by law.

No member may serve on the AC21 for more than six consecutive years. Nominees will initially serve for terms of 1 or 2 years for purposes of continuity. Previous AC21 members who wish again to be considered for membership must resubmit the full package of materials described under *Submitting Nominations* below.

Members of the AC21 and its subcommittees shall serve without pay, but with reimbursement of travel expenses and per diem for attendance at AC21 and subcommittee functions for those AC21 members who require assistance in order to attend the meetings. While away from home or their regular place of business, those members will be eligible for travel expenses paid by REE, USDA, including per diem in lieu of subsistence, at the same rate as a person employed intermittently in the government service is allowed under Section 5703 of Title 5, United States Code.

Submitting Nominations: Nominations should be typed and include the following:

1. A brief summary of no more than two (2) pages explaining the nominee's suitability to serve on the AC21.

2. A resume or curriculum vitae.

3. A completed copy of form AD–755.

Nominations should be sent to Michael Schechtman at the address listed above, and be post marked no later than April 18, 2011.

To ensure that recommendations of the task force take into account the needs of underserved and diverse communities served by USDA, membership will include, to the extent practicable, individuals representing minorities, women, and persons with disabilities. USDA prohibits discrimination in its programs and activities on the basis of race, color, national origin, gender, religion, age, sexual orientation, or disability. Additionally, discrimination on the basis of political beliefs and marital or family status is also prohibited by statutes enforced by USDA (not all prohibited bases apply to all programs). Persons with disabilities who require alternate means for communication of program information (Braille, large print, audio tape, etc.) should contact the USDA's Target Center at (202) 720–2600 (voice and TDD). USDA is an equal opportunity provider and employer.

Dated: March 10, 2011.

Catherine E. Woteki,

Under Secretary for Research, Education and Economics.

[FR Doc. 2011–6361 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2011–0017]

Multi-Agency Informational Meeting Concerning Compliance With the Federal Select Agent Program; Public Meeting

AGENCIES: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: This is to notify all interested parties, including individuals and entities possessing, using, or transferring federally listed biological agents and toxins, that a meeting will be held to provide specific regulatory guidance related to the Federal Select Agent Program established under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. The meeting is being organized by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service, the Department of Health and Human Services' Centers for Disease Control and Prevention, and the Department of Justice's Federal Bureau of Investigation. Issues to be discussed include entity registration, security risk assessments, biosafety requirements, and security measures.

DATES: The meeting will be held on May 10, 2011, from 8 a.m. to 6 p.m. Persons who wish to attend the meeting must register by April 12, 2011.

ADDRESSES: The meeting will be held at the USDA Agricultural Research Service, National Centers for Animal Health Disease Center, Building 20, 1920 Dayton Avenue, Ames, IA.

FOR FURTHER INFORMATION CONTACT:

APHIS: Ms. Sarah Kwiatkowski, Veterinary Program Assistant, APHIS Select Agent Program, APHIS, 4700 River Road Unit 2, Riverdale, MD 20737–1236; (301) 734–5960.

CDC: Dr. Eduardo O'Neill, Training & Outreach Officer, Division of Select Agents and Toxins, CDC, 1600 Clifton Road MS A–46, Atlanta, GA 30333; (404) 718–2000.

SUPPLEMENTARY INFORMATION: Title II of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, "Enhancing Controls on Dangerous Biological Agents and Toxins" (sections 201 through 231), provides for the regulation of certain biological agents and toxins by the Department of Health and Human Services (subtitle A, sections 201–204) and the Department of Agriculture (subtitle B, sections 211–213), and

provides for interagency coordination between the two Departments regarding overlap agents and toxins (subtitle C, section 221). For the Department of Health and Human Services, the Centers for Disease Control and Prevention (CDC) has been designated as the agency with primary responsibility for implementing the provisions of the Act; the Animal and Plant Health Inspection Service (APHIS) is the agency fulfilling that role for the Department of Agriculture. CDC and APHIS list select agents and toxins in 42 CFR 73.3 and in 7 CFR 331.3 and 9 CFR 121.3, respectively. The Federal Bureau of Investigation's (FBI) Criminal Justice Information Service conducts security risk assessments of all individuals and nongovernmental entities that request to possess, use, or transfer select agents and toxins.

The meeting announced here is an opportunity for the regulated community (i.e., registered entity responsible officials, alternate responsible officials, and entity owners) and other interested individuals to obtain specific regulatory guidance and information on standards concerning biosafety and biosecurity issues related to the Federal Select Agent Program. CDC, APHIS, and FBI representatives will be present at the meeting to address questions and concerns. Entity registration, security risk assessments, biosafety requirements, and security measures are among the issues that will be discussed.

All attendees must register in advance of the meeting. For those unable to attend in person, the meeting will be available at no cost as a Webcast for a limited number of registrants. There are two ways to register depending upon the U.S. citizenship status of the attendee:

- Citizens of the United States must complete a U.S. citizen registration form online at *http://www.selectagents.gov* and submit it to the CDC by April 12, 2011; or
- Non-citizens (including lawful permanent residents) must complete a non-citizen registration form online at *http://www.selectagents.gov* and submit it to the CDC prior to April 12, 2011. Registrants must also send copies of all required documentation (e.g., passport, visa, permanent resident card, etc.) to the CDC by the April 12, 2011, deadline. A list of required documentation is provided on the Web site listed above. In addition, non-citizens will need to bring all personal documentation to the meeting.

Travel directions to the National Centers for Animal Health Disease Center are available on the Internet at *http://www.selectagents.gov.* In addition to the documents listed above, Government-issued picture identification is required to gain access to the parking facilities and the building.

If you require special accommodations, such as a sign language interpreter, please call or write one of the individuals listed under **FOR FURTHER INFORMATION CONTACT.**

Done in Washington, DC, this 16th day of March 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–6535 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Boundary Establishment for the Yellow Dog National Wild and Scenic River, Ottawa National Forest; Baraga and Marquette Counties, MI

AGENCY: Forest Service, USDA.

ACTION: Notice of availability.

SUMMARY: In accordance with Section 3(b) of the Wild and Scenic Rivers Act, the USDA Forest Service, Washington Office, is transmitting the final boundary of the Yellow Dog National Wild and Scenic River to Congress.

FOR FURTHER INFORMATION CONTACT: Information may be obtained by contacting Bill Baer, Recreation Program Manager, Ottawa National Forest, E6248 US Hwy. 2, Ironwood, MI 49938, (906) 932–1330, ext. 342.

SUPPLEMENTARY INFORMATION: The Yellow Dog Wild and Scenic River boundary is available for review at the following offices: USDA Forest Service, Office of the Chief, 1400 Independence Avenue, SW., Washington, DC 20024; USDA Forest Service, Eastern Region, Suite 400, 626 East Wisconsin Avenue, Milwaukee, WI 53202 and; Ottawa National Forest, E6248 US Hwy. 2, Ironwood, MI 49938. A detailed legal description is available upon request.

The Michigan Scenic River Act of 1992 (Pub. L. 102–249–March 3, 1992) designated the Yellow Dog River, Michigan, as a National Wild and Scenic River, to be administered by the Secretary of Agriculture. As specified by law, the boundary will not be effective until ninety days after Congress receives the transmittal.

Dated: March 14, 2011.

Keith B. Lannom,

Acting Forest Supervisor.

[FR Doc. 2011–6375 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Humboldt County Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Humboldt County Resource Advisory Committee (RAC) will meet in Eureka, California. The committee meeting is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act.

DATES: The meeting will be held April 12, 2011, from 5 p.m. to 7 p.m.

ADDRESSES: The meeting will be held at the Six Rivers National Forest Office, 1330 Bayshore Way, Eureka, CA 95501.

FOR FURTHER INFORMATION CONTACT: Adam Dellinger, Committee Coordinator, at (707) 441–3569; e-mail *adellinger@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The agenda includes a public comment period, discussion on project monitoring, and a vote on projects to recommend for funding.

Dated: March 10, 2010.

Tyrone Kelley,

Forest Supervisor.

[FR Doc. 2011–6376 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Hood/Willamette Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Hood/Willamette Resource Advisory Committee will meet in Salem, Oregon. 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 present the 2012 project proposals to the committee.

DATES: The meeting will be held on April 22, 2011, and begin at 9:30 a.m.

ADDRESSES: The meeting will be held at Salem Office of the Bureau of Land Management Office; 1717 Fabry Road SE; Salem, Oregon; (503) 375–5646. Written comments should be sent to James Rudisill, McKenzie River Ranger District, 57600 McKenzie Hwy, McKenzie Bridge, OR 97413. Comments may also be sent via e-mail to *jamesrudisill@fs.fed.us,* or via facsimile to 541–822–7254.

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 comments received at McKenzie River Ranger District, 57600 McKenzie Hwy, McKenzie Bridge, Oregon.

FOR FURTHER INFORMATION CONTACT: James Rudisill, McKenzie River Ranger District, 57600 McKenzie Hwy, McKenzie Bridge, OR 97413; (541) 822–7203; E-mail: *jamesrudisill@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) Election of chairperson; (2) Decision on overhead rate for 2012 projects; (3) Presentation of 2012 Projects; and (4) Public Forum. The Public Forum is tentatively scheduled to begin at 10:15 a.m. Time allotted for individual presentations will be limited to 4–5 minutes. Written comments are encouraged, particularly if the material cannot be presented within the time limits for the Public Forum. Written comments may be submitted prior to the April 22nd meeting by sending them to James Rudisill at the address given above.

Dated: March 14, 2011.

Kathryn J Silverman,

Acting Forest Supervisor.

[FR Doc. 2011–6370 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

South Central Idaho Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The South Central Idaho Resource Advisory Committee will meet in Sun Valley, 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 hear project presentations and decide which projects will be funded.

DATES: The meeting will be held March 30, 2011, 9:30 a.m.

ADDRESSES: The meeting will be held at the Sun Valley City Hall Council Chambers, 810 Elkhorn Road, Sun Valley, Idaho 83353. Written comments should be sent to the Sawtooth National Forest, Attn: Julie Thomas, 2647 Kimberly Road East, Twin Falls, Idaho 83301. Comments may also be sent via e-mail to *jathomas@fs.fed.us,* or via facsimile to 208–737–3236.

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 comments received at the Sawtooth National Forest, 2647 Kimberly Road East, Twin Falls, Idaho 83301. Visitors are encouraged to call ahead to 208–737–3200 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Julie Thomas, Designated Federal Official, Sawtooth National Forest, 208–737–3200.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: This Resource Advisory Committee meeting will specifically deal with project presentations and funding of projects. The agenda for the meeting can be found at *http://www.fs.usda.gov/sawtooth.* 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. Public input sessions will be provided and individuals who made written requests by March 24, 2011 will have the opportunity to address the Comittee at those sessions.

Dated: March 14, 2011.

Julie A. Thomas,

Federal Designated Officer.

[FR Doc. 2011–6372 Filed 3–17–11; 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 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 primary objective of the meeting is to review proposed project applications.

DATES: Monday, April 11, 2011 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 e-mail 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) Review committee operating guide; (2) Discuss mileage reimbursement for committee members; (3) Review and discuss submitted project applications; (4) Vote to approve project proposals; and (5) Public Comments. Persons who wish to bring related matters to the attention of the Resource Advisory Committee may file written statements with the committee staff before or after the meeting.

Dated: March 14, 2011.

Frank R. Beum,

Forest Supervisor, Daniel Boone National Forest.

[FR Doc. 2011–6368 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

National Agricultural Library

Notice of Intent To Seek Approval To Collect Information

AGENCY: Agricultural Research Service, National Agricultural Library, USDA.

ACTION: Notice and Request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget (OMB) regulations at 5 CFR part 1320, this notice announces the National Agricultural Library's intent to request approval for renewal of an information collection relating to existing nutrition education and training materials targeting low-income persons. This voluntary form gives Supplemental Nutrition Assistance Program Education (SNAP–Ed) providers the opportunity to share resources that they have developed or used.

DATES: Comments on this notice must be received by 65 days after date of publication in the **Federal Register** to be assured of consideration.

ADDRESSES: Address all comments concerning this notice to Gina Hundley Gomez, Technical Information Specialist, Food and Nutrition Information Center, National Agricultural Library, 10301 Baltimore Avenue, Beltsville, MD 20705–2351, telephone (301) 504–5414 or fax (301) 504–6409.

Submit electronic comments to *gina.hundley@ars.usda.gov*

FOR FURTHER INFORMATION CONTACT: *gina.hundley@ars.usda.gov*

SUPPLEMENTARY INFORMATION:

Title: SNAP–Ed Connection Resource Sharing Form.

OMB Number: PRA# 0518–0031.

Expiration Date: Three years from date of approval.

Type of Request: Renewal of existing data collection from SNAP–Ed providers, data collection previously titled the Food Stamp Nutrition Connection Sharing Form.

Abstract: This voluntary "Sharing Form" gives SNAP–Ed providers the opportunity to share information about resources that they have developed or used. Data collected using this form help the Food and Nutrition Information Center (FNIC) identify existing nutrition education and training resources for review and inclusion in an online database. Educators can search this database via the SNAP–Ed Connection Web site *http://snap.nal.usda.gov.* In 2001, the United States Department of Agriculture's (USDA) Food and Nutrition Service established the Food Stamp Nutrition Connection to improve access to Food Stamp Program nutrition resources. Educators nationwide can use this site to identify curricula, lesson plans, research, training tools and participant materials. In 2008, the Food Stamp Program was renamed the Supplemental Nutrition Assistance Program and the Food Stamp Nutrition Connection Web site became the SNAP–Ed Connection. Developed and maintained at the National Agricultural Library's FNIC, this resource system helps educators find the tools and information they need to provide quality nutrition education for low-income audiences.

The Sharing Form is available for completion online at the SNAP–Ed Connection Web site. Individuals may also print the form and return it via fax or mail. The form consists of four parts. These various sections include: Part 1 consisting of three questions about the responder; Part 2 with nine questions about the resource; Part 3 with five questions about the resource development; and Part 4 with six questions about ordering/obtaining the resource. Responders are asked to complete only relevant sections of the form. Instructions about which sections to complete, based on one's relationship to the resource, are provided in Part 1. For instance, those that use the resource but are neither its developer or distributor would only complete Parts 1 and 2.

This form enables FNIC to inform nutrition educators of existing nutrition education and training materials targeting low-income Americans. This identification of existing materials will help educators spend their monies wisely by reducing duplication of efforts in nutrition education material development and by aiding in identifying areas of need for nutrition education resource development.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 19 minutes per response.

Respondents: SNAP–Ed providers.

Estimated Number of Respondents: 50 per year.

Estimated Total Annual Burden on Respondents: 16 hrs.

Copies of this information collection and related instructions may be obtained without charge from the SNAP–Ed Connection Sharing Center at *http://www.nal.usda.gov/fsn/sharing_center_submission.shtml.*

Comments

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance for the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who respond, including the use of appropriate automated, electronic, mechanical, or other technology. Comments should be sent to the address in the preamble. All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

Dated: March 3, 2011.

Caird E. Rexroad, Jr,

Associate Administrator, ARS.

[FR Doc. 2011–6437 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Rural Business-Cooperative Service

Notice of Request for Revision of a Currently Approved Information Collection

AGENCIES: Rural Housing Service and Rural Business-Cooperative Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the above-named Agencies to request an extension for the currently approved information collection in support of the servicing of Community and Direct Business Programs Loans and Grants.

DATES: Comments on this notice must be received by May 17, 2011 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Beth Jones, Senior Loan Specialist, Community Programs Direct Loans and

Grants Processing and Servicing, RHS, USDA, 1400 Independence Ave., SW., STOP 0787, Washington, DC 20250–0787, Telephone (202) 720–1498, E-mail *beth.jones@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: 7 CFR 1951–E, Servicing of Community and Direct Business Programs Loans and Grants.

OMB Number: 0575–0066.

Expiration Date of Approval: August 31, 2011.

Type of Request: Extension of a currently approved information collection.

Abstract: The Community Facilities program is authorized to make loans and grants to public entities, nonprofit corporations, and Indian tribes for the development of essential community facilities primarily serving rural residents. The Direct Business and Industry program, under Rural Business-Cooperative Service, is authorized to make loans to improve, develop, or finance business, industry, and employment, and improve the economic and environmental climate in rural communities.

The purpose of this collection is to establish security servicing policies, assist recipients in meeting the objectives of the loans and grants, repay loans on schedule, comply with agreements, and protect the Government's financial interest. Routine servicing responsibilities include collection of payments, compliance reviews, security inspections, review of financial reports, determining applicant/borrower eligibility and project feasibility for various servicing actions, monitoring delinquent accounts, and supervision activities.

Supervision by the Agencies include, but is not limited to: Review of budgets, management reports, audits and financial statements; performing security inspections; providing, arranging, or recommending technical assistance; evaluating environmental impacts of proposed actions by the borrower; performing civil rights compliance reviews; and assisting in the development of workout agreements.

Information will be collected by the field offices from applicants, borrowers, consultants, lenders, and attorneys.

Failure to collect information could result in improper servicing of these loans.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: State, local or tribal Governments, not-for-profit institutions, businesses, and individuals.

Estimated Number of Respondents: 105.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 716.

Estimated Total Annual Burden on Respondents: 769.

Copies of the information collection can be obtained from Jeanne Jacobs, Regulations and Paperwork Management Branch, at (202) 692–0040.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agencies, including whether the information will have practical utility; (b) the accuracy of the Agencies' estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Jeanne Jacobs, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, 7th Floor, Room 701, 300 7th Street, SW., Washington, DC 20024. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: March 14, 2011.

Tammye Treviño,

Administrator, Rural Housing Service.

[FR Doc. 2011–6462 Filed 3–17–11; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 19–2011]

Foreign-Trade Zone 137—Washington Dulles International Airport, VA Area; Application for Reorganization Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Washington Dulles Foreign Trade Zone Inc., grantee of FTZ 137, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 1/12/09 (correction 74 FR 3987, 1/22/09); 75 FR 71069–71070, 11/22/10). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on March 14, 2011.

FTZ 137 was approved by the Board on April 17, 1987 (Board Order 350, 52 FR 13489, 4/23/87) and expanded on March 12, 1999 (Board Order 1029, 64 FR 14213, 3/24/99) and on April 5, 2001 (Board Order 1152, 66 FR 19424, 4/16/01).

The current zone project includes the following sites: *Site 1* (243 acres)—Washington Dulles International Airport, Aviation Drive, Dulles; *Site 2* (3.5 acres)—Victory Van Corporation facilities, 110 Terminal Drive, Sterling; *Site 3* (142 acres)—Arcola complex, located at the intersection of Rt. 606 & 621, Dulles; *Site 4* (183 acres)—Ft. Collier Industrial Park (167 acres), located at the intersection of Rt. 11 & Ft. Collier Road, Winchester; and, Fortessa, Inc. (16 acres) within the Stonewall Industrial Park, 402 McGhee Road, Winchester; *Site 5* (64 acres)—Winchester Regional Airport industrial park, Airport Road/Rt. 645 & Pegasus Court, Winchester; and, *Site 6* (155 acres)—Wrights Run complex, intersection of U.S. Rt. 522 & Rt. 624, Winchester.

The grantee's proposed service area under the ASF would be Frederick, Clarke, Loudoun, Fairfax, Fauquier, Prince William, and Arlington Counties and the City of Alexandria, Virginia, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Washington Dulles International Airport Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project under the ASF as follows: renumber the non-contiguous portion (16 acres) of Site 4 as Site 7; Sites 1–6 would become "magnet" sites; and, Site 7 would become a usage-driven site. The ASF allows for the possible exemption of one magnet site from the "sunset" time limits that generally apply to sites under the

ASF, and the applicant proposes that Site 1 be so exempted.

In accordance with the Board's regulations, Kathleen Boyce of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is May 17, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to June 1, 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 Kathleen Boyce at *Kathleen.Boyce@trade.gov* or (202) 482–1346.

Dated: March 14, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–6445 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 21–2011]

Foreign-Trade Zone 47—Boone County, KY; Application for Reorganization Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Greater Cincinnati Foreign Trade Zone, Inc. grantee of FTZ 47, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 1/12/09 (correction 74 FR 3987, 1/22/09); 75 FR 71069–71070, 11/22/10). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on March 15, 2011.

FTZ 47 was approved by the Board on January 12, 1979 (Board Order 141, 44 FR 4003, 1/19/79) and expanded on December 23, 1993 (Board Order 674, 59 FR 1371, 1/10/94) and September 27, 2001 (Board Order 1194, 66 FR 52740, 10/17/01).

The current zone project includes the following sites: *Site 1* (22 acres)—Northern Kentucky Business Center, 1670 Dolwick Drive, Erlanger, Boone County; and, *Site 2* (185 acres)—Park West International Industrial Park, 1500 Worldwide Boulevard, Hebron, Boone County, Kentucky.

The grantee's proposed service area under the ASF would be Boone, Kenton and Campbell Counties, Kentucky, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Cincinnati Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include Site 1 as a "usage-driven" site and Site 2 as a "magnet" site. The applicant is also requesting that 15 acres be deleted from Site 1 due to changed circumstances. Because the ASF only pertains to establishing or reorganizing a general-purpose zone, the application would have no impact on FTZ 47's authorized subzones.

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.

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 May 17, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to June 1, 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: March 15, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–6447 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Proposed Information Collection; Comment Request; Participant Application, Program Exit Questionnaire, SABIT Alumni Success Story Report (Feedback Form)

AGENCY: International Trade Administration.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before May 17, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Tracy M. Rollins, (202) 482–0073, *tracy.rollins@trade.gov*, fax (202) 482–2443.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Special American Business Internship Training (SABIT) Programs of the Department of Commerce's International Trade Administration (ITA), are a key element in the U.S. Government's efforts to support the economic transition of Eurasia (the former Soviet Union) and to support economic growth in other regions of the world, including Pakistan and the Middle East, *et al.* SABIT develops and implements three- to four-week training programs for groups of up to 18 business and government professionals from

Eurasia and other regions. They are trained by government agencies, non-government offices (NGOs) and U.S. companies in various business practices and principles. This unique private sector-U.S. Government partnership was created in order to tap the U.S. private sector's expertise assisting the transition of developing regions to market economies while boosting trade between the United States and other countries. Participant applications and feedback (exit) surveys are needed to enable SABIT to find the most qualified people for the training programs and to track the success of the program as regards to trade between the U.S. and the countries SABIT covers, as well as to improve the content and administration of the programs. Alumni feedback forms are used by SABIT staff to record success information but on occasion are sent to alumni to be completed. The closing date for applications and supplemental materials is based upon the starting date of the program and is published, with the application, on the program's English-language Web site at *http://www.trade.gov/sabit*, and also on the Russian-language Web site at *http://www.sabitprogram.org*, if applicable. Pursuant to section 632(a) of the Foreign Assistance Act of 1961, as amended, funding for the programs will be provided by the Agency for International Development (AID).

II. Method of Collection

Applications are sent to program candidates via electronic mail, facsimile, or mail upon request. Applications are also available to be downloaded from the SABIT English and Russian language Web sites at *http://www.trade.gov/sabit* and *http://www.sabitprogram.org*. Feedback surveys are given to program participants at the completion of programs.

III. Data

OMB Control Number: 0625–0225.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Individuals or households; business or other for-profit organizations.

Estimated Number of Respondents: 2,000.

Estimated Time per Response: 3 hours for application; 1 hour for program feedback form; 1 hour for alumni feedback form.

Estimated Total Annual Burden Hours: 40,500.

Estimated Total Annual Cost to Public: $18,000.

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, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 14, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–6341 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–HE–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–854]

Certain Tin Mill Products From Japan: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from an interested party, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order covering certain tin mill products from Japan. The period of review is August 1, 2009, through July 31, 2010. Based on the withdrawal of request from U.S. Steel Corporation (U.S. Steel), we are now rescinding this administrative review.

DATES: *Effective Date:* March 18, 2011.

FOR FURTHER INFORMATION CONTACT: John Drury or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0195 or (202) 482–3019 respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 2, 2010, the Department published a notice announcing an opportunity for interested parties to request an administrative review of the antidumping duty order on certain tin mill products from Japan. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 45094 (August 2, 2010). On August 31, 2010, U.S. Steel filed a request that the Department initiate an administrative review of the antidumping duty order on certain tin mill products from Japan with respect to JFE Steel Corporation, Kawasaki Steel Corporation, Nippon Steel Corporation, NKK Corporation, and Toyo Kohan Co., Ltd. Based on U.S. Steel's request, on September 29, 2010, the Department published a notice of initiation of the administrative review of the antidumping duty order on certain tin mill products from Japan. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 60076 (September 29, 2010).

Scope of the Order

The merchandise subject to the antidumping duty order is certain tin mill products from Japan. The scope of this order includes tin mill flat-rolled products that are coated or plated with tin, chromium or chromium oxides. Flat-rolled steel products coated with tin are known as tin plate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single-or double-reduced), and whether or not coated with a plastic material. All products that meet the written physical description are within the scope of this order unless specifically excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this order:

—Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (+/−10%) or 0.251 mm (90 pound base box)
(+/−10%) or 0.255 mm (+/−10%) with 770 mm (minimum width) (+/−1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches

(minimum width) (+/− 1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/square meter; with a chrome oxide coating restricted to 6 to 25 mg/m with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/square meter as type DOS, or 3.5 to 6.5 mg/square meter as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).

—Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.

—Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.

—Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur, 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/square meter, with a chromium oxide layer of 5–30 mg/square meter, with a tensile strength of 260–440 N/square millimeter, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and Mu 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.

—Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).

—Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: Crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/square meter and chromium oxide of 10 mg/square meter, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of +/− ⅛ inch, with a thickness tolerance of +/− 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg) with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.

—Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT 4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

—Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT 5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. in., with ordered dimension combinations of (1) 75

pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

—Tin-free steel coated with a metallic chromium layer between 100–200 mg/square meter and a chromium oxide layer between 5–30 mg/square meter; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density ("Br") of 10 kg minimum and a coercive force ("Hc") of 3.8 Oe minimum.

—Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol A).

The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States ("HTSUS"), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0000, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.

Rescission of Review

In accordance with 19 CFR 351.213(d)(1), the Department will rescind an administrative review, "in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." On February 8, 2011, U.S. Steel withdrew its request for a review of the order with respect to JFE Steel Corporation, Kawasaki Steel Corporation, Nippon Steel Corporation, NKK Corporation, and Toyo Kohan Co., Ltd. Although the party submitted a letter withdrawing their review request after the 90-day regulatory deadline, the Department finds it is reasonable to extend the deadline for withdrawing the review request because it has not yet devoted significant time or resources to the review.

Because of the withdrawal of the request for review and because we received no other requests for review, we are rescinding the administrative review of the order with respect to JFE Steel Corporation, Kawasaki Steel Corporation, Nippon Steel Corporation, NKK Corporation, and Toyo Kohan Co., Ltd. This rescission is in accordance with 19 CFR 351.213(d)(1).

Assessment

The Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries. For these five companies, the 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 to CBP 15 days after publication of this notice.

Notifications

This notice 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 review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning destruction of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the 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.

This notice is published 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: March 8, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–6015 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Executive-Led Trade Mission to Afghanistan

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

I. Mission Description

The United States Department of Commerce's International Trade Administration is organizing a business development trade mission to Kabul, Afghanistan in September 2011. This mission will be led by a Senior Commerce Department official. Targeted sectors include: Construction (including engineering, architecture, transportation and logistics, and infrastructure); mining (including equipment, technology, and services); agribusiness; and information and communications technology. The mission's goal is to help U.S. companies explore long-term business opportunities in Afghanistan and enhance U.S.-Afghan commercial relations by providing U.S. participants with first-hand market information, access to government decision makers as well as one-on-one meetings with business contacts, including potential agents, distributors, and partners, to position themselves to enter or expand their presence in the targeted sectors.

II. Commercial Setting

The Government of the Islamic Republic of Afghanistan (GIRoA) is taking steps to develop its market economy and increase both domestic and foreign private investment. GIRoA continues to develop legal and administrative regulatory frameworks that will lead to a market more conducive to trade, investment and private sector development. For example, Afghanistan adopted an investment law that allows investments to be 100% foreign-owned. Additionally, on October 28, 2010, Afghanistan and Pakistan signed the Afghanistan Pakistan Transit Trade Agreement (APTTA), allowing Afghan container trucks to drive through Pakistan to the Indian border, and also to port cities such as Karachi.

After 30 years of war reconstruction and development efforts are required to grow and stabilize Afghanistan's economy. The GIRoA is committed to promoting economic development, increasing production and earnings, promoting technology transfer, improving national prosperity and advancing Afghans' standard of living in

partnership with international donor agencies. GIRoA recognizes that U.S. services, equipment and technology would enhance development of Afghanistan's industrial sector and lead to increased productivity and greater technical skills for Afghan citizens. International donors continue to support Afghanistan's development; however, long-term sustainable growth will take place through private sector development.

To support Afghanistan's private sector and promote reconstruction efforts, GIRoA has identified domestic priority sectors needing investment and development in both equipment and services. These priority sectors are: construction and infrastructure, logistics and transportation, mining, agribusiness, and information and communications technology providers.

The economy is beginning to move from one based on state owned enterprises and the informal economy to a more formal market economy. A notable sign of this transition for the U.S. business community is the establishment of an American Chamber of Commerce in Kabul in 2010.

Kabul is the capital of Afghanistan, situated in Kabul Province. With a total metropolitan population of 2.6 million, it is also the largest city in Afghanistan. It is the commercial center for the country, with national Afghan businesses, associations, and GIRoA ministries maintaining a presence in Kabul. Afghanistan's GDP per capita is approximately $500, and has experienced double digit growth in recent years.

The Commerce Department has supported commercial and private sector development in Afghanistan since 2002, and posted a Senior Commercial Officer in Kabul in June 2010.

III. Mission Goals

The goal of the mission is to provide U.S. participants with first-hand market information, access to government decision makers and one-on-one meetings with business contacts, including potential agents, distributors, and partners, so that they can position themselves to enter the Afghan market or expand their business presence in Afghanistan. Thus, the mission seeks to:

- Improve U.S. companies' understanding of commercial opportunities in Afghanistan.
- Facilitate business meetings between U.S. and Afghan businesses to promote the development of U.S. commercial opportunities in Afghanistan.
- Introduce U.S. industry to the Afghan business community and government leaders.
- Provide GIRoA policymakers with U.S. industry feedback on the direction of its commercial reforms.

IV. Mission Scenario

The business development mission will take place in Kabul, Afghanistan. Participants will meet with Afghan leaders in the public and private sector, learn about the market by participating in Embassy briefings, and explore additional opportunities at networking receptions. Activities will include one-on-one meetings with pre-screened business prospects. (**Note** that the regular workweek in Afghanistan is Sunday through Thursday.)

V. Proposed Timetable

(The State Department will follow RSO procedure in reference to security within and around the mission event)

Day One (weekend)
- Travel Day—Depart U.S. on evening flight

Day Two
- Travel Day—Participants arrive in transit city (tbd) and overnight in pre-arranged departure from transit city

Day Three
- Travel Day
- Arrive in Kabul, Afghanistan (afternoon)
- Evening Event

Day Four
- Security Briefing
- Market Briefing
- One-on-One Business Appointments
- Reception

Day Five
- Market Briefing
- Industry Sector Briefing
- Meetings with Government and Industry Officials
- One-on-One Business Appointments
- Reception

Day Six
- One-on-One Business Appointments (optional)
- Travel Day—Depart for the U.S. (evening)

Day Seven
- Travel Day—Arrive in U.S. (morning)

VI. Participation Requirements

This business development mission is designed for a minimum of 10 qualified companies and can accommodate a maximum of 20 participants from the companies accepted. All parties interested in participating in this business development mission to Kabul, Afghanistan, must submit a completed application package for consideration by the U.S. Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and to best satisfy the selection criteria as outlined below. U.S. companies already doing business in the target sectors as well as U.S. companies seeking to enter this market for the first time are encouraged to apply.

Fees and Expenses

After a company has been selected to participate in the mission, a payment to the U.S. Department of Commerce in the form of a participation fee is required. The participation fee is $4,800 for a single participant for a small- or medium-sized enterprise (SME) [1] and $5,245 for a single participant for a large firm. Participants per company will be limited due to space constraints. The fee for each additional participant is $2,000. Applicants are encouraged to provide a clear business purpose and clarification of role of any additional participants proposed to participate in the mission.

Interpretation services for official activities are included in the fee. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Lodging and meals for each participant will cost approximately $150 USD per day.

Conditions for Participation

- An applicant must submit a completed and signed mission application and supplemental application materials, including information on the company's products and/or services, primary market objectives, and goals for participation. If the U.S. Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the application.
- Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content.

Selection Criteria for Participation

Selection will be based on the following criteria:

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations. *See http://www.sba.gov/contractingopportunities/owners/basics/whatismallbusiness/index.html.* Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008. *See http://www.export.gov/newsletter/march2008/initiatives.html.*

• Suitability of the company's products or services to the mission goals.

• Applicant's potential for business in Afghanistan.

• Consistency of the applicant's goals and objectives with the stated scope of the mission.

(Additional factors, such as diversity of company, size, type and location, may be considered during the selection process.)

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and will not be considered during the selection process.

VII. Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including posting on the U.S. Department of Commerce trade missions calendar—*http://www.trade.gov/trade-missions/*—and other Internet Web sites, publication in domestic trade publications and association newsletters, direct outreach to the Department's clients and distribution lists, publication in the **Federal Register,** and announcements at industry meetings, symposia, conferences, and trade shows.

Recruitment for the mission will begin immediately and conclude no later than June 24, 2011, by the close of business. Applications received after June 24, 2011, will be considered only if space and scheduling constraints permit.

VIII. Disclaimer, Security, and Transportation

Business development mission members participate in the mission and undertake related travel at their own risk and are advised to obtain insurance accordingly. Any question regarding insurance coverage must be resolved by the participant. The U.S. Government does not make any representations or guarantees as to the safety or security of participants. Companies should consult the State Department's travel warning for Afghanistan: *http://travel.state.gov/travel/cis_pa_tw/tw/tw_2121.html* ITA will coordinate with the U.S. Embassy in Kabul to arrange for transportation of the mission participants to and from the airport and lodging facilities. The primary venue for the mission has security measures in place.

Contact*:* Ariana Monti Marshall, Commercial Specialist—Houston, Market Access and Compliance, *Tel:* 202–482–3754, *E-mail: afghanmission2011@trade.gov.*

Jessica Arnold,

Global Trade Programs, U.S. & Foreign Commercial Service.

[FR Doc. 2011–5994 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–912]

Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Extension of Time Limit for the Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Erin Begnal or Raquel Silva, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–1442 or (202) 482–6475, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 26, 2009, the Department of Commerce ("Department") initiated the administrative review of the antidumping duty order on certain new pneumatic off-the-road tires ("OTR tires") from the People's Republic of China ("PRC") for the period February 20, 2008, through August 31, 2009. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 54956 (October 26, 2009). On October 19, 2010, the Department published its preliminary results of the administrative review of the antidumping order on OTR tires from the PRC. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 64259 (October 19, 2010). On February 7, 2011, the Department published notice of a 30-day extension of time for the final results of the administrative review of the antidumping order on OTR tires from the PRC, resulting in a current due date of March 18, 2011. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Extension of Time Limit for the Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order,* 76 FR 6603 (February 7, 2011).

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), requires the Department to issue the final results in an administrative review within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time period to a maximum of 180 days.

We determine that it is not practicable to complete the final results of this review within the current deadline because the Department continues to require additional time to analyze issues raised in recent surrogate value submissions, verification exhibits, and case briefs and rebuttals. Therefore, we are extending the time limit for completion of the final results by an additional 30 days, in accordance with section 751(a)(3)(A) of the Act. An additional extension of 30 days from the current deadline of March 18, 2011, would result in a new deadline of April 17, 2011. However, because April 17, 2011, falls on a Sunday, a non-business day, the final results will now be due no later than April 18, 2011, the next business day. *See Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

This notice is published pursuant to sections 751(a) and 777(i) of the Act.

Dated: March 14, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–6446 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–916]

Laminated Woven Sacks From the People's Republic of China: Final Results of First Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 13, 2010, the Department of Commerce ("Department") published in the **Federal**

Register the preliminary results of the first administrative review of the antidumping duty order on laminated woven sacks ("Sacks") from the People's Republic of China ("PRC"). *See Laminated Woven Sacks From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 55568 (September 13, 2010) ("*Preliminary Results*"). 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 calculations for the final results. We continue to find that the mandatory respondent has sold subject merchandise at less than normal value during the period of review ("POR"), January 31, 2008, through July 31, 2009.

DATES: *Effective Date:* March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Jamie Blair-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) 482–2615.

SUPPLEMENTARY INFORMATION:

Background

On September 22, 2009, the Department initiated this review with respect to two companies upon which an administrative review was requested. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 48224, 48228 (September 22, 2009). The review was initiated with respect to Zibo Aifudi Plastic Packaging Co., Ltd. ("Zibo Aifudi") and Changshu Xinsheng Bags Producing Company Ltd. ("Changshu Xinsheng"). On November 6, 2009, Changshu Xinsheng submitted to the Department a timely letter withdrawing its request for review from the ongoing administrative review. On December 17, 2009, the Department rescinded the review with respect to Changshu Xinsheng.[1]

On May 25, 2010, the Department issued a preliminary determination regarding the country of origin of Sacks made from fabric woven in third countries.[2] Following this determination by the Department, which stated that the PRC is the country of origin of Sacks produced in the PRC from imported fabric, the Department has coordinated with U.S. Customs and Border Protection ("CBP") to resolve issues arising from differences between the Department's and CBP's respective country-of-origin classifications and from technical restrictions in CBP's electronic filing systems. As a result, the Department has added several case numbers to the Case Reference file within the Automated Commercial Environment to ensure that requisite entries are and can be properly claimed as scope merchandise.[3] We sent instructions to CBP on November 23, 2010, providing parties with notice of these new case reference files.[4]

We hereby finalize our preliminary decision presented in the Country of Origin Memo of Sacks made from fabric woven in third countries.[5] The Department has determined that the PRC is the country of origin of Sacks produced in the PRC from imported fabric, as discussed in detail in the "Laminated Woven Sacks from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review," which is dated concurrently with this notice ("Issues and Decision Memorandum").[6]

On September 20, 2010, Zibo Aifudi notified the Department of its withdrawal and refusal to participate in this ongoing administrative review.[7] Additionally, Zibo Aifudi requested that the Department destroy all business proprietary submissions placed on the record by Zibo Aifudi. On September 30, 2010, the Department notified Zibo Aifudi that it had complied with its request and asked all interested parties to do so as well. On October 6, 2010, the Department received from all interested parties the confirmation of the destruction of the business proprietary submissions placed on the record by Zibo Aifudi.

At the *Preliminary Results,* we set the deadline for interested parties to submit case briefs and rebuttal briefs to October 13, 2010, and October 18, 2010, respectively. On October 12, 2010, we extended the deadlines for case and rebuttal briefs submissions by one day to October 14, 2010, and October 19, 2010, respectively. On October 14, 2010, Petitioners,[8] AMS Associates, Inc., operating as Shapiro Packaging ("AMS"), and Commercial Bag Company, doing business as Commercial Packaging ("Commercial Packaging") filed case briefs. On October 19, 2010, Petitioners and AMS filed rebuttal briefs. The Department did not hold a public hearing pursuant to 19 CFR 351.310(d), as all hearing requests made by interested parties were withdrawn.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to these reviews are addressed in the Issues and Decision Memorandum. A list of the issues which parties raised and to which we respond in the Issues and Decision Memorandum is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit, 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.

Scope of the Order

The merchandise covered by the order is laminated woven sacks. Laminated woven sacks are bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip, regardless of the width of the strip; with or without an extrusion coating of polypropylene and/or polyethylene on one or both sides of the fabric; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene ("BOPP") or to an exterior ply of paper that is suitable for high quality print graphics; [9] printed with three colors or more in register; with or without lining; whether or not closed on one end; whether or not in roll form (including sheets, lay-flat tubing, and sleeves); with or without handles; with or without special closing features; not exceeding one kilogram in weight. Laminated woven sacks are typically used for retail packaging of

[1] *See Laminated Woven Sacks from the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 66954 (December 17, 2009).

[2] *See* "Memorandum to Abdelali Elouaradia from Zhulieta Willbrand through Robert Bolling re: Preliminary Decision Regarding the Country of Origin of Laminated Woven Sacks Exported by Zibo Aifudi Plastic Packaging Co., Ltd.—Laminated Woven Sacks from the People's Republic of China," dated May 25, 2010 ("Country of Origin Memo").

[3] *See* "Memorandum to the File from Catherine Bertrand re: Case Reference Files," dated November 12, 2010; *see also* CBP Message No. 0327303 dated November 23, 2010, regarding the clarification of the order.

[4] *See id.*

[5] *See Preliminary Results,* 75 FR at 55569.

[6] *See* accompanying Issues and Decision Memorandum at Comment 1d.

[7] *See* Letter from Zibo Aifudi Regarding "Withdrawal from Administrative Review," dated September 20, 2010.

[8] Petitioners are the Laminated Woven Sacks Committee and its individual members, Coating Excellence International, LLC and Polytex Fibers Corporation.

[9] "Paper suitable for high quality print graphics," as used herein, means paper having an ISO brightness of 82 or higher and a Sheffield Smoothness of 250 or less. Coated free sheet is an example of a paper suitable for high quality print graphics.

consumer goods such as pet foods and bird seed.

Effective July 1, 2007, laminated woven sacks are classifiable under Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 6305.33.0050 and 6305.33.0080. Laminated woven sacks were previously classifiable under HTSUS subheading 6305.33.0020. If entered with plastic coating on both sides of the fabric consisting of woven polypropylene strip and/or woven polyethylene strip, laminated woven sacks may be classifiable under HTSUS subheadings 3923.21.0080, 3923.21.0095, and 3923.29.0000. If entered not closed on one end or in roll form (including sheets, lay-flat tubing, and sleeves), laminated woven sacks may be classifiable under other HTSUS subheadings including 3917.39.0050, 3921.90.1100, 3921.90.1500, and 5903.90.2500. If the polypropylene strips and/or polyethylene strips making up the fabric measure more than 5 millimeters in width, laminated woven sacks may be classifiable under other HTSUS subheadings including 4601.99.0500, 4601.99.9000, and 4602.90.0000. Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Changes Since the Preliminary Results

In the *Preliminary Results,* we found that the one mandatory respondent (*i.e.,* Zibo Aifudi) demonstrated its eligibility for separate-rate status. However, we no longer find Zibo Aifudi eligible for separate rate status as it has significantly impeded the Department's ability to conduct this proceeding and, by withdrawing from the review, prevented the verification of the information it had earlier provided.

Facts Available

Section 776(a)(2) of the Tariff Act of 1930, as amended ("Act") provides that, if an interested party or any other person: (A) Withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title. Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Section 782(d) of the Act further states that, if the party submits further information that is unsatisfactory or untimely, the administering authority may, subject to subsection (e), disregard all or part of the original and subsequent responses. Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties.

Zibo Aifudi

Zibo Aifudi responded to the Department's original questionnaire and several supplemental questionnaires, and the Department calculated a company-specific margin for Zibo Aifudi in the *Preliminary Results.* After the issuance of the *Preliminary Results,* the Department received a letter from Zibo Aifudi withdrawing from this administrative review and requesting that all business proprietary information be destroyed.[10] The Department therefore finds that, pursuant to sections 776(a)(2)(A), (B), (C), and (D) of the Act, Zibo Aifudi has significantly impeded the Department's ability to conduct this administrative review and, by withdrawing from the review and requesting the removal of information from the record, prevented the verification of the information it had earlier provided. Therefore, the application of facts available is warranted with respect to Zibo Aifudi.

Application of an Adverse Inference

Section 776(b) of the Act provides that, in selecting from among the facts available, the Department may use an inference that is adverse to the interests of the respondent if it determines that a party has failed to cooperate to the best of its ability. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[11] In determining whether a respondent has failed to cooperate to the best of its ability, the Department need not make a determination regarding the willfulness of a respondent's conduct.[12] Furthermore, "affirmative evidence of bad faith on the part of the respondent is not required before the Department may make an adverse inference."[13]

In determining whether a party failed to cooperate to the best of its ability, the Department considers whether a party could comply with the request for information, and whether a party paid insufficient attention to its statutory duties.[14] Furthermore, the Department also considers the accuracy and completeness of submitted information, and whether the respondent has hindered the calculation of accurate dumping margins.[15]

In *Nippon Steel* the Federal Circuit explained that,

> if a respondent "fails to provide requested information by the deadlines for submission," Commerce shall fill in the gaps with "facts otherwise available." The focus of {section 776(a) of the Act} is respondent's failure to provide information. The reason for the failure is of no moment. As a separate matter, {section 776(b) of the Act} permits Commerce to "use an inference that is adverse to the interests of a respondent in selecting from among the facts otherwise available," only if Commerce makes the separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to comply." The focus of {section 776(b) of the Act} is respondent's failure to cooperate to the best of its ability, not its failure to provide requested information.

See Nippon Steel, 337 F.3d at 1381. The Federal Circuit also held that "the

[10] *See* Letter from Zibo Aifudi Regarding "Withdrawal from Administrative Review," dated September 20, 2010.

[11] *See* Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong., 2d Session at 870 (1994).

[12] *See Nippon Steel Corp.* v. *United States,* 337 F.3d 1373, 1382–1383 (Fed. Cir. 2003) ("*Nippon Steel*").

[13] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27340 (May 19, 1997).

[14] *See Pacific Giant, Inc.* v. *United States,* 223 F. Supp. 2d 1336, 1342 (August 6, 2002).

[15] *See Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review,* 62 FR 53808, 53819–53820 (October 16, 1997).

statutory mandate that a respondent act to the 'best of its ability' requires the respondent to do the maximum it is able to do." [16]

An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act. It is the Department's practice to assign the highest rate from any segment of a proceeding as total adverse facts available ("AFA") when a respondent fails to cooperate to the best of its ability.[17]

Zibo Aifudi/PRC-Wide Entity

As discussed above, Zibo Aifudi withdrew from participation in this segment of the proceeding and requested that all of its business proprietary submissions be destroyed. Because of this, the Department does not have any record evidence upon which to determine whether Zibo Aifudi is eligible for a separate rate for this review period. Thus, pursuant to Department practice, as Zibo Aifudi has not demonstrated its entitlement to a separate rate, we consider it to be part of the PRC-entity and subject to the PRC-wide rate.[18] Furthermore, because Zibo Aifudi is part of the PRC-wide entity and the only mandatory respondent in this administrative review, it is necessary that we review the PRC-wide entity. In doing so, we note that section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, we find that an element of the PRC-wide entity (Zibo Aifudi) did not respond to our requests for information, the necessary information was not provided, and the information that was provided was unable to be verified. Therefore, we find it necessary, under section 776(a)(2) of the Act, to continue to use facts otherwise available as the basis for the final results of this review for the PRC-wide entity.

Pursuant to section 776(b) of the Act, we find that the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with requests for information. As noted above, an element of the PRC-wide entity (Zibo Aifudi) informed the Department that it would not participate further in this review. Thus, because the PRC-wide entity refused to participate fully in this proceeding, we find it appropriate to use an inference that is adverse to the interests of the PRC-wide entity in selecting from among the facts otherwise available. By doing so, we ensure that the companies that are part of the PRC-wide entity will not obtain a more favorable result by failing to cooperate than had they cooperated fully in this review.

As stated above, the PRC-wide entity (including Zibo Aifudi) withdrew from this administrative review. Because of this, we find it necessary, under sections 776(a)(2) and 776(b) of the Act, to use AFA as the basis for these final results of review for the PRC-wide entity. In accordance with the Department's practice, as AFA, we have assigned to the PRC-wide entity the rate of 91.73 percent, which is the highest rate assigned in any segment of this proceeding. *See Laminated Woven Sacks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 35646, 35648 (June 24, 2008) ("*LTFV Final Determination*").[19] In selecting a rate as AFA, the Department selects a rate that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." [20]

Corroboration of AFA Rate for PRC-Wide Entity, Including Zibo Aifudi

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. As described in the SAA, it is the Department's practice to use secondary information from the petition, the final determination, or any previous review under section 751 of the Act concerning the subject merchandise. *See* SAA at 870. Further, the Department will satisfy itself that the secondary information has probative value and, to the extent practicable, will examine the reliability and relevance of the information to be used.

In this case, the AFA rate we are assigning to the PRC-wide entity, including Zibo Aifudi, is the highest rate from any segment of this proceeding, and is the petition rate in the less-than-fair-value investigation. *See LTFV Final Determination,* 73 FR at 35648. This rate was corroborated in the *LTFV Final Determination,* finding that the petition margin of 91.73 percent had probative value because it was within the range of CONNUM margins for Zibo Aifudi. *See id.* Furthermore, no information has been presented by interested parties challenging the reliability of the 91.73 percent AFA rate. We note that this is the highest rate from any segment of the proceeding and the rate is less than four years old. Thus, the Department finds that the information continues to be reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin.[21] Similarly, the Department does not apply a margin that has been discredited.[22] None of these unusual circumstances are present with respect to the rate being used here.[23] Moreover,

[16] *See Nippon Steel,* 337 F.3d at 1382.

[17] *See, e.g., Stainless Steel Plate in Coils From Taiwan; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review,* 67 FR 5789, 5790 (February 7, 2002) ("Consistent with Department practice in cases where a respondent fails to cooperate to the best of its ability, and in keeping with section 776(b)(3) of the Act, as adverse facts available, we have applied a margin based on the highest margin from any prior segment of the proceeding.").

[18] *See Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review,* 73 FR 8273, 8279 (February 13, 2008) unchanged in *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review,* 73 FR 49162 (August 20, 2008) ("*WBF 2008*").

[19] *See, e.g., Brake Rotors From the People's Republic of China: Rescission of Second New Shipper Review and Final Results and Partial Rescission of First Antidumping Duty Administrative Review,* 64 FR 61581, 61584 (November 12, 1999).

[20] *See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8932 (February 23, 1998).

[21] *See WBF 2008,* 73 FR at 49166; *see also Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review,* 61 FR 6812, 6814 (February 22, 1996) (where the Department disregarded the highest margin in that case as adverse best information available {the predecessor to facts available} because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin).

[22] *See D&L Supply Co.* v. *United States,* 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated).

[23] *See e.g., Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 14th Antidumping Duty Administrative Review,* 75 FR 34976, 34979 (June 21, 2010); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review,* 73 FR 12127, 12131–12132 (March 6, 2008) unchanged in *Certain Frozen Warmwater Shrimp*

Continued

the rate selected is the rate currently applicable to the PRC-wide entity and was corroborated in the *LTFV Final Determination,* using Zibo Aifudi's CONNUM margins. *See LTFV Final Determination,* 73 FR at 35648. The Department assumes that if an uncooperative respondent could have obtained a lower rate, it would have cooperated.[24] Consequently, as there is no information on the record of this review that demonstrates that this rate is not appropriate for use as AFA, we determine that this rate continues to have relevance.

Based on our analysis as described above, we find that the margin of 91.73 percent is reliable and has relevance. As the 91.73 percent rate is both reliable and relevant, we determine that it has probative value. Accordingly, we determine that the calculated rate of 91.73 percent, which is the current PRC-wide rate, is in accordance with the requirement of section 776(c) of the Act that secondary information be corroborated to the extent practicable (*i.e.,* that it have probative value). Consequently, we have assigned this AFA rate to exports of the subject merchandise from the PRC-wide entity, including Zibo Aifudi.

Final Results of Review

The weighted-average dumping margins for the POR are as follows:

Exporter	Weighted Average Percent Margin
PRC–Wide Rate[25]	91.73

Assessment

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For assessment purposes, we calculated importer (or customer)-specific assessment rates for merchandise subject to this review. Where appropriate, we calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer (or customer)-specific assessment rate is *de minimis* (*i.e.,* less than 0.50 percent), the Department will instruct CBP to assess that importer (or customer's) entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

Cash Deposit Requirements

The following cash-deposit requirements will be effective upon publication of the 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) The cash deposit rate for each of the reviewed companies that received a separate rate in this review will be the rate listed in the final results of review (except that if the rate for a particular company is *de minimis, i.e.,* less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent POR; (3) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will be the PRC-wide rate of 91.73 percent. These deposit requirements, when imposed, shall remain in effect until further notice.

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 order ("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: March 14, 2011.

Kim Glas,

Acting Deputy Assistant Secretary for Import Administration.

Appendix I—Issues and Decision Memorandum

Comment 1: Preliminary Decision Regarding Country of Origin

1a. Procedures in Determining Country of Origin

1b. Department's Decision of Country of Origin of Sacks

1c. Authority to Issue Clarification Instruction to CBP

1d. Finalizing the Country-of-Origin Memorandum

Comment 2: Liquidation Instructions

[FR Doc. 2011–6450 Filed 3–17–11; 8:45 am]

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From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 52273 (September 9, 2008).

[24] *See Rhone Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190–91 (Fed. Cir. 1990); *Ta Chen Stainless Steel Pipe, Inc.* v. *United States,* 24 CIT 841, 848 (2000) (respondents should not benefit from failure to cooperate).

[25] The PRC–Wide entity, including Zibo Aifudi Plastic Packaging Co., Ltd.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–929]

Small Diameter Graphite Electrodes From the People's Republic of China: Initiation of Anti-Circumvention Inquiry

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from SGL Carbon LLC and Superior Graphite Co. ("Petitioners"), Petitioners in the original investigation, the Department of

Commerce ("Department") is initiating an anti-circumvention inquiry pursuant to section 781(b) of the Tariff Act of 1930, as amended ("the Act"), to determine whether certain merchandise from the United Kingdom ("U.K.") is being exported to the United States by U.K. Carbon and Graphite Co., Ltd. ("UKCG") in circumvention of the antidumping duty order on small diameter graphite electrodes ("SDGE") from the People's Republic of China ("PRC").[1]

DATES: *Effective Date:* March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Brendan Quinn, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5848.

SUPPLEMENTARY INFORMATION:

Background

On October 12, 2010, Petitioners filed a submission alleging that UKCG, a company located in the United Kingdom, is engaged in circumvention of the *SDGE Order,* by importing unfinished SDGE components [2] from the PRC to the United Kingdom, performing minor completion and assembly on these items, and exporting finished subject merchandise to the United States as SDGE of U.K. origin, thus, not subject to the *SDGE Order*.[3] In this submission, Petitioners request that the Department initiate and conduct a proceeding to clarify whether the scope of the *SDGE Order* includes unfinished graphitized SDGE components, as imported by UKCG from the PRC based on either the dispositive written descriptions of the scope pursuant to 19 CFR 351.225(k)(1) or, a further analysis of the product in question pursuant to factors enumerated in 19 CFR 351.225(k)(2). Alternatively, Petitioners request that the Department initiate an anti-circumvention proceeding, pursuant to 19 CFR 351.225(h), to determine whether the importation of the aforementioned SDGE components by UKCG from the PRC for finishing in the United Kingdom and subsequent sale to the United States constitutes circumvention of the *SDGE Order,* as defined in section 781(b) of the Act.

On October 29, 2010, the Department received a letter on behalf UKCG in rebuttal to Petitioners' request for a scope or anti-circumvention ruling.[4] In this submission, UKCG asserts that there is no need for the Department to undertake a full scope or anti-circumvention inquiry, arguing that the unfinished SDGE component inputs in question have already been excluded from the scope of the *SDGE Order.* On November 12, 2010, we received further comments from Petitioners in response to UKCG's October 29, 2010, submission.[5]

On November 24, 2010, the Department requested that Petitioners supplement their scope request with certain additional information to aide in our decision whether to initiate a formal scope or anti-circumvention inquiry.[6] In this questionnaire, the Department requested that Petitioners provide further information regarding both the pattern of trade for imports of unfinished SDGE components into the United Kingdom from the PRC and domestic U.K. production of unfinished SDGE components during the relevant time period. On November 30, 2010, we received Petitioners' response to the Department's pre-initiation questionnaire.[7] On December 14, 2010, we received a rebuttal from UKCG in response to Petitioners' SQR.[8]

On November 29, 2010, the Department received, via e-mail, a document from the British Embassy in support of UKCG's arguments, which the Department placed on the record of this proceeding.[9]

On January 13, 2011, the Department extended the deadline to initiate an anti-circumvention inquiry by 21 days, pursuant to 19 CFR 351.302(b).[10] On February 4, 2011, the Department further extended the deadline to initiate by 14 days, pursuant to 19 CFR 351.302(b).[11]

Scope of the Order

The merchandise covered by this order includes all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by this order also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrode. Small diameter graphite electrodes and graphite pin joining systems for small

[1] *See Antidumping Duty Order: Small Diameter Graphite Electrodes from the People's Republic of China,* 74 FR 8775 (February 26, 2009) ("*SDGE Order*").

[2] According to Petitioners, the unfinished merchandise in question is defined in UKCG's submissions as, *e.g.,* "graphite electrodes," "rods," "graphite billets," graphite shapes," "synthetic graphite electrode rod," and "re-machined graphite electrode." Petitioners characterize these inputs as "unfinished SDGE," whereas UKCG refers to them as "artificial graphite." For customs purposes, these materials are, generally, classified under HTS 3801.10.00, defined as "Artificial Graphite; Colloidal or Semi-Colloidal Graphite; Preparations Based on Graphite or Other Carbon in the Form of Pastes, Blocks, Plates or Other Semi-Finished Goods." For ease of reference, these materials are referred to as "unfinished SDGE components" or "artificial graphite rods" throughout this notice.

[3] *See* Letter from Petitioners entitled, "Small Diameter Graphite Electrodes from the People's Republic of China," dated October 12, 2010 ("Initiation Request").

[4] *See* Letter from UKCG entitled, "Small Diameter Graphite Electrodes from the People's Republic of China: Response to Petitioners' Submission of October 12, 2010, On Behalf of UK Graphite and Carbon Co., Ltd.," dated October 29, 2010 ("Initiation Rebuttal Comments").

[5] *See* Letter from Petitioners entitled, "Small Diameter Graphite Electrodes from the People's Republic of China," dated November 12, 2010 ("Petitioners' Response to UKCG's Initiation Rebuttal Comments").

[6] *See* the Department's Letter to Petitioners entitled, "Small Diameter Graphite Electrodes from the People's Republic of China: Scope Inquiry Request Regarding Certain Merchandise Imported By UK Carbon and Graphite Company, Ltd.," dated November 24, 2010 ("Pre-Initiation Supplemental Questionnaire" or Pre-Initiation SQ").

[7] *See* Letter from Petitioners entitled, "Small Diameter Graphite Electrodes from the People's Republic of China," dated November 30, 2010 ("Petitioners' Pre-Initiation Supplemental Questionnaire Response" or "Petitioners' SQR"). Upon receipt of this submission, we found that the record, henceforth, contained sufficient information from which the Department may determine whether a formal anti-circumvention inquiry is warranted.

[8] *See* Letter from UKCG entitled, "Small Diameter Graphite Electrodes from the People's Republic of China: Response to Petitioners' Submission of November 30, 2010, On Behalf of UK Graphite and Carbon Co., Ltd.," dated December 14, 2010 ("UKCG's Rebuttal to Petitioners' Pre-Initiation Supplemental Questionnaire Response" or "UKCG's SQR Rebuttal").

[9] *See* the Department's Memorandum from Brendan Quinn to The File entitled, "Scope/Anti-Circumvention Inquiry of Small Diameter Graphite Electrodes from the People's Republic of China: Placing Document on the Record," dated February 2, 2011. In this document, the British Government related its support for UKCG and implored the Department to take into consideration certain arguments forwarded in UKCG's submissions, particularly with regard to the Binding Origin Information ruling discussed below. Because this document did not provide any new argument or information onto the record, we have not further summarized the British Embassy's letter for the purposes of this notice.

[10] *See* the Department's letter to Petitioners entitled, "Small Diameter Graphite Electrodes from the People's Republic of China: Scope Inquiry Request Regarding Certain Unfinished Merchandise Imported By UK Carbon and Graphite Company, Ltd.," dated January 13, 2011 ("Initiation Extension Letter").

[11] *See* the Department's letter to Petitioners entitled, "Small Diameter Graphite Electrodes from the People's Republic of China: Scope Inquiry Request Regarding Certain Unfinished Merchandise Imported By UK Carbon and Graphite Company, Ltd.," dated February 4, 2011 ("Second Initiation Extension Letter").

diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to this order are currently classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 8545.11.0000. The HTSUS number is provided for convenience and customs purposes, but the written description of the scope is dispositive.

Determination Not To Initiate a Scope Proceeding

As noted above, Petitioners have requested the Department initiate either a scope proceeding to clarify whether the scope of the *SDGE Order* includes the merchandise in question pursuant to 19 CFR 351.225(k) or an anti-circumvention proceeding pursuant to section 781(b) of the Act and 19 CFR 351.225(h).

In the instant case, although Petitioners have provided substantial record evidence which may support the initiation of either type of inquiry, the Department has concluded that the issues raised by the parties are better addressed in the context of an anti-circumvention proceeding pursuant to section 781(b) of the Act and 19 CFR 351.225(h).[12] In particular, due to the specificity of Petitioners' request as it pertains to a particular company (*i.e.,* UKCG) and certain record information as to the timing of the pattern of trade (as discussed below), the Department has determined that a decision to initiate an anti-circumvention inquiry is the most appropriate course of action to address Petitioners' concerns at present. As a result of this determination, the Department will not initiate a scope proceeding pursuant to 19 CFR 351.225(k) at this time.

Initiation of Anti-Circumvention Proceeding

Statutory Criteria for Initiation of Anti-Circumvention Proceeding

Section 781(b)(1) of the Act provides that the Department may find that importation of certain merchandise completed or assembled in a third country constitutes circumvention of an antidumping duty order if:

(A) The merchandise imported into the United States is of the same class or kind as merchandise produced in a foreign country that is subject to the order.

(B) Before importation to the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is either subject to the order or is produced in the foreign country subject to the order.

(C) The process of assembly or completion in the third country is minor or insignificant.[13]

(D) The value of the merchandise produced in the country subject to the order amounts to a significant portion of the total value of the merchandise exported to the United States.

(E) Such action would be appropriate to prevent evasion of the order in question. In evaluating these aforementioned criteria, section 781(b)(3) of the Act further instructs the Department to take into account:

1. The pattern of trade, including sourcing patterns.

2. Whether the manufacturer or exporter of the merchandise in question from the country subject to the order (*i.e.,* the PRC producer of unfinished SDGE components) is affiliated with the third country party that completes or assembles the merchandise for subsequent importation into the United States (*i.e.,* UKCG).

3. Whether imports into the third country (*i.e.,* the United Kingdom) of the merchandise in question (*i.e.,* unfinished SDGE components from the PRC) have increased after the initiation of the investigation which resulted in the issuance of the order.

Petitioners' Request for Initiation of an Anti-Circumvention Proceeding[14]

In their October 12, 2010, Initiation Request, Petitioners presented the following evidence with respect to each of the aforementioned statutory criteria:

A. Merchandise of the Same Class or Kind

Petitioners contend that the SDGE products exported to the United States by UKCG are identical to those subject to the *SDGE Order.*[15]

B. Completion of Merchandise in a Foreign Country

Petitioners further assert that the unfinished SDGE component inputs imported by UKCG from the PRC for further processing before exportation to the United States are themselves subject merchandise.[16] Petitioners argue that the language of the scope (as included in the initial Petition, *SDGE Order,* and *Final ITC Determination*) identifies the graphitization process as the point at

[12] As such, the remainder of this notice will focus on the statutory criteria for the initiation of an anti-circumvention inquiry, as defined in section 781(b) of the Act. *See* the *Initiation of Anti-Circumvention Proceeding* section of this notice, below, for a full summary of both Petitioners' and UKCG's comments regarding initiation of an anti-circumvention inquiry. *See also* the *Analysis* section of this notice, below, for the full discussion of the Department's determination to initiate an anti-circumvention inquiry pursuant to section 781(b) of the Act and 19 CFR 351.225(h).

[13] In determining whether the process of assembly or completion is minor or insignificant, section 781(b)(2) of the Act instructs the Department into account: (a) The level of investment in the foreign country; (b) the level of research and development in the foreign country; (c) the nature of the production process in the foreign country; (d) the extent of production facilities in the foreign country; and (e) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

[14] Petitioners' request included arguments for both the initiation of a scope and anti-circumvention inquiry. Because, as noted in the *Determination Not To Initiate a Scope Proceeding,* above, we are focusing this notice on the determination as to whether to initiate an anti-circumvention ruling, we have not summarized or addressed the arguments forwarded by Petitioners, which were submitted to specifically support the initiation of a scope ruling. However, we have included and addressed all arguments submitted in support of the initiation of an anti-circumvention inquiry, even in the instance that they were first presented in support of a scope initiation.

[15] *See* Initiation Request at 23.

[16] With respect to the description of in-scope merchandise, Petitioners cite to the Letter from Petitioners entitled, "Small Diameter Graphite Electrodes from the People's Republic of China—Antidumping Duty Petition," dated January 17, 2008 ("Petition"), *Small Diameter Graphite Electrodes, Inv. 731–TA–1143 (Final),* Pub. 4062, dated February 2009 ("*Final ITC Determination*"), and the *SDGE Order.* They argue that the scope of the *SDGE Order,* as established in these documents, explicitly includes "unfinished" SDGEs whether or not attached to a pin joining system. They assert that the inclusion of the "unfinished" language reflects the fact that unfinished SDGEs undergo no further processing beyond the graphitization stage, other than machining, as stated in the *Final ITC Determination.* As such, Petitioners contend that the scope is unambiguously dispositive regarding the inclusion of unfinished SDGE. Contrary to UKCG's claims that the SDGE components purchased from the PRC were not "unfinished" SDGE but, rather, inputs transformed into SDGE by manufacturing operations in the United Kingdom, Petitioners note that: (a) The 2009 UKCG financial statement describes the business of UKCG as the "purchasing, processing, and sale of synthetic graphite electrodes for the steel and foundry industries;" (b) the unfinished SDGE components in question contain the correct grade of petroleum coke mix, and have been baked, formed, carbonized, impregnated, and graphitized, thus, the resulting cylindrical rod, as produced in the PRC and imported into the U.K., has all the essential characteristics of a graphite electrode; (c) UKCG's own proprietary description of the U.K. processing on these artificial graphite rods demonstrates that only minor machining and finishing operations are performed, which do not impart any essential performance characteristics to the finished product. Therefore, according to Petitioners, the merchandise that UKCG imports from the PRC is "unfinished" SDGE as defined by the scope of the *SDGE Order* and, because the concept of scope encompasses both the product description and the country of origin of the product, the merchandise in question is of PRC origin and is subject merchandise both before and after finishing in the United Kingdom. *See* Initiation Request at 8–16.

which an electrode form becomes a graphite electrode subject to the *SDGE Order*.[17] As such, Petitioners contend that this graphitization process (performed in the PRC) confers both country of origin and, thus, "unfinished" subject merchandise status on the SDGE components in question, even if further machining occurs in a third country to become "finished" subject merchandise. Therefore, Petitioners conclude, the finished merchandise exported to the United States is not only produced from subject merchandise but, due to the nature of further processing not being sufficient to alter the country of origin, the finished merchandise is itself subject merchandise produced in the PRC.[18]

C. Minor or Insignificant Process

1. Level of Investment

Petitioners note that PRC producers have invested extensively in the SDGE industry, which includes significant investment in both manufacturing facilities and production equipment worth many millions of dollars. Petitioners contend that the bulk of this investment goes to the heavy industrial processes required for the production of SDGE (*e.g.,* raw material handling, mixing, forming, baking, impregnating, and graphitizing), each of which occur prior to the final machining stage. Petitioners point out that, on the contrary, the total worth of UKCG's plant, including its single machine shop and finishing equipment, as shown in UKCG's financial statement, demonstrates that the level of investment required for a PRC manufacturer to produce an unfinished graphitized electrode is far greater than the level of investment needed by UKCG to perform its finishing processes.[19]

2. Level of Research and Development

Petitioners argue that, although they do not have detailed information regarding research and development ("R&D") expenses incurred by either UKCG or Chinese producers of SDGE, as explained in the "Level of Production Processes" section, immediately below, the technology required to manufacture merchandise up to the graphitization process of production (and, thus, the related R&D costs), should greatly exceed the R&D costs associated with finishing of the merchandise and that the R&D costs associated with the finishing of the merchandise are relatively insignificant by comparison.[20]

3. Level of Production Processes

Petitioners contend that an understanding of the production of subject merchandise is essential to the analysis of whether or not UKCG is engaged in minor or insignificant production. As such, Petitioners detail the SDGE production process, demonstrating how raw materials are formed, baked, impregnated (if needed), re-baked, graphitized, finished and packaged. Petitioners emphasize the significant energy needed to graphitize the product and emphasize that, upon completion of this process, the electrode becomes an "unfinished" SDGE subject to the *SDGE Order.* Petitioners point out that, for PRC manufacturers to produce unfinished SDGE components for shipment to UKCG, they must perform each of these processes from the mixing of raw materials through to packaging, save finishing, which accounts for the vast majority of production costs (based on an analysis of proprietary information provided in the initial antidumping petition). In contrast, Petitioners argue that UKCG merely finishes [21] and repackages SDGE into UKCG branded cartons, processes amounting to insignificant costs when compared to those incurred by PRC producers to perform the heavy industrial processes summarized above.[22]

4. Extent of Production Facilities

As detailed above, Petitioners note that the facilities needed to form, bake, impregnate, re-bake, graphitize and pack the subject merchandise in the PRC for exportation to the United Kingdom (*e.g.,* equipment such as mills, sifters, calcinatories, presses, ovens, and tanks) is far more significant than the single machining shop needed to finish the products exported by UKCG to the United States.[23]

5. Value of Further Processing Compared to Total Value of Exported Merchandise

As noted above, Petitioners assert that, based on proprietary information supplied in the Petition, the cost of finishing a graphite electrode represents an insignificant amount of the total cost of manufacture for a SDGE.[24]

D. Value of Merchandise Produced in the PRC

Petitioners argue that, for reasons summarized above, the value of merchandise produced in the PRC represents the vast majority of the total value of the product.[25]

E. Whether Action Is Appropriate To Prevent Evasion of the Order

Petitioners reassert that UKCG imports graphitized components of SDGE (which, they contend are, subject merchandise) from PRC producers of subject merchandise, which are then finished and packaged for export to the United States as a product of the United Kingdom. Petitioners note that UKCG has relied on a European Binding Origin Information ("BOI") ruling as support for the U.K. origin designation it applied to the merchandise in question. However, Petitioners argue, this ruling was issued for the purposes of trade within the European common market, and has no legal status in the United States. Moreover, Petitioners conclude that their arguments, as summarized above, invalidate any claim by UKCG that the finishing process is so substantial that it warranted a change in country of origin from the PRC to the United Kingdom.[26]

F. Additional Factors

1. Pattern of Trade

Petitioners argue that, since the filing of the antidumping Petition and issuance of the preliminary determination in the initial less than fair value ("LTFV") investigation in August 2008,[27] UKCG has shipped SDGE to the United States, sourced and finished from PRC-produced graphitized components, in significant and increasing quantities. According to

[17] With respect to the specific argument that the graphitization process confers "unfinished" status to the SDGE in process and is, thus, at that point "subject" to the *SDGE Order* and, furthermore, origin of the country in which this process takes place, Petitioners cite to the Petition at 3, stating, "The electrode form then undergoes the graphitization process, in which the electrode is heated in a furnace to an extremely high temperature (2600–3000 degrees centigrade). Through this process, the electrodes are transformed into graphite." Petitioners also cite to the *Final ITC Determination* at 4, stating, "unfinished SDGEs undergo no further processing beyond the graphitization stage other than machining."

[18] *See* Initiation Request at 23–24.

[19] *See* Initiation Request at 25–26.

[20] *See* Initiation Request at 26.

[21] Petitioners note that the "finishing" process involves machining of an electrode's outside surface so that it is sized to exact dimensions and tolerances (according to National Electrical Manufacturers Association standards for U.S. bound products), and may also include machining and fitting the ends of an electrode with a threaded graphite pin connecting/joining system. *See* Initiation Request at 28.

[22] *See* Initiation Request at 27–30.

[23] *See* Initiation Request at 30–31.

[24] *See* Initiation Request at 31–32.

[25] *See* Initiation Request at 32.

[26] *See* Initiation Request at 32–35.

[27] *See Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances, in Part,* 73 FR 49408 (August 21, 2008).

Petitioners, at the time of initiation of the LTFV investigation in February 2008,[28] the United Kingdom had no exports of SDGE of U.K. origin to the United States, but that UKCG began exporting the merchandise in question to the United States beginning two months after the publication of the preliminary determination.[29] According to Petitioners, during the period November 2008 through March 2010, UKCG exports of SDGE represented 96 percent of the total SDGE exports from the United Kingdom to the United States, and such exports occurred in significant and increasing quantities subsequent to the issuance of the *SDGE Order.* Petitioners also placed Chinese Customs data on the record, which they claim demonstrates a significant increase in imports of finished SDGE from the PRC into the U.K. corresponding to the aforementioned increase in exports to the U.S.[30]

2. Affiliation

Though Petitioners do not claim that UKCG is affiliated with any of the PRC producers from which it sourced the merchandise in question, they cite to UKCG's existing business relationship with PRC producers of merchandise subject to the *SDGE Order.*[31]

3. Import Volume Subsequent to the Investigation and Order

As noted above, Petitioners identify the following trends since the filing of the antidumping petition and issuance of the preliminary determination of the initial LTFV investigation in August 2008: UKCG has shipped Chinese-sourced subject merchandise to the United States in significant and increasing quantities; UKCG exports of SDGE represent the vast majority of the total SDGE exports from the United Kingdom to the United States; and customs data from the PRC and United States show a significant increase in PRC exports of SDGE to the United Kingdom and U.K exports to the United States.[32]

Comments Received Subsequent to the Initiation Request

A. UKCG's Rebuttal Comments

On October 29, 2010, the Department received a letter on behalf UKCG in rebuttal to Petitioners' October 12, 2010, requests for a scope and/or anti-circumvention ruling. In this submission, UKCG asserts that there is no need for the Department to undertake a full scope or anti-circumvention inquiry, arguing that the unfinished SDGE component inputs in question have already been excluded from the scope of the *SDGE Order,* the finished SDGE exports are of U.K. origin, and that Petitioners' October 12, 2010, submission merely reiterates old allegations which have been previously rebutted based on record evidence.[33] UKCG presents the following arguments in support of its position:

Legal Standards: UKCG argues that the scope of the *SDGE Order,* which was drafted by Petitioners, explicitly excludes the unfinished material in question. Citing to *Hylsa, S.A. de C.V.* v. *United States,* 22 C.I.T. 44, 49 (1998), UKCG asserts that it is legally impermissible to bring such excluded merchandise back into the case, either as part of a scope or anti-circumvention proceeding.[34]

Artificial Graphite Is Not Covered by the SDGE Order: UKCG argues that the addition of the term "unfinished" to the scope of the *SDGE Order* is a lawyer-created term with no meaning in the industry and, as such, the term "unfinished" electrode could be applied to even the raw materials used to create SDGE. UKCG claims that the items imported into the United Kingdom are not "unfinished" SDGE but, rather, artificial graphite rods. UKCG cites to separate customs rulings from the United States and the United Kingdom/European Union ("E.U.") that it purports define the product in question as artificial graphite and not unfinished SDGE.[35]

Petitioners Did Not Include Artificial Graphite Rods in the Scope of the Order: UKCG notes that SGL Carbon, a Petitioner, and Graftech, a producer of electrodes who supported Petitioners in their filing of the initial Petition, have themselves imported items classified as artificial graphite rods under the 3801 tariff classification used by UKCG in its classification of the unfinished materials in question. As such, UKCG asserts that Petitioners knew of such materials and their classification under HTS subheading 3801, but expressly did not include them within the scope of the *SDGE Order,* either in the dispositive scope narrative or in the HTS classification listed in the narrative. Therefore, UKCG concludes that, because Petitioners were aware of the use of separate terminology and HTS classification for artificial graphite products and finished graphite electrode products, considering the fact that they refrained from including the former within the scope of the *SDGE Order,* their request to include such products in the order is inappropriate at this stage of the proceeding.[36]

Petitioners' Country of Origin Citation Is Without Factual Basis: UKCG avers that Petitioners have provided no factual basis for their assertion that the *ITC Final Determination* holds that the graphitization process confers the final country of origin status for the purposes of the *SDGE Order,* and that any offhanded remark on this issue in the *ITC Final Determination* is without authority and contradicted by customs rulings from both the United Kingdom and the United States.[37]

A U.K. BOI Ruling Found That Artificial Graphite Rods Are Not Electrodes, and Petitioners Misstate the Effect of This BOI Ruling: UKCG argues that U.K. authorities examined the issue at hand and determined that the unfinished SDGE components in question were properly classified as "Artificial Graphite" under HTS subcategory 3801.10, rather than as "Carbon Electrodes" under HTS subcategory 8548.11. UKCG asserts that Petitioners have misunderstood the impact of this BOI, because the submission of any untrue information on an E.U. export declaration is considered an illegal act.[38]

A U.S. CBP Ruling Also Found That Artificial Graphite Rods Are Not Electrodes: UKCG notes that a February 23, 2009, ruling by U.S. Customs and Border Protection ("CBP") found that semi-manufactures of artificial graphite rods are expressly included in the explanatory note of HTSUS 3801. UKCG points out the CPB ruling states that "artificial graphite rods in their imported condition will consist of un-machined semi-manufactures that must be cut, machined to fine tolerances and surface finished before they can be considered finished articles in {HTSUS}

[28] *See Small Diameter Graphite Electrodes From the People's Republic of China: Initiation of Antidumping Duty Investigation,* 73 FR 8287 (February 13, 2008).

[29] Petitioners note that the preliminary margins ranged from 132.80 to 159.34, indicating that significant dumping margins might be levied against SDGE from the PRC in the final determination.

[30] *See* Initiation Request at 35–37.

[31] *See* Initiation Request at 38.

[32] *See id.*

[33] *See* UKCG's Initiation Rebuttal Comments at 1–2.

[34] *See* UKCG's Initiation Rebuttal Comments at 3.

[35] *See* UKCG's Initiation Rebuttal Comments at 3–4.

[36] *See* UKCG's Initiation Rebuttal Comments at 4–6.

[37] *See* UKCG's Initiation Rebuttal Comments at 6.

[38] *See* UKCG's Initiation Rebuttal Comments at 6–8. This BOI ruling is provided in UKCG's Initiation Rebuttal Comments at Exhibit 2.

heading 8545," and ultimately determines that unfinished artificial graphite electrode rods identical to the product at issue in the instant case should be classified under HTSUS 3801.10.5000. UKCG asserts that, in this ruling, CBP specifically declares that the items in question are a form of artificial graphite rods, which are semi-manufactured inputs that have not yet taken on the nature of an electrode.[39]

B. Petitioners' Response to UKCG's Rebuttal

On November 12, 2010, Petitioners submitted a response to UKCG's Rebuttal Comments. Petitioners first note their disagreement with UKCG's categorization of the unfinished SDGE components in question as artificial graphite rods not subject to the *SDGE Order,* and reiterate their contention that the scope of the *SDGE Order* clearly includes such merchandise.[40] Petitioners then present specific rebuttals to certain arguments forwarded by UKCG, summarized below:

"*Unfinished*" *SDGE Are Clearly Defined:* Petitioners argue that, despite UKCG's assertion that the term "unfinished" is a term without meaning and that Petitioners' conclusion that graphitization confers country of origin to the SDGE in question is unfounded, the Petition and *Final ITC Determination* clearly define "unfinished SDGE" as SDGE that have been graphitized but not further machined or finished. Furthermore, Petitioners argue that whether or not the term "unfinished" has a specific meaning in the trade is irrelevant for antidumping purposes.[41]

UKCG's Argument That Artificial Graphite Was Expressly Excluded From the Scope Is Flawed: Petitioners argue that, because the "unfinished" SDGE language was included within the scope of the *SDGE Order* (which, according to Petitioners, includes the unfinished SDGE components in question), there was no need to consider the classification of artificial graphite rods. Furthermore, Petitioners note that the scope clearly indicates that the HTSUS number provided is for convenience and customs purposes, but should not be considered dispositive.[42]

The BOI Ruling Is Not Relevant to This Proceeding: Petitioners contend that the BOI Ruling cited to by UKCG as evidence that the merchandise in question is of U.K. origin is not relevant for antidumping purposes because: (a) It speaks to HTS classifications, which are not dispositive to the scope of the *SDGE Order;* (b) the BOI does not address the specific issue relevant in the instant proceeding (*i.e.,* whether artificial graphite rods are unfinished SDGE); (c) the BOI is a ruling applicable to trade within the European Community and has no application for exports to other countries, including the United States; and (d) no customs ruling, whether United Kingdom or United States in origin, can bind or limit the scope of a U.S. antidumping duty order.[43]

Commerce Should Request Immediate Suspension of Liquidation: Petitioners argue that because UKCG has incorrectly reported the country of origin in its entry documents (*i.e.,* listing the United Kingdom rather than the PRC) and, in so doing, has avoided suspension of liquidation and antidumping duty deposits that are required under the *SDGE Order,* the Department should immediately request that CBP reverse the liquidation of such entries in order to properly suspend liquidation and collect the appropriate antidumping duty deposits.[44]

Responses to the Department's Request for Supplemental Information

On November 24, 2010, the Department requested that Petitioners supplement their scope request with certain additional information to aide in the Department's decision to initiate a formal scope or anti-circumvention inquiry.[45] In this questionnaire, the Department requested that Petitioners provide further information regarding both the pattern of trade for imports of "unfinished SDGE" into the United Kingdom from the PRC and domestic U.K. production of "unfinished SDGE" during the relevant time period. On November 30, 2010, we received Petitioners' response to the Department's pre-initiation questionnaire.[46] On December 14, 2010, we received a rebuttal from UKCG in response to Petitioners' submission.[47]

A. Petitioners' Supplemental Questionnaire Response

In their November 30, 2010, response, Petitioners submitted information onto the record regarding U.K. imports under HTS 3801.10.00[48] from the PRC (*i.e.,* the HTS subcategory most specific to unfinished SDGE components in question) for the years 2008–2010.[49] Petitioners assert that these data show a direct correlation between the antidumping investigation on SDGE and imports of the unfinished merchandise in question into the United Kingdom from the PRC, noting that:

- The monthly average volume of imports of merchandise classified under HTS 3801.10.00 from January through August 2008 was 66,208 kg, but in September 2008, the month following the preliminary determination, imports increased to a monthly average of 603,944 kg.[50]
- In the four months between the announcement of the preliminary determination and the final determination, September through December 2008, the average monthly imports were 574,162 kg, but the volume of imports rose to 815,061 kg in January 2009, the month corresponding to the announcement of the final determination.[51]
- The volume of imports, by year, has increased dramatically since the filing of the initial antidumping duty petition, with 2,152,370 kg (averaging 180,198 kg per month) imported in 2008, 3,097,554 kg (averaging 258,130 per month) in 2009, and 8,751,286 kg (annualized, averaging 729,273 kg per month) in 2010.[52]

Petitioners argue that these data demonstrate that the antidumping duty investigation resulted in a significant increase of imports of "unfinished SDGE" into the United Kingdom from the PRC, and allege that this increase is attributable to a scheme undertaken by PRC producers to unlawfully avoid U.S. antidumping duties.[53] Finally, Petitioners maintain that they do not know of any SDGE manufacturing operations in the United Kingdom during the relevant time period, other

[39] *See* UKCG's Initiation Rebuttal Comments at 8–9.

[40] *See* Petitioners' Response to UKCG's Initiation Rebuttal Comments at 1–4.

[41] *See* Petitioners' Response to UKCG's Initiation Rebuttal Comments at 4–5.

[42] *See* Petitioners' Response to UKCG's Initiation Rebuttal Comments at 6.

[43] *See* Petitioners' Response to UKCG's Initiation Rebuttal Comments at 6–7. Citing to *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 74 FR 3987 (January 22, 2009), and accompanying Issues and Decisions Memorandum ("*Tapered Roller Bearings*") at Comment 1, Petitioners assert that only the Department has the authority to define what products are within or outside the scope of an order.

[44] *See* Petitioners' Response to UKCG's Initiation Rebuttal Comments at 7–8.

[45] *See* Pre-Initiation Supplemental Questionnaire.

[46] *See* Petitioners' SQR.

[47] *See* UKCG's SQR Rebuttal.

[48] "Artificial Graphite; Colloidal or Semi-Colloidal Graphite; Preparations Based on Graphite or Other Carbon in the Form of Pastes, Blocks, Plates or Other Semi-Finished Goods."

[49] *See* Petitioners' SQR at Attachment 1. These data were obtained from HM Revenue and Customs' UK Overseas Trade Statistics and Regional Trade Statistics Web site, available at *http://www.hmrc.gov.uk/stats/trade-statistics.htm.*

[50] *See* Petitioners' SQR at 1.

[51] *See* Petitioners' SQR at 1–2.

[52] *See* Petitioners' SQR at 2.

[53] *See* Petitioners' SQR at 2–3.

than the finishing operations performed by UKCG.[54]

B. UKCG's Rebuttal to Petitioners' Supplemental Questionnaire Response

In rebuttal, UKCG asserts that the information submitted by Petitioners in both their Initiation Request and SQR is misleading because it: (a) Misstates the amounts of SDGE exported by UKCG to the United States, (b) misinterprets the significance of UKCG's increase of business with the United States as an attempt to circumvent the Order when it is only a result of increased global marketing on behalf of the company, and (c) draws incorrect conclusions regarding circumvention due to a reliance on publicly available information for HTS subcategory 3801, which is a basket category containing items much more broad than just artificial graphite rods.[55]

UKCG argues that the CBP data used by Petitioners in the Initiation Request to demonstrate the amount of SDGE exported to the United States by UKCG during the relevant time period do not accurately reflect the volume of exports. UKCG also disputes Petitioners' assertion from the Initiation Request that UKCG did not export SDGE to the United States until November 2008 (two months after the Department's announcement of the preliminary determination), and demonstrates that the company had certain exports of SDGE produced in the same manner as the merchandise in question prior to that date.[56]

Furthermore, UKCG attributes its increase in U.S. business to certain factors unrelated to the LTFV investigation and subsequent *SDGE Order,* including:

- The actual significance of any U.S. sales being overstated, because the low base of existing sales volume would yield any increase (or decrease) to appear significant in percentage terms, even though the actual change in sales volume was considerably less meaningful.[57]
- Internal efforts to obtain a larger global market share, which predate the *SDGE Order.*[58]
- The increase in demand due to the shortage of electrodes in the United States, created by high antidumping duties imposed on PRC SDGE.[59]

Finally, UKCG argues that it is misleading for Petitioners to point to a swing in the import figures for a broad-basket 3801.10.00 "artificial graphite" HTS subcategory, such as the large increase in January 2009, and attribute such an increase to UKCG's sales of finished SDGE to the United States, since the total amount UKCG sales of finished SDGE to the United States during that year was lower than the imports of unfinished artificial graphite imported into the country in that single month. UKCG also points out that, though Petitioners submitted import data extracted from the uktradeinfo.com website in the November 30, 2010 SQR, they did not provide other information available at the same Web site, which shows that over 40 U.K. companies imported products under HTS 3801.10.00 in 2008. UKCG asserts that this information undermines Petitioners' arguments regarding circumvention, and shows the import data for HTS 3801.10.00 to be overstated and unreliable.[60]

Analysis

Based on our analysis of Petitioners' anti-circumvention inquiry request, summarized above, the Department determines that Petitioners have satisfied the criteria to warrant an initiation of a formal anti-circumvention inquiry pursuant to section 781(b)(1) of the Act and 19 CFR 351.225(h). In accordance with 19 CFR 351.225(e), if the Department finds that the issue of whether a product is included within the scope of an order cannot be determined based solely upon the application and the descriptions of the merchandise, the Department will notify by mail all parties on the Department's scope service list of the initiation of a scope inquiry, including an anti-circumvention inquiry. In addition, in accordance with 19 CFR 351.225(f)(1)(ii), a notice of the initiation of an anti-circumvention inquiry issued under paragraph (e) of this section will include a description of the product that is the subject of the anti-circumvention inquiry, *i.e.,* SDGE, as provided in the scope of the *SDGE Order,* produced from unfinished artificial graphite rod components from the PRC that are further machined and finished in the United Kingdom for exportation to the United States. Furthermore, in accordance with 19 CFR 351.225(f)(1)(ii), the Department will explain the reasoning for its decision to initiate an anti-circumvention inquiry, which is provided below.

With regard to whether the merchandise exported to the United States is of the same class or kind as subject merchandise produced in the PRC, Petitioners have presented information to the Department indicating that, pursuant to section 781(b)(1)(A) of the Act, the merchandise being exported from the United Kingdom by UKCG may be of the same class or kind as SDGE produced in the PRC, which are subject to the *SDGE Order.* While UKCG contends that its finished SDGE exports to the United States are of U.K. origin, UKCG has not presented evidence demonstrating that the merchandise exported to the United States is not of the same class or kind as merchandise subject to the *SDGE Order.* Consequently, the Department finds that Petitioners have provided sufficient information in their requests regarding the class or kind of merchandise to warrant initiation of an anti-circumvention inquiry.

With regard to completion or assembly of merchandise in a foreign country, pursuant to section 781(b)(1)(B) of the Act, Petitioners have also presented information to the Department indicating that the SDGE exported from the United Kingdom are being processed by UKCG from unfinished components which are produced in the PRC (*i.e.,* the country subject to the *SDGE Order*) and which might be, themselves, "unfinished SDGE" subject to the *SDGE Order.* While UKCG argues that such inputs are not subject to the *SDGE Order,* it does not provide evidence to contradict Petitioners' claim that the finished SDGE exported to the United States by UKCG are produced from inputs sourced from the PRC. Therefore, we find that the information presented by Petitioners regarding this criterion supports their request to initiate an anti-circumvention inquiry.

Further, we find that Petitioners have provided sufficient evidence to demonstrate that the processing performed in the United Kingdom may be minor or insignificant, as described by sections 781(b)(1)(C) and 781(b)(2) of the Act. In particular, we find that Petitioners' submissions suggest that the level of overall investment, R&D, sophistication of production processes (and the degree to which they alter the fundamental characteristics of the merchandise), and production facilities needed for UKCG to machine and finish the components in question into finished SDGE for exportation to the United States may be insignificant, especially when compared to the level of investment, facilities, R&D, and processes required by SDGE producers in the PRC to manufacture said components. We find that Petitioners

[54] *See* Petitioners' SQR at 3.

[55] *See* UKCG's SQR Rebuttal at 2.

[56] *See* UKCG's SQR Rebuttal at 2–4.

[57] *See* UKCG's SQR Rebuttal at 4.

[58] *See* UKCG's SQR Rebuttal at 4–5.

[59] *See* UKCG's SQR Rebuttal at 4.

[60] *See* UKCG's SQR Rebuttal 5–6.

have also provided evidence to demonstrate that finishing processes in the United Kingdom may add little value to the merchandise imported into the United Kingdom, as exported to the United States. Though UKCG provides rebuttal evidence to demonstrate that the processes performed in the United Kingdom are, indeed, sophisticated and contend that Petitioners' arguments are based on the incorrect conclusion that the SDGE component inputs sourced from the PRC are in-scope (citing to the U.K. Customs and CBP rulings noted above), we do not find that their arguments are sufficient to deter the Department from initiating an anti-circumvention inquiry to attain more information regarding the concerns raised by Petitioners. As a result, our subsequent analysis will focus on UKCG's machining and finishing operations in the United Kingdom (in addition to information regarding pattern of trade, as discussed below) and we will closely examine the nature of the materials sourced from the PRC and whether those materials are subject to the scope of the *SDGE Order.*

With respect to the value of the merchandise produced in the PRC pursuant to section 781(b)(1)(D) of the Act, Petitioners rely on their "minor or insignificant processing" arguments summarized above, as well as certain proprietary cost information provided in the initial *Petition,* to indicate that the value of the unfinished SDGE components may be significant relative to the total value of a the finished SDGE exported to the United States. We find that the information, as discussed above, adequately meets the requirements for initiation pursuant to section 781(b)(1)(D) of the Act.

Regarding whether action is needed to prevent evasion of the *SDGE Order,* pursuant to section 781(b)(1)(E) of the Act, Petitioners do not address this issue directly, instead addressing this criterion in their arguments regarding "pattern of trade" pursuant to section 781(b)(3) of the Act. Specifically, they rebut UKCG's reliance on the BOI ruling and the CBP ruling as support for either the appropriateness of the HTS 3801 sub-classification for the unfinished components or confirmation of U.K. origin of the finished merchandise in question. Petitioners conclude that neither ruling is relevant for the purposes of the issues present in the instant proceeding. Conversely, UKCG emphasizes the weight of these determinations and implores the Department to consider them in its analysis on the issue of proper classification of the unfinished SDGE components for the purposes of this initiation determination. We will seek more information regarding the proper country of origin classification for the finished SDGE imported into the United States; however, we note that Petitioners are correct to point out that neither the BOI nor the CBP ruling are legally binding for the purposes of antidumping proceedings in the United States.[61] While we will give each document due consideration for the purposes of our ultimate anti-circumvention determination, we do not find the content of either document sufficient to compel the Department to decline to initiate such a proceeding.

Finally, we find that Petitioners have provided sufficient evidence, in both their Initiation Request and SQR, to fulfill the additional initiation criteria specified in section 781(b)(3) of the Act. Though Petitioners do not show that UKCG is affiliated with any PRC producer of subject merchandise, they demonstrate that the company has a business relationship with PRC producers of subject merchandise. Furthermore, information provided by Petitioners regarding imports and exports under HTS 3801 and 8545, suggests that (a) U.K. importers are sourcing PRC-produced unfinished SDGE components in increasing quantities, and (b) exports of finished SDGE from the United Kingdom have increased since the beginning of the initial SDGE investigation. Although UKCG provides evidence to demonstrate that Petitioners' information may be distorted or misstated due to certain factors, the Department intends to seek further information on this pattern of trade issue during the course of this inquiry, and will request greater detail as to the nature of UKCG's relationship with PRC producers of subject merchandise and timing of sales and sourcing. As such, though we recognize UKCG's concerns regarding the conclusions reached by Petitioners in their analysis of the pattern of trade data placed on the record, we do not agree with UKCG that the Department should conclude that such concerns are sufficient to refrain from further inquiry.

Therefore, for the reasons stated above, we have determined that Petitioners have provided sufficient basis for the Department to initiate a formal anti-circumvention inquiry concerning the *SDGE Order,* pursuant to section 781(b) of the Act. In accordance with 19 CFR 351.225(l)(2), if the Department issues a preliminary affirmative determination, we will then instruct CBP to suspend liquidation and require a cash deposit of estimated duties on the merchandise.

This anti-circumvention inquiry covers UKCG only. If, within sufficient time, the Department receives a formal request from an interested party regarding potential circumvention of the *SDGE Order* by other companies in the United Kingdom, we will consider conducting additional inquiries concurrently.

The Department will, following consultation with interested parties, establish a schedule for questionnaires and comments on the issues. The Department intends to issue its final determination within 300 days of the date of publication of this initiation pursuant to section 781(f) of the Act. This notice is published in accordance with 19 CFR 351.225(f).

Dated: February 17, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–6451 Filed 3–17–11; 8:45 am]

BILLING CODE P

[61] *See, e.g., Tapered Roller Bearings* at Comment 1.

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement (NAFTA), Article 1904 Binational Panel Reviews

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of decision of panel.

SUMMARY: On March 10, 2011, the binational panel issued its decision in the review of the determination on remand made by the International Trade Commission, respecting Light-Walled Rectangular Pipe and Tube from Mexico: Final Determination of Material Injury to a U.S. Industry (NAFTA Secretariat File Number USA–MEX–2008–1904–04). The binational panel affirmed the International Trade Commission's determination on remand. Copies of the panel's order are available from the U.S. Section of the NAFTA Secretariat.

FOR FURTHER INFORMATION CONTACT: Valerie Dees, United States Secretary, NAFTA Secretariat, Suite 2061,14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement ("Agreement") establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty

cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* ("Rules"). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686). The panel review in this matter has been conducted in accordance with these Rules.

Panel Decision: The panel affirmed the International Trade Commission's determination on remand respecting Light-Walled Rectangular Pipe and Tube from Mexico: Final Determination of Material Injury to a U.S. Industry.

Dated: March 14, 2011.

Valarie Dees,

U.S. Secretary, NAFTA Secretariat.

[FR Doc. 2011–6311 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–918]

Steel Wire Garment Hangers From the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Robert Palmer, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; (202) 482–6905.

Background

On November 29, 2010, the Department of Commerce ("Department") published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on steel wire garment hangers from the People's Republic of China ("PRC") covering the period October 1, 2009, through September 30, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews* 75 FR 73036 (November 29, 2010) ("*Initiation Notice*"). On December 23, 2010, the M&B Metal Products Inc. ("Petitioner") withdrew its request for an administrative review of 87 [1] companies out of the 102 companies upon which we initiated the administrative review. Petitioner was the only party to request a review of these 87 companies.

Partial Rescission

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. Petitioner's request was submitted within the 90 day period and, thus, is timely. Because Petitioner's withdrawal of its request for review is timely and because no other party requested a review of the aforementioned companies, in accordance with 19 CFR 351.213(d)(1), we are partially rescinding this review with respect to the 87 companies listed above.

Assessment Rates

The Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries. For those companies for which this review has been rescinded and which have a separate rate, 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)(2). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice for those companies with a separate rate.

For the above companies that are part of the PRC-wide entity, the Department cannot order liquidation at this time because although they are no longer under review as a separate entity, they may still be under review as part of the PRC-wide entity. Therefore, the Department cannot order liquidation instructions at this time because their respective entries may be under review in the ongoing administrative review. The Department intends to issue assessment instructions for the PRC-wide entity, 15 days after publication of the final results of the ongoing administrative review.

Notification to Importers

This notice serves as a final reminder to importers for whom this review is being rescinded, as of the publication date of this notice, of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the

[1] These 87 companies are: Angang Clothes Rack Manufacture Company Limited; Bazhou Sanqiang Furniture Co., Ltd.; Bestallied International Corp.; Bestluck Enterprise Limited; Blue Mountain Imp Exp Co Ltd.; Bon Voyage Logistics Inc.; Butler Courtesy (Guilin) Inc.; C Import And Export (HongKong) Co., Ltd.; Century Distribution System (Shenzhen) Ltd.; Changzhou Fortune Handicraft Co., Ltd.; Changzhou MC Imp. & Exp. Co. Ltd. a/k/a Changzhou MC I E Co., Ltd.; China Fujian Minhou Shenghua Handicrafts Co., Ltd.; China Ningbo Wahfay Industrial (Group) Co., Ltd.; CTN Limited Company; CTO International Co. Ltd.; Eagle Brand Holdings Limited Ecocom Crafts Co., Ltd. a/k/a/Hangzhou Ecocom Crafts Co., Ltd.; Eisho Co., Ltd. a/k/a Eisho Hanger Co., Ltd.; Fujian Pucheng Breeze Home Products, Inc.; Good Wonder Ltd.; Guangdong Machinery Imp. & Exp. Co.; Guangdong Provincial Taoyue Manufacturing Co., Ltd.; Guangxi Yikai Industry and Trade Co., Ltd. ; Guangzhou Haojin Motorcycle Company; Guangzhou Zhuocheng Plastic Co., Ltd.; Guilin Betterall Household Articles Co., Ltd.; Guilin Harvest Co., Ltd.; Guilin Jinlai Imp. & Exp. Co., Ltd.; Guilin Yusense Home Collection Co., Ltd.; Haimen Jinhang Business Trading Co.; Haiyan Lianxiang Hardware Products Co.; Hangzhou Dunli Import & Export Co.; Hanji Metals and Plastics Crafts Co.; Hd Supply Shenzhen; Hezhou City Yaolong Trade Co Ltd.; Jiahe International Trading Co.; Jiangmen Masters Hardware Products; Jiangsu Y and S Inc.; Jiangyin Hongji Metal Products Co., Ltd.; K.O.D Solutions Limited Dongguan Office; Kingtex Imp & Exp Co., Ltd.; Laidlaw Company LLC; Mainfreight Int'l Logistics (Shanghai) Co. Ltd.; Maxplus Industries Co., Ltd.; Nanjing Feisike Import & Export Trading Co. Ltd.; Ningbo Beilun Huafa Metal Products; Ningbo Everun International Limited; Ningbo First Rank International Co.; Ningbo Home-dollar Imp. & Exp. Corp.; Ningbo Hongdi Measuring Tape Co., Ltd.; Ningbo Municipal Xinyu Imp. & Exp. Co.; Ningbo Wellway Imp. & Exp. Co., Ltd.; Overseas Int'l Group Corp.; Plastic Intercon Co., Ltd.; Quyky Yanglei International Co., Ltd., a/k/a/ Quyky Group; Shandong Autjinrong Found-assemble Co., Ltd.; Shanghai Cheertie Display Fixture; Shanghai Electric Imp. & Exp. Co., Ltd.; Shanghai Hua Yue Packaging Products; Shanghai International Trade Transportation Co., Ltd.; Shanghai International Trade Yee Da Imp. & Ex. Co. Ltd.; Shanghai New Union Textra Import & Export Co., Ltd.; Shanghai Overseas Enterprises Co.Ltd.; Shanghai Textile Raw Materials; Shanghai Wintex Import & Export Co., Ltd.; Shaoxing Amazon Prime Trade Co., Ltd.; Shaoxing Dingli Metal Clotheshorse Co., Ltd.; Shaoxing Kinglaw Metal Products Co., Ltd.; Shenzhen He Zhenglong Imp. & Exp. Co. Ltd., a/k/a Shenzhen He Zhong Long Imxp; Shenzhen SED Industry Co., Ltd. a/k/a/Shenzhen Sed Electronics Co.; Sunny Metal Inc.; Taishan Jinji Hangers Co., Ltd.; Taizhou Huasheng Wooden Co., Ltd.; Tianjin Tailai Imp & Exp Co., Ltd.; Transtek Automotive Products Co. Ltd.; Tri-star Trading Co.; Uasha Group International Shanghai Ltd.; Universal Houseware (Dongguan); Wenzhou N.& A. foreign Trade Corp.; Wenzhou Pan Pacific Foreign Trade Co., Ltd.; Wesken International (Kunshan) Co., Ltd.; World Trading Service Limited; X&Y Papa-fix Industry Limited; Zhangjiagang Maohua Coating & Adorn Zhejiang Arts and Crafts Import; Zhejiang Huamao International Co., Ltd.; and Zhejiang Wenzhou Packaging Imp. & Exp.

Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order ("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.

This notice is issued and published in accordance with 19 CFR 351.213(d)(4).

Dated: March 14, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–6455 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–912]

Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Raquel Silva or Frances Veith, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–6475 or (202) 482–4295, respectively.

Background

On September 1, 2010, the Department of Commerce ("the Department") published a notice of opportunity to request an administrative review of the antidumping duty order on certain new pneumatic off-the-road tires ("OTR tires") from the People's Republic of China ("PRC") for the period of review ("POR") September 1, 2009, through August 31, 2010. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 75 FR 53635 (September 1, 2010). On September 17, 2010, Mai Shandong Radial Tyre Co., Ltd. ("Mai Shandong") an exporter of subject merchandise, requested that the Department conduct an administrative review of its exports to the United States during the POR. On September 27, 2010, Qingdao Free Trade Zone Full World International Trading Co., Ltd. ("Full World"), an exporter of subject merchandise, also requested a review of its own exports. On September 30, 2010, Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC (collectively "Bridgestone"), a domestic interested party to the proceeding, requested that the Department conduct an administrative review of OTR tire exports from the following entities: (1) Hangzhou Zhongce Rubber Co., Ltd. ("Hangzhou Zhongce"), (2) Hebei Starbright Tire Co., Ltd. ("Starbright"), (3) KS Holding Limited/KS Resources Limited ("KS Holding"), (4) Laizhou Xiongying Rubber Industry Co., Ltd. ("Laizhou Xiongying"), (5) Qingdao Taifa Group Co., Ltd. ("Qingdao Taifa"), (6) Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC"), and (7) Weihai Zhongwei Rubber Co., Ltd. ("Weihai Zhongwei"). On September 30, 2011, Guizhou Tyre Co., Ltd., Guizhou Advance Rubber Co., Ltd. and Guizhou Tyre Import and Export Corporation (collectively, "GTC") requested an administrative review of its own OTR tire exports. The Department then published in the **Federal Register** the initiation notice for the antidumping duty administrative review of OTR tires from the PRC for the 2009–2010 POR. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 66349 (October 28, 2010).

Partial Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the party that requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. The Secretary may also extend this time limit if the Secretary decides that it is reasonable to do so. On November 15, 2010, GTC timely withdrew its request for a review of its exports. On January 24, 2011, Full World timely withdrew its request for a review of its exports. On January 26, 2011, Bridgestone timely withdrew its request for review of Starbright, Hangzhou Zhongce, KS Holding, Laizhou Xiongying, and Qingdao Taifa.

On February 17, 2011, Mai Shandong withdrew its request for a review of its exports. Although the deadline to withdraw requests for review was January 26, 2011, the Department notes that this administrative review remains in its early stages, and significant resources have not yet been expended on this review as a whole. Therefore, the Department is accepting Mai Shandong's withdrawal.

Because no additional party requested a review of GTC, Starbright, Hangzhou Zhongce, KS Holding, Laizhou Xiongying, Qingdao Taifa, Full World, and Mai Shandong, the Department hereby rescinds the administrative review of OTR tires with respect to these entities in accordance with 19 CFR 351.213(d)(1). This administrative review will continue with respect to TUTRIC and Weihai Zhongwei because requests for review of these companies remain.

Assessment Rates

The Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries. For GTC, Starbright, KS Holding, Laizhou Xiongying, and Full World, which each had previously established eligibility for a separate rate, 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)(2). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Because Hangzhou Zhongce, Qingdao Taifa, and Mai Shandong remain part of the PRC entity, their respective entries may be under review in the ongoing administrative review. Accordingly, the Department will not order liquidation of entries for Hangzhou Zhongce, Qingdao Taifa, or Mai Shandong. The Department intends to issue assessment instructions for the PRC entity, which will cover any entries by Hangzhou Zhongce, Qingdao Taifa, and Mai Shandong, 15 days after publication of the final results of the ongoing administrative review.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under section 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 assumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.

This notice is issued and published in accordance with section 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: March 14, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–6456 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Trade Mission to South Africa

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

Mission Description

The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service is organizing a Trade Mission to South Africa September 19–23, 2011, to help U.S. firms find business partners and help export equipment and services in Johannesburg and Cape Town, South Africa.

Targeted sectors are:

- *Sustainable and Efficient Energy Technologies, Equipment and Products.*
- Electrical generating equipment.
- Renewable energy technologies.
- Clean coal technology.
- Transmission and distribution equipment and technology.
- Energy efficiency building technologies and products.
- *Productivity Enhancing Agricultural Technologies and Equipment.*
- Crop production equipment and machinery.
- Irrigation equipment and technology.
- Crop storage and handling.
- Precision farming technologies.
- *Educational Services and Skills Development.*
- Training and education services and systems.
- Educational and training franchises.
- Educational materials.

Although focused on the sectors above, the mission also will consider participation from companies in other appropriate sectors as space permits.

This mission will be led by a senior Department of Commerce Official and will include business-to-business matchmaking with local companies, market briefings, and meetings with key government officials.

Commercial Setting

South Africa represents the largest economy and most sophisticated and diversified industrial and services sectors in Sub-Saharan Africa. Recent reports show the economy recovering well from the recent global recession. Projections are for economic growth in gross domestic product (GDP) to average five percent for the next decades as the country continues to develop. Sectors such as energy, health care, agriculture, vehicles, processed foods, and others are poised for solid growth in South Africa. The country also stands to benefit from rapid growth anticipated in many of its Sub-Saharan African trading partners, where South African-based companies have strong market prospects. In 2009, total U.S.-South Africa trade was $10.3 billion, a significant decrease from 2008 levels of $16.4 billion. However, 2010 trade figures for January to September show growth in trade of over 40 percent above corresponding 2009 levels and indicate a strong recovery in U.S. exports to the country. Leading U.S. exports are machinery, vehicles, aircraft, chemicals, IT equipment and services.

Best Prospects in Mission Targeted Sectors

Energy

State-owned utility Eskom produces about 95 percent of the electricity used in South Africa and about 60 percent of the electricity generated on the African continent. Its operations incorporate power generation, transmission and distribution. Although Eskom has a total of 24 power stations in commission, with a total generating capacity of 42,011 MW, this has proved inadequate for the current electricity demand.

Eskom is building additional power stations and power lines on a massive scale to meet rising electricity demand in South Africa. Eskom's capacity expansion budget is $56 billion (R385 billion) up to 2013 and is expected to grow to more than R1 trillion ($144 billion) by 2026. It plans to double capacity to 80,000 MW by 2026. Since 2005 Eskom commissioned projects totaling an additional 4,454 MW and plans to deliver an additional 16,304 MW in power station capacity by 2017. This creates opportunities for U.S. firms to provide products, services and the latest clean coal technologies to the South African energy market.

According to the South African Government, 30 percent of all new power generation will be the responsibility of independent power producers (IPPs). In response to South Africa's plans to limit its CO_2 emissions to below 275 million tons by 2025, Eskom, still the single buyer of all privately produced generation capacity, is studying the integration of solar generation from the Northern Cape Province, including its own World Bank supported Concentrating Solar Power (CSP) project, into the grid. The focus is to connect the first 1,000 MW, which could be introduced by 2016. Eskom is already rolling out plans for a 400-kV transmission system in the area.

The country's power supply shortfall has accelerated the need to diversify Eskom's energy mix and its move towards alternative energy sources, including various forms of renewable energy. The South African Department of Energy (DoE) recently released the Integrated Resource Plan (IRP 2010) for public comment. The IRP calls for diversifying sources of power and will call for renewable energy sources to supply 16 percent and nuclear sources to supply 14 percent of power by 2030. In addition, detailed work is currently under way to determine a range of near-term electricity demand-reduction options that could yield the equivalent of some 5,000 MW and help stabilize the South African system between now and 2016. Specific opportunities include renewable-energy generation, cogeneration, own generation, municipal generation and other independent power producer programs.

As part of its financial restructuring and capital expansion program, Eskom has received authorization to increase electricity prices to consumers by an average of 25 percent per year for the next three years, and will seek additional increases for the following several years. The effect of steadily rising energy costs for industry and consumers will be to create market opportunities for a wide range of energy saving technologies ranging from energy efficient building products, lighting, heating and air conditioning, metering, and similar products and technologies.

Agricultural Equipment

South Africa has by far the most modern, productive and diverse agricultural economy in Sub-Saharan Africa. It is a net exporter of agricultural and food products and is self sufficient in food products. South Africa offers U.S. exporters of agricultural equipment

and technology a wide range of opportunities. The country's annual agricultural equipment market is estimated at approximately US$919 million. Tractor sales constitute 60 percent of the total agricultural equipment market followed by combine and baler sales. Five percent of all new agriculture equipment is being produced locally; 95 percent of all agriculture equipment and parts are being sourced from international markets, and at least 20 percent of new equipment and technologies are currently being sourced from the U.S. However, used equipment has limited market opportunities.

Agriculture is a leading component of the South African economy, employing a million people, and agro-industrial activity amounts to about fifteen percent of GDP, with substantial growth potential. Although eighty percent of South Africa's land is used for agriculture only 15 percent of that is arable, with the rest used for pastoral and other purposes. South Africa's recent broad-based agriculture empowerment charter (AgriBEE) aims to boost land reforms and black ownership of farmland to 30 percent by 2014. With the implementation of AgriBEE creating new land owners from previously disadvantaged communities, mission participants will have an opportunity to explore new emerging market opportunities for equipment and technology.

Educational Materials and Services

Many of South Africa's universities are world-class academic institutions, at the cutting edge of research in certain spheres such as mining and engineering. At about 5.3 percent of GDP and 20 percent of total state expenditure, South Africa has one of the highest rates of public investment in education in world terms. However, there are still huge imbalances in education in the country. The greatest challenges lie in the poorer, rural provinces like the Eastern Cape and KwaZulu-Natal. One of the country's greatest challenges is persistent unemployment as it grapples with the effects of a large unskilled labor force. For that reason, improving education and skills development are priorities for the government.

There is potential for U.S. companies offering training programs that will address the serious shortage of skilled labor force in sectors such as hospitality, utilities, construction, and transportation. On the business skills area, there is a need for programs that offer job skills assessment systems which help employers select, hire, train and develop prospective employees. Other opportunities include "learning centers" franchises, focusing on after-school care and tuition, both for primary and secondary students/learners, in the areas of arithmetic, math and science respectively. Franchising opportunities also exist for adult learning centers, given the large number of people with gaps in their formal education, in the area of languages, computer training, and general business skills.

Mission Goals

The goal of the South Africa Trade Mission is to provide U.S. participants with first-hand market information, one-on-one meetings with business contacts, including potential agents, distributors and partners so they can position themselves to enter or expand their presence in the South African market. South Africa, with its well developed business and financial sector, its indigenous multinational enterprises, substantial foreign investment, and well developed infrastructure, is often seen as the point of access to develop markets throughout Sub-Saharan Africa. Subject to prior consultation and confirmations, mission participants will have the opportunity to explore contacts with local firms active in the region and will have the option of extending their stay for additional business development activities in South Africa or meetings in neighboring countries.

Mission Scenario

The South Africa Mission will visit both Johannesburg and Cape Town, allowing participants to access the two largest markets and business centers in the country. In each city, participants will meet with new business contacts.

PROPOSED TIMETABLE

Day of week	Date	Activity
Sunday	Sept. 18	Arrive in Johannesburg.
Monday	Sept. 19, Johannesburg	Mission Meetings Officially Start. Breakfast briefing with U.S. Embassy Staff. One-on-one business appointments. Evening business reception.
Tuesday	Sept. 20, Johannesburg	One-on-one business appointments continue.
Wednesday	Sept. 21, Travel to Cape Town	Briefing by Cape Town Consulate Staff. One-on-one business meetings. Evening business reception.
Thursday	Sept. 22, Cape Town	One-on-one business appointments continue. Mission Officially Ends.

***Note:** The final schedule and potential site visits will depend on the availability of local government and business officials, specific goals of mission participants, and air travel schedules.

Participation Requirements

All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. The mission is designed for a minimum of 15 and a maximum of 20 companies to participate in the mission from the applicant pool. U.S. companies already doing business in the target markets as well as U.S. companies seeking to enter these markets for the first time are encouraged to apply.

Fees and Expenses

After a company has been selected to participate on the mission, a participation fee to the U.S. Department of Commerce is required. The participation fee for one representative is $2,125 for a small or medium-sized enterprise (SME) [1] and $2,565 for large firms. The fee for each additional firm representative (SME or large) is $450. Expenses for travel, lodging, some

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations. *See http://www.sba.gov/contractingopportunities/owners/basics/whatismallbusiness/index.html.* Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008. *See http://www.export.gov/newsletter/march2008/initiatives.html.*

meals, and incidentals will be the responsibility of each mission participant.

Conditions for Participation

• An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the U.S. Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.

• Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least 51 percent U.S. content of the value of the finished product or service.

Selection for Participation

• Suitability of the company's products or services to the mission goals.

• Applicant's potential for business in South Africa, including likelihood of exports resulting from the mission.

• Consistency of the applicant's goals and objectives with the stated scope of the mission.

Additional factors, such as diversity of company size, type, location, and demographics, may also be considered during the selection process.

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

Selection Timeline

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar—*http://www.trade.gov/trade-missions/*—and other Internet Web sites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

Recruitment for the mission will begin immediately, and conclude at 11:59 p.m. on July 18, 2011. Applications received after 11:59 p.m. on July 18, 2011, will be considered only if space and scheduling constraints permit.

Contacts

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Teresa Yung,

Global Trade Programs, Commercial Service Trade Missions Program.

[FR Doc. 2011–5993 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA303

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that an Exempted Fishing Permit (EFP) application contains all of the required information and warrants further consideration. In support of research conducted by the Coonamessett Farm Foundation, Inc. (CFFI), this EFP would grant exemptions from the limited access scallop days-at-sea (DAS) program to allow CFFI to conduct tests with its low profile excluder dredge (CFFI dredge). In addition, limited access and limited access general category (LAGC) vessels would be authorized to temporarily retain fish that would otherwise be restricted by commercial fishing regulations. Such regulations include minimum fish sizes; fish possession limits; species quota closures; prohibited fish species, not including species protected under the Endangered Species Act; and gear-specific fish possession restrictions. The Assistant Regional Administrator has made a preliminary determination that the activities authorized under this EFP would be consistent with the goals and objectives of the Atlantic sea scallop Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue an EFP.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments must be received on or before April 4, 2011.

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

• *E-mail: NERO.EFP@noaa.gov.* Include in the subject line "Comments on CFFI flounder bycatch EFP."

• *Mail:* Patricia A. Kurkul, Regional Administrator, NMFS, NE Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on CFFI flounder bycatch EFP."

• *Fax:* (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Christopher Biegel, Fisheries Management Specialist, 978–281–9112.

SUPPLEMENTARY INFORMATION: CFFI has been awarded a research grant through the Commercial Fisheries Research Foundation titled, "Testing of a Low Profile Excluder Dredge for Winter Flounder Bycatch Reduction." The goal of this research is to examine how modifications to the CFFI excluder dredge will impact the bycatch of winter flounder by commercial scallop vessels. The research will consist of three or four trips of 5 to 7 days each, for a total of 21 days, and deploy the CFFI dredge to document the impacts of dredge modifications on catch and bycatch rates. Over the course of the project, there will be 240 tows of less than 30 minutes at 4.5 knots. The vessel is expected to catch the following: Scallops 45,000 lb (20,412 kg); winter flounder 4,000 lb (1,815 kg); yellowtail flounder 300 lb (136 kg); monkfish 2,000 lb (907 kg); and little skate 8,000 lb (3,629 kg). All catch will be discarded after standard species composition, size, and catch rate data have been collected. The gear testing would occur between April 2011 and April 2012, in open areas of offshore of Massachusetts and Rhode Island at a depth of 15 to 30 fathoms (30–60 m), including Cape Cod Bay, South Channel, and Southern New England.

CFFI submitted a complete EFP application on February 4, 2011, requesting exemption allowing commercial fishing vessels to fish

outside of the limited access Atlantic sea scallop DAS regulations at 50 CFR 648.53(b) and to temporarily retain fish that would otherwise be restricted by commercial fishing regulations. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

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

Dated: March 15, 2011.

Margo Schulze-Haugen,

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

[FR Doc. 2011–6443 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA296

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Applications for four new scientific research permits.

SUMMARY: Notice is hereby given that NMFS has received four scientific research permit application requests relating to Pacific salmonids. The proposed research is intended to increase knowledge of species listed under the Endangered Species Act (ESA) and help guide management and conservation efforts. The applications may be viewed online at: *https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm*

DATES: Comments or requests for a public hearing on the applications must be received at the appropriate address or fax number (*see* **ADDRESSES**) no later than 5 p.m. Pacific standard time on April 18, 2011.

ADDRESSES: Written comments on the applications should be sent to the Protected Resources Division, NMFS, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232–1274. Comments may also be sent via fax to 503–230–5441 or by e-mail to *nmfs.nwr.apps@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Garth Griffin, Portland, OR (*ph.:* 503–231–2005, *Fax:* 503–230–5441, *e-mail: Garth.Griffin@noaa.gov*). Permit application instructions are available from the address above, or online at *apps.nmfs.noaa.gov http://www.nwr.noaa.gov./.*

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

The following listed species are covered in this notice:

Chinook salmon (*Oncorhynchus tshawytscha*): threatened lower Columbia River (LCR), Snake River fall-run Chinook salmon (*O. tshawytscha*), Puget Sound Chinook salmon (*O. tshawytscha*), California Coast Chinook salmon (*O. tshawytscha*).

Chum salmon (*O. keta*): Threatened Columbia River (CR).

Steelhead (*O. mykiss*): Threatened SR.

Coho salmon (*O. kisutch*): Threatened LCR, threatened Oregon Coast (OC).

Authority

Scientific research permits are issued in accordance with section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et. seq*) and regulations governing listed fish and wildlife permits (50 CFR parts 222–226). NMFS issues permits based on findings that such permits: (1) Are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species that are the subject of the permit; and (3) are consistent with the purposes and policy of section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (*see* **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

Applications Received

Permit 16333

NOAA Fisheries' Northwest Fisheries Science Center (NWFSC) is seeking a 5-year permit to conduct yearly survey trawling operations off the West Coast of the U.S. The researchers would take individuals from all the species covered in this notice except for OC coho. The purpose of the research is to provide fisheries-independent indices of stock abundance to support stock assessment models for commercially and recreationally harvested groundfish species. The survey would collect data on 90+ fish species in the ocean to fulfill the mandates of the Magnuson-Stevens Sustainable Fisheries Act (MSA). The survey would run from May through October every year and cover the area from the US-Canada border at Cape Flattery, Washington to the US-Mexico border, at depths ranging from 55 meters to 1,280 meters. The objectives of the survey are to: (1) Quantify the distribution and relative abundance of commercially valuable groundfish species, with an emphasis on rockfish species of the genus *Sebastes;* (2) obtain biological data (length, weight, gender, and maturity) from various species of interest; (3) collect age structures for species covered by MSA fisheries management plans; (4) record net mensuration and trawl performance data; and (5) collect oceanographic data (i.e., surface and bottom water temperature, salinity, near bottom dissolved oxygen concentration, chlorophyll fluorescence, and irradiance near bottom).

The research would benefit listed species by increasing our understanding of the connections between various oceanographic conditions and fish survival in the marine environment. This greater understanding, in turn, will be used to inform future decisions regarding listed species management and recovery. The researchers do not intend to kill any listed fish, but a few may die as an inadvertent result of the proposed activities.

Permit 16335

The NWFSC is seeking a 5-year permit to conduct biennial acoustic surveys of Pacific hake along the West Coast of the U.S. during odd-numbered years. The researchers would take individuals from all species covered in this notice except for SR steelhead. The age-specific estimates of total population abundance derived from the surveys are a key data source for the joint U.S.-Canada Pacific hake stock assessments and, ultimately, are critical to informing decisions about U.S., Tribal, and international harvest levels. This integrated acoustic and trawl survey is used to assess the distribution, biology, and status and trends in abundance of Pacific hake. The survey would be conducted from June to September; it would target aggregations of Pacific hake along the continental shelf and break. The survey would extend from Monterey, California to Dixon Entrance, Alaska, in depths from about 50 meters to 1,500 meters. The NWFSC is seeking authorization for the U.S. portion of the survey. The goal of the survey is to obtain representative catches of acoustically-detected organisms.

The research would benefit listed species by helping make the West Coast hake fishery more specific to the target species and thereby reducing bycatch of other species. The researchers do not intend to kill any listed fish, but a few may die as an inadvertent result of the proposed activities.

Permit 16337

The NWFSC is seeking a 5-year permit to conduct Pacific hake Acoustic Inter-vessel Calibration (IVC) research and gear trial cruises along the West Coast of the U.S. to make hake stock assessment and improve hake biomass estimates. The researchers would take individuals from all species covered in this notice except for OC coho and SR steelhead. The goals of the IVC research are to: (1) Compare acoustic estimates for hake between two vessels; (2) research acoustic differentiation between hake and Humboldt squid (*Dosidicus gigas*); and (3) confirm that groundtruthing tows (mid-water and bottom trawls) are adequately characterizing schools of hake. The IVC research would take place in the ocean from a point off the Strait of Juan de Fuca, Washington down to the central Oregon coast. If hake and Humboldt squid are not present at the time of the study, the cruise may extend to the south until they are found or until the vessels reach a point 100 nautical miles south of Monterey Bay, California. The IVC research would be conducted in June and July. The goal of the gear trial cruises is to test new equipment and methods to ensure that the best available science is used when conducting the biennial hake survey. The gear trial cruises would take place from August through September and would extend from Monterey, California to Dixon Entrance, Alaska, in depths from about 50 meters to 1,500 meters.

The proposed research would benefit listed species by generating information that, ultimately, will be used to help reduce the number of listed fish being accidentally caught in the hake fishery. The researchers do not intend to kill any listed fish, but a few may die as an inadvertent result of the proposed activities.

Permit 16338

The NWFSC is seeking a 5-year permit to test the efficacy of an open escape window bycatch reduction device to reduce Chinook salmon and rockfish bycatch in the Pacific hake fishery. The proposed activities would be conducted from May to September off the Central Oregon coast and, although it is unlikely, sampling may also occur off the coasts of Washington and northern California. All research tows would take place over the continental shelf and slope in depths of less than 1,000 meters; all captured fish would be identified, and some would be retained for the scientific analyses necessary for the research.

The research would benefit listed species by helping develop fishing methods and equipment that allow large-scale fisheries (like the hake fishery) to catch fewer threatened and endangered fish. The researchers do not intend to kill any listed fish, but a few may die as an inadvertent result of the proposed activities.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the applications, associated documents, and comments submitted to determine whether the applications meet the requirements of section 10(a) of the ESA and Federal regulations. The final permit decisions will not be made until after the end of the 30-day comment period. NMFS will publish notice of its final action in the **Federal Register**.

Dated: March 15, 2011.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–6441 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA244

Takes of Marine Mammals Incidental to Specified Activities; Russian River Estuary Management Activities

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from the Sonoma County Water Agency (SCWA) for an Incidental Harassment Authorization (IHA) to take marine mammals incidental to Russian River estuary management activities. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to SCWA to take, by Level B Harassment only, several species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than April 18, 2011.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910. The mailbox address for providing e-mail comments is *ITP.Laws@noaa.gov.* NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (*see* **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Supplemental documents provided by SCWA may also be found at the same address: Pinniped Monitoring Plan; Report of Activities and Monitoring Results—April 1 to December 31, 2010; and Russian River Estuary Outlet Channel Adaptive Management Plan. NMFS' Environmental Assessment (2010) and associated Finding of No Significant Impact, prepared pursuant to the National Environmental Policy Act, are available at the same site. Documents cited in this notice, including NMFS' Biological Opinion (2008) on the effects of Russian River management activities on salmonids, may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is published in the **Federal Register** to provide public

notice and initiate a 30-day comment period.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by Level B harassment as defined below. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization. If authorized, the IHA would be effective for one year from date of issuance.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

NMFS received an application on February 15, 2011 from SCWA for renewal of an IHA for the taking, by Level B harassment only, of marine mammals incidental to activities conducted in management of the Russian River estuary in Sonoma County, California. SCWA was first issued an IHA, valid for a period of one year, on April 1, 2010 (75 FR 17382). Management activities include management of a naturally-formed barrier beach at the mouth of the river in order to minimize potential for flooding of properties adjacent to the Russian River estuary and enhance habitat for juvenile salmonids, and biological and physical monitoring of the estuary. Flood control-related breaching of barrier beach at the mouth of the river may include artificial breaches, as well as construction and maintenance of a lagoon outlet channel. The latter activity, an alternative management technique conducted to mitigate impacts of flood control on rearing habitat for Endangered Species Act (ESA)-listed salmonids, occurs only from May 15 through October 15 (hereafter, the "lagoon management period"). Species known from the haul-out at the mouth of the Russian River, and analyzed in this document, include the harbor seal (*Phoca vitulina*), California sea lion (*Zalophus californianus*), and northern elephant seal (*Mirounga angustirostris*).

Breaching of naturally formed barrier beach at the mouth of the Russian River requires the use of heavy equipment (*e.g.,* bulldozer, excavator) and increased human presence. As a result, pinnipeds hauled out on the beach may exhibit behavioral responses that indicate incidental take by Level B harassment under the MMPA. Numbers of harbor seals, the species most commonly encountered at the haul-out, have been recorded extensively since 1972 at the haul-out near the mouth of the Russian River. Based on these monitoring data and SCWA's estimated number of management events, SCWA is requesting authorization to incidentally harass up to 2,735 harbor seals, nineteen California sea lions, and fifteen northern elephant seals during the one-year time span of the proposed IHA, from April 15, 2011 to April 14, 2012.

Description of the Specified Activity

The estuary is located about 97 km (60 mi) northwest of San Francisco in Sonoma County, near Jenner, California (see Figure 1 of SCWA's application). The Russian River watershed encompasses 3,847 km^2 (1,485 mi^2) in Sonoma, Mendocino, and Lake Counties. The mouth of the Russian River is located at Goat Rock State Beach; the estuary extends from the mouth upstream approximately 10 to 11 km (6–7 mi) between Austin Creek and the community of Duncans Mills (Heckel 1994). The proposed action involves management of the estuary to prevent flooding while preventing adverse modification to critical habitat for ESA-listed salmonids. During the lagoon management period, this involves construction and maintenance of a lagoon outlet channel that would facilitate formation of a perched lagoon. A perched lagoon, which is an estuary closed to tidal influence in which water surface elevation is above mean high tide, would reduce flooding while maintaining appropriate conditions for juvenile salmonids. Additional breaches of barrier beach may be conducted for the sole purpose of reducing flood risk.

The Russian River estuary is a drowned river valley formed via erosion during the early Pleistocene, when sea level was lower (Erskian and Lipps 1977). The bed of the estuary rises above mean sea level near Duncans Mills, about five miles from the river's mouth. Ocean tides can influence water surface elevation in the river as far as ten miles upstream near Monte Rio (Corps and SCWA 2004), and directly affect water elevation about five to seven miles upstream in the vicinity of Austin Creek (Erskian and Lipps 1977; Corps and SCWA 2004). Tides range approximately six feet and are diurnal (Erskian and Lipps 1977).

Closure of the estuary's bar is a complex process related to tides, waves and swells, sediment transport, and river flows (Largier 2008; RREITF 1994). Prior to dams and diversions in the Russian River watershed, the estuary was likely open to ocean tides for several months between late fall and early spring, when high stream flows coincided with larger coastal waves. As stream flow waned in the spring, sufficient hydraulic energy was not available to maintain a direct connection to the ocean. This, combined with the presence of bar building wave events, would often cause a barrier beach to form at the outlet of the estuary (NMFS 2008). Historically, flows during the summers were low and were unlikely to have breached the barrier beach once it formed. This pattern of open estuarine conditions in the late fall, winter and early spring, followed by estuary closure to ocean tides in the spring, summer, or early fall, remains evident today, though it is altered by management activity in the Russian River watershed.

Estuaries in California can become productive freshwater lagoons following formation of a barrier beach (Smith 1990), dependent upon the time of initial closure and freshwater inflow to the estuary. Conversion to freshwater occurs when freshwater from upstream builds up on top of the salt water layer, gradually forcing the salt water layer to seep back into the ocean through the barrier beach, or when freshwater outflow entrains some of the salt water at the boundary between fresh and salt layers; the process may take one month or more (Smith 1990). Until the conversion process has completed, stratification of the water by salinity

occurs. Saltwater, being denser, is located at the bottom, while freshwater is found on top. Stratification can limit both the quantity and quality of freshwater habitat, relative to a freshwater lagoon. When conversion of an estuary to a lagoon is complete, fish may have more abundant space and prey for survival. It is likely that, with reduced inflow and without artificial breaching, in the spring and summer the Russian River estuary would naturally form a perched or closed lagoon that in many years would contain a highly productive environment for rearing juvenile salmonids (NMFS 2008).

Closure of the bar can result in flooding of low-lying properties adjacent to the estuary. When the estuary closes, it may breach naturally or require mechanical breaching to open. Table 1 describes breaching events occurring in the estuary from 1996–2010. Artificial breaching may have occurred as far back as the 1800s; the County of Sonoma Department of Public Works (DPW) was responsible for breaching beginning in the early 1950s. SCWA took over breaching from DPW in 1995 (SCWA 2004). The historic method of artificial breaching causes the lagoon to return to a tidal system reconnected to the ocean, creating a near marine environment, with shallow depths and high salinity throughout most of the water column. In some areas salinity stratification contributes to low dissolved oxygen at the bottom. These conditions are neither natural nor optimal for the survival of juvenile salmonids (NMFS 2008).

Table 1. Breaching of the Russian River estuary from 1996 to 2010

Month	Year															
	1996	**1997**	**1998***	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**Total**
Jan						1								1,[1]	1	**4**
Feb												2				**2**
Mar		1,[1]						[1]								**3**
Apr		[1]				2			[1]			3	[1]	[1]		**9**
May		1,[1]			1	3			1				5			**12**
Jun		2		1	1		1	[1]						1		**7**
Jul	1			1									1		{1},[1]	**5**
Aug	(2)	1							[1]							**4**
Sep	1,(1)	2	4	1	1					1			1	1		**13**
Oct	1	1	3	2	2	2	[1]	2	(1)	1	[1]	[1]	1	4	2,[1]	**26**
Nov	[1]	1	1	1,[1]	4	[1]	3	1	(2)	2	[3]	2	1	4	[1]	**29**
Dec					2		1				[1]	2	1,[1]	4		**12**
Total	**7**	**12**	**8**	**7**	**11**	**9**	**6**	**5**	**6**	**4**	**5**	**10**	**12**	**17**	**6**	
SCWA	**3**	**9**	**8**	**6**	**11**	**8**	**5**	**3**	**1**	**4**	**0**	**9**	**10**	**15**	**3**	

Number of times breached by year and month, including artificial breaches by SCWA; natural breaches, denoted by [#]); unpermitted breaches conducted by private individuals, denoted by (#); and an outlet channel management event, conducted in accordance with NMFS' Biological Opinion (2008) and denoted by {#}.

* Type of breach was not recorded for 1998. All breaching events for 1998 are treated as done by SCWA.

Within the Russian River watershed, the U.S. Army Corps of Engineers (Corps), SCWA and the Mendocino County Russian River Flood Control and Water Conservation Improvement District (MCRRFCD) operate and maintain Federal facilities and conduct activities in addition to the previously described estuary management, including flood control, water diversion and storage, instream flow releases, hydroelectric power generation, channel maintenance, and fish hatchery production. The Corps, SCWA, and the MCRRFCD conducted these activities for many years before salmonid species in the Russian River—Central California Coast (CCC) steelhead (*Oncorhynchus mykiss*), CCC coho salmon (*O. kisutch*), and California Coastal Chinook salmon (*O. tshawytscha*)—were protected under the ESA. Starting with the listing of coho salmon in 1996 (61 FR 56138), SCWA and the Corps engaged NMFS in pre-consultation technical assistance to evaluate the potential risk their activities posed to these species. Upon determination that these actions were likely to affect salmonids, as well as designated critical habitat for these species, formal consultation was initiated. In 2008, NMFS issued a Biological Opinion (BiOp) for Water Supply, Flood Control Operations, and Channel Maintenance conducted by the Corps, SCWA, and MCRRFCD in the Russian River watershed (NMFS 2008). This BiOp found that the activities—including SCWA's estuary management activities—authorized by the Corps and undertaken by SCWA and MCRRFCD, if continued in a manner similar to recent historic practices, were likely to jeopardize the continued existence of threatened CCC steelhead and endangered CCC coho salmon and were likely to adversely modify critical habitat for those two species.

If a project is found to jeopardize a species or adversely modify its critical habitat, NMFS must develop a Reasonable and Prudent Alternative (RPA) to the proposed project in coordination with the Federal action agency and any applicant. A component of the RPA described in the 2008 BiOp requires SCWA to collaborate with NMFS and modify their estuary water level management in order to reduce marine influence (*i.e.,* high salinity and tidal inflow) and promote a higher water surface elevation in the estuary in order to enhance the quality of rearing habitat for juvenile steelhead. A program of potential incremental steps prescribed to reach that goal includes adaptive

management of the outlet channel. SCWA is also required to monitor the response of water quality, invertebrate production, and salmonids in and near the estuary to water surface elevation management in the estuary-lagoon system.

The analysis contained in the BiOp found that maintenance of lagoon conditions was necessary only for the lagoon management period. See NMFS' BiOp (2008) for details of that analysis. As a result of that determination, there are three components to SCWA's estuary management activities: (1) Lagoon outlet channel management, during the lagoon management period only, required to accomplish the dual purposes of flood risk abatement and maintenance of juvenile salmonid habitat; (2) traditional artificial breaching, with the sole goal of flood risk abatement; and (3) physical and biological monitoring.

Lagoon Outlet Channel Management

SCWA, in compliance with the BiOp, adaptively manages estuary water surface elevations during the lagoon management period. Maintaining the lagoon water levels in a perched state that is also below flood stage requires an outlet channel to convey water from the estuary to the ocean over the beach berm. Active management of estuarine/lagoon water levels commences following the first closure of the barrier beach during this period. When this happens, SCWA monitors lagoon water surface elevation and creates an outlet channel when water levels in the estuary are between 4.5 and 7.0 ft (1.4–2.1 m) in elevation. Water levels above 4.0 ft (1.2 m) are expected to indicate reduced marine influence and would be likely to improve habitat. The ideal lagoon water level is 7.0–9.0 ft (2.1–2.7 m)—the BiOp specifies a target average daily water surface elevation of 7.0 ft during the lagoon management period, and flood stage is reached at 9.0 ft. However, in practice, this target leaves SCWA with little margin for error. The Russian River Estuary Outlet Channel Adaptive Management Plan (hereafter, "Plan"; PWA 2010) employs an incremental approach to channel management, favoring smaller, more frequent modifications over larger, less frequent, modification with less certain outcome. To the extent feasible, estuary water levels will initially be managed at the lower end of the 4.0–9.0 ft range in order to: (1) Reduce the scour potential associated with larger water surface differences between the lagoon and ocean and (2) provide a larger flood buffer if the channel closes and water levels rise. As experience is gained from implementing the channel and observing its response, SCWA will seek to make larger changes during each incremental modification. These larger changes will decrease the duration and frequency of management activity, thereby reducing the disturbance impact over time. Management practices will be incrementally modified over the course of the lagoon management period in an effort to improve performance in meeting the goals of the BiOp while preventing flooding.

The adaptive lagoon outlet channel management plan seeks to work with natural processes and site conditions to maintain an outlet channel that reduces tidal inflow of saline water into the estuary, as described in the Plan. The location of the outlet channel, at the interface of the estuary and the surf zone, is a dynamic system influenced by river discharge, ocean waves, and sand transport (*see* Figure 2 of SCWA's application). As such, the outlet channel will be subject to variable forcing at hourly, tidal, and monthly timescales. To sustainably meet its performance criteria, the outlet channel must be resilient in the face of this variable forcing. The outlet channel geometry must simultaneously meet two key objectives: Convey sufficient discharge from the estuary to the ocean to preserve constant water levels in the estuary and preserve channel function by avoiding closure or breaching. These two objectives can be in conflict, since both conveyance capacity and the potential for breaching increase with flow rates, but closure is more likely for lower flow rates.

The target outlet channel is subject to two failure modes: (1) Closure caused by deposition, leading to rising water levels and possible flooding, and (2) breaching caused by scour, leading to tidal exchange and marine conditions in the estuary. Conceptual models of these conditions may be found in Figures 2–4 of the Plan. Of the two failure modes, breaching is more detrimental. Once breaching occurs, exposing the estuary to tidal water levels and saline inflow, the estuary may persist in a breached state for weeks or months before the barrier beach can re-form. Closure results in increasing estuary water levels, which allows time for further management action to prevent flooding.

A pilot channel will be created in the sandbar at a sufficient depth to allow river flows to begin transporting sand to the ocean. The pilot channel would not be excavated as deeply, narrowly, or with as steep a gradient as typical artificial breaching channels, which are designed to allow the current velocities to erode a wider and deeper channel and downcut into the barrier beach. While the channel is dug, it will remain disconnected from the estuary by a portion of the sand bar. Excavated sand will be placed on the beach adjacent to the pilot channel. In the past, excavation work associated with artificial breaching has usually generated a maximum of 1,000 yd^3 (765 m^3) of sand, sidecast onto the sand bar below the high tide line (NMFS 2005). However, SCWA is in the process of requesting permit renewals that would allow maximum excavations of 2,000 yd^3 (1,529 m^3) to accommodate the maximum volume of sand excavation that could be needed for certain outlet channel configurations. Once the channel is complete, the remaining portion of the sandbar will be removed by heavy equipment allowing the river water to flow to the ocean. The channel configuration—and thus the size of the resulting pilot channel—varies, depending on the height of the sand bar to be breached, the tide level, and the elevation of the estuary at the time of breaching. Two types of channel configurations will be initially considered for implementation: A wide and short channel that seeks to minimize scour potential; or a narrow and long channel aligned to the north that seeks to minimize closure potential. The channel selected for implementation will be based on site conditions at the time of closure. Monitoring of the outlet channel and estuary response will be used to inform adaptive management during the lagoon management period.

Some uncertainty remains about the exact outlet channel configuration that may best achieve the target performance criteria. This uncertainty arises from the dynamic natural setting for the outlet channel and from the unquantified tradeoffs between channel specifications which may benefit one performance criterion while impairing another criterion. For example, to reduce the likelihood of closure, it may be beneficial to locate the mouth of the channel further north where the coastline's aspect is more sheltered from waves from the north. However, extending the channel's length to the northern location necessitates narrowing its width to keep excavation within currently-permitted volumes (*i.e.,* 1,000 yd^3). A narrower channel increases the likelihood of scour-induced breaching. The relative importance of these factors is not known, precluding an exact determination of optimal channel configuration. In addition to these uncertainties, actual conditions at the

time of closure, such as beach berm topography, may inform the selected configuration (PWA 2010).

The wide/short approach will be to construct the channel in the same general location and alignment as the preexisting channel (*i.e.,* the location just prior to closure). When pursuing this approach, excavation will simply widen and connect the channel in place. As the channel migrates during the management season, the location of new excavation may follow this migration. The narrow/long approach will angle the channel to the northwest with an approximate aspect of 30–40 degrees with respect to the beach. This angled alignment tests possible advantages of site features such as areas of reduced wave energy and rocks imbedded in the beach.

The quantity of sand moved will depend on antecedent beach topography. Once either the wide/short or narrow/long planform alignment is selected, limits on excavation volume will largely set channel dimensions. Any sand excavated from the channel will be placed on the adjacent beach and graded to heights of approximately 1–2 ft (0.3–0.6 m) above existing grade. The placed sand will be distributed in such a way as to minimize changes to beach topography. The bed will be excavated 0.5–1 ft (0.15–0.3 m) below the lagoon water level along its entire length, to achieve target channel depths upon initiation of flow. The bed slope should be nearly flat within the outlet channel to minimize the likelihood of bed scour, which may result in breaching. The target range of water depths, 0.5–2 ft, is constrained on the upper end by the maximum depth at which the channel is likely to be stable (*i.e.,* not scour). The lower end of the range is constrained by the width; shallower depths would require impractically large channel widths to provide sufficient cross-sectional area to convey flow. For the wide/short configuration, the channel bottom would be excavated to a width of approximately 100 ft (30 m), the Corps-permitted maximum, to reduce the potential for scour. For the narrow/long configuration, the channel bottom width will be approximately 30 ft (9 m) to achieve the desired channel length and slope while still staying within the excavation volume limits. The wide/short configuration would result in channel lengths of 100–200 ft (30–60 m) while the narrow/long configuration would result in channel lengths approaching the maximum of 400 ft (120 m). Channel modifications will be initiated during low tide so that after several hours of work, the channel will be completed near high tide (PWA 2010).

Ideally, initial implementation of the outlet channel would produce a stable channel for the duration of the lagoon management period. However, the sheer number of variables and lack of past site-specific experience likely preclude this outcome. Given the conservative approach, in which excavation technique disproportionately seeks to avoid failure by breaching rather than closure, attempted channel implementation is most likely to fail through closure. In this case, succeeding excavation attempts may be required. The precise number of excavations would depend on uncontrollable variables such as seasonal ocean wave conditions (*e.g.,* wave heights and lengths), river inflows, and the success of previous excavations (*e.g.,* the success of selected channel widths and meander patterns) in forming an outlet channel that effectively maintains lagoon water surface elevations. Based on lagoon management operations under similar conditions at Carmel River, and expectations regarding how wave action and sand deposition may increase beach height or result in closure, it is predicted that up to three successive outlet channel excavation events, at increasingly higher beach elevations, may be necessary to produce a successful outlet channel. In the event that an outlet channel fails through breaching (*i.e.,* erodes the barrier beach and forms a tidal inlet), SCWA would resume adaptive management of the outlet channel's width, slope, and alignment in consultation with NMFS and the California Department of Fish and Game (CDFG), only after ocean wave action naturally reforms a barrier beach and closes the river's mouth during the lagoon management period.

SCWA's lagoon outlet channel management activities would involve the use of heavy equipment and increased human presence on the beach, in order to excavate and maintain an outlet channel from the lagoon to the ocean. SCWA has estimated that a maximum of three such events could be necessary during this period. During pupping season, management events may occur over a maximum of two consecutive days per event and all estuary management events on the beach must be separated by a minimum no-work period of one week. The use of heavy equipment and increased human presence has the potential to harass hauled-out marine mammals by causing movement or flushing into the water. Mitigation and monitoring measures described later in this document are designed to minimize this harassment to the lowest practicable level.

Implementation and Maintenance—SCWA accesses the beach from the paved parking lot at Goat Rock State Beach, (*see* Figure 2 of SCWA's application), and would contact State Parks lifeguards, as well as State Park District headquarters and the Monte Rio Fire Protection District, within 24 hours prior to excavating and maintaining the lagoon outlet channel to minimize potential hazards to beach visitors. Signs and barriers would be posted 750 ft (229 m) from each side of the outlet channel for 24 hours prior to and after excavation events to warn beach visitors of the hazards in the area and the presence of pinnipeds on the beach. Notifications for the general public would also be posted at the Jenner visitor's center boat launch. Equipment (*e.g.,* bulldozer, excavator) is off-loaded in the parking lot and driven onto the beach via an existing access point. Personnel on the beach would include up to two equipment operators, three safety team members on the beach (one on each side of the channel observing the equipment operators, and one at the barrier to warn beach visitors away from the activities), and one safety team member at the overlook on Highway 1 above the beach. Occasionally, there would be two or more additional people on the beach (SCWA staff or regulatory agency staff) to observe the activities. SCWA staff would be followed by the equipment, which would then be followed by an SCWA vehicle (typically a small pickup truck, to be parked at the previously posted signs and barriers on the south side of the excavation location).

Upon successful construction of an outlet channel, adaptive management, or maintenance, may be required for the channel to continue achieving performance criteria. In order to reduce disturbance to seals and other wildlife, as well as beach visitors, the amount and frequency of mechanical intervention will be minimized. As technical staff and maintenance crews gain more experience with implementing the outlet channel and observing its response, maintenance is anticipated to be less frequent, with events of lesser intensity. During pupping season, machinery may only operate on up to two consecutive working days, including during initial construction of the outlet channel. In addition, SCWA must maintain a one week no-work period between management events during pupping season, unless flooding is a threat, to allow for adequate disturbance recovery period. During the no-work period,

equipment must be removed from the beach. SCWA seeks to avoid conducting management activities on weekends (Friday to Sunday) in order to reduce disturbance of beach visitors. In addition, activities are to be conducted in such a manner as to effect the least practicable adverse impacts to pinnipeds and their habitat as described later in this document (*see* "Mitigation").

Artificial Breaching

As described previously, the estuary may close naturally throughout the year as a result of barrier beach formation at the mouth of the Russian River. Although closures may occur at any time of the year, the mouth usually closes during the spring, summer, and fall (Heckel 1994; Merritt Smith Consulting 1997, 1998, 1999, 2000; SCWA and Merritt Smith Consulting 2001). Natural breaching events occur when estuary water surface levels exceed the height of the barrier beach and overtop it, scouring an outlet channel that reconnects the Russian River to the Pacific Ocean. Closures result in lagoon formation in the estuary and, as water surface levels rise, flooding may occur. For decades, artificial breaching has been performed in the absence of natural breaching, in order to alleviate potential flooding of low-lying shoreline properties near the town of Jenner.

Estuary management events, as described previously in this document, may be carefully engineered for the dual purpose of reducing flood risk while maintaining lagoon conditions appropriate for juvenile salmonids. However, artificial breaching, as defined here, is conducted for the sole purpose of reducing flood risk, and may occur at any time of the year. As prescribed in the BiOp, artificial breaching is limited to two events during the lagoon management period, but is unlimited outside the lagoon management period. Any estuary management event occurring outside of the lagoon management period will be an artificial breaching.

Breaching has historically been performed in accordance with the Russian River Estuary Study 1992–1993 (Heckel 1994). The beach berm is artificially breached by SCWA when the water surface elevation in the estuary is 4.5–7.0 ft (1.4–2.1 m) as read at the Jenner gage. Breaching is performed by creating a deep cut in the closed beach berm, approximately 100 ft long by 25 ft wide and 6 ft deep (30 x 8 x 2 m), by moving up to 1,000 yd^3 (765 m^3) of sand. Based on experience and beach topography at the time of the breach, the planform alignment of the breach is selected to maximize the success of the breaches. Breaching activities are typically conducted on outgoing tides to maximize the elevation head difference between the estuary water surface and the ocean.

After the last portion of the beach berm is removed, water typically begins flowing out the channel at high velocities, scouring and enlarging the channel to widths of 50–100 ft (15–30 m). As the channel evolves and meanders, it may reach lengths in excess of 400 ft (122 m). After breaching, the estuary is subject to saline water inflow throughout incoming tides. As with other outlet channel management activities, sand is placed onto the beach adjacent to the pilot channel. The size of the pilot channel may vary depending on the height of the sandbar to be breached, the tide level, and the water surface elevation in the estuary.

Artificial breaching activities occur in accordance with the BiOp, and primarily occur outside the lagoon management period, *i.e.,* October 16 to May 14. However, if conditions present unacceptable risk of flooding during the lagoon management period, SCWA may artificially breach the sandbar a maximum of two times during that period. Implementation protocol would follow that described previously for lagoon outlet channel management events, with the exception that only one piece of heavy equipment is likely to be required per event, rather than two.

SCWA's artificial breaching activities would involve the use of heavy equipment and increased human presence on the beach, in order to breach the barrier between the lagoon and the ocean. The use of heavy equipment and increased human presence has the potential to harass hauled-out marine mammals by causing movement or flushing into the water. Mitigation measures described later in this document are designed to minimize this harassment to the lowest practicable level.

Physical and Biological Monitoring

Implementation of the lagoon outlet channel adaptive management plan requires monitoring to measure changes in the bar and channel elevation, lengths, and widths, as well as flow velocities and observations of the bed structure (to identify bed forms and depth-dependent grain size distribution indicative of armoring) in the channel. In addition to the activities described for the lagoon outlet channel adaptive management plan, SCWA is required by the BiOp and other state and Federal permits to collect biological and physical habitat data in conjunction with estuary management. Fisheries seining and trapping, water quality monitoring, invertebrate/sediment sampling, and physical habitat measurements require the use of boats and nets in the estuary. Boating and other monitoring activities occur in the vicinity of river haul-outs (*see* Figure 4 of SCWA's application); these monitoring activities have the potential to disturb pinnipeds. Table 2 provides a summary of the monitoring tasks and the frequency of their implementation. The majority of monitoring is required under the BiOp and occurs approximately during the lagoon management period (mid-May through October or November, depending on river dynamics. Beach topographic surveys occur year-round.

Table 2. Monitoring tasks associated with Russian River estuary management with potential to disturb pinnipeds

Task	Description	Field activities	Frequency
Lagoon Outlet Channel Management on the Barrier Beach			
Discharge measurements	Collected within the outlet channel to verify the channel's conveyance	Two field staff to complete cross sectional flow velocity surveys using flow meter attached to a wading rod with electronic data logger; bank pins to be installed on either bank and fiberglass measuring tape stretched from bank to bank	Every two weeks
Outlet channel bed structure	Observe the bed for bed forms and depth-dependent grain size distribution indicative of armoring; Sediment sampler used	Two field staff to collect sediment sample from the surface of the channel bed	Monthly
Outlet channel topography	Collect outlet channel elevation and width	Two field staff would capture outlet channel features using a prism mounted on a survey rod	Monthly
Biological and Physical Habitat Monitoring in the Estuary			
Fisheries seining	Deploy seine to collect fish at up to eight locations in the estuary	One or two boats with approximately six field staff	Monthly
Invertebrate/salmonid prey study	Collection of benthic invertebrates and zooplankton	One boat with two field staff	Weekly
Water quality	Collection of temperature, dissolved oxygen, conductivity, pH, depth, nutrient and bacteriological samples	A boat with two or three field staff, six datasonde arrays submerged in estuary at various locations from mouth to Duncans Mills	Every three weeks
Topographic survey of sandbar	Survey of sandbar height and widths	Two field staff on beach equipped with a survey rod	Monthly
Flow circulation	Survey of cross-sectional velocity data in estuary and collection of temperature and salinity profile data at various locations from mouth to Duncans Mills	A boat with two or three field staff, collecting cross-sectional data from mouth to Duncans Mills	Weekly

Description of Marine Mammals in the Area of the Specified Activity

Harbor seals are the most common species inhabiting the haul-out at the mouth of the Russian River (Jenner haul-out). California sea lions and northern elephant seals have also been observed infrequently in the project area. In addition to the Jenner haul-out, there are eight additional haul-outs nearby (*see* Figure 2 of SCWA's Report of Activities and Monitoring Results). These include North Jenner and Odin Cove to the north; Pocked Rock, Kabemali, and Rock Point to the south; and Penny Logs, Patty's Rock, and Chalanchawi upstream within the estuary.

Harbor Seals

Harbor seals in the eastern Pacific inhabit near-shore coastal and estuarine areas from Baja California, Mexico, to the Pribilof Islands in Alaska. In California, approximately 400–600 harbor seal haul-outs are widely distributed along the mainland and on offshore islands, including intertidal sandbars, rocky shores and beaches (Hanan 1996).

The harbor seal population in California is estimated at approximately 34,233 (Carretta *et al.* 2007). Counts of harbor seals in California showed a rapid increase from approximately 1972 to 1990, though net production rates appeared to decline from 1982 to 1994. The decrease in population growth rate has occurred at the same time as a decrease in human-caused mortality and may be an indication that the population is reaching its environmental carrying capacity.

In general, harbor seals do not undertake long migrations, but do travel 300–500 km on occasion to find food or suitable breeding areas (Herder 1986). Harbor seals are rarely found in pelagic waters and typically stay within the tidal and intertidal zones. On land, harbor seals haul out on rocky outcrops, mudflats, sandbars and sandy beaches with unrestricted access to water and with minimal human presence. Haul-out sites are important as resting sites for harbor seals, who feed opportunistically in shallow waters on fish, crustaceans, and cephalopods. Harbor seals are typically solitary while foraging, although small groups have been observed. They normally choose isolated sites for pupping, which normally occurs at the Russian River from March until late June, and sometimes into early July. The Jenner haul-out is the largest in Sonoma County.

A substantial amount of monitoring effort has been conducted at the Jenner haul-out and surrounding areas. Concerned local residents formed the Stewards' Seal Watch Public Education Program in 1985 to educate beach visitors and monitor seal populations. State Parks Volunteer Docents continue this effort towards safeguarding local harbor seal habitat. On weekends during the pupping and molting season (approximately March-August), volunteers conduct public outreach and record the numbers of visitors and seals on the beach, other marine mammals observed, and the number of boats and kayaks present.

Ongoing monthly seal counts at the Jenner haul-out were begun by J. Mortenson in January 1987, with additional nearby haul-outs added to the counts thereafter. In addition, local resident E. Twohy began daily observations of seals and people at the Jenner haul-out in November 1989.

Table 3 shows average daily numbers of seals observed at the mouth of the Russian River from 1993–2005. These datasets note whether the mouth at the Jenner haul-out was opened or closed at each observation, as well as various other daily and annual patterns of haul-out usage (Mortenson and Twohy 1994).

Table 3. Average daily number of seals observed at Russian River mouth for each month, 1993-2005

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1993	140	219	269	210	203	238	197	34	8	38	78	163
1994	138	221	243	213	208	212	246	98	26	31	101	162
1995	133	270	254	261	222	182	216	74	37	24	38	148
1996	144	175	261	247	157	104	142	65	17	29	76	139
1997	154	177	209	188	154	119	186	58	20	29	30	112
1998	119	151	192	93	170	213	232	53	33	21	93	147
1999	161	170	215	210	202	128	216	98	57	20	74	123
2000	151	185	240	180	158	245	256	63	46	50	86	127
2001	155	189	161	168	135	212	275	75	64	20	127	185
2002	117	12	20	154	134	213	215	89	43	26	73	126
2003	-	1	26	161	164	222	282	100	43	51	109	116
2004	2	5	39	180	202	318	307	35	40	47	68	61
2005	0	7	42	222	220	233	320	145	-	-	-	-
Avg	**118**	**137**	**167**	**191**	**179**	**203**	**238**	**76**	**36**	**32**	**79**	**134**

Adapted from Mortenson and Twohy 1994 and E. Twohy unpublished data.
Months represented by dash indicate periods where data were missing or incomplete.

The number of seals present at the Jenner haul-out generally declines during bar-closed conditions (Mortenson 1996). SCWA's pinniped monitoring efforts from 1996 to 2000 focused on artificial breaching activities and their effects on the Jenner haul-out. Seal counts and disturbances were recorded from one to two days prior to breaching, the day of breaching, and the day after breaching (Merritt Smith Consulting 1997, 1998, 1999, 2000; SCWA and Merritt Smith Consulting 2001). In each year, the trend observed was that harbor seal numbers generally declined during a beach closure and increased the day following an artificial breaching event. Heckel (1994) speculated that the loss of easy access to the haul-out and ready escape to the sea during bar-closed conditions may account for the lower numbers. Table 4 shows average daily seal counts recorded during SCWA monitoring of breaching events from 1996–2000, representing bar-closed conditions, when seal numbers decline.

Table 4. Average number of harbor seals observed at the mouth of the Russian River during breaching events (i.e., bar-closed conditions) by month from 1996-2000.

Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
173	103	100	75	17	5	22	11

Mortenson (1996) observed that pups were first seen at the Jenner haul-out in late March, with maximum counts in May. In this study, pups were not counted separately from other age classes at the haul-out after August due to the difficulty in discriminating pups from small yearlings. From 1989 to 1991, Hanson (1993) observed that pupping began at the Jenner haul-out in mid-April, with a maximum number of pups observed during the first two weeks of May. This corresponds with the peaks observed at Point Reyes, where the first viable pups are born in March and the peak is the last week of April to early May (SCWA 2011). Based on this information, pupping season at the Jenner haul-out is conservatively defined here as March 15 to June 30.

California Sea Lions

California sea lions range from southern Mexico to British Columbia, Canada. The entire U.S. population has been estimated at 238,000, and grew at a rate of approximately six percent annually between 1975 and 2005 (Carretta *et al.* 2007). Sea lions can be found at sea from the surf zone out to nearshore and pelagic waters. On land, sea lions are found resting and breeding in groups of various sizes, and haul out on rocky surfaces and outcroppings and beaches, as well as on manmade structures such as jetties. Sea lions prefer haul-out sites and rookeries near abundant food supplies, with easy access to water; although they may occasionally travel up rivers and bays in search of food.

California sea lions exhibit seasonal migration patterns organized around their breeding activity. Sea lions breed at large rookeries in the Channel Islands in southern California, and on both sides of the Baja California peninsula, typically from May to August. Females tend to remain close to the rookeries throughout the year, while males migrate north after the breeding season in the late summer before migrating back south to the breeding grounds in the spring (CDFG 1990). No established rookeries are known north of Point Reyes, California, but large numbers of subadult and non-breeding or post-breeding male California sea lions are found throughout the Pacific Northwest. There is a mean seasonal pattern of peak numbers occurring in the northwest during fall, but local areas show high

annual and seasonal variability. Sea lions feed on fish and cephalopods. Although solitary feeders, sea lions often hunt in groups, which can vary in size according to the abundance of prey (CDFG 1990).

Solitary California sea lions have occasionally been observed at or in the vicinity of the haul-out (Merritt Smith Consulting 1999, 2000). Individual sea lions were observed near the mouth of the Russian River in November and December of 2009; a single individual was observed hauled-out on one occasion in November 2009. Juvenile sea lions were observed during the summer of 2009 at the Patty's Rock haul-out, and some sea lions were observed during monitoring of peripheral haul-outs in October 2009. The occurrence of individual California sea lions in the action area may generally occur from September through April, but is infrequent and sporadic.

Northern Elephant Seals

Populations of northern elephant seals in the U.S. and Mexico are derived from a few tens or hundreds of individuals surviving in Mexico after being nearly hunted to extinction (Stewart *et al.* 1994). Given the recent derivation of most rookeries, no genetic differentiation would be expected. Although movement and genetic exchange continues between rookeries, most elephant seals return to their natal rookeries when they start breeding (Huber *et al.* 1991). The California breeding population is now demographically isolated from the Baja California population and is considered to be a separate stock. Based on the estimated 35,549 pups born in California in 2005, the California stock was estimated at approximately 124,000 (Carretta *et al.* 2009). Based on trends in pup counts, northern elephant seal colonies were continuing to grow in California through 2005 (Carretta *et al.* 2009).

Northern elephant seals breed and give birth in California and Baja California, Mexico, primarily on offshore islands from December to March (Stewart *et al.* 1994; Stewart and Huber 1993). Males feed near the eastern Aleutian Islands and in the Gulf of Alaska, and females feed further south (Stewart and Huber 1993; Le Boeuf *et al.* 1993). Adults return to land between March and August to molt, with males returning later than females. Adults return to their feeding areas again between their spring/summer molting and their winter breeding seasons. Pups are born in early winter from December to January. Breeding occurs from December to March, and gestation lasts around eleven months. Northern elephant seals are polygamous; males establish dominance over large groups of females during the breeding season.

Northern elephant seals range along the entire California coast, with breeding occurring in dense rookeries on offshore islands and at several mainland locations. From April to November, they feed at sea or haul out to molt at rookeries. Elephant seals feed at night in deep water, primarily on fish and cephalopods (CDFG 2009). Entanglement in marine debris, fishery interactions, and boat collisions are the main threats to elephant seals.

Censuses of pinnipeds at the mouth of the Russian River have been taken at least semi-monthly since 1987. Elephant seals were noted from 1987–95, with one or two elephant seals typically counted during May censuses, and occasional records during the fall and winter (Mortenson and Follis 1997). A single, tagged northern elephant seal sub-adult was present at the Jenner haul-out from 2002–07. This individual seal, which was observed harassing harbor seals also present at the haul-out, was generally present during molt and again from late December through March. A single juvenile elephant seal was observed at the Jenner haul-out in June 2009. The occurrence of individual northern elephant seals in the action area has generally been infrequent and sporadic from December through March in the past ten years.

Potential Effects of the Specified Activity on Marine Mammals

As described previously, a significant body of monitoring data exists for pinnipeds at the mouth of the Russian River. In addition, pinnipeds have co-existed with regular estuary management activity for decades, as well as with regular human use activity at the beach, and are likely habituated to human presence and activity. Nevertheless, SCWA's estuary management activities have the potential to harass pinnipeds present on the beach. During breaching operations, past monitoring has revealed that some or all of the seals present typically move or flush from the beach in response to the presence of crew and equipment, though some may remain hauled-out. No stampeding of seals—a potentially dangerous occurrence in which large numbers of animals succumb to mass panic and rush away from a stimulus—has been documented since SCWA developed protocols to prevent such events in 1999. While it is likely impossible to conduct required estuary management activities without provoking some response in hauled-out animals, precautionary mitigation measures, described later in this document, ensure that animals are gradually apprised of human approach. Under these conditions, seals typically exhibit a continuum of responses, beginning with alert movements (*e.g.,* raising the head), which may then escalate to movement away from the stimulus and possible flushing into the water. Flushed seals typically re-occupy the haul-out within minutes to hours of the stimulus. In addition, eight other haul-outs exist nearby that may accommodate flushed seals. In the absence of appropriate mitigation measures, it is possible that pinnipeds could be subject to injury, serious injury, or mortality, likely through stampeding or abandonment of pups.

Therefore, based on a significant body of site-specific data, harbor seals are unlikely to sustain any harassment that may be considered biologically significant. Individual animals would, at most, flush into the water in response to maintenance activities but may also simply become alert or move across the beach away from equipment and crews. California sea lions and northern elephant seals have been observed as less sensitive to stimulus than harbor seals during monitoring at numerous other sites. For example, monitoring of pinniped disturbance as a result of abalone research in the Channel Islands showed that while harbor seals flushed at a rate of 84 percent, California sea lions flushed at a rate of only sixteen percent. The rate for elephant seals declined to 0.2 percent (VanBlaricom 2010). In the unlikely event that either of these species is present during management activities, they would be expected to display a minimal reaction to maintenance activities—less than that expected of harbor seals.

Although the Jenner haul-out is not known as a primary pupping beach, pups have been observed during the pupping season; therefore, NMFS has evaluated the potential for injury, serious injury or mortality to pups. There is a lack of published data regarding pupping at the mouth of the Russian River, but SCWA monitors have observed pups on the beach. No births were observed during monitoring in 2010, but were inferred based on signs indicating pupping (*e.g.,* blood spots on the sand, birds consuming possible placental remains). Pup injury or mortality would be most likely to occur in the event of extended separation of a mother and pup, or trampling in a stampede. As discussed previously, no stampedes have been recorded since development of appropriate protocols in

1999. Any California sea lions or northern elephant seals present would be independent juveniles or adults; therefore, analysis of impacts on pups is not relevant for those species. Pups less than one week old are characterized by being up to 15 kg, thin for their body length, or having an umbilicus or natal pelage.

Similarly, the period of mother-pup bonding, critical time needed to ensure pup survival and maximize pup health, is not expected to be impacted by estuary management activities. Harbor seal pups are extremely precocious, swimming and diving immediately after birth and throughout the lactation period, unlike most other phocids which normally enter the sea only after weaning (Lawson and Renouf 1985; Cottrell *et al.* 2002; Burns *et al.* 2005). Lawson and Renouf (1987) investigated harbor seal mother-pup bonding in response to natural and anthropogenic disturbance. In summary, they found that the most critical bonding time is within minutes after birth. As described previously, the peak of pupping season is typically concluded by mid-May, when the lagoon management period begins. As such, it is expected that mother-pup bonding would likely be concluded as well. The number of management events during the months of March and April has been relatively low in the past (*see* Table 1), and the breaching activities occur in a single day over several hours. In addition, mitigation measures described later in this document further reduce the likelihood of any impacts to pups, whether through injury or mortality or interruption of mother-pup bonding.

Based on extensive monitoring data, NMFS has preliminarily determined that impacts to hauled-out pinnipeds during estuary management activities would be behavioral harassment of limited duration (*i.e.,* less than one day) and limited intensity (*i.e.,* temporary flushing at most). Stampeding, and therefore injury or mortality, is not expected—nor been documented—in the years since appropriate protocols were established (*see* "Mitigation" for more details). Further, the continued, and increasingly heavy, use of the haul-out despite decades of breaching events indicates that abandonment of the haul-out is unlikely.

Anticipated Effects on Habitat

The purposes of the estuary management activities are to improve summer rearing habitat for juvenile salmonids in the Russian River estuary and/or to minimize potential flood risk to properties adjacent to the estuary. These activities would result in temporary physical alteration of the Jenner haul-out, but are essential to conserving and recovering endangered salmonid species, as prescribed by the BiOp. These salmonids are themselves prey for pinnipeds. In addition, with barrier beach closure, seal usage of the beach haul-out declines, and the three nearby river haul-outs may not be available for usage due to rising water surface elevations. Breaching of the barrier beach, subsequent to the temporary habitat disturbance, would likely increase suitability and availability of habitat for pinnipeds. Biological and water quality monitoring would not physically alter pinniped habitat.

Construction of the lagoon outlet channel would alter the beach by creating a shallow outlet channel to convey river flow over the sandbar and minimize or eliminate tidal exchange during the lagoon management period. The gentle slope of the outlet channel would allow seals to travel through the channel, although the shallow depths would likely not allow for swimming through the channel. Depending on the barrier beach height and the location of the river's thalweg when the beach closes, part of the outlet channel may be constructed in areas where seals typically haul out. Artificial breaching activities, as opposed to lagoon outlet channel creation, alter the habitat by creating a pilot channel through the closed sandbar. The location of the pilot channel is dependent on the height and width of the sandbar and the location of the river's thalweg. The pilot channel could be constructed in areas where seals typically haul out. Construction of pilot channels for the lagoon outlet channel and artificial breaching events requires excavated sand to be sidecast on the beach. Any sand excavated would be graded on the adjacent beach in such a way as to minimize changes to beach topography.

During SCWA's pinniped monitoring associated with artificial breaching activities from 1996 to 2000, the number of harbor seals hauled out declined when the barrier beach closed and then increased the day following an artificial breaching event (Merritt Smith Consulting 1997, 1998, 1999, and 2000; SCWA and Merritt Smith Consulting 2001). This response to barrier beach closure followed by artificial breaching is anticipated to continue. However, it is possible that the number of pinnipeds using the haul-out could decline during the extended lagoon management period, when SCWA would seek to maintain a shallow outlet channel rather than the deeper channel associated with artificial breaching. Collection of baseline information during the lagoon management period is included in the monitoring requirements described later in this document. SCWA's previous monitoring, as well as Twohy's daily counts of seals at the sandbar (Table 3) indicate that the number of seals at the haul-out declines from August to October, so management of the lagoon outlet channel (and managing the sandbar as a summer lagoon) would have little effect on haul-out use during the latter portion of the lagoon management period. The early portion of the lagoon management period coincides with the pupping season. Past monitoring during this period, which represents some of the longest beach closures in the late spring and early summer months, shows that the number of pinnipeds at the haul-out tends to fluctuate, rather than showing the more straightforward declines and increases associated with closures and openings seen at other times of year (Merritt Smith Consulting 1998). This may indicate that seal haul-out usage during the pupping season is less dependent on bar status. As such, the number of seals hauled out from May through July would be expected to fluctuate, but is unlikely to respond dramatically to the absence of artificial breaching events. Regardless, any impacts to habitat resulting from SCWA's management of the estuary during the lagoon management period are not in relation to natural conditions, but rather in relation to conditions resulting from SCWA's discontinued approach of artificial breaching during this period.

Changes in haul-out elevation regularly occur with the tides at this site and any habitat that would be impacted by sidecast sand would be temporary. Pinnipeds seeking to haul out would still have access to the estuary/lagoon waters and would likely continue to naturally flush into the water during high water surface elevation periods. Therefore, the natural cycle of using the Jenner haul-out on a daily basis is not expected to change. Modification of habitat resulting from construction of the lagoon outlet channel or artificial breaching pilot channel would also be temporary in nature. Harbor seals are regularly observed crossing overland from the Pacific Ocean to haul out on the estuary side of the beach, even in bar-open conditions, so it is anticipated that seals would continue to use the haul-out in bar-closed, lagoon conditions.

In summary, there will be temporary physical alteration of the beach. However, natural opening and closure of the beach results in the same impacts to habitat; therefore, seals are likely

adapted to this cycle. In addition, the increase in rearing habitat quality has the goal of increasing salmon abundance, ultimately providing more food for seals present within the action area.

Summary of Previous Monitoring

SCWA complied with the mitigation and monitoring required under the previous authorization. In accordance with the 2010 IHA, SCWA submitted a Report of Activities and Monitoring Results, covering the period of April 1 through December 31, 2010. During the dates covered by the 2010 monitoring report, SCWA conducted one outlet channel implementation event, two artificial breaching events, and associated biological and physical monitoring. During the course of these activities, SCWA did not exceed the take levels authorized under the 2010 IHA.

Baseline Monitoring—Baseline monitoring was performed to gather additional information regarding a possible relationship between tides, time of day, and the highest pinniped counts at the Jenner haul-out and to gain a better understanding about which specific conditions harbor seals may prefer for hauling out at the mouth. Baseline monitoring of the peripheral haul-outs was conducted concurrently with monitoring at the mouth of the Russian River, and was scheduled for two days out of each month with the intention of capturing a low and high tide each in the morning and afternoon. Appendix D of SCWA's monitoring report provides additional data, including weather conditions data collected during baseline monitoring. No species of pinnipeds other than harbor seals were observed at the Jenner or peripheral haul-outs during the baseline monitoring. Table 5 shows the mean number of harbor seal adults and pups (identified only during the pupping season) during twice monthly baseline monitoring events. The highest means were observed from the end of the pupping season into molt in 2010. Comparison of count data between the Jenner and peripheral haul-outs did not show any obvious correlations (*e.g.,* the number of seals occupying peripheral haul-outs compared to the Jenner haul-out did not necessarily increase or decrease as a result of disturbance caused by beach visitors).

Table 5. Mean number of harbor seals observed at the mouth of the Russian River during baseline pinniped monitoring from April to December 2010.

Date	Number of harbor seals at mouth of Russian River				
	Adults	Neonate pups (less than one week old)*	Pups (greater than one week old)*	Total pups*	Total harbor seals
April 29	142	-	-	19	161
May 6	111	3	15	19	130
May 27	78	1	10	11	89
June 14	101	-	1	1	102
June 21	184	-	-	-	184
July 13	295	-	-	-	295
July 19	230	-	-	-	230
August 9	133	-	-	-	133
August 16	94	-	-	-	94
September 9	47	-	-	-	47
September 16	72	-	-	-	72
October 7	13	-	-	-	13
October 14	37	-	-	-	37
November 3	102	-	-	-	102
November 18	75	-	-	-	75
December 2	71	-	-	-	71
December 23	-	-	-	-	-

*Pups are counted separately through June. After June, all seals are counted as adults as it becomes more difficult to accurately age individuals.

Water Level Management Activities—There were five barrier beach formations (bar closures) at the mouth of the Russian River from April through December, 2010 (Table 6). Implementation of the 2010 Lagoon Outlet Channel Adaptive Management Plan (PWA 2010) (*i.e.,* construction of an outlet channel) occurred once in 2010, on July 8. The outlet channel closed during high tide on the same day and the barrier beach naturally breached on July 11, 2010. SCWA artificially breached the barrier beach two times in 2010. Both artificial breaching events occurred during the lagoon management period, following consultation with NMFS and CDFG regarding potential

flood risk associated with high wave events and inflows into the Russian River estuary. The timing of the closures late in the lagoon management period meant that artificial breaching posed little or no risk to habitat for juvenile salmonids, while the potential for flooding was high. The artificial breaching events during the lagoon management period were allowed under the Incidental Take Statement provided in the BiOp (NMFS 2008).

Table 6. Russian River Estuary barrier beach closures, April-December 2010, and summary of SCWA water level management activities under 2010 IHA

Closure date	Number of days closed	Resulting event type and date
July 4	4	Lagoon outlet implementation; July 8[a]
July 8	3	Natural breach; July 11[a]
September 21	9	Artificial breach attempt; September 30[b]
September 30	1	Artificial breach; October 1[b]
October 4	7	Artificial breach attempt; October 11[c]
October 11	1	Artificial breach; October 12[c]
October 21	3	Natural breach; October 24
November 2	1	Natural breach; November 2

[a] SCWA implemented the 2010 lagoon outlet channel adaptive management plan on July 8, 2010, following July 4 closure. The outlet channel closed during a high tide event on the same day. The barrier beach naturally breached on July 11, 2010.
[b] SCWA consulted with NMFS and CDFG regarding the potential flood risk associated with closure. First breach attempted on September 30, 2010, but was unsuccessful as high wave activity re-formed the barrier beach. Successfully breached the barrier beach on October 1, 2010.
[c] SCWA consulted with NMFS and CDFG regarding the potential flood risk associated with closure. First breach attempted on October 11, 2010, but was unsuccessful as high wave activity re-formed the barrier beach. Successfully breached the barrier beach on October 12, 2010.

Monitoring was conducted before, during, and after each of these management events. Monitoring for the July 8 outlet channel implementation was conducted from July 7–9. For each of the two artificial breaching events, monitoring was conducted for four days; monitoring began the day before the event, was conducted on the day of the initial event (which failed in both cases) and on the day of the subsequent effort, and on the day after the successful effort. These dates were September 29–October 2 and October 10–13, respectively. As shown in Table 7, post-event seal counts increased in all cases. In addition, seals began returning to the beach following removal of equipment and crews within thirty minutes for two events (no return was observed due to lack of visibility for the October 12 event), with large numbers of seals returning to the haul-outs within a maximum of three hours.

No injuries or mortalities were observed during 2010, and harbor seal reactions ranged from merely alerting to crew presence to flushing from the beach. Please see SCWA's Monitoring Report for narrative descriptions of each event. Appendix C of the Report contains estuary water surface elevations during baseline and water level management activity monitoring and Appendix F contains weather observations collected during water level management event monitoring. No species other than harbor seals were observed during monitoring. Total observed take of marine mammals resulting from SCWA's estuary management activity during 2010 is shown in Table 7. Total observed take, by harassment only, from three estuary management events, and associated biological and physical monitoring prescribed by the BiOp, was 290 harbor seals. SCWA was authorized to take, by harassment only, 2,861 harbor seals, sixteen California sea lions, and eleven northern elephant seals. While the observed take was significantly lower than the level authorized, it is possible that incidental take in future years could approach the level authorized. Actual take is dependent largely upon the number of water level management events that occur, which is unpredictable. Take of species other than harbor seals depends upon whether those species, which do not consistently utilize the Jenner haul-out, are present. The authorized take, though much higher than the actual take, was justified based on conservative estimated scenarios for animal presence and necessity of water level management. No significant departure from the method of estimation is used for the proposed IHA (*see* "Estimated Take by Incidental Harassment") for the same activities in 2011.

Table 7. Observed incidental harassment (Level B harassment only) of harbor seals during Russian River estuary management activities, April-December, 2010

Date	Event Type	Counts[a]		Observed take	
		Pre-event	Post-event	Age class[b]	Number
Jul 8	Lagoon outlet implementation	101	204	Adult	170
Sep 30-Oct 1	Artificial breaching	23	124	Adult	80
Oct 11-12	Artificial breaching	37	98	Adult	8
				Subtotal	**258**
Jun 14	Biological and physical monitoring in the estuary	-	-	Adult	5
Jun 30	Beach topographic survey	-	-	Adult	5
Nov 17	Beach topographic survey	-	-	Adult	22
				Subtotal	**32**
				Total	**290**

[a] Pre- and post-event counts (day before and day after) are conducted only for water level management events.
[b] Pups are counted separately through June, after which all seals are counted as adults as it becomes more difficult to accurately age individuals.

The primary purpose of SCWA's Pinniped Monitoring Plan is to detect the response of pinnipeds to estuary management activities at the Russian River estuary. However, the following questions are also of specific interest:

1. Under what conditions do pinnipeds haul out at the Russian River estuary mouth at Jenner?
2. How do seals at the Jenner haul-out respond to activities associated with the construction and maintenance of the lagoon outlet channel and artificial breaching activities?
3. Does the number of seals at the Jenner haul-out significantly differ from historic averages with formation of a summer lagoon in the Russian River estuary?
4. Are seals at the Jenner haul-out displaced to nearby river and coastal haul-outs when the mouth remains closed in the summer?

The baseline data collected in 2010 shows the highest number of pinnipeds observed at the Jenner haul-out during molt and the late part of pupping season (Table 5). The 2010 baseline effort focused on understanding whether tides affected the timing of the use of the Jenner haul-out by harbor seals. With limited data thus far, there does not appear to be a clear pattern indicating whether the haul-out is used by a greater number of seals during high or low tides. Additional evaluation and data is needed to understand the influence of tides on the daily timing of harbor seal use of the Jenner haul-out. It is likely that multiple factors (*e.g.,* season, tides, wave heights, level of beach disturbance) influence level of haul-out use. Similarly, limited data collected in 2010, when only three management events took place and the duration of closure associated with the lagoon outlet channel implementation was not dissimilar from the duration of closures that have been previously observed at the estuary, precludes drawing conclusions regarding the key questions in SCWA's Monitoring Plan.

Proposed Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

SCWA has proposed to continue the following mitigation measures, as implemented during the previous IHA, designed to minimize impact to affected species and stocks:

- SCWA crews would cautiously approach the haul-out ahead of heavy equipment to minimize the potential for sudden flushes, which may result in a stampede—a particular concern during pupping season.
- SCWA staff would avoid walking or driving equipment through the seal haul-out.
- Crews on foot would make an effort to be seen by seals from a distance, if possible, rather than appearing suddenly at the top of the sandbar, again preventing sudden flushes.
- During breaching events, all monitoring would be conducted from the overlook on the bluff along Highway 1 adjacent to the haul-out in order to minimize potential for harassment.
- A water level management event may not occur for more than two consecutive days unless flooding threats cannot be controlled.

In addition, SCWA has proposed mitigation measures specific to pupping season (March 15–June 30), as implemented in the previous IHA:

- SCWA will maintain a one week no-work period between water level management events (unless flooding is an immediate threat) to allow for an adequate disturbance recovery period. During the no-work period, equipment must be removed from the beach.
- If a pup less than one week old is on the beach where heavy machinery would be used or on the path used to access the work location, the management action will be delayed until the pup has left the site or the latest day possible to prevent flooding while still maintaining suitable fish rearing habitat. In the event that a pup remains present on the beach in the presence of flood risk, SCWA would consult with NMFS and CDFG to determine the appropriate course of action. SCWA will coordinate with the locally established seal monitoring program (Stewards' Seal Watch) to determine if pups less than one week old are on the beach prior to a breaching event.

• Physical and biological monitoring, as described in Table 2, will not be conducted if a pup less than one week old is present at the monitoring site or on a path to the site.

Personnel on the beach would include up to two equipment operators, three safety team members on the beach (one on each side of the channel observing the equipment operators, and one at the barrier to warn beach visitors away from the activities), and one safety team member at the overlook on Highway 1 above the beach. Occasionally, there would be two or more additional people on the beach (SCWA staff or regulatory agency staff) on the beach to observe the activities. SCWA staff would be followed by the equipment, which would then be followed by an SCWA vehicle (typically a small pickup truck, the vehicle would be parked at the previously posted signs and barriers on the south side of the excavation location). Equipment would be driven slowly on the beach and care would be taken to minimize the number of shut downs and start-ups when the equipment is on the beach. All work would be completed as efficiently as possible, with the smallest amount of heavy equipment possible, to minimize disturbance of seals at the haul-out. Boats operating near river haul-outs during monitoring would be kept within posted speed limits and driven as far from the haul-outs as safely possible to minimize flushing seals.

NMFS has carefully evaluated the applicant's mitigation measures as proposed and considered their effectiveness in past implementation, to preliminarily determine whether they are likely to effect the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures includes consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals, (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; (3) the practicability of the measure for applicant implementation, including consideration of personnel safety, and practicality of implementation.

Injury, serious injury, or mortality to pinnipeds would likely result from startling animals inhabiting the haul-out into a stampede reaction, or from extended mother-pup separation as a result of such a stampede. Long-term impacts to pinniped usage of the haul-out could result from significantly increased presence of humans and equipment on the beach. To avoid these possibilities, NMFS and SCWA have developed the previously described mitigation measures. These are designed to reduce the possibility of startling pinnipeds, by gradually apprising them of the presence of humans and equipment on the beach, and to reduce the possibility of impacts to pups by eliminating or altering management activities on the beach when pups are present and by setting limits on the frequency and duration of events during pupping season. During the past fifteen years of flood control management, implementation of similar mitigation measures has resulted in no known stampede events and no known injury, serious injury, or mortality. Over the course of that time period, management events have generally been infrequent and of limited duration. Based upon the SCWA's record of management at the mouth of the Russian River, as well as information from monitoring SCWA's implementation of the improved mitigation measures as prescribed under the previous IHA, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

The applicant has developed a Pinniped Monitoring Plan which describes the proposed monitoring efforts. This Monitoring Plan can be found on the NMFS Web site at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* The purpose of this monitoring plan, which is carried out collaboratively with the Stewards of the Coasts and Redwoods (Stewards) organization, is to detect the response of pinnipeds to estuary management activities at the Russian River estuary. SCWA has designed the plan both to satisfy the requirements of the IHA, and to address the following questions of interest (as described previously):

1. Under what conditions do pinnipeds haul out at the Russian River estuary mouth at Jenner?

2. How do seals at the Jenner haul-out respond to activities associated with the construction and maintenance of the lagoon outlet channel and artificial breaching activities?

3. Does the number of seals at the Jenner haul-out significantly differ from historic averages with formation of a summer (May 15 to October 15) lagoon in the Russian River estuary?

4. Are seals at the Jenner haul-out displaced to nearby river and coastal haul-outs when the mouth remains closed in the summer?

In summary, monitoring includes the following:

Baseline Monitoring

Seals at the Jenner haul-out are counted twice monthly for the term of the IHA. This baseline information will provide SCWA with details that may help to plan estuary management activities in the future to minimize pinniped interaction. This census begins at local dawn and continues for eight hours. All seals hauled out on the beach are counted every thirty minutes from the overlook on the bluff along Highway 1 adjacent to the haul-out using high powered spotting scopes. Monitoring may conclude for the day if weather conditions affect visibility (*e.g.,* heavy fog in the afternoon). Counts are scheduled for two days out of each month, with the intention of capturing a low and high tide each in the morning and afternoon. Depending on how the sandbar is formed, seals may haul out in multiple groups at the mouth. At each thirty-minute count, the observer indicates where groups of seals are hauled out on the sandbar and provides a total count for each group. If possible, adults and pups are counted separately.

In addition to the census data, disturbances of the haul-out are recorded. The method for recording disturbances follows those in Mortenson (1996). Disturbances would be recorded on a three-point scale that represents an increasing seal response to the disturbance (Table 5). The time, source, and duration of the disturbance, as well as an estimated distance between the source and haul-out, are recorded. It should be noted that only responses falling into Mortenson's Levels 2 and 3 will be considered as harassment under the MMPA, under the terms of this proposed IHA.

Table 8. Seal response to disturbance

Level	Type of response	Definition
1	Alert	Seal head orientation in response to disturbance. This may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, or changing from a lying to a sitting position.
2	Movement	Movements away from the source of disturbance, ranging from short withdrawals over short distances to hurried retreats many meters in length.
3	Flight	All retreats (flushes) to the water, another group of seals, or over the beach.

Weather conditions are recorded at the beginning of each census. These include temperature, percent cloud cover, and wind speed (Beaufort scale). Tide levels and estuary water surface elevations are correlated to the monitoring start and end times.

In an effort towards understanding possible relationships between use of the Jenner haul-out and nearby coastal and river haul-outs, several other haul-outs on the coast and in the Russian River estuary are monitored as well (*see* Figure 2 of SCWA's Pinniped Monitoring Plan). The peripheral haul-outs are visited for ten minute counts twice during each baseline monitoring day. All pinnipeds hauled out were counted from the same vantage point(s) at each haul-out using a high-powered spotting scope or binoculars.

Estuary Management Event Monitoring

Lagoon Outlet Channel—Should the mouth close during the lagoon management period, SCWA would construct a lagoon outlet channel as required by the BiOp and described previously in this document. Activities associated with the initial construction of the outlet channel, as well as the maintenance of the channel that may be required, would be monitored for disturbances to the seals at the Jenner haul-out.

A one-day pre-event channel survey would be made within one to three days prior to constructing the outlet channel. The haul-out would be monitored on the day the outlet channel is constructed and daily for up to the maximum two days allowed for channel excavation activities. Monitoring would also occur on each day that the outlet channel is maintained using heavy equipment for the duration of the lagoon management period. Monitoring of outlet channel construction and maintenance would correspond with that described under the "Baseline" section previously, with the exception that management activity monitoring duration is defined by event duration, rather than being set at eight hours. On the day of the management event, pinniped monitoring begins at least one hour prior to the crew and equipment accessing the beach work area and continues through the duration of the event, until at least one hour after the crew and equipment leave the beach.

In an attempt to understand whether seals from the Jenner haul-out are displaced to coastal and river haul-outs nearby when management events occur, other nearby haul-outs are monitored concurrently with monitoring of outlet channel construction and maintenance activities. This provides an opportunity to qualitatively assess whether these haul-outs are being used by seals displaced from the Jenner haul-out during lagoon outlet channel excavation and maintenance. This monitoring would not provide definitive results regarding displacement to nearby coastal and river haul-outs, as individual seals are not marked, but is useful in tracking general trends in haul-out use during lagoon outlet channel excavation and maintenance. As volunteers are required to monitor these peripheral haul-outs, haul-out locations may need to be prioritized if there are not enough volunteers available. In that case, priority would be assigned to the nearest haul-outs (North Jenner and Odin Cove), followed by the Russian River estuary haul-outs, and finally the more distant coastal haul-outs.

Artificial Breaching Events—Pinniped responses to SCWA's artificial breaching activities were extensively monitored from 1996 to 2000 (Merritt Smith Consulting 1997, 1998, 1999, 2000; SCWA and Merritt Smith Consulting 2001). In accordance with the Russian River BiOp, SCWA may artificially breach the barrier beach outside of the summer lagoon management period, and may conduct a maximum of two such breachings during the lagoon management period, when estuary water surface elevations rise above seven feet. In that case, NMFS and CDFG may be consulted regarding potential scheduling of an artificial breaching event to open the barrier beach and reduce flooding risk.

Pinniped response to artificial breaching will be monitored at each such event during the term of the IHA. Methods would follow the census and disturbance monitoring protocols described in the "Baseline" section, which were also used for the 1996 to 2000 monitoring events (Merritt Smith Consulting 1997, 1998, 1999, 2000; SCWA and Merritt Smith Consulting 2001). The exception, as for lagoon management events, is that duration of monitoring is dependent upon duration of the event. On the day of the management event, pinniped monitoring begins at least one hour prior to the crew and equipment accessing the beach work area and continues through the duration of the event, until at least one hour after the crew and equipment leave the beach.

For all counts, the following information would be recorded in thirty minute intervals: (1) Pinniped counts, by species; (2) behavior; (3) time, source and duration of any disturbance; (4) estimated distances between source of disturbance and pinnipeds; (5) weather conditions (*e.g.,* temperature, wind); and (5) tide levels and estuary water surface elevation.

Monitoring During Pupping Season—The pupping season is defined as March 15 to June 30. Baseline, lagoon outlet channel, and artificial breaching monitoring during the pupping season will include records of neonate (pups less than one week old) observations. Characteristics of a neonate pup include: Body weight less than 15 kg; thin for their body length; an umbilicus or natal pelage present; wrinkled skin; and awkward or jerky movements on land. SCWA will coordinate with the Seal Watch monitoring program to determine if pups less than one week old are on the beach prior to a water level management event.

If, during monitoring, observers sight any pup that might be abandoned, SCWA would contact the NMFS stranding response network immediately and also report the incident to NMFS' Southwest Regional Office and NMFS Headquarters within

48 hours. Observers will not approach or move the pup. Potential indications that a pup may be abandoned are no observed contact with adult seals, no movement of the pup, and the pup's attempts to nurse are rebuffed.

Staffing—Monitoring is conducted by qualified individuals with prior approval by NMFS. Generally, these individuals include professional biologists employed by NMFS or SCWA, or volunteers trained by the Stewards' Seal Watch program (Stewards). All volunteer monitors are required to attend classroom-style training and field site visits to the haul-outs. Training covers the MMPA and conditions of the IHA, SCWA's pinniped monitoring protocols, pinniped species identification, age class identification (including a specific discussion regarding neonates), recording of count and disturbance observations (including completion of datasheets), and use of equipment. Pinniped identification would include harbor seal, California sea lion, and northern elephant seal, as well as other pinniped species with potential to occur in the area. Generally, SCWA staff and volunteers collect baseline data on Jenner haul-out use during the twice monthly monitoring events. A schedule for this monitoring would be established with Stewards once volunteers are available for the monitoring effort. SCWA staff monitors lagoon outlet channel excavation and maintenance activities and artificial breaching events at the Jenner haul-out, with assistance from Stewards volunteers as available. Stewards volunteers monitor the coastal and river haul-out locations during lagoon outlet channel excavation and maintenance activities.

Training on the MMPA, pinniped identification, and the conditions of the IHA is held for staff and contractors assigned to estuary management activities. The training includes equipment operators, safety crew members, and surveyors. In addition, prior to beginning each water surface elevation management event, the biologist monitoring the event participated in the onsite safety meeting to discuss the location(s) of pinnipeds at the Jenner haul-out that day and methods of avoiding and minimizing disturbances to the haul-out as outlined in the IHA.

Reporting

SCWA is required to submit a report on all activities and marine mammal monitoring results to the Office of Protected Resources, NMFS, and the Southwest Regional Administrator, NMFS, 90 days prior to the expiration of the IHA if a renewal is sought, or within 90 days of the expiration of the permit otherwise. This annual report will also be distributed to California State Parks and Stewards, and would be available to the public on SCWA's Web site. This report will contain the following information:

- The number of seals taken, by species and age class (if possible);
- behavior prior to and during water level management events;
- start and end time of activity;
- estimated distances between source and seals when disturbance occurs;
- weather conditions (*e.g.,* temperature, wind, *etc.*);
- haul-out reoccupation time of any seals based on post activity monitoring;
- tide levels and estuary water surface elevation; and
- seal census from bi-monthly and nearby haul-out monitoring.

The annual report includes descriptions of monitoring methodology, tabulation of estuary management events, summary of monitoring results, and discussion of problems noted and proposed remedial measures.

Estimated Take by Incidental Harassment

SCWA is requesting, and NMFS is proposing, authorization to take harbor seals, California sea lions, and northern elephant seals, by Level B harassment only, incidental to estuary management activities. These activities, involving increased human presence and the use of heavy equipment and support vehicles, are expected to harass pinnipeds present at the haul-out through disturbance only. In addition, monitoring activities prescribed in the BiOp may harass additional animals at the Jenner haul-out and at the three haul-outs located in the estuary (Penny Logs, Patty's Rock, and Chalanchawi). Estimates of the number of harbor seals, California sea lions, and northern elephant seals that may be harassed by the proposed activities is based upon the number of potential events associated with Russian River estuary management activities and the average number of individuals of each species that are present during conditions appropriate to the activity. As described previously in this document, monitoring effort at the mouth of the Russian River has shown that the number of seals utilizing the haul-out declines during bar-closed conditions. Tables 9 and 10 detail the total number of estimated takes.

Events associated with lagoon outlet channel management would occur only during the lagoon management period, and are split into two categories: (1) Initial channel implementation, which would likely occur between May and September, and (2) maintenance and monitoring of the outlet channel, which would continue until October 15. In addition, it is possible that the initial outlet channel could close through natural processes, requiring additional channel implementation events. Based on past experience, SCWA estimates that a maximum of three outlet channel implementation events could be required. Outlet channel implementation events would only occur when the bar is closed; therefore, it is appropriate to use data from bar-closed monitoring events in estimating take (Table 4). Construction of the outlet channel is designed to produce a perched outflow, resulting in conditions that more closely resemble bar-closed than bar-open with regard to pinniped haul-out usage. As such, bar-closed data is appropriate for estimating take during all lagoon management period maintenance and monitoring activity. As dates of outlet channel implementation cannot be known in advance, the highest daily average of seals per month—from May—is used in estimating take. For maintenance and monitoring activities associated with the lagoon outlet channel, which would occur on a weekly basis following implementation of the outlet channel, the average number of harbor seals for each month was used.

Artificial breaching activities would also occur during bar-closed conditions; however, data collected specifically during bar-closed conditions exists only for April through November (Table 4). These data may be used for estimating take associated with artificial breaching occurring during those months. For activity occurring from December through March, monitoring data that are not specific to bar conditions may be used for estimating take (Table 3).

For biological and physical habitat monitoring activities in the estuary, it was assumed that pinnipeds may be encountered once per event and flush from a river haul-out. The potential for harassment associated with these events is limited to the three haul-outs located in the estuary. In past experience, SCWA typically sees no more than a single harbor seal at these haul-outs, which consist of scattered logs and rocks that often submerge at high tide.

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Table 9. Estimated number of harbor seal takes resulting from Russian River estuary management activities

Number of animals expected to occur[a]	Number of events[b,c]	Potential total number of individual animals that may be taken
Lagoon Outlet Channel Management (May 15 to October 15)		
Implementation: 103[d]	Implementation: 3	Implementation: 309
Maintenance and Monitoring: May: 103 June: 100 July: 75 Aug: 17 Sept: 5 Oct: 22	Maintenance: May: 1 June-Sept: 4/month Oct: 1	Maintenance: 913
	Monitoring: June-Sept: 2/month Oct: 1	Monitoring: 416
		Total: 1,638
Artificial Breaching		
Oct: 22	Oct: 2	Oct: 44
Nov: 11	Nov: 2	Nov: 22
Dec:134	Dec: 2	Dec: 268
Jan: 118	Jan: 1	Jan: 118
Feb: 137	Feb: 1	Feb: 137
Mar: 167	Mar: 1	Mar: 167
Apr: 173	Apr: 1	Apr: 173
May: 103	May: 1	May: 103
	11 events maximum	**Total: 1,032**
Biological and Physical Habitat Monitoring in the Estuary		
1[e]	65	65
Total		**2,735**

[a] For events occurring from April through November, average daily number of animals corresponds with data from Table 4. For events occurring from December through March, average daily number of animals corresponds with data from Table 5.
[b] For implementation of the lagoon outlet channel, an event is defined as a single, two-day episode. It is assumed that the same individual seals would be hauled out during a single event. For the remaining activities, an event is defined as a single day on which an activity occurs. Some events may include multiple activities listed in Table 2.
[c] Number of events for artificial breaching derived from historical data (Table 1). The average number of events for each month was rounded up to the nearest whole number; estimated number of events for December was increased from one to two because multiple closures resulting from storm events have occurred in recent years during that month. These numbers likely represent an overestimate, as the average annual number of events is six.
[d] Although implementation could occur at any time during the lagoon management period, the highest daily average per month from that period was used.
[e] Based on past experience, SCWA expects that no more than one seal may be present, and thus have the potential to be disturbed, at each of the three river haul-outs.

Table 7. Estimated number of California sea lion and elephant seal takes resulting from Russian River estuary management activities

Species	Number of animals expected to occur[a]	Number of events[b,c]	Potential total number of individual animals that may be taken
Lagoon Outlet Channel Management (May 15 to October 15)			
California sea lion (potential to encounter once per event)	1	3	3
Northern elephant seal (potential to encounter once per event)	1	3	3
Artificial Breaching			
California sea lion (potential to encounter once per event, Sept-Apr)	1	8	8
Northern elephant seal (potential to encounter once per month Dec-May)	1	6	6
Biological and Physical Habitat Monitoring in the Estuary			
California sea lion (potential to encounter once per month Sept-Apr)	1	8	8
Northern elephant seal (potential to encounter once per month Dec-May)	1	6	6
Total			
California sea lion			**19**
Elephant seal			**15**

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Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In determining whether or not authorized incidental take will have a negligible impact on affected species stocks, NMFS considers a number of criteria regarding the impact of the proposed action, including the number, nature, intensity, and duration of Level B harassment take that may occur. Although SCWA's estuary management activities may harass pinnipeds hauled out at the mouth of the Russian River, as well as those hauled out at several locations in the estuary during recurring monitoring activities, impacts are occurring to a small, localized group of animals. No mortality or injury is anticipated, nor will the proposed action result in long-term impacts such as permanent abandonment of the haul-out. Seals will likely become alert or, at most, flush into the water in reaction to the presence of crews and equipment on the beach. However, breaching the sandbar has been shown to increase seal abundance on the beach, with seals quickly re-inhabiting the haul-out following cessation of activity. In addition, the implementation of the lagoon management plan may provide ideal increased availability of prey species (salmonids). No impacts would be expected at the population or stock level.

No pinniped stocks known from the action area are listed as threatened or endangered under the ESA or determined to be strategic or depleted under the MMPA. Recent data suggests that harbor seal populations have reached carrying capacity; populations of California sea lions and northern elephant seals in California are also considered healthy.

The proposed number of animals taken for each species of pinnipeds can be considered small relative to the population size. There are an estimated 34,233 harbor seals in the California stock, 238,000 California sea lions, and 124,000 northern elephant seals in the California breeding population. Based on extensive monitoring effort specific to the affected haul-out and historical data on the frequency of the specified activity, NMFS is proposing to authorize take, by Level B harassment only, of 2,735 harbor seals, nineteen California sea lions, and fifteen northern elephant seals, representing 8.0, 0.008, and 0.012 percent of the populations, respectively. However, this represents an overestimate of the number of individuals harassed over the duration of the proposed IHA, because a given individual is likely to be harassed multiple times.

The proposed action would not be likely to cause injury or mortality to any harbor seal pup, nor would it impact mother-pup bonding. The peak of pupping season occurs during May, when few management activities are anticipated. However, any management activity that is required during pupping season will be delayed in the event that a pup less than one week old is present on the beach. As described previously in this document, harbor seal pups are precocious, and mother-pup bonding is likely to occur within minutes. Delay of events would further ensure that mother-pup bonding is not interfered with.

Based on the foregoing analysis, behavioral disturbance to pinnipeds at the mouth of the Russian River would be of low intensity and limited duration. To ensure minimal disturbance, SCWA will implement the mitigation measures described previously, which NMFS has preliminarily determined will serve as the means for effecting the least practicable adverse effect on marine mammals stocks or populations and their habitat. NMFS preliminarily finds that SCWA's estuary management activities will result in the incidental take of small numbers of marine mammals, and that the requested number of takes will have no more than

a negligible impact on the affected species and stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

Endangered Species Act (ESA)

There are no ESA-listed marine mammals found in the action area; therefore, no consultation under the ESA is required. As described elsewhere in this document, SCWA and the Corps consulted with NMFS under Section 7 of the ESA regarding the potential effects of their operations and maintenance activities, including SCWA's estuary management program, on ESA-listed salmonids. As a result of this consultation, NMFS issued the Russian River Biological Opinion (NMFS 2008), which prescribes modifications to SCWA's estuary management activities.

National Environmental Policy Act (NEPA)

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), as implemented by the regulations published by the Council on Environmental Quality (40 CFR parts 1500–1508), and NOAA Administrative Order 216–6, NMFS prepared an Environmental Assessment (EA) to consider the direct, indirect and cumulative effects to the human environment resulting from issuance of an IHA to SCWA. NMFS signed a Finding of No Significant Impact on March 30, 2010. NMFS has reviewed the proposed application and preliminarily determined that there are no substantial changes to the proposed action or new environmental impacts or concerns. Therefore, NMFS has determined that a new or supplemental EA or Environmental Impact Statement is likely unnecessary. Before making a final determination in this regard and decision on whether or not to issue a Finding of No Significant Impact for this proposed action, NMFS will review public comments and information submitted by the public and others in response to this notice. The March 10, 2010 EA, referenced above is available for review at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to authorize the take of marine mammals incidental to SCWA's estuary management activities, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: March 14, 2011.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–6439 Filed 3–17–11; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes products and a service from the Procurement List previously furnished by such agencies.

DATES: *Effective Date:* 4/18/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.

2. The action will result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following services are added to the Procurement List:

Services

Service Type/Location: Contract Cook Support & Dining Facility Attendant, White Sands Missile Range, NM.
NPA: Tresco, Inc., Las Cruces, NM.
Contracting Activity: Dept of the Army, XR W6BB ACA White Sands Missile, NM.

The DoD contracting activity specifically identified its requirement as Contract Cook Support (CCS) and Dining Facility Attendant (DFA) Service in its Performance Work Statement (PWS). The dining facility (DFAC) associated with this service requirement is newly constructed and will be under the control and military management of the 2D Engineer Battalion when it relocates to White Sands Missile Range (WSMR) under a Base Realignment and Closure action. Food service personnel assigned to the battalion will operate and manage the DFAC and will be augmented by contractor-provided dining facility attendants (DFA).

The PWS describes the DFA service tasks as preparation of vegetables, dining room service (prepare, maintain, clean dining areas; clean condiment containers; clean spills and remove soiled dinnerware; clean dining room tables, chairs, booths; clean dining room walls, baseboards, window ledges, doors, doorframes, ceiling fans, pictures, wall art, artificial plants, light fixtures, etc); buss and replace tray carts during meal serving periods; service and maintain patron self-service area; clean and sanitize food service equipment, utensil cleaning, and dishwashing; clean pots, pans, utensils, storage shelves, and racks; facility maintenance and sanitation; and provide trash and garbage service.

Because the 2d Engineer Battalion is a deployable, combat unit, it may be absent from WSMR as its mission dictates. When deployed, the DFAC will be augmented by contractor-provided cooks to replace absent military food service personnel. The Contracting Officer stated that the military will retain management and operational control during deployments as a Government (civil service) contracting officer's representative will assume those duties. At no time will the contractor be responsible for the management and operational control of the DFAC.

Service Type/Location: Laundry & Dry Cleaning Service, F.E. Warren, AFB, WY.
NPA: Goodwill Industrial Services Corporation, Colorado Springs, CO.
Contracting Activity: Dept of the Air Force, FA4613 90 CONS LGC, F.E. Warren AFB, WY.
Service Type/Location: Custodial Service, 185th Air Refueling Wing, Buildings 234 and 241, 2920 Headquarters Avenue, Sioux City, IA.
NPA: Goodwill Community Rehabilitation Services, Inc., Sioux City, IA.
Contracting Activity: Dept of the Army, XRAW7M8 USPFO Activity IA ARNG, Johnston, IA.

Deletions

On 1/21/2011 (76 FR 3879–3880), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and service listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and service deleted from the Procurement List.

End of Certification

Accordingly, the following products and service are deleted from the Procurement List:

Products

Floor Care Products
NSN: 7930–01–486–4050
NSN: 7930–01–486–5928
NSN: 7930–01–486–5930
NPA: Lighthouse for the Blind of Houston, Houston, TX.
Contracting Activity: General Services Administration, Fort Worth, TX.

Service

Service Type/Location: Laundry Service, Atlanta VA Medical Center, Decatur, GA.
NPA: GINFL Services, Inc., Jacksonville, FL.
Contracting Activity: Department of Veterans Affairs, VISN 7 Consolidated Contracting, Augusta, GA.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2011–6422 Filed 3–17–11; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to the Procurement List.

SUMMARY: The Committee is proposing to add products to the Procurement List that will be furnished by a nonprofit agency employing persons who are blind or have other severe disabilities.

Comments Must Be Received on or Before: 4/18/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products listed below from a nonprofit agency employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organization that will furnish the products to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products are proposed for addition to Procurement List for production by the nonprofit agency listed:

Products

NSN: MR 899—Slicer, Pineapple, Stainless
NSN: MR 1135—Set, Spreader, 4Pc
NSN: MR 1136—Mug, Seasonal
NPA: Industries for the Blind, Inc., West Allis, WI.
Contracting Activity: Military Resale-Defense Commissary Agency, Fort Lee, VA.
Coverage: C–List for the requirements of military commissaries and exchanges as aggregated by the Defense Commissary Agency.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2011–6421 Filed 3–17–11; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Antidisruptive Practices Authority

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed Interpretive Order.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing this interpretive order to provide interpretive guidance regarding the three statutory disruptive practices set forth in new section 4c(a)(5) of the Commodity Exchange Act ("CEA") pursuant to section 747 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Commission requests comment on all aspects of the proposed interpretive order.

DATES: Comments must be received on or before May 17, 2011.

ADDRESSES: Comments, identified by RIN number, may be sent by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Robert Pease, Counsel to the Director of Enforcement, 202–418–5863, *rpease@cftc.gov;* Steven E. Seitz, Attorney, Office of the General Counsel, 202–418–5615, *sseitz@cftc.gov;* or Mark D. Higgins, Counsel to the Director of Enforcement, 202–418–5864, *mhiggins@cftc.gov,* Commodity Futures Trading Commission, Three Lafayette

Centre, 1151 21st Street, NW., Washington, DC 20581.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act ("FOIA"),[1] a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the CFTC's regulations.[2] The Commission reserves the right, but shall have no obligation, to review, prescreen filter, redact, refuse, or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

SUPPLEMENTARY INFORMATION:

Prohibition of Disruptive Practices

I. Statutory and Regulatory Authorities

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[3] Title VII of the Dodd-Frank Act[4] amended the Commodity Exchange Act ("CEA")[5] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

Section 747 of the Dodd-Frank Act amends section 4c(a) of the CEA to add a new section entitled "Disruptive Practices." New CEA section 4c(a)(5) makes it unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—

(A) Violates bids or offers;

(B) Demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or

(C) Is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).

Dodd-Frank Act section 747 also amends section 4c(a) by granting the Commission authority under new CEA section 4c(a)(6) to promulgate such "rules and regulations as, in the judgment of the Commission, are reasonably necessary to prohibit the trading practices" enumerated therein "and any other trading practice that is disruptive of fair and equitable trading."

The Commission is issuing this proposed interpretive order to provide market participants and the public with guidance on the scope of the statutory prohibitions set forth in section 4c(a)(5). The Commission requests comment on all aspects of this proposed interpretive order, as well as comment on the specific provisions and issues highlighted below.

II. Background

On November 2, 2010, the Commission issued an advance notice of proposed rulemaking ("ANPR") asking for public comment on all aspects of Dodd-Frank Act section 747.[6] When the ANPR was issued, the Commission was considering whether to adopt regulations regarding the disruptive practices set forth in new CEA section 4c(a)(5). After reviewing the ANPR comments, the Commission determined that it was appropriate to address the statutory disruptive practices through a proposed interpretive order. Accordingly, a Commission document terminating the ANPR is being published elsewhere in the Proposed Rules section of this issue of the **Federal Register**. Notwithstanding that termination, the Commission considered all of the ANPR commentary in developing this proposed interpretive order.

In the ANPR, commenters were encouraged to address the nineteen specific questions posed by the Commission in the ANPR.[7] The ANPR requested, among other things, comment on section 747(A) ("violating bids and offers"), section 747(B) ("the disorderly execution of transactions around the closing period"), section 747(C) ("spoofing"), the role of executing brokers, and the regulation of algorithmic and automated trading systems.[8] The questions in the ANPR also formed the basis for a December 2, 2010, roundtable held by Commission staff in Washington, DC.[9] The full-day roundtable consisted of three panels[10] that addressed the ANPR questions, the role of exchanges in CFTC-regulated markets, and whether there are other potential disruptive trading practices that the Commission should prohibit. The ANPR set a deadline of January 3, 2011, by which comments had to be submitted.[11] In response to the ANPR, the Commission received 28 comments from interested parties,[12] including industry members, trade associations, consumer groups, exchanges, one member of the U.S. Congress, and other interested members of the public.[13] The Commission has carefully considered all of the ANPR comments, as well as the roundtable discussion, in proposing this interpretive order.

Throughout the roundtable discussion and comment letters, there was widespread support for the Commission's goal of preventing disruptive trading practices and ensuring fair and equitable markets.[14] Several themes emerged from the roundtable discussion and the comment

[1] 5 U.S.C. 552.

[2] 17 CFR 145.9.

[3] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[4] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[5] 7 U.S.C. 1 *et seq.*

[6] 75 FR 67301, Nov. 2, 2010.

[7] The ANPR may be accessed through: *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=893.*

[8] 75 FR 67302, Nov. 2, 2010.

[9] *See* Appendix III for a list of roundtable participants and discussion panels. A verbatim transcript of the disruptive trading practices roundtable may be accessed at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission24_120210-transcri.pdf.*

[10] Note that citations to statements by the panelists at the public roundtable will be cited as [Panelist name at page X of roundtable transcript].

[11] 75 FR 67301, Nov. 2, 2010.

[12] *See* Appendix IV for a list of parties submitting comment letters in response to the ANPR.

[13] The comment letters received by the Commission in response to the ANPR may be accessed through: *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=893.*

[14] Liam Connell at 40 ("Allston Trading supports the mission of the CFTC to maintain orderly markets and to prohibit deceptive practices and manipulative trading."); Rajiv Fernando at 17 ("I support the CFTC's effort to ensure that markets operate in an orderly way that's fair for all participants."); Argus at 1 ("Argus supports the important goal of preventing disruptive trade practices in CFTC jurisdictional markets.").

letters, which are discussed below in the following sections.

a. Market Participants Request Additional Guidance Regarding the Scope and Application of Section 747's Provisions

Throughout the Commission roundtable, panelists stated that the provisions of section 747 were vague [15] and did not provide market participants with adequate notice of the type of trading, practices, and conduct that is prohibited by section 4c(a)(5).[16] Several comment letters also raised concerns about vagueness and believed that Dodd-Frank Section 747 was susceptible to constitutional challenge.[17] Comment letters requested that the Commission provide additional guidance concerning the conduct and trading practices that constitute violations under the statute.[18] During the roundtable discussion, panelists also requested additional clarity and refinement in the definition of terms such as "the orderly execution of transactions," [19] "closing period," [20] and "spoofing." [21] The comment letters reiterated this concern and expressed the need for the Commission to define these terms and other concepts such as violating bids and offers.[22]

Panelists and commenters also sought clarity on whether scienter is required for each of the enumerated practices of section 4c(a)(5), and if so, specificity as to the degree of intent required. Roundtable panelists [23] and commenters [24] stated that a showing of bad intent should be necessary to distinguish prohibited conduct from legitimate trading activities. Panelists further stressed that any evaluation of trading behavior must consider the historical trading patterns and practices of market participants.[25]

In response to these comments, the Commission is proposing this Interpretive Order to provide additional guidance to market participants and the public on the types of trading, conduct, and practices that will constitute violations of section 4c(a)(5). This proposed interpretive order addresses the concerns expressed by the commenters regarding market uncertainty by clarifying how the Commission will interpret and implement the provisions of section 4c(a)(5). By the terms of the statute, 4c(a)(5) applies to trading, practices or conduct on or subject to the rules of a registered entity: a designated contract market or a swap execution facility ("SEF").[26] The Commission interprets that section 4c(a)(5) will not apply to block trades or exchanges for related positions ("EFRPs") transacted in accordance with the rules of a designated contract market or SEF or bilaterally negotiated swap transactions.

The Commission stresses the important role and unique position of exchanges and self-regulatory organizations to ensure that markets operate in a fair and equitable manner without disruptive trading practices.[27] The Commission agrees with commenters and panelists that a multi-layered, coordinated approach is required to prevent disruptive trading practices and ensure fair and equitable trading through enforcement of these provisions.[28]

i. Violating Bids and Offers

1. Comments From ANPR and Roundtable

During the roundtable discussion, panelists questioned how the concept of violating bids and offers applies across various trading platforms and markets.[29] Commenters expressed a similar concern [30] and requested that the Commission clarify how the prohibition against violating bids and offers applies to swaps,[31] open outcry pits,[32] infrequently traded over-the-counter products,[33] and electronic trading venues where the best bid and offer are matched automatically by algorithm.[34]

2. Commission Guidance

The Commission interprets section 4c(a)(5)(A) as prohibiting any person from buying a contract at a price that is

[15] *See. e.g.,* Gary DeWaal at 57 ("This is an incredibly vague provision."); Greg Mocek at 170 ("There are a lot of issues on vagueness.").

[16] *See, e.g.,* Adam Nunes at 20 ("Additional guidance * * * is going to be necessary."); Ike Gibbs at 157 ("We would really prefer to see a scenario where the Commission is not overly prescriptive [and] we're given guidance as to what's appropriate and what's not appropriate.").

[17] *See, e.g.,* Managed Funds Association at 4 ("Dodd-Frank Act Section 747 as written is vague and particularly vulnerable to constitutional challenge by market participants."); CME Group at 2 ("As written, Section 747 is vague and susceptible to constitutional challenge.").

[18] *See, e.g.,* American Petroleum Institute at 2 ("The Commission should provide specific guidance regarding the scope of the trading practices listed in 747."); Investment Company Institute at 2 (Recommending that the "Commission provide additional guidance as to the types of conduct that would constitute violations under the statute."); HETCO at 4 ("The Commission should resolve the ambiguity in Section 4c(a)(5) by articulating the specific types of disruptive practices that prompted it to request the new enforcement authority in Section 747.").

[19] *See, e.g.,* Adam Nunes at 26 ("When we look at disruptive trading practices and the intentional reckless disregard for orderly execution that is going to be very difficult to define.").

[20] *See, e.g.,* Don Wilson at 46 ("The definition of those rules around what is and is not acceptable in the closing period needs to be carefully considered.").

[21] *See, e.g.,* Gary DeWaal at 64 ("I'm not sure the definition of spoofing can be agreed upon by the ten people around this table."); John J. Lothian at 82 (Referring to 'spoofing' as a "very undefined type of term within the industry.").

[22] *See, e.g.,* Futures Industry Association at 3 ("Definitions such as 'orderly execution,' 'violates bids or offers' and 'spoofing' in Sections 4c(a)(5)(A), (B) and (C), respectively, require refinement and clarification by the Commission.").

[23] *See, e.g.,* Adam Nunes at 36 ("The intent to manipulate * * * [is] critically important."); Cameron Smith at 37 ("What really needs to be there in my mind is some notions of intent or phrases like "for the purpose of."); Don Wilson at 47 ("I think it really comes down to intent."); Mark Fabian at 163 ("I think everyone has agreed that intent is something that is required.").

[24] *See, e.g.,* Chopper Trading at 3 ("Any definition of spoofing must include an element of an intent to manipulate the market."); FIA at 4 ("The Commission should clarify that manipulative intent to create an artificial price is required to violate 5(A)'s prohibition on violating bids or offers * * * [and] that manipulative intent is necessary under 5(B)'s prohibition."); International Swaps and Derivatives Association at 3 ("Manipulative intent is a necessary element of 'manipulative' or 'disruptive' conduct.").

[25] *See, e.g.,* Adam Nunes at 94 ("[I]t's really a pattern and practice of activity."); John Hyland at 147 ("It's patterns and practices, facts and circumstances."); Mark Fabian at 163 ("A pattern is also required.").

[26] The Commission does not believe that a trade becomes subject to 4c(a)(5) solely because it is reported on a swap data repository, even though a swap data repository is a registered entity.

[27] *See, e.g.,* CME Group Rule 432B.2 ("It shall be an offense * * * to engage in conduct or proceedings inconsistent with just and equitable principles of trade.").

[28] *See, e.g.,* FIA at 10 ("FIA strongly believes that a multi-layered enforcement approach, which implements policies and procedures at the firm, exchange and clearing level, will most effectively mitigate the risk of market disruptions.").

[29] *See, e.g.,* Greg Mocek at 173 ("There's more practical issues to think about in the context of the concepts themselves and how the industry is structured, like violating a bid and an offer."); Ken Raisler at 176 (generally asking how the concept of violating bids and offers applies to over-the-counter markets, swap execution facilities, and block trades).

[30] *See, e.g.,* CME Group at 4 ("The Commission should make clear that the prohibition on violating bids or offers is not intended to create a best execution standard across venues as any such standard would be operationally and practically untenable.").

[31] *See, e.g.,* ISDA at 2 ("The phrase 'violating bids and offers' simply has no meaning in most if not all swaps markets. The pricing and trading of many swaps involves a variety of factors (*e.g.,* size, credit risk) which, taken together, render the concept of "violating bids or offers" as inapposite.").

[32] *See, e.g.,* CME Group at 4 (generally discussing how the concept of violating bids and offers applies to open outcry trading environments).

[33] *See, e.g.,* FIA at 4 ("The Commission should clarify that the prohibition on violating bids or offers does not apply in the over-the-counter markets.").

[34] *See, e.g.,* CME Group at 4 ("Order matching algorithms on electronic platforms preclude bids and offers from being violated."); FIA at 4 ("Matching engines make it impossible to sell or buy except at the best available quote."); MFA at 5 ("The term 'violate bids or offers' * * * has virtually no application to electronic trading where systems buy or sell at the best available quote.").

higher than the lowest available offer price and/or selling a contract at a price that is lower than the highest available bid price. Such conduct, regardless of intent, disrupts the normal forces of supply and demand that are the foundation of fair and equitable trading. This proposed interpretive order is consistent with exchange rules that prohibit the violation of bids and offers.[35] Notably, Congress did not include an intent requirement in section 4c(a)(5)(A) as it did in both sections 4c(a)(5)(B) and (C). Accordingly, the Commission interprets section 4c(a)(5)(A) as a *per se* offense, that is, the Commission is not required to show that a person violating bids or offers did so with any intent to disrupt fair and equitable trading.

The Commission agrees that section 4c(a)(5)(A) does not apply where a person is unable to violate a bid or offer—*i.e.* when a person is utilizing an electronic trading system where algorithms automatically match the best bid and offer.[36] Section 4c(a)(5)(A) will operate in any trading environment where a person exercises some control over the selection of the bids or offers against which they transact, including in an automated trading system which operates without pre-determined matching algorithms. The Commission recognizes that at any particular time the bid-ask spread in one trading environment may differ from the bid-ask spread in another trading environment. Accordingly, in the view of the Commission, section 4c(a)(5)(A) does not create any sort of best execution standard across multiple trading platforms and markets; rather, a person's obligation to not violate bids or offers is confined to the specific trading venue which he or she is utilizing at a particular time. Finally, section 4c(a)(5)(A) does not apply where an individual is "buying the board"—that is, executing a sequences of trades to buy all available bids or offers on that order book in accordance with the rules of the facility on which the trades were executed.

ii. Orderly Execution of Transactions During the Closing Period

1. Comments From ANPR and Roundtable

Roundtable panelists expressed the view that additional clarity was needed for the definitions incorporated in section 747(B), in particular, terms such as "closing period."[37] Commenters also requested clarification on the definition of closing period and requested Commission guidance on whether the prohibition on disorderly execution of transactions extends to conduct occurring outside the closing period.[38] More specifically, some commenters requested that the prohibitions in section 747(B) be limited to manipulative conduct such as "banging" or "marking the close."[39]

2. Commission Guidance

New CEA section 4c(a)(5)(B) prohibits any trading, practices, or conduct on or subject to the rules of a registered entity that "demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period." In the view of the Commission, Congress's inclusion of a *scienter* requirement means that accidental, or even negligent, trading conduct and practices will not suffice for a claim under section 4c(a)(5)(B); rather a market participant must at least act recklessly.[40] Accordingly, section 4c(a)(5)(B) will not capture legitimate trading behavior and is not "a trap for those who act in good faith."[41]

The Commission interprets the closing period to be generally defined as the period in the contract or trade when the daily settlement price is determined under the rules of that trading facility.[42] While the Commission interprets the prohibition in section 4c(a)(5)(B) to encompass any trading, conduct, or practices occurring inside the closing period that affects the orderly execution of transactions during the closing period, potential disruptive conduct outside that period may nevertheless form the basis for an investigation of potential violations under this section and other sections under the Act. With respect to swaps executed on a SEF, a swap will be subject to the provisions of section 4c(a)(5)(B) if a closing period or daily settlement price exists for the particular swap. Additionally, section 4c(a)(5)(B) violations will include executed orders as well as any bids and offers submitted by individuals for the purposes of disrupting fair and equitable trading.

Similar to other intent-based violations of the CEA, the Commission will consider all of the relevant facts and circumstances in determining whether a person violated section 4c(a)(5)(B). The Commission will evaluate the facts and circumstances as of the time the person engaged in the relevant trading, practices, or conduct (*i.e.* the Commission will consider what the person knew, or should have known, at the time he or she was engaging in the conduct at issue). The Commission will use existing concepts of orderliness of markets when assessing whether trades are executed, or orders are submitted, in an orderly fashion in the time periods prior to and during the closing period. In the view of the Commission, an orderly market may be characterized by, among other things, parameters such as a rational relationship between consecutive prices, a strong correlation between price changes and the volume of trades, levels of volatility that do not materially reduce liquidity, accurate relationships between the price of a derivative and the underlying such as a physical commodity or financial instrument, and reasonable spreads between contracts for near months and for remote months.[43] Participants and regulators in

[35] *See, e.g.,* New York Mercantile Exchange Rule 514.A.3; Minneapolis Grain Exchange Rule 731.00.

[36] *See, e.g.,* CME Group at 4 ("Order matching algorithms on electronic platforms preclude bids and offers from being violated.").

[37] *See, e.g.,* Greg Mocek at 173 ("It's easy to define the term 'closing period' presumably in a designated contract market. Are you planning on defining that period in a SEF?").

[38] *See, e.g.,* API at 12 ("Trading practices or conduct outside the closing period are not relevant to determine whether conduct inside the closing period is deemed 'orderly'."); HETCO at 7 ("HETCO urges the Commission to refrain from applying the prohibition against disorderly trading to an overly broad trading time period."); CEF at 6 ("The Commission should refrain from looking at trading practices outside of the closing period.").

[39] *See, e.g.,* FIA at 5 ("The Commission should clarify that traditionally accepted types of market manipulation, such as 'banging the close,' 'marking the close' and pricing window manipulation fall under the prohibition of 5(B).").

[40] *See, e.g., Hammond* v. *Smith Barney, Harris Upham & Company, Inc.,* [1990–1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 (CFTC Mar. 1, 1990) (scienter requires proof that a defendant committed the alleged wrongful acts "intentionally or with reckless disregard for his duties under the Act"); *Drexel Burnham Lambert, Inc.* v. *CFTC,* 850 F.2d 742, 748 (DC Cir. 1988) (holding that recklessness is sufficient to satisfy scienter requirement and that a reckless act is one where there is so little care that it is "difficult to believe the [actor] was not aware of what he was doing") (*quoting First Commodity Corp.* v. *CFTC,* 676 F.2d 1, 7 (1st Cir. 1982)).

[41] *United States* v. *Ragen,* 314 U.S. 513, 524 (1942).

[42] Closing periods may include the time period in which a daily settlement price is determined, the expiration day for a futures contract, and any period of time in which the cash-market transaction prices for a physical commodity are used in establishing a settlement price for a futures contract, option, or swap (as defined by the CEA).

[43] Concepts applicable to the securities markets are useful in analyzing commodity markets because of similarities between the two areas. Concerning orderliness of markets, *see, e.g., In re NYSE Specialists Securities Litigation,* 503 F.3d 89 (2d Cir. 2007) (discussing role of specialists in maintaining orderly market and various circumventions of that role); *Last Atlantis Partners, LLC* v. *AGS Specialist Partners,* 533 F.Supp. 2d 828 (N.D. Ill. 2008) (allegation that trading specialists disengaged automated order execution mechanism to discriminate against customers having direct access to markets); *LaBranche & Co.,* NYSE AMEX Hearing Board Decisions 09–AMEX–28, –29, and –30 (Oct. 2009) and *NYSE Member Education*

the commodity and securities markets are already familiar with these assessments of orderliness in connection with issues of market manipulation [44] and risk mitigation. The Commission believes that market participants should assess market conditions and consider how their trading practices and conduct affect the orderly execution of transactions during the closing period.[45]

iii. Spoofing

1. Comments From ANPR and Roundtable

Roundtable panelists commented that there is no commonly-accepted definition of "spoofing" throughout the industry.[46] Some commenters expressed a similar concern [47] and requested additional Commission guidance that any definition of "spoofing" set forth in section 4c(a)(5)(C) would not capture legitimate trading behavior.[48] In particular, several comment letters also expressed views on whether partial fills should be exempt from the definition of "spoofing."[49]

2. Commission Guidance

New CEA section 4c(a)(5)(C) prohibits any trading, practice, or conduct that "is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution)." To violate section 4c(a)(5)(C), a market participant must act with some degree of intent, or scienter, to engage in the "spoofing" trading practices prohibited by section 4c(a)(5)(C). In the view of the Commission, a 4c(a)(5)(C) "spoofing" violation requires that a person intend to cancel a bid or offer before execution; therefore, the Commission believes that reckless trading, conduct, or practices will not result in violations of section 4c(a)(5)(C).[50] Furthermore, orders, modifications, or cancellations will not be classified as "spoofing" if they were submitted as part of a legitimate, good-faith attempt to consummate a trade. Thus, the legitimate, good-faith cancellation of partially filled orders would not violate section 4c(a)(5)(C). However, a partial fill does not automatically exempt activity from being classified as "spoofing." When distinguishing between legitimate trading involving partial executions and "spoofing" behavior, the Commission will evaluate the market context, the person's pattern of trading activity (including fill characteristics), and other relevant facts and circumstances. For example, if a person's intent when placing a bid or offer was to cancel the entire bid or offer prior to execution, regardless of whether such bid or offer was subsequently filled, that conduct may violate section 4c(a)(5)(C). Accordingly, under this interpretation, section 4c(a)(5)(C) will not capture legitimate trading.

This "spoofing" prohibition covers bid and offer activity on all registered entities, including all regulated futures, options, and swap execution facilities, including all bids and offers in pre-open periods or during other exchange-controlled trading halts. "Spoofing" also includes, but is not limited to: (i) Submitting or cancelling bids or offers to overload the quotation system of a registered entity, (ii) submitting or cancelling bids or offers to delay another person's execution of trades; and (iii) submitting or cancelling multiple bids or offers to create an appearance of false market depth.[51] However, the "spoofing" provision is not intended to cover non-executable market communications such as requests for quotes and other authorized pre-trade communications.

As with other intent-based violations, the Commission distinguishes between legitimate trading and "spoofing" by evaluating all of the facts and circumstances of each particular case, including a person's trading practices and patterns. Notably, a section 4c(a)(5)(C) violation does not require a pattern of activity, even a single instance of trading activity can be disruptive of fair and equitable trading.

Issued in Washington, DC, on February 24, 2011 by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Antidisruptive Practices Authority—Commission Voting Summary; Statements of Commissioners; List of Roundtable Participants and Commenters

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Chilton and O'Malia voted in the affirmative; Commissioner Sommers voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed interpretive order regarding disruptive practices on designated contract markets or swap execution facilities. Congress expressly prohibited three trading practices that it deemed were disruptive of fair and equitable trading. Today's order provides additional guidance to market participants and the public on the trading, practices and conduct that violate these statutory provisions. The order also addresses comments received by the Commission at the December 2nd roundtable and in response to the Advanced Notice of

Bulletin 2006–19 (discussing the proper design and use of specialist algorithms to avoid taking liquidity from the market at and surrounding the prevailing market price).

[44] *See, e.g., Cargill, Inc.* v. *Hardin,* 452 F.2d 1154, 1170–71 (8th Cir. 1971) (market disruption through "squeeze" of shorts characterized by extraordinary price fluctuations, with little relationship to basic supply and demand factors for wheat; other markets not similarly affected; long employed unusual mechanism to liquidate position).

[45] For example, absent an intentional or reckless disregard for the orderly execution of transactions during the closing period, a person would not be liable under 4c(a)(5)(B) upon executing an order during the closing period simply because the transactions had a substantial effect on the settlement price.

[46] *See, e.g.,* John J. Lothian at 82 (referring to spoofing as "a very undefined type of term within the industry").

[47] *See, e.g.,* Chopper Trading at 3 ("The Commission must consider that spoofing does not have a generally understood definition in the futures markets.").

[48] *See, e.g.,* CME Group at 8 ("The statute's definition of 'spoofing' as 'bidding or offering with the intent to cancel the bid or offer before execution,' is too broad and does not differentiate legitimate market conduct from manipulative conduct that should be prohibited. The distinguishing characteristic between 'spoofing' that should be covered by paragraph (C) and the legitimate cancellation of other unfilled or partially filled orders is that 'spoofing' involves the intent to enter non bona fide orders for the purpose of misleading market participants and exploiting that deception."); HETCO at 7 ("The Commission should describe, with specificity, what trade practices constitute spoofing, particularly where this is not a concept familiar to the markets for commodities and derivatives."); ICE at 8 (generally discussing the practice of "spoofing" as defined in paragraph (C) of Section 747 may capture legitimate trading behavior).

[49] *See, e.g.,* API at 14 ("The Commission has requested comment on whether a "partial fill of an order * * * necessarily exempts that activity from being defined as 'spoofing.' The answer is yes."); HETCO at 8 ("A partial fill of an order or series of orders should not exempt the activity described above from being defined as 'spoofing'.").

[50] Similar to violations under section 4c(a)(5)(B), accidental or negligent trading, practices, and conduct will not constitute violations of section 4c(a)(5)(C).

[51] *See, e.g., Trillium Brokerage Services, LLC,* Letter of Acceptance, Waiver and Consent, No. 2007007678201, from the Financial Industry Regulatory Authority ("FINRA") (issued September 12, 2010) for a discussion of a "spoofing" case involving an illicit high frequency trading strategy. Under their "spoofing" strategy, Trillium entered numerous layered, non-bona fide market moving orders to generate selling or buying interest in specific stocks. By entering the non-bona fide orders, often in substantial size relative to a stock's overall legitimate pending order volume, Trillium traders created a false appearance of buy- or sell-side pressure. This trading strategy induced other market participants to enter orders to execute against limit orders previously entered by the Trillium traders. Once their orders were filled, the Trillium traders would then immediately cancel orders that had only been designed to create the false appearance of market activity. The *Letter of Acceptance, Waiver and Consent* and accompanying press release from FINRA can be accessed at *http://www.finra.org/Newsroom/NewsReleases/2010/P12195.*

Proposed Rulemaking on disruptive trading practices. The order addresses the comments by clarifying how the Commission will interpret and implement the provisions of Section 747. I look forward to hearing from the public in response to this proposed interpretive order. The comment letters and staff roundtable were extremely helpful in formulating this proposed order.

Appendix III

December 2, 2010 CFTC Staff Roundtable on Disruptive Trading Practices

I. Panel One: Opportunities and Challenges to Fair and Equitable Trading

i. Ensuring Fair and Equitable Trading at the Close

ii. Exploring "the character of" Spoofing

a. *Panelists:* John Hyland—U.S. Natural Gas Fund; Rajiv Fernando—Chopper Trading LLC; Adam Nunes—Hudson River Trading Group; Cameron Smith—Quantlab Financial, LLC; Liam Connell—Allston Trading, LLC; Don Wilson—DRW Trading Group; Joel Hasbrouck—New York University; Gary DeWaal—Newedge USA, LLC; Mark Fisher—MBF Clearing Corp; John Lothian—John J. Lothian & Company.

II. Panel Two: Rules "Reasonably Necessary" To Prohibit Disruptive Trading

a. *Panelists:* Tom Gira—Financial Industry Regulatory Authority; Chris Heymeyer—National Futures Association; Ike Gibbs—ConocoPhillips; Dean Payton—Chicago Mercantile Exchange; Mark Fabian—IntercontinentalExchange; Joe Mecane—New York Stock Exchange; Greg Mocek—McDermott Will & Emery; Ken Raisler on behalf of Futures Industry Association—Sullivan and Cromwell LLP; Micah Green—Patton Boggs LLP; Tyson Slocum—Public Citizen; Andrew Lo—Massachusetts Institute of Technology.

III. Panel Three: Exchange Perspectives on Disruptive Trading; Potential New Disruptive Trading Practices

a. *Panelists:* Tom Gira—Financial Industry Regulatory Authority; Chris Heymeyer—National Futures Association; Dean Payton—Chicago Mercantile Exchange; Mark Fabian—IntercontinentalExchange; Joe Mecane—New York Stock Exchange; Andrew Lo—Massachusetts Institute of Technology.

Appendix IV

Parties Submitting Comment Letters in Response to Disruptive Trading Practices ANPR

A. Flachman
American Petroleum Institute (API)
Argus Media, Inc. (Argus)
Better Markets (BM)
Bix Weir
Chopper Trading, LLC (Chopper Trading)
CME Group, Inc. (CME Group)
Commodity Markets Council (CMC)
David S. Nichols
DeWitt Brown
Edison Electric Institute (EEI)
Emilie Lauran
Futures Industry Association (FIA)
Hess Energy Trading Company, LLC (HETCO)
IntercontinentalExchange, Inc., and ICE Futures U.S., Inc. (collectively, ICE)
International Swaps and Derivatives Association, Inc. (ISDA)
Investment Company Institute (ICI)
Managed Funds Association (MFA)
Minneapolis Grain Exchange, Inc. (MGEX)
Newedge USA, LLC (Newedge USA)
Nicole Provo
Peter J. Carini
Petroleum Marketers Association of America (PMAA)
Rebecca Washington
Securities Industry and Financial Markets Association (SIFMA)
U.S. Senator Carl Levin
West Virginia Oil Marketers & Grocers Association (OMEGA)
Working Group of Commercial Energy Firms (CEF)

[FR Doc. 2011–6398 Filed 3–17–11; 8:45 am]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: U.S. Consumer Product Safety Commission.

ACTION: 30-Day notice of submission of information collection approval from the Office of Management and Budget and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the U.S. Consumer Product Safety Commission ("CPSC," "Commission," or "we") has submitted a Generic Information Collection Request (Generic ICR): "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et. seq.*).

DATES: Comments must be submitted April 18, 2011.

ADDRESSES: Written comments may be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* CPSC Desk Officer, *FAX:* 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified by the CPSC Docket No. CPSC [ ] and the title "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery." The written comments should also be submitted to the CPSC, identified by Docket No. CPSC [ ], by any of the following methods: Submit electronic comments in the following way: Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail) except through *http://www.regulations.gov.*

Submit written submissions in the following way:

Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, U.S. Consumer Product Safety Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to *http://www.regulations.gov.* Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Glatz, Division of Policy and Planning, Office of Information Technology and Technology Services, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814 *telephone:* 301–504–7671 or *e-mail: lglatz@cpsc.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 22, 2010 (75 FR 80542), the Office of Management and Budget (OMB) published a notice ("OMB notice") stating that, as part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, OMB is coordinating the development of a proposed Generic Information Collection Request titled, "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et. seq.*). The OMB notice announced that agencies (including the CPSC) intend to submit this collection to OMB for approval and also invited comments on specific aspects for the proposed information collection. The OMB notice also provided an estimated information collection burden and stated that agencies would provide more

refined individual estimates of burden in subsequent notices (75 FR at 80543). The OMB notice also provided a 60-day comment period.

This notice constitutes the CPSC's refined individual estimates of the information collection burden regarding generic clearance for the collection of qualitative feedback on agency service delivery. In compliance with 44 U.S.C. 3507, we have submitted the following proposed collection of information to OMB for review and clearance.

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback, we mean information that provides useful insights on perceptions and opinions, but not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations; provide an early warning of issues with service; or focus attention on areas where communication, training, or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the CPSC and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

We received no comments in response to the 60-day notice published by OMB in the **Federal Register** on December 22, 2010 (75 FR 80542).

Below we provide our projected average annual estimates for the next three years: [1]

Current Actions: New collection of information.

Type of Review: New collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Average Expected Number of Activities: Eight activities including qualitative surveys, focus groups, customer satisfaction surveys and usability tests.

Annual Number of Respondents: 1,600.

Annual Responses: 1,600.

Frequency of Response: Once per request.

Average Minutes per Response: 45 minutes per response.

Annual Burden Hours: 1,200.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

Dated: March 14, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–6442 Filed 3–17–11; 8:45 am]

BILLING CODE 6355–01–P

[1] The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance federal-wide: *Average Expected Annual Number of activities:* 25,000. *Average number of Respondents per Activity:* 200. *Annual responses:* 5,000,000. *Frequency of Response:* Once per request. *Average minutes per response:* 30. *Burden hours:* 2,500,000.

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, March 23, 2011, 10 a.m.–12 Noon.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

MATTER TO BE CONSIDERED:

Briefing Matter: Bed Rails—Notice of Proposed Rulemaking.

A live Webcast of the Meeting can be viewed at *http://www.cpsc.gov/webcast.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: March 15, 2011.

Todd A. Stevenson,

Secretary.

[FR Doc. 2011–6547 Filed 3–16–11; 4:15 pm]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, March 23, 2011; 2 p.m.–3 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

MATTER TO BE CONSIDERED:

Compliance Status Report

The Commission staff will brief the Commission on the status of compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: March 15, 2011.

Todd A Stevenson,

Secretary.

[FR Doc. 2011–6548 Filed 3–16–11; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Acquisition University Industry Day: "Better Buying Power" Initiatives

AGENCY: Defense Acquisition University, DoD.

ACTION: Event notice.

SUMMARY: Mrs. Katrina McFarland, President, Defense Acquisition University (DAU), will host a forum to discuss implementation of Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending, outlined in the Dr.

Ashton B. Carter, Undersecretary of Defense, Acquisition, Technology & Logistics, 14 September 2010 memorandum to acquisition professionals. Name of Event: Defense Acquisition University Industry Day: "Better Buying Power" Initiatives.

DATES: Thursday, April 21, 2011 from 8 a.m.–12:30 p.m.

ADDRESSES: Defense Acquisition University, Howell Auditorium, Bldg. 226, 9820 Belvoir Rd., Fort Belvoir, VA 22060.

FOR FURTHER INFORMATION CONTACT: Christen Goulding, Protocol Director, DAU; *Phone:* 703–805–5134; *Fax:* 703–805–3856; *E-mail: christen.goulding@dau.mil.*

SUPPLEMENTARY INFORMATION:

Purpose of the Event: The purpose of this event is to discuss and dialogue with industry about implementation of the USD(AT&L) memo about better buying power.

Agenda:

8 a.m. Overview of initiatives
9 a.m. Question and answer session
10:30 a.m. Begin individual, 20-minute sessions

Public's Accessibility to the Event: All attendees must be pre-registered to attend the event. Persons desiring to attend can register online at *http://www.dau.mil/documents/conference/index.asp*

Event Point of Contact: Ms. Christen Goulding, 703–805–5134.

Dated: March 10, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–6357 Filed 3–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Cancellation of Open Meeting of the National Defense University Board of Visitors (BOV)

AGENCY: National Defense University (NDU), DoD.

ACTION: Notice of cancellation of an open meeting.

SUMMARY: The Department of Defense, National Defense University, announced an open meeting of the National Defense University Board of Visitors on January 10, 2011 (76 FR 1408). The meeting previously scheduled to be held on April 7 & 8, 2011, has been canceled. This meeting will be rescheduled for a later date.

FOR FURTHER INFORMATION CONTACT: Ms. Dolores Hodge @ (202) 685–0082, Fax (202) 685–7707 or *HodgeD@ndu.edu.*

Dated: March 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–6358 Filed 3–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notification of Open Meeting of the National Defense University Board of Visitors (BOV)

AGENCY: National Defense University (NDU), DoD.

ACTION: Notice of open meeting.

SUMMARY: The National Defense University, Designated Federal Officer, has scheduled a meeting of the Board of Visitors. The National Defense University Board of Visitors is a Federal Advisory Board. The Board meets twice a year in proceedings that are open to the public.

DATES: The meeting will be held on May 24 & 25, 2011 from 11:30 a.m. to 5 p.m. on the 24th and continuing on the 25th from 8 a.m. to 12:30 p.m.

ADDRESSES: The Board of Visitors meeting will be held at Marshall Hall, Building 62, Room 155, the National Defense University, 300 5th Avenue, SW., Fort McNair, Washington, DC 20319–5066.

FOR FURTHER INFORMATION CONTACT: Ms. Dolores Hodge @ (202) 685–0082, Fax (202) 685–7707 or *HodgeD@ndu.edu.*

SUPPLEMENTARY INFORMATION: The future agenda will include discussion on Defense transformation, faculty development, facilities, information technology, curriculum development, post 9/11 initiatives as well as other operational issues and areas of interest affecting the day-to-day operations of the National Defense University and its components. The meeting is open to the public; limited space made available for observers will be allocated on a first come, first served basis. Written statements to the committee may be submitted to the committee at any time or in response to a stated planned meeting agenda by FAX or E–MAIL to the point of contact person listed in the preceding paragraph. (Subject Line: Comment/Statement to the NDU BOV).

Dated: March 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–6359 Filed 3–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Closed Meeting of the U.S. Strategic Command Strategic Advisory Group

AGENCY: Department of Defense.

ACTION: Notice of advisory committee closed meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act of 1972 (5 U.S.C. App 2, Section 1), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.150, the Department of Defense announces the following closed meeting notice pertaining to the following federal advisory committee: U.S. Strategic Command Strategic Advisory Group.

DATES: April 7, 2011, from 8 a.m. to 5 p.m. and April 8, 2011, from 8 a.m. to 11:30 a.m.

ADDRESSES: Dougherty Conference Center, Building 432, 906 SAC Boulevard, Offutt AFB, Nebraska 68113.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce Sudduth, Designated Federal Officer, (402) 294–4102, 901 SAC Blvd, Suite 1F7, Offutt AFB, NE 68113–6030.

For Additional/Supplementary Information Contact: Mr. Floyd March, Joint Staff, (703) 697–0610.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of the meeting is to provide advice on scientific, technical, intelligence, and policy-related issues to the Commander, U.S. Strategic Command, during the development of the Nation's strategic war plans.

Agenda: Topics include: Policy Issues, Space Operations, Nuclear Weapons Stockpile Assessment, Weapons of Mass Destruction, Intelligence Operations, Cyber Operations, Global Strike, Command and Control, Science and Technology, Missile Defense.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, and 41 CFR 102–3.155, the Department of Defense has determined that the meeting shall be closed to the public. Per delegated authority by the Chairman, Joint Chiefs of Staff, General C. Robert Kehler, Commander, U.S. Strategic Command, in consultation with his legal advisor, 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, U.S.C.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public of interested organizations may submit written statements to the membership of the Strategic Advisory Group at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the Strategic Advisory Group's Designated Federal Officer; the Designated Federal Officer's contact information can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.* Written statements that do not pertain to a scheduled meeting of the Strategic Advisory Group may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five business days prior to the meeting in question. The Designated Federal Officer will review all submitted written statements and provide copies to all the committee members.

Dated: March 11, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–6360 Filed 3–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2011–0009]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Department of the Air Force is proposing to alter 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: The proposed action will be effective on April 18, 2011 unless comments are received that would result in a contrary determination.

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

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

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

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

FOR FURTHER INFORMATION CONTACT: Mr. Charles J. Shedrick, 703–696–6488, or the Department of the Air Force Privacy Office, Air Force Privacy Act Office, Office of Warfighting Integration and Chief Information officer, ATTN: SAF/XCPPI, 1800 Air Force Pentagon, Washington DC 20330–1800.

SUPPLEMENTARY INFORMATION: The Department of the Air Force 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 **FOR FURTHER INFORMATION CONTACT** address above.

The proposed systems reports, as required by 5 United States Code 552a(r) of the Privacy Act, were submitted on March 8, 2011 to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget pursuant to paragraph 4c of Appendix I to Office of Management and Budget Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: March 10, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F044 AFPC A

SYSTEM NAME:

Medical Assignment Limitation Record System (August 29, 2003, 68 FR 51998).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Headquarters Air Force Personnel Center, Medical Service Officer Management Division, Medical Retention Standards Branch, 550 C Street West, Randolph Air Force Base, TX 78150–4727."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "All active duty Air Force members who develop, as determined by the local Deployment Availability Working Group, a medical condition that may warrant placement on an Assignment Limitation Code (ALC) in Military Personnel Data System (MilPDS). This includes all cases presented to a Medical Evaluation Board or Physical Evaluation Board that were returned to duty and therefore considered for an ALC. An ALC flags the member in MilPDS as medical waiver required for deployments and overseas assignments."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Medical Evaluation and Physical Evaluation Board packages, Report of Medical Examination, Report of Medical History, Narrative Summary, Armed Forces Health Longitudinal Technology Application (AHLTA) medical record documentation, Clinical Record Consultation Sheet, Electrocardiographic Record, Pulmonary Function Testing reports, laboratory results, commander letters, and Deployment Availability Working Group summary. Personally identifiable information included in the above records includes name, Social Security Number (SSN), and date of birth."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 8013, Secretary of the Air Force; Air Force Instruction 36–3212, Physical Evaluation for Retention, Retirement and Separation; and Air Force Instruction 36–2110, Assignments; and E.O. 9397 (SSN), as amended."

PURPOSE(S):

Delete entry and replace with "Collect applicable medical information and commander input to determine appropriate medical Assignment Limitation Code (ALC)."

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' published at the beginning of the Air Force's compilation of systems of records notices apply to this system.

Note: This system of records contains individually identifiable health information. The DoD Health Information Privacy Regulation (DoD 6025.18–R) issued pursuant to the Health Insurance Portability and Accountability Act of 1996, applies to most such health information. DoD 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice."

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Delete entry and replace with "Maintained in hardcopy file folders and electronic storage media."

RETRIEVABILITY:

Delete entry and replace with "Electronic and hardcopy files are retrieved by last name and last four digits of Social Security Number (SSN)."

SAFEGUARDS:

Delete entry and replace with "Records are accessed by person(s) responsible for servicing the record system in performance of their official duties. Records are stored in locked rooms and cabinets and electronic records are accessible by use of the Common Access Card (CAC) and site specific login."

RETENTION AND DISPOSAL:

Delete entry and replace with "Retained in office files for two years or when no longer needed for reference, then destroyed by tearing into pieces, shredding, pulping, macerating, burning, or deleting."

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Headquarters Air Force Personnel Center, Medical Service Officer Utilization Division, Chief, Medical Retention Standards Branch, Randolph Air Force Base, TX 78150–4727."

NOTIFICATION PROCEDURES:

Delete entry and replace with "Individuals seeking to determine whether this system of records contains information on themselves should address written inquiries to Headquarters Air Force Personnel Center, Medical Service Officer Management Division, Chief, Medical Retention Standards Branch, Randolph Air Force Base, TX 78150–4727.

For verification purposes, individual should provide their full name, Social Security Number (SSN), any details, which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking to access records about themselves contained in this system should address written requests to Headquarters Air Force Personnel Center, Medical Service Officer Utilization Division, Chief, Medical Retention Standards Branch, Randolph Air Force Base, TX 78150–4727.

For verification purposes, individual should provide their full name, Social Security Number (SSN), any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United State of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'."

CONTESTING RECORD PROCEDURES:

Delete entry and replace with "The Air Force rules for accessing records and for contesting contents and appealing initial agency determinations are published in 32 CFR part 806b, Air Force Instruction 33–332, Air Force Privacy Program and may be obtained from the system manager."

* * * * *

F044 AFPC A

SYSTEM NAME:

Medical Assignment Limitation Record System.

SYSTEM LOCATION:

Headquarters Air Force Personnel Center, Medical Service Officer Management Division, Medical Retention Standards Branch, 550 C Street West, Randolph Air Force Base, TX 78150–4727.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All active duty Air Force members who develop, as determined by the local Deployment Availability Working Group, a medical condition that may warrant placement on an Assignment Limitation Code (ALC) in Military Personnel Data System (MilPDS). This includes all cases presented to a Medical Evaluation Board or Physical Evaluation Board that were returned to duty and therefore considered for an ALC. An ALC flags the member in MilPDS as medical waiver required for deployments and overseas assignments.

CATEGORIES OF RECORDS IN THE SYSTEM:

Medical Evaluation and Physical Evaluation Board packages, Report of Medical Examination, Report of Medical History, Narrative Summary, Armed Forces Health Longitudinal Technology Application (AHLTA) medical record documentation, Clinical Record Consultation Sheet, Electrocardiographic Record, Pulmonary Function Testing reports, laboratory results, commander letters, Deployment Availability Working Group summary. Personally identifiable information included in the above records includes name, Social Security Number (SSN), and date of birth.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; Air Force Instruction 36–3212, Physical Evaluation for Retention, Retirement and Separation; and Air Force Instruction 36–2110, Assignments and E.O. 9397 (SSN), as amended.

PURPOSE(S):

Collect applicable medical information and commander input to determine appropriate medical Assignment Limitation Code (ALC).

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' published at the beginning of the Air

Force's compilation of systems of records notices apply to this system.

Note: This system of records contains individually identifiable health information. The DoD Health Information Privacy Regulation (DoD 6025.18–R) issued pursuant to the Health Insurance Portability and Accountability Act of 1996, applies to most such health information. DoD 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in hardcopy file folders and electronic storage media.

RETRIEVABILITY:

Electronic and hardcopy files are retrieved by last name and last four digits of Social Security Number (SSN).

SAFEGUARDS:

Records are accessed by person(s) responsible for servicing the record system in performance of their official duties. Records are stored in locked rooms and cabinets and electronic records are accessible by use of the Common Access Card (CAC) and site specific login.

RETENTION AND DISPOSAL:

Retained in office files for two years or when no longer needed for reference, then destroyed by tearing into pieces, shredding, pulping, macerating, burning, or deleting.

SYSTEM MANAGER(S) AND ADDRESS:

Headquarters Air Force Personnel Center, Medical Service Officer Utilization Division, Chief, Medical Retention Standards Branch, Randolph Air Force Base, TX 78150–4727.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether this system of records contains information on themselves should address written inquiries to Headquarters Air Force Personnel Center, Medical Service Officer Management Division, Chief, Medical Retention Standards Branch, Randolph Air Force Base, TX 78150–4727.

For verification purposes, individual should provide their full name, Social Security Number (SSN), any details, which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system should address written requests to Headquarters Air Force Personnel Center, Medical Service Officer Utilization Division, Chief, Medical Retention Standards Branch, Randolph Air Force Base, TX 78150–4727.

For verification purposes, individual should provide their full name, Social Security Number (SSN), any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records and for contesting contents and appealing initial agency determinations are published in 32 CFR part 806b, Air Force Instruction 33–332, Air Force Privacy Program and may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information obtained from military and civilian medical institutions and correspondence as related to board proceedings.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–6356 Filed 3–17–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Notice of Availability of Draft Environmental Impact Statement for the Proposed Honolulu Seawater Air Conditioning Project, Honolulu, HI

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of Availability.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA), the U.S. Army Corps of Engineers, Honolulu District has prepared a Draft Environmental Impact Statement (DEIS) to inform a decision on an application from Honolulu Seawater Air Conditioning, LLC to construct a seawater air conditioning system (SWAC) at Kaka'ako on the south shore of O'ahu. The applicant's overall project purpose is to provide a renewable-energy air conditioning system for downtown Honolulu buildings. In order to obtain deep, cold seawater to chill fresh water that would circulate through the SWAC system and return it to the ocean after it has passed through onshore heat exchangers, the applicant proposes to construct intake and return pipelines in adjacent coastal waters. The proposed pipeline staging and installation sites are located within the navigable waters of the United States and the proposed activity is subject to the jurisdiction of the U.S. Army Corps of Engineers. Proposed onshore improvements and upland infrastructure are briefly described to provide an overview of the project, but their impacts to terrestrial environmental resources are not a primary focus of the document.

Of primary federal concern are potential effects of proposed in-water construction, including the discharge of fill material at the offshore pipeline receiving pit, and operation of the system on the quality of the human environment. The DEIS considers alternative cooling technologies, cooling station designs and locations, pipeline installation methods, diffuser location and depth, and intake design. It evaluates two alternatives involving different pipeline alignments. Identified environmental resources potentially affected include marine biota and habitat; water quality; navigation and other human use; noise; and air quality.

DATES: All written comments must be postmarked or electronically transmitted on or before May 2, 2011.

ADDRESSES: Comments may be submitted in writing to: Mr. Peter C.

Galloway, Project Manager; U.S. Army Corps of Engineers, Honolulu District; Regulatory Branch (CEPOH–EC–R); Building 230; Fort Shafter, HI 96858–5440. Comments may also be submitted via e-mail to *honoluluswac@usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: Peter C. Galloway at (808) 438–8416, or via e-mail at *peter.c.galloway@usace.army.mil.*

SUPPLEMENTARY INFORMATION: To obtain, utilize, and return deep, cold seawater, Honolulu Seawater Air Conditioning, LLC (applicant) proposes to construct a 63-inch diameter seawater intake pipe extending offshore approximately four miles, to a depth of 1,600 to 1,800 feet; a 54-inch diameter seawater return pipe extending offshore approximately 3,500 feet, to a depth of 150 feet; an on-shore cooling station containing pumps, heat exchangers and auxiliary chillers; and a network of upland distribution pipes to circulate cooled fresh water from the station to customer buildings in the downtown area. In addition, the applicant proposes to use an area along the western shore of Sand Island and the adjoining channel area of Ke'ehi Lagoon for pipeline assembly and staging prior to towing and installing the lines at the project site. Individual pipe segments would be heat-fused to form longer segments and then flange-bolted to form a continuous line.

At the project site, the pipelines would be buried from behind the shore to some depth offshore in order to reduce negative impacts to the benthic environment and to protect the pipes from high waves and storm surge in the nearshore zone. An offshore receiving pit would be excavated and backfilled at the pipeline "breakout" location. The offshore portions of the intake and return pipelines, which would be installed adjacent to each other, would be supported on pre-cast concrete supports which would be placed on the pipelines prior to their filling and sinking at the project site. The seaward end of the intake line would be unscreened and would terminate in a right-angle elbow, such that water would be drawn down into the pipe from about 14 feet above the sea bottom. The seaward end of the return pipeline would terminate in a diffuser section extending from depths of 120 to 150 feet.

The proposed project would involve work or structures in or affecting the course, condition, location or capacity of navigable waters of the United States. It would also involve the discharge of dredged or fill material into waters of the United States. Federal authorization of the project will therefore require issuance of a Department of the Army (DA) permit pursuant to both Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344).

USACE invites participation in the EIS process of federal, state and local agencies; Hawaiian organizations, individuals and practitioners; and other interested private organizations and parties.

An electronic version of the DEIS may be viewed by visiting the USACE Honolulu District Web site at *http://www.poh.usace.army.mil* and selecting "Public Notices", then the link provided within the listing for Special Public Notice No. POH–2004–01141. A CD copy of the document may be obtained by contacting Mr. Galloway in writing at the mailing address or the contact e-mail address above. In addition, a hard copy of the DEIS may also be viewed at the Hawaii State Library (Hawaii & Pacific Section), 478 South King Street, Honolulu, Hawai'i 96813.

Dated: February 16, 2011.

Douglas B. Guttormsen,

Lieutenant Colonel, U.S. Army, Commanding.

[FR Doc. 2011–6426 Filed 3–17–11; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

National Professional Development Program; Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students; Overview Information; National Professional Development Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2011

Catalog of Federal Domestic Assistance (CFDA) Number: 84.195N.

Dates:

Applications Available: March 18, 2011.

Deadline for Transmittal of Applications: May 2, 2011.

Deadline for Intergovernmental Review: July 5, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: Section 3131 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), provides for a National Professional Development (NPD) program that will award grants on a competitive basis, for a period of not more than 5 years, to institutions of higher education (in consortia with State educational agencies or local educational agencies). These grants support professional development activities that are designed to improve classroom instruction for English Learners (ELs) and will assist educational personnel working with such children to meet high professional standards, including standards for certification and licensure as teachers who work in language instruction educational programs or serve ELs.

Grants awarded under this program may be used—

(1) For pre-service professional development programs that will assist local schools and institutions of higher education (IHEs) to upgrade the qualifications and skills of educational personnel who are not certified or licensed, especially educational paraprofessionals;

(2) For the development of program curricula appropriate to the needs of the consortia participants involved; and

(3) In conjunction with other Federal need-based student financial assistance programs, for financial assistance, and costs related to tuition, fees, and books for enrolling in courses required to complete the degree involved, to meet certification or licensing requirements for teachers who work in language instruction educational programs or serve ELs.

Priorities: This notice includes three competitive preference priorities and two invitational priorities. Competitive Preference Priority 1 is from section 75.225 of the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.225). Competitive Preference Priorities 2 and 3 are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

Competitive Preference Priorities: For FY 2011, these priorities are competitive preference priorities. For Competitive Preference Priority 1, under 34 CFR 75.105(c)(2)(i), we award an additional 5 points to an applicant that meets the priority. For Competitive Preference Priorities 2 and 3, we award up to an additional 5 points per priority to an application, depending on how well the application meets the priority.

Note: We will award competitive preference priority points for Competitive Preference Priorities 2 and 3 only to applications that score 80 or above on the selection criteria. We will award competitive preference priority points under Competitive Preference Priority 1 to any application that meets that priority.

These priorities are:

Competitive Preference Priority 1—Novice Applicants.

Under this priority, the Secretary gives special consideration to novice applicants. Under 34 CFR 75.225(a), a novice applicant means any applicant for a grant from the Department of Education that—

(1) Has never received a grant or subgrant under the program from which it seeks funding;

(2) Has never been a member of a group application, submitted in accordance with 34 CFR 75.127–75.129, that received a grant under the program from which it seeks funding; and

(3) Has not had an active discretionary grant from the Federal Government in the five years before the deadline date for applications under the program.

For the purposes of this requirement, a grant is active until the end of the grant's project or funding period, including any extensions of those periods that extend the grantee's authority to obligate funds. In the case of a group application submitted in accordance with 34 CFR 75.127–75.129, a group applicant is considered a novice applicant if the group includes only parties that meet the requirements listed above.

Competitive Preference Priority 2—Enabling More Data-Based Decision-Making.

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in the following priority area:

Improving instructional practices, policies, and student outcomes in elementary or secondary schools.

Competitive Preference Priority 3—Promoting Science, Technology, Engineering, and Mathematics (STEM) Education.

Projects that are designed to address the following priority area:

Increasing the opportunities for high-quality preparation of, or professional development for, teachers or other educators of STEM subjects.

Invitational Priorities: For FY 2011, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1—Improving Achievement and High School Graduation Rates.

Projects that are designed to address the following priority area:

Accelerating learning and helping to improve high school graduation rates and college enrollment rates for students in rural local educational agencies.

Invitational Priority 2—Improving Preparation of All Teachers to Better Serve English Learners.

Projects designed to improve a teacher education program at an IHE in order to better prepare all participants in a teacher education program to provide effective instruction to ELs. In such projects, IHEs would collaborate with local educational agencies on activities such as:

(1) Professional development to improve the ability of teacher preparation faculty and content faculty at IHEs in preparing prospective teachers to teach ELs; and

(2) The development of teacher education curricula that—

(a) Are aligned with State content standards in academic subjects and State English language proficiency standards; and

(b) Prepare all teacher candidates in an IHE to provide instruction that accelerates ELs' acquisition of language, literacy, and content knowledge.

Definition: The following definition is from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486) and applies to Competitive Preference Priority 2.

Privacy requirements means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State and local requirements regarding privacy.

Program Authority: 20 U.S.C. 6861.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, and 99. (b) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $17,846,355 for new awards for this program for FY 2011. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $275,000–$400,000 per year, for each year of the grant.

Estimated Average Size of Awards: $337,000.

Estimated Number of Awards: 53.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs, in consortia with local educational agencies (LEAs) or State educational agencies (SEAs).

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:*

Yvonne Mathieu, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5C138, Washington, DC 20202–6510. Telephone: (202) 401–1461 or by e-mail: *Yvonne.Mathieu@ed.gov*mailto:. If you request an application package by e-mail, please include "84.195N Application Request" in the subject heading of your e-mail.

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

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 35 pages using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

• Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the two-page abstract. However, the page limit does apply to all of the application narrative section in Part III.

We will reject your application if you exceed the page limit; or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: March 18, 2011.

Deadline for Transmittal of Applications: May 2, 2011.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the persons listed under *For Further Information Contact* in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: July 5, 2011.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (*see http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*).

7. *Other Submission Requirements:*

Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the NPD program, CFDA number 84.195N, must be submitted electronically using the Governmentwide Grants.gov Apply site at www.Grants.gov. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the National Professional Development program at *http://www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.195, not 84.195N).

Please note the following:

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than .PDF or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under *For Further Information Contact* in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Ana Maria Garcia, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5C147, Washington, DC 20202. FAX: (202) 260–1292.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.195N), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.195N), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in

Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 of EDGAR. The maximum score for all of these criteria is 100 points. The maximum score for each criterion is indicated in parentheses.

The notes that we have included after each criterion are guidance to assist applicants in understanding the criterion as they prepare their applications, and are not required by statute or regulation.

(a) *Quality of the project design.* (40 points)

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable. (35 points)

(2) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice. (5 points)

Notes for Quality of the Project Design: In responding to this criterion, the applicant may wish to describe a plan to carry out activities under the grant as part of its required consortium with one or more LEAs or SEAs, including how each member will be involved in the planning, development, and implementation of the project; the resources to be provided by each partner(s); the specific activities that the partner(s) will contribute to the grant during each year of the project; and the identity of each member of the consortium.

(b) *Quality of project personnel.* (10 points)

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

(1) The qualifications, including relevant training and experience, of the project director or principal investigator. (5 points)

(2) The qualifications, including relevant training and experience, of key project personnel. (5 points)

Notes for Quality of the project personnel: The applicant may address the factors under this criterion by including position descriptions (not resumes) for the project director and other key personnel, such as the evaluator of the program.

(c) *Quality of the management plan.* (20 points)

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks. (15 points)

(2) The extent to which the time commitment of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project. (5 points)

Notes for Quality of the management plan: In responding to this criterion, the applicant may wish to include a narrative that describes how and when, in each budget period of the project, the applicant plans to meet each project objective.

The applicant may also want to consider addressing the factors under this criterion by including a clear, well-thought-out management plan that includes annual timelines, key project milestones, a schedule of activities, the persons responsible for each activity, and the percentage of time the project director, partner(s) staff, consultants, and other key personnel will spend in the project.

(d) *Quality of the project evaluation.* (30 points) The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(1) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project. (10 points)

(2) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible. (10 points)

(3) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes. (10 points)

Note for Quality of the project evaluation: Applicants may wish to consider addressing the factors under this criterion by describing how the evaluation plan is aligned with the goals, objectives and activities described under the Quality of Project Design criterion. In addition, each applicant may wish to explain how each objective will be evaluated and when the applicant will collect, analyze, and report quantitative and qualitative data on project measures and Government Performance and Results Act (GPRA) performance measures.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Transparency and Open Government Policy:* After awards are made under this competition, all of the submitted successful applications, together with reviewer scores and comments, will be posted on the Department's Web site.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms.html.*

5. *Performance Measures:* Under GPRA, Federal departments and agencies must clearly describe the goals and objectives of programs, identify resources and actions needed to accomplish goals and objectives, develop a means of measuring progress made, and regularly report on achievement. One important source of program information on successes and lessons learned is the project evaluation conducted under individual grants. The Department has developed the following GPRA performance measures for evaluating the overall effectiveness of the NPD program: Measure 1.1: The percentage of pre-service program completers who are State and/or locally certified, licensed, or endorsed in EL instruction. Measure 1.2: The percentage of pre-service program completers who are placed in instructional settings serving EL students within one year of program completion. Measure 1.3: The percentage of pre-service program completers who are providing instructional services to EL students 3 years after program completion.

Measure 1.4: The percentage of paraprofessional program completers who meet State and/or local qualifications for paraprofessionals working with EL students.

Measure 1.5: The percentage of in-service teacher completers who complete State and/or local certification, licensure, or endorsement requirements in EL instruction as a result of the program.

Measure 1.6: The percentage of in-service teacher completers who are providing instructional services to EL students.

6. *Continuation Awards:*

In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also requires various assurances and, in making a continuation award, considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contacts

For Further Information Contact: Ana Garcia, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5C147, Washington, DC 20202–6510. Telephone: (202) 401–1440, or by e-mail: *Ana.Garcia@ed.gov;* Diana Schneider, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C139, Washington, DC 20202–6510. Telephone: (202) 401–1456, or by e-mail: *Diana.Schneider@ed.gov;* or Sharon Coleman, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C136, Washington, DC 20202–6510. Telephone: (202) 401–1452, or by e-mail: *Sharon.Coleman@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact persons listed under **For Further Information Contact** in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.*

Dated: March 15, 2011.

Rosalinda Barrera,

Assistant Deputy Secretary and Director for English Language Acquisition, Language Enhancement and Academic Achievement for Limited English Proficient Students.

[FR Doc. 2011–6459 Filed 3–17–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12778–004]

Fall Creek Hydro, LLC; Notice of Application Tendered for Filing With the Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original major license.

b. *Project No.:* 12778–004.

c. *Date Filed:* February 28, 2011.

d. *Applicant:* Fall Creek Hydro, LLC.

e. *Name of Project:* Fall Creek Dam Hydroelectric Project.

f. *Location:* The proposed project would be constructed at the existing U.S. Army Corps of Engineers' (Corps) Fall Creek Dam located on Fall Creek near the towns of Springfield and Eugene in Lane County, Oregon. The project would occupy 6.53 acres of Federal lands managed by the Corps.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Brent L. Smith, Chief Operating Officer; Symbiotics LLC; 371 Upper Terrace, Suite 2; Bend, OR 97702; Telephone (541) 330–8779.

i. *FERC Contact:* Lee Emery; (202) 502–8379 or *lee.emery@ferc.gov.*

j. This application is not ready for environmental analysis at this time.

k. *Project Description:* The proposed project would consist of the following new facilities: (1) An intake structure located on the face of the Corps dam and installed directly above one of the existing intake structures; (2) two 8-foot-diameter by 110-foot-long steel penstocks that would bifurcate the existing south regulating outlet to deliver flow to a powerhouse and a fish bypass system; (3) a 60-foot by 75-foot concrete powerhouse that would be located downstream from the toe of the dam and would house two Francis generating units and one Kaplan generating unit with a total installed capacity of 10 megawatts; (4) a fish bypass system (to provide downstream fish passage) that would include, among other things, Eicher fish screens, steel pipes, multi-level release ports, open channels, a fish counting station, and a discharge culvert; (5) one 442-foot-long, 12.5-kilovolt (kV), single-circuit transmission line that would be buried and extend from the powerhouse to an existing power line at the base of the dam; and (6) appurtenant facilities.

l. *Locations of the Application:* A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Procedural Schedule:* The application will be processed according to the preliminary licensing schedule below. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Notice of Acceptance/Notice of Ready for Environmental Analysis	May 2011.
Filing of recommendations, preliminary terms and conditions, and fishway prescriptions	July 2011.
Commission issues Draft EA or EIS	January 2012.
Comments on Draft EA or EIS	February 2012.
Modified Terms and Conditions	April 2012.
Commission Issues Final EA or EIS	July 2012.

o. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: March 11, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–6334 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1867–000.

Applicants: Equitrans, L.P.

Description: Equitrans, L.P. submits tariff filing per 154.204: Scheduling and Curtailment of Service Revision to be effective 4/2/2011.

Filed Date: 03/02/2011.

Accession Number: 20110302–5113.

Comment Date: 5 p.m. Eastern Time on Monday, March 14, 2011.

Docket Numbers: RP11–1868–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits tariff filing per 154.204: Devon Amendments Filing to be effective 3/3/2011.

Filed Date: 03/02/2011.

Accession Number: 20110302–5142.

Comment Date: 5 p.m. Eastern Time on Monday, March 14, 2011.

Docket Numbers: RP11–1869–000.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission, LLC submits tariff filing per 154.204: SGT/SGL Qualification to be effective 4/2/2011.

Filed Date: 03/03/2011.

Accession Number: 20110303–5013.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 15, 2011.

Docket Numbers: RP11–1870–000.

Applicants: Alliance Pipeline L.P.

Description: Alliance Pipeline L.P. submits tariff filing per 154.204: ExxonMobil to Husky to be effective 3/1/2011.

Filed Date: 03/03/2011.

Accession Number: 20110303–5039.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 15, 2011.

Docket Numbers: RP11–1871–000.

Applicants: Distrigas of Massachusetts LLC, GDF Suez Gas NA LLC.

Description: Joint Petition Of Distrigas Of Massachusetts LLC And GDF Suez Gas NA LLC For Temporary Waiver Of Capacity Release Regulations And Policies, And Request For Expedited Treatment.

Filed Date: 03/02/2011.

Accession Number: 20110302–5250.

Comment Date: 5 p.m. Eastern Time on Monday, March 14, 2011.

Docket Numbers: RP11–1872–000.

Applicants: Texas Eastern Transmission, LP.

Description: Texas Eastern Transmission, LP submits tariff filing per 154.204: No-notice Service Enhancement to be effective 6/1/2011.

Filed Date: 03/07/2011.

Accession Number: 20110307–5048.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011.

Docket Numbers: RP11–1873–000.

Applicants: Eastern Shore Natural Gas Company.

Description: Eastern Shore Natural Gas Company submits tariff filing per 154.204: Revision of Creditworthiness Provisions to be effective 4/7/2011.

Filed Date: 03/07/2011.

Accession Number: 20110307–5071.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make

protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 7, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6434 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1874–000.

Applicants: Transcontinental Gas Pipe Line Company,

Description: Transcontinental Gas Pipe Line Company, LLC submits tariff filing per 154.203: Compliance Filing to Update Volume No. 2 Table of Contents to be effective 3/1/2011.

Filed Date: 03/08/2011.

Accession Number: 20110308–5034.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011.

Docket Numbers: RP11–1875–000.

Applicants: Trunkline LNG Company, LLC.

Description: Trunkline LNG Company, LLC submits tariff filing per 154.204: Negotiated Rate Filing to be effective 3/11/2011.

Filed Date: 03/08/2011.

Accession Number: 20110308–5037.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011

Docket Numbers: RP11–1876–000.

Applicants: Golden Pass Pipeline LLC.

Description: Request of Golden Pass Pipeline LLC for an Extension of Time to Provide Support for Mozilla Firefox as a Browser Option.

Filed Date: 03/08/2011.

Accession Number: 20110308–5137.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011.

Docket Numbers: RP11–1877–000.

Applicants: Natural Gas Pipeline Company of America LLC.

Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.204: Expired Negotiated Rate Agreements Filing to be effective 4/1/2011.

Filed Date: 03/09/2011.

Accession Number: 20110309–5021.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011.

Docket Numbers: RP11–1878–000.

Applicants: Natural Gas Pipeline Company of America.

Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.204: Negotiated Rate Agreement Filing to be effective 4/1/2011.

Filed Date: 03/09/2011.

Accession Number: 20110309–5033.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Dated: March 9, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6436 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–76–002.

Applicants: Bison Pipeline LLC.

Description: Bison Pipeline LLC submits tariff filing per 154.203: NAESB WGQ 1.9 Compliance to be effective 1/14/2011.

Filed Date: 02/28/2011.

Accession Number: 20110228–5081.

Comment Date: 5 p.m. Eastern Time on Monday, March 14, 2011.

Docket Numbers: RP11–1670–001.

Applicants: Eastern Shore Natural Gas Company.

Description: Eastern Shore Natural Gas Company submits tariff filing per 154.203: T–1 Compliance to be effective 7/1/2011.

Filed Date: 03/02/2011.

Accession Number: 20110302–5137.

Comment Date: 5 p.m. Eastern Time on Monday, March 14, 2011.

Docket Numbers: RP10–877–007.

Applicants: Cameron Interstate Pipeline, LLC.

Description: Cameron Interstate Pipeline, LLC submits tariff filing per 154.203: Cameron Interstate Pipeline LLC Compliance Filing March 2, 2011 to be effective 11/1/2010.

Filed Date: 03/03/2011.

Accession Number: 20110303–5008.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 15, 2011.

Docket Numbers: RP11–1714–001.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Transcontinental Gas Pipe Line Company, LLC submits tariff filing per 154.203: Compliance Filing—Revision to Section 7 of the GT&C to be effective 3/1/2011.

Filed Date: 03/03/2011.

Accession Number: 20110303–5021.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 15, 2011.

Docket Numbers: RP11–1825–001.

Applicants: Columbia Gas Transmission, LLC.

Description: Columbia Gas Transmission, LLC submits tariff filing per 154.205(b): EPCA Errata to be effective 4/1/2011.

Filed Date: 03/03/2011.

Accession Number: 20110303–5116.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 15, 2011.

Docket Numbers: RP11–43–001.

Applicants: Central New York Oil And Gas, LLC.

Description: Central New York Oil And Gas, LLC submits tariff filing per 154.203: CNYOG's Baseline Compliance Filing, to be effective 10/7/2010.

Filed Date: 03/07/2011.

Accession Number: 20110307–5121.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 9, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6435 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

March 11, 2011.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC11–48–000.

Applicants: Tiverton Power Inc., Rumford Power Inc., Brick Power Holdings LLC, Rumford Power Holdings Inc., Tiverton Power Holdings Inc., Capital Power Investments LLC.

Description: Application for Order Under Section 203 of the Federal Power Act, Request for Confidential Treatment, Waivers and 21 Day Comment Period of Brick Power Holdings LLC, *et. al.*

Filed Date: 03/10/2011.

Accession Number: 20110310–5120.

Comment Date: 5 p.m. Eastern Time on Thursday, March 31, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3055–000.

Applicants: Alabama Power Company.

Description: Alabama Power Company submits tariff filing per 35: Attachment S (Gulf)—Compliance Filing under Docket No. ER11–2477 to be effective 9/22/2010.

Filed Date: 03/10/2011.

Accession Number: 20110310–5000.

Comment Date: 5 p.m. Eastern Time on Thursday, March 31, 2011.

Docket Numbers: ER11–3056–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): Amendments to the PJM Operating Agreement Schedule 12 Membership List to be effective 2/21/2011.

Filed Date: 03/10/2011.

Accession Number: 20110310–5047.

Comment Date: 5 p.m. Eastern Time on Thursday, March 31, 2011.

Docket Numbers: ER11–3057–000.

Applicants: PJM Interconnection, L.L.C., PPL Electric Utilities Corporation.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): Revisions to PPL's Attachment H–8G to conform PJM's baseline filing to be effective 9/17/2010.

Filed Date: 03/10/2011.

Accession Number: 20110310–5072.

Comment Date: 5 p.m. Eastern Time on Thursday, March 17, 2011.

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.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6433 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–2382–002.

Applicants: NorthWestern Corporation.

Description: Compliance Refund Report of Northwestern Corporation.

Filed Date: 03/07/2011.

Accession Number: 20110307–5188.

Comment Date: 5 p.m. Eastern Time on Monday, March 28, 2011.

Docket Numbers: ER11–3039–000.

Applicants: Calvert Cliffs Nuclear Power Plant, LLC.

Description: Calvert Cliffs Nuclear Power Plant, LLC submits tariff filing per 35.13(a)(2)(iii): Amendment to MBR Tariff to be effective 8/10/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5000.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3040–000.

Applicants: Constellation Energy Commodities Group Maine, LLC.

Description: Constellation Energy Commodities Group Maine, LLC submits tariff filing per 35.13(a)(2)(iii): Amendment to MBR Tariff to be effective 8/10/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5001.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3041–000.

Applicants: Constellation Power Source Generation, Inc.

Description: Constellation Power Source Generation, Inc. submits tariff filing per 35.13(a)(2)(iii): Amendment to MBR Tariff to be effective 8/10/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5002.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3042–000.

Applicants: Criterion Power Partners, LLC.

Description: Criterion Power Partners, LLC submits tariff filing per 35.13(a)(2)(iii): Amendment to MBR Tariff to be effective 9/30/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5003.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3043–000.

Applicants: R.E. Ginna Nuclear Power Plant, LLC.

Description: R.E. Ginna Nuclear Power Plant, LLC submits tariff filing per 35.13(a)(2)(iii): Amendment to MBR Tariff to be effective 8/10/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5004.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3044–000.

Applicants: Handsome Lake Energy, LLC.

Description: Handsome Lake Energy, LLC submits tariff filing per 35.13(a)(2)(iii): Amendment to MBR Tariff to be effective 8/10/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5005.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3045–000.

Applicants: Constellation Mystic Power, LLC.

Description: Constellation Mystic Power, LLC submits tariff filing per 35.13(a)(2)(iii): Amendment to MBR Tariff to be effective 11/9/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5006.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3046–000.

Applicants: Nine Mile Point Nuclear Station, LLC.

Description: Nine Mile Point Nuclear Station, LLC submits tariff filing per 35.13(a)(2)(iii): Amendment to MBR Tariff to be effective 8/10/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5007.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3048–000.

Applicants: ISO New England Inc., New England Power Pool.

Description: ISO New England Inc. and New England Power Pool, Filing of Installed Capacity Requirement, Hydro Quebec Interconnection Capability Credits and Related Values for the 2014/2015 Capability Year.

Filed Date: 03/08/2011.

Accession Number: 20110308–5140.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Docket Numbers: ER11–3049–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii): Alpental Blue Mountain E&P Agreement to be effective 2/10/2011.

Filed Date: 03/09/2011.

Accession Number: 20110309–5047.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

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.

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Dated: March 9, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6429 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11–68–000.

Applicants: FRV AE Solar, LLC.

Description: Notice of Self-Certification as an Exempt Wholesale Generator by FC of FRV AE Solar, LLC.

Filed Date: 03/08/2011.

Accession Number: 20110308–5124.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–2201–002.

Applicants: Evergreen Wind Power III, LLC.

Description: Evergreen Wind Power III, LLC submits tariff filing per 35.17(b): Amendment to Evergreen Wind Power III, LLC MBR Application to be effective 7/1/2011.

Filed Date: 03/08/2011.

Accession Number: 20110308–5112.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Docket Numbers: ER11–2558–001; *ER11–2557–001; ER11–2555–001; ER11–2556–001; ER11–2549–001; ER11–2552–001; ER11–2554–001.*

Applicants: Niagara Mohawk Power Corporation.

Description: Errata to Exhibits of National Grid USA.

Filed Date: 03/08/2011.

Accession Number: 20110308–5126.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Docket Numbers: ER11–3034–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc submits informational filing for qualification in the Forward Capacity Market for the 2014–2015 Capacity Commitment Period.

Filed Date: 03/08/2011.

Accession Number: 20110308–0201.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 23, 2011.

Docket Numbers: ER11–3035–000.

Applicants: Midland Cogeneration Venture Limited Partnership.

Description: Midland Cogeneration Venture Limited Partnership submits tariff filing per 35.1: Rate Schedule 1 for Reactive Supply Service to be effective 6/1/2011.

Filed Date: 03/08/2011.

Accession Number: 20110308–5088.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Docket Numbers: ER11–3036–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: V4–052 WMPA Original Service Agreement No. 2787 to be effective 2/14/2011.

Filed Date: 03/08/2011.

Accession Number: 20110308–5090.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Docket Numbers: ER11–3037–000.

Applicants: Geodyne Energy, LLC.

Description: Geodyne Energy, LLC submits tariff filing per 35: Geodyne Energy, LLC Baseline Filing to be effective 3/8/2011.

Filed Date: 03/08/2011.

Accession Number: 20110308–5105.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Docket Numbers: ER11–3038–000.

Applicants: Entergy Arkansas, Inc.

Description: Entergy Arkansas, Inc. submits tariff filing per 35.13(a)(2)(iii: ICT Extension Compliance Filing to be effective 11/17/2010.

Filed Date: 03/08/2011.

Accession Number: 20110308–5106.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Docket Numbers: ER11–3047–000.

Applicants: PJM Interconnection L.L.C.

Description: Request for Limited Wavier of Tariff of PJM Interconnection L.L.C.

Filed Date: 03/08/2011.

Accession Number: 20110308–5138.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 29, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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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.

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Dated: March 9, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6430 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–2424–000; ER11–2424–001.

Applicants: Pinetree Power-Tamworth, Inc.

Description: Second Supplemental Request for Acceptance of Market-Based Rate Tariff, Waivers and Blanket Authority of PINETREE POWER–TAMWORTH, INC. under ER11–2424, *et al.*

Filed Date: 03/09/2011.

Accession Number: 20110309–5136.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–2695–001.

Applicants: Wisconsin Power and Light Company.

Description: Wisconsin Power and Light Company submits tariff filing per 35.17(b): WPL Changes in Depreciation Rates for Wholesale Production Service Amendment to be effective 3/31/2011.

Filed Date: 03/09/2011.

Accession Number: 20110309–5041.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–2735–002.

Applicants: Censtar Energy Corp.

Description: Censtar Energy Corp. submits tariff filing per 35: Compliance Filing Under Docket ER11–2735 to be effective 3/28/2011.

Filed Date: 03/09/2011.

Accession Number: 20110309–5069.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–2798–000.

Applicants: Unidentified Registered Entity.

Description: Supplemental Filing of Midwest Independent Transmission System Operator, Inc.

Filed Date: 03/09/2011.

Accession Number: 20110309–5095.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3050–000.

Applicants: FirstEnergy Corp.

Description: FirstEnergy Corp request for waiver of certain affiliate restriction requirements.

Filed Date: 03/09/2011.

Accession Number: 20110309–0200.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3051–000.

Applicants: Macho Springs Power I, LLC.

Description: Macho Springs Power I, LLC submits tariff filing per 35.12: Market-Based Rate Application to be effective 5/1/2011.

Filed Date: 03/09/2011.

Accession Number: 20110309–5083.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3052–000.

Applicants: Troy Energy, LLC.

Description: Troy Energy, LLC's Transfer of Reactive Power Revenue Requirement.

Filed Date: 03/09/2011.

Accession Number: 20110309–5091.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3053–000.

Applicants: Holcim (US) Inc.

Description: Holcim (US) Inc. submits tariff filing per 35.12: Holcim (US) Inc. MBRA Application to be effective 5/9/2011.

Filed Date: 03/09/2011.

Accession Number: 20110309–5114.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Docket Numbers: ER11–3054–000.

Applicants: American Electric Power Service Corporation, PJM Interconnection, L.L.C.

Description: American Electric Power Service Corporation submits tariff filing per 35: AEP compliance filing revising Attachment H–14 per Order in Docket No. ER08–1329 to be effective 9/17/2010.

Filed Date: 03/09/2011.

Accession Number: 20110309–5115.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA11–6–000.

Applicants: Cedar Point Wind, LLC.

Description: Request for Waiver of Cedar Point Wind, LLC.

Filed Date: 03/09/2011.

Accession Number: 20110309–5137.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 30, 2011.

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.

Dated: March 10, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6432 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1879–000.

Applicants: El Paso Natural Gas Company.

Description: Request for Limited Waiver of El Paso Natural Gas Company.

Filed Date: 03/09/2011.

Accession Number: 20110309–5133.

Comment Date: 5 p.m. Eastern Time on Monday, March 21, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 11, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6428 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Supplemental Notice of Technical Conference

	Docket Nos.
Priority Rights to New Participant-Funded Transmission	AD11–11–000.
Alta Wind I, LLC	EL10–62–000.
Alta Wind II, LLC.	
Alta Wind III, LLC.	
Alta Wind IV, LLC.	
Alta Wind V, LLC.	
Alta Wind VI, LLC.	
Alta Wind VII, LLC.	
Alta Wind VIII, LLC.	
Alta Windpower Development, LLC.	
TGP Development Company, LLC.	
Puget Sound Energy, Inc	EL10–72–001.
Terra-Gen Dixie Valley, LLC, TGP Dixie Development Company, LLC, and New York Canyon, LLC	EL10–29–002.
Green Borders Geothermal, LLC v. Terra-Gen Dixie Valley, LLC	EL10–36–002.
Terra-Gen Dixie Valley, LLC	ER11–2127–001.
Northern Pass Transmission, LLC	ER11–2377–000.
Cedar Creek Wind Energy, LLC	RC11–1–000.
Milford Wind Corridor Phase I, LLC	RC11–2–000.
SunZia Transmission, LLC	EL11–24–000.
Hudson Transmission Partners, LLC	ER11–3017–000.

	Docket Nos.
Peetz Logan Interconnect, LLC	ER11–2970–000.

On February 22, 2011, the Federal Energy Regulatory Commission (Commission) announced that a Technical Conference on Priority Rights to New Participant-Funded Transmission will be held on Tuesday, March 15, 2011, from 9:30 a.m. to 3:15 p.m. (EDT). The staff-led conference will be held in the Commission Meeting Room at the Commission's headquarters at 888 First Street, NE., Washington, DC 20426. The conference will be open for the public to attend and advance registration is not required. Members of the Commission may attend the conference. On March 7, 2011, the Commission issued a supplemental notice with an agenda for the conference.

Discussions at the conference may address matters at issue in the above-referenced individual proceedings that are either pending or within their rehearing period. The March 7 Notice omitted two proceedings before the Commission that are either pending or within their rehearing period. This supplemental notice reflects the addition of the following proceedings:

Hudson Transmission Partners, LLC, Docket No. ER11–3017–000; and Peetz Logan Interconnect, LLC, Docket No. ER11–2970–000.

A free webcast of the technical conference will be available. Anyone with internet access who desires to listen to this event can do so by navigating to the Calendar of Events on the Commission's Web site and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for webcasts and will offer the option of listening to the conference via phone-bridge for a fee. If you have any questions about the webcast, visit *http://www.CapitolConnection.org* or call (703) 993–3100.

This conference will also be transcribed. Transcripts will be available immediately, for a fee, from Ace Reporting Company (202–347–3700 or 800–336–6646).

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the requested accommodations.

For further information please contact Becky Robinson at (202) 502–8868 or *Becky.Robinson@ferc.gov;* or Pierson Stoecklein at (202) 502–6372 or *Pierson.Stoecklein@ferc.gov.*

Dated: March 9, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–6431 Filed 3–17–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2010–0374; FRL–9282–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Primary Aluminum Reduction Plants (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to theOffice 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 collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before April 18, 2011.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2010–0374, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: 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: Learia A. Williams, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; e-mail address: *williams.learia@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 2, 2010 (75 FR 30813), 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 number EPA–HQ–OECA–2010–0374, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 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: NESHAP for Primary Aluminum Reduction Plants (Renewal).

ICR Numbers: EPA ICR Number 1767.06, OMB Control Number 2060–0360.

ICR Status: This ICR is scheduled to expire on April 30, 2011. 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, and 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: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 63, subpart LL.

Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 2,010 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: Owners or operators of primary aluminum reduction plants.

Estimated Number of Respondents: 16.

Frequency of Response: Initially, semiannually and annually.

Estimated Total Annual Hour Burden: 80,398.

Estimated Total Annual Cost: $7,599,556, which includes $7,508,208 in labor costs and $91,348 in operation and maintenance (O&M) costs. There are no annualized capital/startup costs for this ICR.

Changes in the Estimates: There is no change in the calculation methodology for labor hours and Agency costs in this ICR compared to the previous ICR. This is due to two considerations. First, the regulations have not changed over the past three years and are not anticipated to change over the next three years. Secondly, the growth rate for the respondents is very low, negative, or non-existent. It should be noted that there is an apparent increase of 352 hours in respondent labor hours. This is due to a mathematical error in the previous ICR.

The increase in cost to Respondents and the Agency is due to updating of the labor rates to reflect the most recent available estimates. There are no changes to the capital/startup or operation and maintenance costs.

Dated: March 11, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–6309 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9282–7]

Proposed CERCLA Administrative Cost Recovery Settlement; Eugenio Painting Company

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement for recovery of past response costs concerning the Industrial Street Drum Site in Dearborn, Michigan with the following settling party: Eugenio Painting Company. The settlement requires the settling party to pay $20,000 to the Hazardous Substance Superfund. The settlement includes a covenant not to sue the settling party pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all such comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

DATES: Written comments on the proposed settlement must be received by EPA's designee on or before close of business on April 18, 2011 to be assured of consideration.

ADDRESSES: Comments should reference the Industrial Street Drum Site and should be addressed to Robert H. Smith, U.S. EPA, 77 W. Jackson Blvd (C–14J), Chicago, IL 60604–3590.

FOR FURTHER INFORMATION CONTACT: Robert H. Smith, U.S. EPA, 77 W. Jackson Blvd (C–14J), Chicago, IL 60604–3590, 312–886–0765. A copy of the proposed settlement and the Agency's response to any comments received may be obtained from the above contact as well. Additional background information relating to the settlement is available for review at the EPA's Region 5 Office of Regional Counsel.

Authority: 42 U.S.C. 9601–9675.

Dated: March 2, 2011.

Douglas E. Ballotti,

Acting Director, Superfund Division, Region 5.

[FR Doc. 2011–6415 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8995–9]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly Receipt of Environmental Impact Statements

Filed 03/07/2011 Through 03/11/2011. Pursuant to 40 CFR 1506.9.

Notice

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has included its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire

EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, on March 31, 2010, EPA discontinued the publication of the notice of availability of EPA comments in the **Federal Register**.

EIS No. 20110076, Draft Supplement, USFS, MT, Grizzly Vegetation and Transportation Management Project, Updated and Additional Information, Proposes Timber Harvest, Prescribed Burning, Road Maintenance, and Transportation Management Actions, Three Rivers Ranger District, Kootenai National Forest, Lincoln County, MT, Comment Period Ends: 05/02/2011, Contact: Kathy Mohar 406–295–4693.

EIS No. 20110077, Draft EIS, USFS, SD, Section 30 Limestone Mining Project, Proposal to Implement Mining Actions, Mystic Ranger District, Black Hills National Forest, Rapid City, Pennington County, SD, Comment Period Ends: 05/02/2011, Contact: Robert J. Thompson 605–343–1567.

EIS No. 20110078, Draft EIS, USACE, HI, Honolulu Seawater Air Conditioning Project, Proposal to Construct a Seawater Air Conditioning System, US COE Section 10 and 404 Permits, City and County of Honolulu, HI, Comment Period Ends: 05/02/2011, Contact: Peter Galloway 808–438–8416.

EIS No. 20110079, Draft EIS, NPS, CA, Extension of F–Line Streetcar Service to Fort Mason Center Project, To Provide Park Visitors and Transit Dependent Residents with High-Quality Rail Transit that Improves Transportation Access and Mobility, Golden Gate National Recreation Area, San Francisco Maritime National Historical Park, CA, Comment Period Ends: 05/16/2011, Contact: Rick Foster 415–561–2872.

EIS No. 20110080, Draft EIS, USN, WA, Trident Support Facilities Explosives Handling Wharf (EHW–2), Construction and Operating, Naval Base Kitsap Banorg, Silverdale, WA, Comment Period Ends: 05/02/2011, Contact: Christine Stevenson 360–396–0080.

EIS No. 20110081, Draft EIS, NRCS, UT, Logan Northern Canal Reconstruction Project, To Construct a System that will Safely Restore Delivery of Water, City of Logon, Cache County, UT, Comment Period Ends: 05/02/2011, Contact: Bronson Smart 801–524–4559.

EIS No. 20110082, Draft EIS, DOE, TX, Texan Clean Energy Project, Construction and Operation of a Coal-Based Electric Power Generation and Chemicals Production Plant, Odessa, Ector County, TX, Comment Period Ends: 05/02/2011, Contact: Mark L. McKoy 1–800–432–8330 Ext 4426.

EIS No. 20110083, Final EIS, USFS, MT, Beaver Creek Landscape Management Project, Vegetation Treatment, Implementation, Ashland Ranger District, Custer National Forest, Powder River County, MT, Review Period Ends: 04/18/2011, Contact: Walt Allen 406–784–2344.

Amended Notices

EIS No. 20100466, Draft EIS, BLM, 00, PROGRAMMATIC—Solar Energy Development in Six Southwestern States, To Establish a New BLM Solar Energy Program applicable to Utility-Scale Solar Energy Development and DOE's Proposed Action to Develop new Program Guidance Relevant to DOE Supported Solar Project, AZ, CA, CO, NV, NM and UT, Comment Period Ends: 04/15/2011, Contact: Linda Resseguie 202–912–7337. Revision to FR Notice Published 12/17/2010: Extending Comment Period from 03/17/2011 to 04/15/2011.

Dated: March 15, 2011.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2011–6405 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OARM–2011–0189; FRL–9282–8]

Public Availability of Environmental Protection Agency FY 2010 Service Contract Inventory

AGENCY: Environmental Protection Agency.

ACTION: Notice of public availability of FY 2010 Service Contract inventories.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), Environmental Protection Agency is publishing this notice to advise the public of the availability of the FY 2010 Service Contract inventory. This inventory provides information on service contract actions over $25,000 that were made in FY 2010. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* Environmental Protection Agency has posted its inventory and a summary of the inventory on the EPA's homepage at the following link: *http://www.epa.gov/oam/inventories/inventories.htm.*

FOR FURTHER INFORMATION CONTACT: Questions regarding the service contract inventory should be directed to Linear Cherry in the Office of Acquisition Management, Headquarters Procurement Operations Division (3803R), Business Analysis Support Staff, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: 202–564–4403; e-mail address: *cherry.linear@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

How can I get copies of this docket and other related information?

1. EPA has established a docket for this action under Docket ID No. EPA–HQ–OARM–2011–0189. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the FY 2010 Service Contract Inventory Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 FY 2010 Service Contract Inventory Docket is (202) 566–1752.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

Dated: March 11, 2011.

John R. Bashista,

Director, Office of Acquisition Management.

[FR Doc. 2011–6414 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket# EPA–RO4–SFUND–2011–0278, FRL–9284–1]

National Starch and Chemical Company, Salisbury, Rowan County, NC; Notice of Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of settlement.

SUMMARY: Under Section 122(h)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency has entered into a settlement for reimbursement of past response costs concerning the National Starch and Chemical Company Site located in Mobile, Mobile County, Alabama for publication.

DATES: The Agency will consider public comments on the settlement until April 18, 2011. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the settlement are available from Ms. Paula V. Painter. Submit your comments, identified by Docket ID No. EPA–RO4–SFUND–2011–0278 or Site name National Starch and Chemical Company Superfund Site by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *http://www.epa.gov/region4/waste/sf/enforce.htm*
- E-mail: *Painter.Paula@epa.gov*

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at 404/562–8887.

Dated: March 4, 2011.

Anita L. Davis,

Chief, Superfund Enforcement & Information Management Branch, Superfund Division.

[FR Doc. 2011–6404 Filed 3–17–11; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

SUMMARY: The Advisory Committee was established by Public Law 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

Time and Place: Wednesday, March 30, 2011 from 1 p.m. to 4 p.m. Security processing will be necessary for entry into the building. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Agenda items include a briefing of the Advisory Committee members on the status of the Bank's reauthorization, the competitiveness report and progress reports from the various subcommittees.

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If you plan to attend, a photo ID must be presented at the guard's desk as part of the clearance process into the building, and you may contact Susan Houser to be placed on an attendee list. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to March 23, 2011, Susan Houser, Room 1273, 811 Vermont Avenue, NW., Washington, DC 20571. Voice: (202) 565–3232.

Further Information: For further information, contact Susan Houser. Room 1273, 811 Vermont Ave. NW., Washington, DC 20571, (202) 565–3232.

Jonathan Cardone,

Senior Vice President and General Counsel.

[FR Doc. 2011–6314 Filed 3–17–11; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update listing of financial institutions in liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as "of record" notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *http://www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: March 14, 2011.

Federal Deposit Insurance Corporation.

Pamela Johnson,

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10349	First National Bank of Davis	Davis	OK	3/11/2011
10348	Legacy Bank	Milwaukee	WI	3/11/2011

[FR Doc. 2011–6423 Filed 3–17–11; 8:45 am]

BILLING CODE 6741–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: *Background.* On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act (PRA), as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR part 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Request for Comment on Information Collection Proposal

The following information collection, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before May 17, 2011.

ADDRESSES: You may submit comments, identified by *FR 4100,* by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *FAX:* 202/452–3819 or 202/452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

Additionally, commenters should send a copy of their comments to the OMB Desk Officer by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street, NW., Washington, DC 20503 or by fax to 202–395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve Board's public Web site at: *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm* or may be requested from the agency clearance officer, whose name appears below.

Cynthia Ayouch, Acting Federal Reserve Board Clearance Officer (202–452–3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact (202–263–4869), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal to approve under OMB delegated authority the extension for three years, without revision, of the following report:

Report title: The Recordkeeping and Disclosure Requirements Associated with the Guidance on Response Programs for Unauthorized Access to Customer Information.

Agency form number: FR 4100.

OMB control number: 7100–0309.

Frequency: Develop customer notice, one-time; Incident notification, event-generated.

Reporters: Financial institutions.

Estimated annual reporting hours: Develop response program, 2,544 hours; Incident notification, 2,952 hours.

Estimated average hours per response: Develop response program, 24 hours; Incident notification, 36 hours.

Number of respondents: Develop response program, 106; Incident notification, 82.

General description of report: This information collection is mandatory (15 U.S.C. 6801(b)). Since the Federal Reserve does not collect information associated with the FR 4100, confidentiality would not generally be an issue. However, confidentiality issues may arise if the Federal Reserve were to obtain a copy of a customer notice during the course of an examination or were to receive a copy of a Suspicious Activity Report (SAR; FR 2230; OMB No. 7100–0212). In such cases the information would be exempt from disclosure to the public under the Freedom of Information Act (5 U.S.C. 552(b)(3), (4), and (8)). Also, a federal employee is prohibited by law from disclosing an SAR or the existence of an SAR (31 U.S.C. 5318(g)).

Abstract: The FR 4100 is the information collection associated with the *Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice* (security guidelines), which was published in the **Federal Register** in March 2005 (70 FR 15736). Trends in customer information theft and the accompanying misuse of that information led to the issuance of these security guidelines applicable to financial institutions. The security guidelines are designed to facilitate timely and relevant notification to affected customers and the appropriate regulatory authority of the financial institutions. The security guidelines provide specific direction regarding the

development of response programs and customer notifications.

Board of Governors of the Federal Reserve System, March 14, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–6307 Filed 3–17–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 1, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Russell W. Blaha,* Ord, Nebraska, to acquire control of BBJ, Incorporated, and thereby indirectly acquire control of First National Bank in Ord, both in Ord, Nebraska.

Board of Governors of the Federal Reserve System, March 14, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–6251 Filed 3–17–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Government in the Sunshine; Meeting Notice

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 10:30 a.m., Wednesday, March 16, 2011.

The business of the Board requires that this meeting be held with less than one week's advance notice to the public, and no earlier announcement of the meeting was practicable.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Administrative matter.

FOR MORE INFORMATION PLEASE CONTACT: Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: March 16, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–6586 Filed 3–16–11; 4:15 pm]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED FEBRUARY 1, 2011 THRU FEBRUARY 28, 2011

ET date	Trans. No.	ET req. status	Party name
02/01/2011	20110449	G	Baker Brothers Life Sciences, L.P.; Ardea Biosciences, Inc.; Baker Brothers Life Sciences, LP.
	20110510	G	Deerfield Capital Corp.; Charlesbank Equity Fund V, Limited Partnership; Deerfield Capital Corp.
02/02/2011	20110353	G	Wizard Parent LLC; Novell, Inc.; Wizard Parent LLC.
02/03/2011	20110348	G	Verigy Ltd.; LTX-Credence Corporation; Verigy Ltd.
	20110479	G	GEA Group Aktiengesellschaft; CFS Holdings B.V.; GEA Group Aktiengesellschaft.
	20110481	G	Thomas H. Lee Equity Fund VI, L.P.; John J. Campbell and Ann L. Campbell; Thomas H. Lee Equity Fund VI, L.P.
	20110502	G	L'Oreal S.A.; Q-Med AB; L'Oreal S.A.
	20110506	G	ASSA ABLOY AB; Cardo AB; ASSA ABLOY AB.
02/04/2011	20110474	G	SteelRiver Infrastructure Fund North American LP; TWP Inc.; SteelRiver Infrastructure Fund North American L.P.
	20110509	G	Pfingsten Partners Fund IV, L.P.; MCG Capital Corporation; Pfingsten Partners Fund IV, L.P.
	20110512	G	MasTec, Inc.; Martin J. Maslonka; MasTec, Inc.

EARLY TERMINATIONS GRANTED FEBRUARY 1, 2011 THRU FEBRUARY 28, 2011—Continued

ET date	Trans. No.	ET req. status	Party name
	20110516	G	Thomas H. Lee Equity Fund VI, L.P.; UnitedHealth Group Incorporated; Thomas H. Lee Equity Fund VI, L.P.
	20110518	G	Novartis AG; Genoptix, Inc.; Novartis AG.
	20110530	G	William Clay Ford, Jr.; Ford Motor Company; William Clay Ford, Jr.
	20110535	G	Rock-Tenn Company; Smurfit-Stone Container Corporation; Rock-Tenn Company.
02/07/2011	20110383	G	Paychex, Inc.; SurePayroll, Inc.; Paychex, Inc.
	20110494	G	Montrica Global Opportunities Fund; Pride International, Inc.; Montrica Global Opportunities Fund.
	20110495	Y	TPG-Axon Partners (Offshore), Ltd.; Pride International, Inc.; TPG-Axon Partners (Offshore), Ltd.
	20110496	G	TPG-Axon Partners, L.P.; Pride International, Inc.; TPG-Axon Partners, L.P.
	20110526	G	Boston Scientific Corporation; Atritech, Inc.; Boston Scientific Corporation.
02/08/2011	20110513	G	General Electric Company; Gores Capital Partners II, L.P.; General Electric Company.
02/09/2011	20110477	G	Sanford; North Country Health Services, Inc.; Sanford.
	20110519	G	Intermec, Inc.; Vocollect, Inc.; Intermec, Inc.
	20110532	G	SES Holdings, LLC; Water Providers, Ltd. d/b/a Sweet H20 Transfer Services; SES Holdings, LLC.
02/11/2011	20110522	G	AutoNation, Inc.; Wilfred and Ann J. Templeton AutoNation, Inc.
	20110534	G	Tencent Holdings Limited; Riot Games, Inc.; Tencent Holdings Limited.
	20110536	G	Standard Microsystems Corporation; Conexant Systems Inc.; Standard Microsystems Corporation.
	20110537	G	Terrence M. Pegula; B. Thomas Golisano; Terrence M. Pegula.
	20110540	G	Open Text Corporation; Metastorm Inc.; Open Text Corporation.
02/15/2011	20110539	G	The Toronto-Dominion Bank; CG Investor, LLC; The Toronto-Dominion Bank.
02/17/2011	20110520	G	Fidelity National Financial, Inc.; Remy International, Inc.; Fidelity National Financial, Inc.
	20110549	G	Cargotec Oyj; Zebra Technologies Corporation Cargotec Oyj.
02/18/2011	20110552	G	Verizon Communications Inc.; Iowa RSA 10 General Partnership; Verizon Communications Inc.
	20110559	G	Warburg Pincus Private Equity X, L.P.; AmRest Holdings SE; Warburg Pincus Private Equity X, L.P.
	20110560	G	Valeant Pharmaceuticals International, Inc.; GlaxoSmithKline plc; Valeant Pharmaceuticals International, Inc.
02/22/2011	20110553	G	Danaher Corporation; Axed III K/S 2; Danaher Corporation.
	20110556	G	Visa Inc.; PlaySpan Inc.; Visa Inc.
02/23/2011	20110541	G	Cerberus Institutional Partners, L.P.; GeoEye, Inc.; Cerberus Institutional Partners, L.P.
	20110547	G	John J. Shalam; Fred S. Klipsch; John J. Shalam.
	20110550	G	William H. Gates III; Canadian National Railway Company; William H. Gates III.
	20110563	G	Liberty Mutual Holding Company Inc.; Sunshine Silver Mines Corporation; Liberty Mutual Holding Company Inc.
	20110564	G	Kumar Mangalam Birla; J.P. Morgan Chase & Co.; Kumar Mangalam Birla.
02/24/2011	20110521	G	Qualcomm Incorporated; Atheros Communications, Inc.; Qualcomm Incorporated.
	20110554	G	Wind Point Partners VII–A, L.P.; Cummins Inc.; Wind Point Partners VII–A, L.P.
02/28/2011	20110529	G	CVS Caremark Corporation Universal American Corp.; CVS Caremark Corporation.
	20110565	G	MidOcean Partners III, L.P.; Pre-Paid Legal Services, Inc.; MidOcean Partners III, L.P.
	20110576	G	AOL Inc.; TheHuffingtonPost.com; AOL Inc.
	20110577	G	Louis Le Duff; Sun Capital Partners II, L.P. Louis Le Duff.
	20110584	G	Barry and Stephanie Zekelman; Carlyle Partners IV, LP.; Barry and Stephanie Zekelman.
	20110586	G	Apollo Investment Fund VI, L.P., c/o Apollo Management VI LP; Sprouts Farmers Markets, LLC; Apollo Investment Fund VI, L.P., c/o Apollo Management VI LP.

For Further Information Contact: Sandra M. Peay, Contact Representative, or Renee Chapman, Contact Representative, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2011–6180 Filed 3–17–11; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Biodefense Science Board

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the National Biodefense Science Board (NBSB) will be holding a public meeting. The meeting is open to the public.

DATES: The NBSB will hold a public meeting on April 28–29, 2011. Tentatively the meeting will be from 8 a.m. to 4 p.m. ET on April 28 and 8 a.m. to 12 p.m. ET on April 29. The agenda is subject to change as priorities dictate.

ADDRESSES: Washington, DC Metro Area. The venue and call-in details will be posted as they become available on the NBSB's April meeting Web page at *http://www.phe.gov/Preparedness/legal/boards/nbsb/meetings/Pages/110428meeting.aspx.*

FOR FURTHER INFORMATION CONTACT: E-mail: *NBSB@HHS.GOV.*

SUPPLEMENTARY INFORMATION: Pursuant to section 319M of the Public Health Service Act (42 U.S.C. 247d–7f) and section 222 of the Public Health Service Act (42 U.S.C. 217a), the Department of Health and Human Services established the National Biodefense Science Board. The Board shall provide expert advice and guidance to the Secretary on scientific, technical, and other matters of special interest to the Department of Health and Human Services regarding current and future chemical, biological, nuclear, and radiological agents, whether naturally occurring, accidental, or deliberate. The Board may also provide advice and guidance to the Secretary and/or the Assistant Secretary for Preparedness and Response on other matters related to public health emergency preparedness and response.

Background: The majority of this public meeting will be dedicated to a discussion of the findings of the NBSB's All Hazard Science Response Working Group and of their recommendations for consideration and vote by the members of the Board. Subsequent agenda topics will be added as priorities dictate. Any additional agenda topics will be available on the Board's April meeting Web page no later than April 15, 2011.

Availability of Materials: The meeting agenda and materials will be posted prior to the meeting on the NBSB's April meeting Web page at *http://www.phe.gov/Preparedness/legal/boards/nbsb/meetings/Pages/110428meeting.aspx.*

Procedures for Providing Public Input: Any member of the public providing oral comments at the meeting must sign-in at the registration desk and provide his/her name, address, and affiliation. All written comments must be received by April 25, 2011 and should be sent by e-mail to *NBSB@HHS.GOV* with "NBSB Public Comment" as the subject line. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should e-mail *NBSB@HHS.GOV.*

Dated: March 10, 2011.

Nicole Lurie,

Assistant Secretary for Preparedness and Response.

[FR Doc. 2011–6327 Filed 3–17–11; 8:45 am]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Policy Committee's Workgroup Meetings; Notice of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meetings.

This notice announces forthcoming subcommittee meetings of a federal advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meetings will be open to the public via dial-in access only.

Name of Committees: HIT Policy Committee's Workgroups: Meaningful Use, Privacy & Security Tiger Team, Enrollment, Governance, Adoption/Certification, PCAST Report, and Information Exchange workgroups.

General Function of the Committee: To provide recommendations to the National Coordinator on a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the Federal Health IT Strategic Plan and that includes recommendations on the areas in which standards, implementation specifications, and certification criteria are needed.

Date and Time: The HIT Policy Committee Workgroups will hold the following public meetings during April 2011: April 5th Meaningful Use Workgroup, hearing—Renaissance Dupont Circle Hotel, Washington, DC, 9 a.m. to 4:30 p.m./ET; April 6th Privacy & Security Tiger Team Workgroup, 2 p.m. to 4 p.m./ET; April 8th Information Exchange Workgroup, 10:30 a.m. to 12:30 p.m/ET; April 18th Privacy & Security Tiger Team, 2 p.m. to 3:30 p.m./ET; April 21st Certification/Adoption Workgroup, hearing—location TBD, 9 a.m. to 4 p.m./ET.

Location: All workgroup meetings will be available via webcast; for instructions on how to listen via telephone or Web visit *http://healthit.hhs.gov.* Please check the ONC Web site for additional information or revised schedules as it becomes available.

Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW., Washington, DC 20201, 202–205–4528, Fax: 202–690–6079, e-mail: *judy.sparrow@hhs.gov.* Please call the contact person for up-to-date information on these meetings. A notice in the **Federal Register** about last minute modifications that affect a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The workgroups will be discussing issues related to their specific subject matter, *e.g.,* meaningful use, information exchange, privacy and security, enrollment, governance, or adoption/certification. If background materials are associated with the workgroup meetings, they will be posted on ONC's Web site prior to the meeting at *http://healthit.hhs.gov.*

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the workgroups. Written submissions may be made to the contact person on or before two days prior to the workgroup's meeting date. Oral comments from the public will be scheduled at the conclusion of each workgroup meeting. Time allotted for each presentation will be limited to three minutes. If the number of speakers

requesting to comment is greater than can be reasonably accommodated during the scheduled open public session, ONC will take written comments after the meeting until close of business on that day.

If you require special accommodations due to a disability, please contact Judy Sparrow at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: March 11, 2011.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2011–6406 Filed 3–17–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Standards Committee's Workgroup Meetings; Notice of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meetings.

This notice announces forthcoming subcommittee meetings of a federal advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meetings will be open to the public via dial-in access only.

Name of Committees: HIT Standards Committee's Workgroups: Clinical Operations, Vocabulary Task Force, Clinical Quality, Implementation, and Privacy & Security Standards workgroups.

General Function of the Committee: To provide recommendations to the National Coordinator on standards, implementation specifications, and certification criteria for the electronic exchange and use of health information for purposes of adoption, consistent with the implementation of the Federal Health IT Strategic Plan, and in accordance with policies developed by the HIT Policy Committee.

Date and Time: The HIT Standards Committee Workgroups will hold the following public meetings during April 2011: April 6th Privacy & Security Standards Workgroup, 11 a.m. to 1:30 p.m./ET; April 7th Clinical Quality Workgroup, 2:30 p.m. to 3:30 p.m./ET; April 18th Clinical Quality Workgroup, 11 a.m. to 12:30 p.m./ET; April 27th Privacy & Security Standards Workgroup, 2 p.m. to 4:30 p.m./ET; and TBD Clinical Operations Workgroup.

Location: All workgroup meetings will be available via Webcast; visit *http://healthit.hhs.gov* for instructions on how to listen via telephone or Web. Please check the ONC Web site for additional information as it becomes available. Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW., Washington, DC 20201, 202–205–4528, Fax: 202–690–6079, e-mail: *judy.sparrow@hhs.gov.* Please call the contact person for up-to-date information on these meetings. A notice in the **Federal Register** about last minute modifications that affect a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The workgroups will be discussing issues related to their specific subject matter, *e.g.,* clinical operations vocabulary standards, clinical quality, implementation opportunities and challenges, and privacy and security standards activities. If background materials are associated with the workgroup meetings, they will be posted on ONC's Web site prior to the meeting at *http://healthit.hhs.gov.*

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the workgroups. Written submissions may be made to the contact person on or before two days prior to the workgroups' meeting dates. Oral comments from the public will be scheduled at the conclusion of each workgroup meeting. Time allotted for each presentation will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public session, ONC will take written comments after the meeting until close of business on that day.

If you require special accommodations due to a disability, please contact Judy Sparrow at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: March 11, 2011.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2011–6409 Filed 3–17–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Policy Committee Advisory Meeting; Notice of Meeting

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meeting.

This notice announces a forthcoming meeting of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meeting will be open to the public.

Name of Committee: HIT Policy Committee.

General Function of the Committee: to provide recommendations to the National Coordinator on a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the Federal Health IT Strategic Plan and that includes recommendations on the areas in which standards, implementation specifications, and certification criteria are needed.

Date and Time: The meeting will be held on April 13, 2011, from 9 a.m. to 4:30 p.m./Eastern Time.

Location: TBD. For up-to-date information, go to the ONC Web site, *http://healthit.hhs.gov.*

Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW., Washington, DC 20201, 202–205–4528, Fax: 202–690–6079, e-mail: *judy.sparrow@hhs.gov* Please call the contact person for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The committee will hear reports from its workgroups, including the Meaningful Use Workgroup, the Privacy & Security Tiger Team, the Information Exchange Workgroup, the PCAST Report Workgroup and the

Quality Measures Workgroup. ONC intends to make background material available to the public no later than two (2) business days prior to the meeting. If ONC is unable to post the background material on its Web site prior to the meeting, it will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on ONC's Web site after the meeting, at *http://healthit.hhs.gov.*

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before April 8, 2011. Oral comments from the public will be scheduled between approximately 3:30 and 4:30 p.m. Time allotted for each presentation is limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public hearing session, ONC will take written comments after the meeting until close of business.

Persons attending ONC's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

ONC welcomes the attendance of the public at its advisory committee meetings. Seating is limited at the location, and ONC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Judy Sparrow at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: March 11, 2011.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2011–6407 Filed 3–17–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Standards Committee Advisory Meeting; Notice of Meeting

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meeting.

This notice announces a forthcoming meeting of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meeting will be open to the public.

Name of Committee: HIT Standards Committee.

General Function of the Committee: To provide recommendations to the National Coordinator on standards, implementation specifications, and certification criteria for the electronic exchange and use of health information for purposes of adoption, consistent with the implementation of the Federal Health IT Strategic Plan, and in accordance with policies developed by the HIT Policy Committee.

Date and Time: The meeting will be held on April 20, 2011, from 9 a.m. to 3 p.m./Eastern Time.

Location: Renaissance Dupont Circle Hotel, 1143 New Hampshire Avenue, NW., Washington, DC. For up-to-date information, go to the ONC Web site, *http://healthit.hhs.gov.*

Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW., Washington, DC 20201, 202–205–4528, Fax: 202–690–6079, e-mail: *judy.sparrow@hhs.gov.* Please call the contact person for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The committee will hear reports from its workgroups, including the Clinical Operations, Vocabulary Task Force, Clinical Quality, Implementation, and Enrollment Workgroups. ONC intends to make background material available to the public no later than two (2) business days prior to the meeting. If ONC is unable to post the background material on its Web site prior to the meeting, it will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on ONC's Web site after the meeting, at *http://healthit.hhs.gov.*

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before April 15, 2011. Oral comments from the public will be scheduled between approximately 2 and 3 p.m./Eastern Time. Time allotted for each presentation will be limited to three minutes each. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public hearing session, ONC will take written comments after the meeting until close of business.

Persons attending ONC's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

ONC welcomes the attendance of the public at its advisory committee meetings. Seating is limited at the location, and ONC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Judy Sparrow at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: March 11, 2011.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2011–6408 Filed 3–17–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Decision To Evaluate a Petition To Designate a Class of Employees From Mathieson Chemical Co., Pasadena, TX, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees from Mathieson Chemical Co., Pasadena, Texas, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Mathieson Chemical Co.

Location: Pasadena, Texas.

Job Titles and/or Job Duties: All employees.

Period of Employment: 1951 through October 2009.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2011–6369 Filed 3–17–11; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 76, FR 1167, dated January 7, 2011) is amended to reflect the reorganization of the National Center for Emerging and Zoonotic Infectious Diseases, Office of Infectious Diseases, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in their entirety the titles and functional statements for the Division of Healthcare Quality Promotion (CVLD) and insert the following:

Division of Healthcare Quality Promotion (CVLD). The mission of the Division of Healthcare Quality Promotion (DHQP) is to protect patients; protect healthcare personnel; and promote safety, quality, and value in both national and international healthcare delivery systems. In carrying out its mission, DHQP: (1) Measures, validates, interprets, and responds to data relevant to healthcare-associated infections (HAI); antimicrobial resistance; adverse drug events; blood, organ and tissue safety; and immunization safety; and other related adverse events or medical errors in healthcare affecting patients and healthcare personnel; (2) investigates and responds to emerging infections and related adverse events among patients and healthcare personnel; (3) develops and maintains the National Healthcare Safety Network (NHSN), a tool for monitoring healthcare-associated infections, measuring healthcare outcomes and processes, and monitoring healthcare worker vaccination and selected health measures in healthcare facilities; (4) assesses rates of infections caused by resistant-bacteria in the U.S. through active surveillance, review of national healthcare data sets, and laboratory surveillance programs; (5) conducts epidemiologic, and basic and applied laboratory research to identify new strategies to prevent infections/antimicrobial resistance, and related adverse events or medical errors, especially those associated with medical or surgical procedures, indwelling medical devices, contaminated products, dialysis, and water; (6) collaborates with academic and public health partners to design, develop, and evaluate the efficacy of interventions for preventing infections and reducing antimicrobial resistance, and related adverse events or medical errors; (7) develops and disseminates evidence-based guidelines and recommendations to prevent and control HAT, antimicrobial resistance, and related adverse events or medical errors; (8) promotes the nationwide implementation of Healthcare Infection Control Practices Advisory Committee (HICPAC) recommendations and other evidence-based interventions to prevent HAI, antimicrobial resistance, and related adverse events or medical errors among patients and healthcare personnel; (9) evaluates the impact of evidence-based recommendations and interventions across the spectrum of healthcare delivery sites; (10) develops, implements, and evaluates the effectiveness of interventions to prevent transmission of healthcare-associated human immunodeficiency virus (HIV) and other bloodborne pathogen, infections; (11) serves as the National Reference Laboratory for the identification and antimicrobial susceptibility testing of staphylococci, anaerobic bacteria, non-tuberculous mycobacterial, and those gram-negative bacilli causing healthcare associated infections; (12) serves as the technical reference laboratory for detection and characterization of other pathogens related to healthcare; and for characterizing the contribution of the healthcare environment to HAI; (13) coordinates guidance and research related to infection control across the agency and with national and international partners; (14) monitors vaccine safety and conducts research to evaluate the safety of available and new vaccines; (15) promotes the integration of the healthcare delivery system in federal/state/local public health preparedness planning; (16) trains Epidemic Intelligence Service Officers and other trainees; (17) coordinates antimicrobial resistance activities at CDC; (18) works in a national leadership capacity with public and private organizations to enhance antimicrobial resistance prevention and control, surveillance and response, and applied research; (19) coordinates blood, organ, and other tissue safety at CDC; and (20) provides expertise arid assistance to HHS and other Federal agencies on efforts and activities related to health reform.

Office of the Director (CVLD1). (1) Manages, directs, and coordinates the activities of the DHQP; (2) provides leadership and guidance on policy and communications/media; (3) works with Federal agencies, CDC's Office of Prevention through Healthcare, and other partners on activities related to Health Reform; (4) coordinates state and local activities to monitor and prevent HAI; (5) provides liaison with other governmental agencies, international organizations, and other outside groups; (6) coordinates, in collaboration with the appropriate CIO and CDC components, global health activities relating to the prevention of healthcare-associated infections/antimicrobial resistance, and related adverse events or medical errors; (7) coordinates activities, guidance, emergency response, and research related to infection control in healthcare settings across the agency and with national and international partners; (8) works with other federal agencies, state governments, medical societies, and other public and private organizations to promote collaboration and to integrate healthcare preparedness in federal/state/local public health preparedness planning; (9) oversees the coordination of antimicrobial resistance activities at CDC; (10) represents CDC as co-chair of the federal Interagency Task Force on Antimicrobial Resistance; (11) coordinates with other agencies, state governments, medical societies, and other public and private organizations to enhance antimicrobial resistance prevention and control, surveillance and response, and applied research; (12) leads CDC's activities on blood, organ, and other tissue safety; (13) represents CDC on the Advisory Committee on Blood Safety and Availability and the Advisory Committee on Organ Transplantation; (14) works with other federal agencies, state governments, and

other public and private organizations to enhance blood, organ, and other tissue safety through coordination of investigation, prevention, response, surveillance, applied research, health communication, and public policy; and (15) advises the Director, NCEZID, on science, policy and communication matters concerning DHQP activities.

Program Implementation and Integration Activity (CVLD13). (1) Provides leadership and guidance for program planning and development, program management, and operations; (2) provides DHQP-wide administrative and program services and coordinates or ensures coordination with the appropriate CIOs and CDC staff offices on administrative and program matters including budget formulation and execution and human resource management; (3) oversees the coordination of federal and state programs and new initiatives to prevent HAI (*e.g.,* the HAI Recovery Act State Cooperative Agreement program); (4) interprets general program and administrative policy directives for implications on management and execution of DHQP's programs; (5) serves as lead and primary contact and liaison with relevant CDC staff offices on all matters pertaining to DHQP's procurement needs and activities; (6) provides management and coordination for DHQP-occupied space and facilities including laboratory space and facilities; (7) provides oversight and management of the distribution, accountability, and maintenance of CDC property and equipment including laboratory property and equipment; and (8) provides program and administrative support for HICPAC.

Clinical and Environmental Microbiology Branch (CVLDB). (1) Collaborates with the Prevention and Response Branch to provide laboratory response to outbreaks and emerging threats associated with infections/antimicrobial resistance and related adverse events throughout the healthcare delivery system; (2) provides comprehensive laboratory support and expertise for investigations of recognized and emerging bacterial agents in healthcare settings; (3) develops methods to assess contamination of environmental surface; (4) investigates novel and emerging mechanisms of antimicrobial resistance among targeted pathogens found in healthcare settings; (5) detects toxins/virulence factors of bacteria causing HAI to understand their transmission and pathogenicity; (6) conducts research in collaboration with partners to develop new, accurate methods of detecting antimicrobial resistance in bacteria and to improve reporting of antimicrobial susceptibility testing results to physicians to improve antimicrobial use; (7) conducts laboratory research to identify new strategies to prevent infections/antimicrobial resistance, related adverse events, and medical errors, especially those associated with invasive medical devices, contaminated products, dialysis, and water; (8) maintains capacity to evaluate commercial microbial identification and antimicrobial susceptibility testing systems and products and facilitates their improvement to provide accurate patient test results; (9) investigates the role of biofilms, particularly those detected in indwelling medical devices and medical water systems, in medicine and public health, and identifies novel methods to eliminate colonization and biofilm formation on foreign bodies; (10) investigates the role of the water distribution systems in healthcare facilities in order to understand and prevent waterborne healthcare associated infections; and (11) provides expertise, research opportunities, training, and laboratory support for investigations of infections and related adverse events to other CDC CIOs and to our partners in areas related to quality clinical microbiology laboratory practices, investigation of emerging pathogens and environmental microbiology.

Prevention and Response Branch (CVLDC). (1) Coordinates rapid response to assess and control strategically selected outbreaks and emerging threats (i.e., healthcare associated infections, related adverse events, including related infections in the community, and antimicrobial resistance) and communicates the results of response activities with federal and state agencies, healthcare providers, and the public to prevent similar adverse events in the future; (2) supports local, state, and national efforts to prevent HAI and related adverse events using evidence-based recommendations; (3) develops and/or evaluates the effectiveness of interventions to prevent HAI and related adverse events or medical errors across the spectrum of healthcare delivery sites including acute and long-term inpatient care, dialysis, and ambulatory settings; (4) provides epidemiology support for investigation and study of both recognized and emerging bacterial healthcare pathogens and related community pathogens, including antimicrobial resistant forms of these pathogens; (5) provides epidemiology support to Clinical and Environmental Microbiology Branch to identify new strategies to prevent infections associated with indwelling medical devices, contaminated products, dialysis, and water; (6) develops, promotes, and monitors implementation of evidence-based guidelines/recommendations, and other proven interventions to prevent HAI and related adverse events, and occupational infections/exposures among healthcare personnel; (7) develops, promotes, and monitors implementation of interventions to prevent transmission of healthcare-associated HIV infections and conducts case investigations of occupational HIV infections; (8) conducts and supports research and evaluates impact of public health practices to prevent HAIs and related adverse events and monitors progress in reaching national prevention goals; and (9) provides expert consultation, guidance, and technical support to other branches in the division, across the agency, to government (e.g., Centers for Medicare Services and the VA Administration) and non-governmental payers of healthcare, and other domestic and international partners, and the U.S. public on the epidemiology and prevention of HAI and related adverse events, and exposures/injuries among healthcare personnel.

Surveillance Branch (CVLDD). (1) Monitors and evaluates on the national level the extent, distribution, and impact of healthcare-associated infections, antimicrobial use and resistance, adverse drug events, healthcare worker safety events, and adherence to clinical processes and intervention programs designed to prevent or control adverse exposures or outcomes in healthcare; (2) provides leadership and consultative services for statistical methods and analysis to investigators in the branch, division, and other organizations responsible for surveillance, research studies, and prevention and control of HAI and other healthcare-associated adverse events; (3) improves methods and enables wider use of clinical performance measurements by healthcare facilities and public health entities for specific interventions and prevention strategies designed to safeguard patients and healthcare workers from risk exposures and adverse outcomes through collaborations with extramural partners; (4) collaborates with public and private sector partners to further standardize, integrate, and streamline systems by which healthcare organizations collect, manage, analyze, report, and respond to data on clinical guideline adherence, HAI, including transmission of multi-drug resistant organisms and other HAI; (5) coordinates, further develops,

enables wider use, and maintains NHSN to obtain scientifically valid clinical performance indices and benchmarks that promote healthcare quality and value at the facility, state, and national levels; (6) conducts applied research to identify and develop innovative methods to detect and monitor HAI and antimicrobial resistance; (7) conducts special studies and provides national estimates of targeted, healthcare-associated adverse events, antimicrobial use and resistance patterns, and the extent to which prevention and control safeguards are in use to protect at-risk patients across the spectrum of healthcare delivery sites; (8) uses NHSN and other data sources to conduct special studies and provide national estimates of targeted occupational illnesses and injuries among healthcare workers and the extent to which preventive safeguards are in use across the spectrum of healthcare delivery sites; and (9) leads CDC's national adverse drug events surveillance activities and seeks to translate population-based surveillance data into evidence-based policies and targeted, innovative and collaborative interventions.

Immunization Safety Office (CVLDE). (1) Assesses the safety of new and currently available vaccines received by children, adolescents and adults; (2) coordinates vaccine safety activities at CDC; (3) conducts public health surveillance to identify adverse events following immunization; (4) in collaboration with the Food and Drug Administration, coordinates and maintains the Vaccine Adverse Event Reporting System, a national reporting system that serves as an early-warning system to detect medical problems that may be related to vaccines; (5) coordinates and maintains the Vaccine Safety Datalink, a collaborative effort with managed care organizations, to assess adverse events following immunization; (6) administers the Clinical Immunization Safety Assessment network, a national network of medical research centers with expertise in immunization safety conducting clinical research on immunization-associated health risks; (7) participates in the Brighton Collaboration, an international collaboration of scientists from around the world working to develop, evaluate, and disseminate globally accepted standard case definitions for adverse events following immunization and guidelines for collection, analysis, and presentation of vaccine safety data; and (8) works with other federal agencies, state governments, and other public and private organizations to assess and promote the safety of vaccines.

Dated: March 10, 2011.

James D. Seligman,

Acting Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011–6179 Filed 3–17–11; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Muscular Dystrophy Coordinating Committee (MDCC).

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should inform the Contact Person listed below in advance of the meeting.

Name of Committee: Muscular Dystrophy Coordinating Committee.

Date: April 20, 2011.

Time: 8 a.m. to 4:30 p.m.

Agenda: The 2011 meeting of the MDCC will review Federal agency activities in the muscular dystrophies, brief participants on the NIH grant database, NIH RePORTER, discuss therapy development resources at the NIH, and review joint NIH/FDA activities and initiatives in rare diseases. The MDCC will also discuss new opportunities in therapy development based upon a representative example of a new mechanistic finding and the lessons learned in current drug development programs. A panel will review and discuss the challenges of conducting clinical trials in the muscular dystrophies.

An agenda will be posted prior to the meeting on the MDCC Web site: *http://www.ninds.nih.gov/find_people/groups/mdcc/index.htm.*

Place: Hilton Rockville Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, Maryland 20852–1699.

Contact Person: John D. Porter, PhD, Executive Secretary, Muscular Dystrophy Coordinating Committee, National Institute of Neurological Disorders and Stroke, NIH, 6001 Executive Boulevard, NSC 2172, Bethesda, MD 20892, (301) 496–5739, *porterjo@ninds.nih.gov.*

Any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: March 11, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–6453 Filed 3–17–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Open Meeting Notice

Notice is hereby given that the National Institutes of Health (NIH), Department of Health and Human Services, will hold a scientific workshop.

Title: "State of the Knowledge Workshop on Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS) Research".

Dates: April 7–8, 2011.

Time: 8 a.m. to 5 p.m.

Place: Building 31, Conference Rooms 6C8/9/10, NIH campus, Bethesda, Maryland.

Purpose of the Meeting: This workshop will bring together subject matter experts who will discuss multiple aspects of ME/CFS, including epidemiology, etiology, pathophysiology, diagnosis, and treatment. The workshop panelists will identify gaps in knowledge and opportunities for advancing biomedical research.

This workshop is open to the public. Please note that attendance is limited. We encourage registration for those attending in person (*see* Web address below). For those unable to attend, the workshop will be available via NIH VideoCasting (*http://videocast.nih.gov/*) both during and after the event.

Individuals with disabilities who need reasonable accommodation should indicate their needs on registration or contact Infinity Conference Group by telephone at 703–925–9455, ext. 0, or e-mail at *icg@infinityconferences.com.*

For more information including an agenda, registration, and visitor information, please visit the workshop Web site: *https://www.infinityconferences.com/InfiniBase/Templates/157557/Index.htm.*

Contact Person: Dennis Mangan, PhD; Chair, Trans-NIH ME/CFS Research Working Group, Office of Research on

Women's Health, Division of Program Coordination, Planning, and Strategic Initiatives, Office of the Director, NIH; 301–496–9006; *Dennis.Mangan@nih.gov.*

Dated: March 14, 2011.

Francis S. Collins,

Director, National Institutes of Health.

[FR Doc. 2011–6458 Filed 3–17–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; National Institute on Drug Abuse; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a joint meeting of the National Advisory Council on Alcohol Abuse and Alcoholism and the National Advisory Council on Drug Abuse.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify one of the IC Contact Persons listed below in advance of the meeting.

Name of Committees: National Advisory Council on Alcohol Abuse and Alcoholism and National Advisory Council on Drug Abuse.

Date: April 11, 2011.

Open: April 11, 2011, 10 a.m. to 1:30 p.m.

Agenda: NIH Director's report on the new institute on substance use, abuse and addiction and discussion with the NIH Director and Council Members of NIDA and NIAAA Council.

Place: National Institutes of Health, Building 1, Wilson Hall, Bethesda, MD 20892.

Contact Person: Abraham P. Bautista, PhD, Director, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2085, Rockville, MD 20892. 301–443–9737. *bautistaa@mail.nih.gov.*

Contact Person: Teresa Levitin, PhD, Director, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4243, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550. (301) 443–2755. *tlevitin@nida.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to a Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information will also available on the Institute's/Center's home pages: *http:///www.silk.nih.gov/silk/niaaa1/about/roster.htm, and http://www.nida.nih.gov/nidahome.html* where an agenda and any additional information for the meeting will be posted when available.

(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: March 11, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–6448 Filed 3–17–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5477–N–11]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: March 10, 2011.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2011–6066 Filed 3–17–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management, Regulation and Enforcement

[Docket ID No. BOEM–2011–0009]

BOEMRE Information Collection Activity: 1010–0185, Increased Safety Measures for Oil and Gas Drilling, Well-Completion, and Well-Workover Operations, Renewal of a Collection; Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Interior.

ACTION: Notice of extension of an information collection (1010–0185).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to OMB an information collection request (ICR) to renew approval of the paperwork requirements in the regulations under 30 CFR 250, "Increased Safety Measures for Oil and Gas Drilling, Well-Completion, and Well-Workover Operations," and related documents. This notice also provides the public a second opportunity to comment on the paperwork burden of these regulatory requirements.

DATES: Submit written comments by April 18, 2011.

ADDRESSES: Submit comments by either fax (202) 395–5806 or e-mail (*OIRA_DOCKET@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior (1010–0185). Please also submit a copy of your comments to BOEMRE by any of the means below.

- Electronically: go to *http://www.regulations.gov.* In the entry titled, "Enter Keyword or ID," enter BOEM–

2011–0009 then click search. Follow the instructions to submit public comments and view supporting and related materials available for this collection. BOEMRE will post all comments.

• E-mail *cheryl.blundon@boemre.gov.* Mail or hand-carry comments to: Department of the Interior; Bureau of Ocean Energy Management, Regulation and Enforcement; Attention: Cheryl Blundon; 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference ICR 1010–0185 in your comment and include your name and return address.

FOR FURTHER INFORMATION CONTACT: Cheryl Blundon, Regulations and Standards Branch, (703) 787–1607. To see a copy of the entire ICR submitted to OMB, go to *http://www.reginfo.gov* (select Information Collection Review, Currently Under Review).

SUPPLEMENTARY INFORMATION:

Title: 30 CFR 250, Increased Safety Measures for Oil and Gas Drilling, Well-Completion, and Well-Workover Operations.

OMB Control Number: 1010–0185.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior to prescribe rules and regulations to manage the mineral resources of the OCS. Such rules and regulations will apply to all operations conducted under a lease, right-of-use and easement, or pipeline right-of-way. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition. Section 1332(6) states that "operations in the Outer Continental Shelf should be conducted in a safe manner by well trained personnel using technology, precautions, and other techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstructions to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property or endanger life or health."

The interim rule (75 FR 63346), effective October 14, 2010, implemented certain safety measures outlined in the Secretary of the Interior's report entitled, "Increased Safety Measures for Energy Development on the Outer Continental Shelf" (Safety Measures Report), dated May 27, 2010. The President requested that the Department of the Interior develop this report as a result of the Deepwater Horizon incident on April 20, 2010. On June 2, 2010, the Secretary of the Interior directed the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) to adopt the recommendations contained in the Safety Measures Report and to implement them as soon as possible.

This information collection (IC) request concerns the regulations that amend certain drilling requirements. This includes requirements related to subsea and surface blowout preventers (BOPs), well casing and cementing, secondary intervention, unplanned disconnects, record keeping, well completion, and well plugging. It also covers the related Notices to Lessees and Operators (NTLs) that the BOEMRE issues to clarify and provide additional guidance on some aspects of the regulations.

Regulations implementing these responsibilities are under multiple subparts in 30 CFR part 250. Responses are mandatory and are submitted on occasion. No questions of a sensitive nature are asked. BOEMRE protects information considered proprietary according to the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2), 30 CFR 250.197, "Data and information to be made available to the public or for limited inspection," and 30 CFR part 252, "OCS Oil and Gas Information Program."

BOEMRE collects the information to address various recommendations from the Secretary's report that were incorporated into the regulations. These regulatory requirements: ensure sufficient redundancy in the BOPs; promote the integrity of the well and enhance well control; and facilitate a culture of safety through operational and personnel management. They also improve the safety of offshore oil and gas drilling operations in Federal waters and promote human safety and environmental protection while requiring OCS lessees and operators to follow best industry practices for well control. This collection references Applications for Permit to Drill and Modify (Forms MMS–123 and MMS–124) but does not change the forms.

Frequency: On occasion.

Description of Respondents: Potential respondents comprise Federal oil, gas, or sulphur lessees and/or operators.

Estimated Reporting and Recordkeeping Hour Burden: The estimated annual hour burden for this information collection is a total of 44,731 hours. The following chart details the individual components and estimated hour burdens. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Citation 30 CFR 250	Reporting & recordkeeping requirement	Hour burden	Average No. of annual responses	Annual burden hours
	Subpart D			
408; 409; 410–418; 420(a)(6); 423(b)(3), (c)(1); 449(j), (k)(1); plus various references in subparts A, B, D, E, H, P, Q.	Apply for permit to drill/revised APD that includes any/all supporting documentation/evidence [test results, calculations, verifications, procedures, criteria, qualifications, etc.] and requests for various approvals required in subpart D (including §§ 250.423, 424, 427, 432, 442(c), 447, 448(c), 449(j), (k), 451(g), 456(a)(3), (f), 460, 490(c)(1), (2)) and submitted via Application for Permit to Drill.	6	700	4,200
416(g)(2)	Provide 24 hour advance notice of location of shearing ram tests or inspections; allow BOEMRE access to witness testing, inspections and information verification.	10 mins	6 notifications	1

Citation 30 CFR 250	Reporting & recordkeeping requirement	Hour burden	Average No. of annual responses	Annual burden hours
420(b)(3)	Submit dual mechanical barrier documentation after installation.	30 mins	700 submittals	350
423(a)	Request approval of other pressure casing test pressures per District Manager.	Burden covered under 1010–0141		0
423(b)(4), (c)(2)	Perform pressure casing test; document results and make available to BOEMRE upon request.	30 mins	700 drilling ops × 5 tests per ops = 3,500 tests.	1,750
442(c)	Request alternative method for the accumulator system.	Burden covered under 1010–0141.		0
442(h)	Label all functions on all panels;	30 mins	30 panels	15
442(i)	Develop written procedures for management system for operating the BOP stack and LMRP.	4	30 procedures	120
442(j)	Establish minimum requirements for authorized personnel to operate critical BOP equipment; require training.	Burden covered under 1010–0128		0
446(a)	Document BOP maintenance and inspection procedures used; record results of BOP inspections and maintenance actions; maintain records for 2 years; make available to BOEMRE upon request.	1	105 rigs	105
449; 450; 467	Function test annular and rams; document results every 7 days between BOP tests (biweekly). Note: part of BOP test.	Burden covered under 1010–0141		0
449(j)(2)	Test all ROV intervention functions on your subsea BOP stack; document all test results; make available to BOEMRE upon request.	10	110 wells	1,100
449(k)(2)	Function test autoshear and deadman on your subsea BOP stack during stump test; document all test results; make available to BOEMRE upon request.	30 mins	110 wells	55
456(i)	Record results of drilling fluid tests in drilling report.	Burden covered under 1010–0141		0
456(j)	Submit detailed step by step procedures describing displacement of fluids with your APD/APM [this submittal obtains District Manager approval].	2	110 wells	220
460; 465; 449(j), (k)(1); 516(d)(8), (d)(9); 616(h)(1), (2); plus various references in subparts A, D, E, F, H, P, and Q.	Submit revised plans, changes, well/drilling records, procedures, certifications that include any/all supporting documentation etc., submitted via Application for Permit to Modify.	4	4,057	16,228
Subtotal			9,458 responses	24,144 hours
	Subpart E			
516(d)(8)	Submit test procedures with your APM for approval.	Burden covered under 1010–0141		0
516(d)(8)	Function test ROV interventions on your subsea BOP stack; document all test results; make available to BOEMRE upon request.	10	110 wells	1,100
516(d)(9)	Function test autoshear and deadman on your subsea BOP stack during stump test; document all test results; make available to BOEMRE upon request.	30 mins	1,048 completions	524

Citation 30 CFR 250	Reporting & recordkeeping requirement	Hour burden	Average No. of annual responses	Annual burden hours
516(g)(l)	Document the procedures used for BOP inspections; record results; maintain records for 2 years; make available to BOEMRE upon request.	7 days × 12 hrs/day = 84.	105 rigs/once every 3 years = 35 per year.	2,940
516(g)(2)	Request alternative method to inspect a marine riser.	Burden covered under 1010–0067		0
516(h)	Document the procedures used for BOP maintenance; record results; maintain records for 2 years; make available to BOEMRE upon request.	1	105 rigs	105
Subtotal			1,298 responses	4,669 hours
Subpart F				
616(h)(l)	Test all ROV intervention functions on your subsea BOP stack; document all test results; make available to BOEMRE upon request.	10 hours	1,226 workovers	12,260
616(h)(2)	Function test autoshear and deadman on your subsea BOP stack during stump test; document all test results; make available to BOEMRE upon request.	30 mins	1,226 workovers	613
617(a)(l)	Document the procedures used for BOP inspections; record results; maintain records for 2 years; make available to BOEMRE upon request.	7 days × 12 hrs/day = 84.	105 rigs/once every 3 years = 35 per year.	2,940
617(a)(2)	Request approval to use alternative method to inspect a marine riser..	Burden covered under 1010–0067		0
617(b)	Document the procedures used for BOP maintenance; record results; maintain records for 2 years; make available to BOEMRE upon request.	1	105 rigs	105
Subtotal			2,592 responses	15,918 hours
Subpart Q				
1712(f), (g); 1721(h)	Submit with your APM, archaeological and sensitive biological features; professional engineer certification.	Burden covered under 1010–0141		0
1721(e)	Identify and report subsea wellheads, casing stubs, or other obstructions.	USCG requirements		0
Total			13,348 Responses	44,731 Hours

Estimated Reporting and Recordkeeping Non-Hour Cost Burden: We have identified no paperwork non-hour cost burdens associated with the collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3501, *et seq.*) requires each agency "* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *" Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, on October 14, 2010, we published a **Federal Register** notice (75 FR 63346) associated with the IFR announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. In addition, § 250.199 provides the OMB control number for the information collection requirements imposed by the 30 CFR 250 regulations and forms. The regulation also informs the public that they may comment at any time on the collections of information and provides the address to which they should send comments. We received multiple comments in response to the IFR; however, BOEMRE is

extending the comment period and will continue to accept comments on the IFR and this information collection. Therefore, all comments received to date, and those that may be received during the extended comment period, will be considered, addressed, and consolidated in the final rulemaking, and we will revise this collection of information accordingly.

If you wish to comment in response to this notice, you may send your comments to the offices listed under the **ADDRESSES** section of this notice. The OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, to ensure maximum consideration, OMB should receive public comments by April 18, 2011.

Public Availability of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

BOEMRE Information Collection Clearance Officer: Arlene Bajusz (703) 787–1025.

Dated: March 3, 2011.

Doug Slitor,

Acting Chief, Office of Offshore Regulatory Programs.

[FR Doc. 2011–6411 Filed 3–17–11; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R–2011–N006; BAC–4311–K9–S3]

Sunkhaze Meadows National Wildlife Refuge, Penobscot, Kennebec, and Waldo Counties, ME, and Carlton Pond Waterfowl Production Area, Waldo County, ME; Comprehensive Conservation Plan and Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) and environmental assessment (EA) for Sunkhaze Meadows National Wildlife Refuge (NWR) and Carlton Pond Waterfowl Production Area (WPA). We provide this notice in compliance with our CCP policy to advise other Federal and State agencies, Tribes, and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process.

DATES: To ensure consideration, please send your written comments by April 30, 2011. We will announce opportunities for public input in local news media throughout the CCP process.

ADDRESSES: Send your comments or requests for more information by any one of the following methods.

E-mail: northeastplanning@fws.gov. Include "Sunkhaze Meadows NWR CCP" in the subject line of the message.

Fax: Attention: Lia McLaughlin, 413–253–8468.

U.S. Mail: Lia McLaughlin, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035.

In-Person Drop-off: You may drop off comments during regular business hours at 9 Water Street, Rockland, ME 04841. Comments can also be dropped off at Milford Town Hall, 62 Davenport Street, Milford, ME 04461.

FOR FURTHER INFORMATION CONTACT: Beth Goettel, 207–594–0600 (phone); *Beth_Goettel@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we initiate our process for developing a CCP for Sunkhaze Meadows NWR, located in Kennebec, Penobscot, and Waldo Counties, ME, and Carlton Pond WPA, located in Waldo County, ME. This notice complies with our CCP policy to: (1) Advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge, and (2) obtain suggestions and information on the scope of issues to consider in the environmental document and during development of the CCP.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Tribal, State, and local governments; agencies; organizations; and the public. At this time we encourage input in the form of issues, concerns, ideas, and suggestions for the future management of Sunkhaze Meadows NWR and Carlton Pond WPA.

We will conduct the environmental review of this project and develop an EA in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

Sunkhaze Meadows National Wildlife Refuge and Carlton Pond Waterfowl Production Area

Sunkhaze Meadows NWR is comprised of three units: The Sunkhaze Meadows Unit, the Benton Unit, and the Sandy Stream Unit. The Sunkhaze Meadows Unit is the largest of the three, at 11,485 acres. It is located in the Town of Milford, Penobscot County, ME, approximately 14 miles north of Bangor. The Benton Unit is a 334-acre former dairy farm in the Town of Benton in Kennebec County. The Sandy Stream Unit is a 58-acre parcel in the Town of Unity in Waldo County.

The refuge was established in 1988 to ensure the ecological integrity of the Sunkhaze Meadows peat bog and the continued availability of its wetland, stream, forest, and wildlife resources to the citizens of the United States. The purpose of acquisition, under the authority of the Fish and Wildlife Act of 1956 was "for the development, advancement, management, conservation, and protection of fish and wildlife resources" and "for the benefit of the United States Fish and Wildlife Service, in performing its activities and services." The Land and Water Conservation Fund was the source of funding for the purchase.

The Sunkhaze Meadows Unit protects the second-largest peatland in Maine. Sunkhaze Stream bisects this unit along a northeast-to-southwest orientation and, with its six tributaries, creates a diversity of wetland communities. The bog and stream wetlands, along with the adjacent uplands and associated transition zones, provide important habitat for many wildlife species. The Benton Unit is comprised of grassland, young mixed softwood-hardwood forest, and small wetland habitats. A variety of landbird species of conservation concern are known to breed there, including American woodcock, red-winged blackbird, and bobolink. The Sandy Stream Unit is mainly comprised of upland shrub, abandoned fields, and floodplain forest. The tidewater mucket and yellow lampmussel, two mussel species listed as threatened by the State of Maine, have been observed at the Sandy Stream Division. Combined, the three units provide habitat for at least three plants, seven birds, two mollusks, and three invertebrates listed as endangered or threatened by the State of Maine.

Carlton Pond WPA is a 1,055-acre artificial impoundment located in the town of Troy in Waldo County. The area was acquired by the Service in 1966 to protect the waterfowl and other wildlife associated with this area in central Maine. Carlton Pond WPA has historically provided good nesting habitat for waterfowl and other birds, and is one of the few areas in the State that provides nesting habitat for the black tern, which is State-listed as endangered. Many bird species that use Carlton Pond have been listed by the Partners-in-Flight organization as species that are declining. Slender blue flag iris, a plant species listed as threatened by the State of Maine, has also been observed at Carlton Pond.

Scoping: Preliminary Issues, Concerns, and Opportunities

We have identified preliminary issues, concerns, and opportunities that we may address in the CCP. We have briefly summarized these issues below. During public scoping, we may identify additional issues.

(1) Ecoregional or ecosystem-wide issues, such as climate change, regional land conservation, and protection of water quality throughout the Penobscot River watershed;

(2) Biological program issues, such as habitat and species management needs, protection, restoration, monitoring, inventories, and research;

(3) Public use program issues, such as the breadth and quality of programs, public access, user conflicts, and use impacts on natural resources;

(4) Infrastructure and staffing issues, such as appropriateness of facilities, safety, accessibility, and additional staffing needs;

(5) Community relations and outreach issues and opportunities, such as increasing local awareness of the refuge and NWRS;

(6) Coordination and communication issues and opportunities with Federal, State, and Tribal Governments and with nongovernmental conservation partners; and

(7) Potential for both wilderness and wild and scenic rivers designations on refuge lands.

Public Meetings

We will give the public an opportunity to provide input at one or more public meetings. You can obtain the schedule from the planning team leader or refuge manager (*see* **ADDRESSES**). You may also send comments anytime during the planning process by mail, e-mail, or fax (*see* **ADDRESSES**). There will be additional opportunities to provide public input once we have prepared a draft CCP.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: February 16, 2011.

Salvatore M. Amato,

Acting Regional Director, U.S. Fish and Wildlife Service, Hadley, MA 01035.

[FR Doc. 2011–6373 Filed 3–17–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2011–N059; 96300–1671–0000–P5]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless a Federal permit is issued that allows such activities. The ESA laws require that we invite public comment before issuing these permits.

DATES: We must receive comments or requests for documents on or before April 18, 2011.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or e-mail *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an e-mail or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please

confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (*see* **DATES**) or comments delivered to an address other than those listed above (*see* **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, the Endangered Species Act of 1973, section 10(a)(1)(A), as amended (16 U.S.C. 1531 *et seq.*), require that we invite public comment before final action on these permit applications.

III. Permit Applications

A. Endangered Species

Applicant: Tom Stehn, Whooping Crane Recovery Plan Coordinator, U.S. Fish and Wildlife Service, Region 2, Austwell, TX, PRT–013808

The applicant requests renewal of a permit to import captive-bred/captive-hatched and wild live specimens, captive-bred/wild-collected viable eggs, biological samples from captive-bred/wild specimens, and salvaged materials from captive-bred/wild specimens of whooping cranes (*Grus americana*) from Canada, for completion of identified tasks and objectives mandated under the Whooping Crane Recovery Plan. Salvage materials may include, but are not limited to, whole or partial specimens, feathers, eggs and egg shell fragments. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Rosamond Gifford Zoo at Burnet Park, Syracuse, NY; PRT–28295A

The applicant requests a permit to re-import two captive born female Asian elephants (*Elephas maximus*) and one captive born male Asian elephant from African Lion Safari and Game Farm, Ontario, Canada for the purpose of enhancement of the survival of the species.

Applicant: Ronald Grubbs, Cuthbert, GA; PRT–37429A

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Dated: March 11, 2011.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2011–6377 Filed 3–17–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW160429]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW160429, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Rock Well Petroleum (US) Inc. for oil and gas lease WYW160429 for land in Natrona County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre or fraction thereof, per year and 16–⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW160429 effective June 1, 2010, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease to any other interest affecting the lands.

Julie L. Weaver,

Chief, Fluid Minerals Adjudication.

[FR Doc. 2011–6211 Filed 3–17–11; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVL01000 L51010000.ER0000.LVRWF09F1640 241A; N–82076; 11–08807; MO#4500019905; TAS: 14X5017]

Notice of Availability of the Record of Decision for the One Nevada Transmission Line (ON Line) Project, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) to authorize the granting of Rights-of-Way (ROW) for the construction of the One Nevada Transmission Line (ON Line) Project. Lands described in the ROW authorizations are located within the BLM Ely District Office's management area in White Pine, Nye, and Lincoln counties, Nevada; and the BLM Southern Nevada District in Clark County, Nevada. The Ely District Office was designated the project lead by the BLM Nevada State Director. The Ely District Manager has signed the ROD, which constitutes the final decision of the BLM. The appeal period for this decision will end 30 days after publication of this notice in accordance with 43 CFR 4.411(a).

ADDRESSES: Printed copies of the ROD or electronic files on compact disk are available upon request from the Field Manager, Egan Field Office, Bureau of

Land Management, HC 33 Box 33500, Ely, Nevada 89301. The ROD is also available at the following Web site: *http://www.blm.gov/nv/st/en/fo/ely_field_office.* Printed copies of the ROD are available for public inspection at several locations listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

A limited number of copies of the document will be available at the following BLM offices:

—Las Vegas District Office, 4701 North Torrey Pines, Las Vegas, Nevada;
—Ely District Office, 702 North Industrial Way, Ely, Nevada; and
—Nevada State Office, 1340 Financial Boulevard, Reno, Nevada.

FOR FURTHER INFORMATION CONTACT: Doris Metcalf, telephone: (775) 289–1852, or e-mail: *doris_metcalf@blm.gov.*

SUPPLEMENTARY INFORMATION: Printed copies of the ROD are available for public inspection at the following locations:

—University of Nevada-Reno, Getchell Library, Government Publication Dept., Reno, Nevada;
—Washoe County Library, 301 South Center Street, Reno, Nevada;
—White Pine County Library, 950 Campton Street, Ely, Nevada;
—Nye County Library, 167 S. Central Street, Tonopah, Nevada;
—Lincoln County Library, 63 Main Street, Pioche, Nevada; and
—Clark County Library, 1401 E. Flamingo Rd., Las Vegas, Nevada.

The main issues addressed in the Final EIS were visual resources, biological resources, lands with wilderness characteristics, and socioeconomic effects. Three alternatives were analyzed in the Final EIS: (1) The Proposed Action, in which the power line would be located largely within West-Wide Energy Corridors; (2) an alternative alignment within the corridors; and (3) no Action, which would be to not authorize the ROW.

After careful consideration of many factors, including the need to provide electricity to the Western United States and strengthening and stabilizing the economies of White Pine, Nye, Lincoln, and Clark Counties, and balancing those factors with the need to protect air, visual and biological resources, the BLM has selected the agency preferred alternative. The BLM's preferred alternative will approve all of the facilities described in the Proposed Action, including the transmission-line route, except the R–SS–Site B sub-alternative, including the access road and Falcon-Gondor loop-ins will replace the Robinson Summit Substation components. Various site-specific applicant-committed mitigation measures will be implemented at the development stage to protect other resources and uses.

Comments on the ON Line Draft Supplemental EIS received from the public, cooperating agencies and internal BLM reviewers were incorporated into the Final EIS. The comments resulted in corrections, clarifying text, and the addition of new text used in the analysis of impacts. The ON Line Final EIS addresses impacts of the power line on private lands and those administered by the BLM.

This decision is subject to appeal to the Interior Board of Land Appeals (IBLA) as provided in 43 CFR part 4, within 30 days from the date of publication of this Notice of Availability in the **Federal Register**. The ROD contains instructions for filing an appeal with the IBLA.

The ROD for this project addresses only BLM's decisions for public lands and resources administered by BLM.

Rosemary Thomas,

District Manager, Ely District Office.

[FR Doc. 2011–6461 Filed 3–17–11; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Graftech International Ltd. and Seadrift Coke, L.P.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comment received on the proposed Final Judgment in *United States* v. *GrafTech International Ltd. and Seadrift Coke, L.P.,* Civil Action No. 1:10–CV–02039, which was filed in the United States District Court for the District of Columbia on March 3, 2011, together with the response of the United States to the comment.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (*telephone:* 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
UNITED STATES OF AMERICA,
Plaintiff,
v.
GRAFTECH INTERNATIONAL LTD.
and
SEADRIFT COKE L.P.
Defendants.
CASE NO.: 1:10-cv-02039
JUDGE: Collyer, Rosemary M.
DECK TYPE: Antitrust
DATE STAMP: March 3, 2011

Response of Plaintiff United States to Public Comment on the Proposed Final Judgment

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comment received regarding the proposed Final Judgment in this case. After careful consideration of the comment submitted, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).

The United States filed a civil antitrust complaint on November 29, 2010, seeking to enjoin GrafTech International Ltd.'s ("GrafTech") proposed acquisition of Seadrift Coke L.P. ("Seadrift"). The Complaint alleged that the acquisition likely would substantially lessen competition in the worldwide sale of petroleum needle coke used to manufacture graphite electrodes, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. That loss of competition likely would result in higher prices, reduced output and less favorable terms of sale in the global petroleum needle coke market.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment, which is designed to remedy the expected anticompetitive effects of the acquisition, and a Stipulation signed by the plaintiffs and the defendants, consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. 16. Pursuant to those

requirements, the United States filed its Competitive Impact Statement ("CIS") with the Court on November 29, 2010; the proposed Final Judgment and CIS were published in the **Federal Register** on December 7, 2010, *see United States* v. *Graftech international Ltd. and Seadrift L.P.,* 75 FR 76026; and summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published in The Washington Post for seven (days beginning on December 3, 2010 and ending on December 9, 2010. The sixty-day period for public comment ended on February 7, 2011; one comment was received as described below and attached hereto.

I. The Investigation and Proposed Resolution

A. The Investigation

On April 1, 2010, Defendants GrafTech and Seadrift entered into an Agreement and Plan of Merger, pursuant to which GrafTech agreed to acquire the 81.1 percent of Seadrift stock it does not already own for about $308.1 million. Immediately following the announcement of the merger, the United States Department of Justice ("Department") opened an investigation into the likely competitive effects of the transaction that spanned more than seven months. As part of this detailed investigation, the Department issued Second Requests to the merging parties and several Civil Investigative Demands ("CIDs") to third parties. The Department considered more than a million documents submitted by the merging parties in response the Second Requests and by third parties in response to CIDs. The Department also took oral testimony from eight executives from the merging parties, and conducted over 100 interviews with customers, competitors and other market participants. The investigative staff carefully analyzed the information provided and thoroughly considered all of the issues presented. The Department considered the potential competitive effects of the transaction on the production and sale of petroleum needle coke used to manufacture graphite electrodes, and concluded that the merger likely would result in higher prices, reduced output and less favorable terms of sale in the global petroleum needle coke market.

As part of its investigation, the Department considered the potential competitive effects of the merger on the markets for numerous products and services and on a variety of customer groups. The Department concluded, as explained more fully in the Complaint and CIS, the acquisition of Seadrift by GrafTech could substantially lessen competition in the international petroleum needle coke market. Seadrift is a producer of petroleum needle coke, a product purchased by GrafTech and its competitors to make graphite electrodes which are, in turn, sold to steel producers to melt scrap in electric arc furnaces. Petroleum needle coke is a key input in large-diameter (18- to 32-inch) electrodes, in particular, because they are often used in high intensity applications, where petroleum needle coke's needle-like structure, low coefficient of thermal expansion, and low impurity rate are critical to efficient conduction of strong current without costly shutdowns to replace broken or exhausted graphite electrodes. Petroleum needle coke is available from four producers: ConocoPhillips Company ("Conoco"), Seadrift and two other competitors located in Japan. Sales typically are negotiated annually, with price terms and volume targets memorialized in formal contracts.

At the time of the proposed merger, GrafTech received a substantial portion of its petroleum needle coke supply from Conoco, pursuant to a multi-year agreement ("Supply Agreement"), which also included a provision that either GrafTech or Conoco could "audit" the books and records of the other. On September 27, 2010, in response to the proposed merger, Conoco activated the "termination clause" of that agreement, which effectively locked in volume targets and imposed most-favored-nation ("MFN") pricing for three years, while leaving the audit right intact. By operation of the merger, the audit clause would extend to Seadrift the information provided to GrafTech from Conoco. Should the audit clause be used in conjunction with the MFN, for example, to verify that GrafTech was, in fact, receiving the lowest price, Seadrift potentially would have access to its largest competitor's production and pricing to all other customers. By facilitating the exchange of customer-specific, real-time, competitor pricing information, the merger was likely to facilitate coordination.

Therefore, the Department concluded, as a result of its investigation, that GrafTech's acquisition of Seadrift likely would substantially lessen competition in the development, production and sale of petroleum needle coke in the United States, leading to higher prices, reduced output and less favorable terms of sale in the worldwide petroleum needle coke market, in violation of Section 7 of the Clayton Act. The proposed Final Judgment is designed to address the threat of information exchange created by the merger, by removing the opportunity and means for Seadrift and Conoco to engage in anticompetitive activity under cover of the Supply Agreement, and possibly future supply arrangements.

B. Proposed Final Judgment

The proposed Final Judgment contains several layers of prohibited and required conduct to eliminate the anticompetitive effects that otherwise would result from GrafTech's acquisition of Seadrift. First, the terms of the proposed Final Judgment require GrafTech and Seadrift immediately to abrogate, amend or otherwise alter the current petroleum needle coke Supply Agreement between GrafTech and Conoco to remove the terms related to the ongoing audit rights, sharing of non-public or proprietary information, and MFN pricing. Had these clauses persisted, they might have allowed GrafTech and Seadrift access to Conoco's customer-specific pricing, production and other commercial terms. GrafTech also is prohibited from adding similar terms to future contracts with Conoco for the ten-year period term of the proposed Final Judgment. Second, to enforce this prohibition, GrafTech must produce copies of each petroleum needle coke supply agreement to the United States on an annual basis. As an additional safeguard against any informal exchange of pricing or output information between GrafTech, Seadrift and Conoco, the proposed Final Judgment also mandates that GrafTech strictly segregate employees who negotiate terms with Conoco from those who make decisions about pricing and production at Seadrift, and vice versa. Finally, so that the United States can detect any changes in capacity, production or sales that might suggest coordination, GrafTech must report capacity, sales and production information on a quarterly basis.

These layers of protection prevent harm without imperiling the efficiencies that GrafTech expects from the merger. GrafTech anticipates substantial, merger-specific efficiencies by internal consumption of Seadrift petroleum needle coke, which would allow the elimination of double margins. Should this result in lower GrafTech prices for graphite electrode customers, it not only would benefit those customers directly, but it also likely would incentivize other graphite electrode competitors to reduce prices in response to that competition. Verified plans to improve the quality of Seadrift petroleum needle coke likely will benefit Seadrift's

graphite electrode customers, as well as the downstream consumers of finished graphite electrodes, in the future. Thus, the source of potential harm is eliminated without depriving consumers of the procompetitive efficiencies that GrafTech and Seadrift expect their merger to generate.

II. Standard of Judicial Review

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(l). In making that determination in accordance with the statute, the court is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A)–(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); *see* generally *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.DC 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N. V./S.A.,* 2009–2 Trade Cas. (CCH) ¶76,736, No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.DC Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the Final Judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see* also Microsoft, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.DC 2001); InBev, 2009 U.S. Dist. LEXIS 84787, at *3 Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[1] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." SBC Commc'ns, 489 F. Supp. 2d at 17; *see* also Microsoft, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.DC 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.DC 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States,* 460 U.S. 1001 (1983); *see* also *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). As this Court has previously recognized, to meet this standard "[t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms, it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *United States* v. *Abitibi-Consolidated Inc.,* 584 F. Supp. 2d 162, 165 (D.DC 2008) (citing SBC Commc'ns, 489 F. Supp. 2d at 17).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, rather than to "construct [its] own hypothetical case and then evaluate the decree against that case." Microsoft, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As this Court recently confirmed in SBC Communications, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[2] Congress made clear its

[1] Cf BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

[2] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); *see* also SBC Commc'ns, 489 F.

Continued

intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." SBC Commc'ns, 489 F. Supp. 2d at 11.[3]

III. Summary of Public Comment and The United States's Response

During the sixty-day comment period, the United States received only one comment, from a Russian graphite electrode competitor, Energoprom. Energoprom's comment, which objected to the scope of the remedy described in the proposed Final Judgment, is attached hereto. As explained in detail below, after careful review, the United States continues to believe that the proposed Final Judgment is in the public interest.

A. Summary of the Public Comment

Energoprom, a competitor of GrafTech's, is the largest producer of graphite electrodes in the Russian Federation, with facilities in the Rostov and Novosibirsk regions of Russia. Energoprom argues first that the proposed Final Judgment should be expanded to require more thorough monitoring to protect competition in the petroleum needle coke market and, in the alternative, asserts that no settlement could be crafted that would prevent anticompetitive effects from the merger of GrafTech and Seadrift.[4]

Energoprom first argues that the proposed Final Judgment does not require sufficient monitoring to prevent anticompetitive effects arising from coordination. The company contends that GrafTech's acquisition of Seadrift, in combination with GrafTech's supply agreement with Conoco, increases the likelihood of price fixing, output coordination, and other anticompetitive agreements between Seadrift and Conoco.[5] To prevent such coordination, Energoprom submits that it is necessary to collect and analyze basic economic indicators regarding these companies and the market as a whole.[6] Energoprom further objects to the ten-year duration of the proposed Final Judgment, and questions whether competition will continue after its expiration.[7]

Second, Energoprom argues that neither the Complaint nor the proposed Final Judgment addresses the possibility that unilateral effects may result from the acquisition of Seadrift by Graftech. Energoprom argues that Seadrift has "a dominant market position" in the petroleum needle coke industry.[8] Acquiring Seadrift, in the company's view, would allow GrafTech to determine the production volume and terms of sale to GrafTech's competitors in the sale of graphite electrodes, creating the potential for abuse.[9] Energoprom argues that unilateral anticompetitive effects may include a reduction of Seadrift's output to GrafTech's competitors and less favorable terms of sale to GrafTech's competitors, either of which may cause Energoprom and other graphite electrode competitors to lose customers because of reduced Seadrift output or because competitors "couldn't provide consumers as low [a] price for electrodes as GrafTech did."[10]

B. The United States's Response

Energoprom's allegations are not new; in fact, the company expressed its concerns to the United States on several occasions during the investigation of the proposed acquisition. The United States is confident that Energoprom's suggestions for additional remedial measures are unnecessary to serve the public interest. Further, the United States's exercise of its discretion not to allege in the complaint potential unilateral effects from the acquisition is beyond the scope of Tunney Act review.

1. Additional Monitoring Requirements

Energoprom asserts that, to prevent anticompetitive effects from potential coordination between GrafTech, Seadrift and Conoco, the Final Judgment must compel the "systematic" production of more information than the proposed Final Judgment currently requires, including "the conditions of contracts entered into by each producer with consumers," each company's price lists, and "other documents" that reveal "basic economic indicators."[11] Energoprom suggests this information should be compared with similar information from the "market on the whole."

The additional documents and information that Energoprom suggests should be required, at best, would be unnecessary supplements to the comprehensive remedy included in the proposed Final Judgment and, at worst, would impose a significant burden on GrafTech as well as other competitors and customers in this industry. The proposed Final Judgment already provides several layers of protection against potential anticompetitive effects, whether they manifest as price increases or output reductions, including significant reporting requirements. First, the proposed Final Judgment removes the mechanism likely to facilitate coordination on price and input by requiring that GrafTech amend its supply agreement with Conoco to remove the audit and MFN provisions prior to consummating the merger.[12] The proposed Final Judgment likewise prohibits GrafTech from adding similar provisions for ten years. Second, the proposed Final Judgment requires that GrafTech produce copies of all of its contracts with Conoco, so the United States may monitor compliance with this prohibition and detect any variation of the audit and MFN provisions that might suggest a price-fixing or output restriction arrangement. Third, the proposed Final Judgment requires that GrafTech erect a firewall that separates those GrafTech employees negotiating prices and terms with Conoco from those making decisions about price and output for Seadrifi. Finally, GrafTech must produce information revealing

Supp. 2d at 11 (concluding that the 2004 amendments effected minimal changes" to Tunney Act review).

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.DC 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should.. carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

[4] Energoprom also argues that GrafTech has failed to abide by Russian competition agency reporting requirements, a complaint that is beyond the scope of this review.

[5] Energoprom Comment at 2.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 3.

[9] *Id.* at 4

[10] *Id.*

[11] *Id.*

[12] In fact, GrafTech has already complied with this provision in the proposed Final Judgment.

Seadrift's projected output and external sales on a quarterly basis. Any significant change in production or sales levels immediately would reveal changes in production volume that might suggest output coordination, but also likely would provide a clear signal of the attendant output effects of an anticompetitive price-fixing agreement.

In addition, Energoprom's proposal that the proposed Final Judgment should require the "systematic collection, storage and processing" of information regarding customer contracts, price lists and other "economic indicators" ignores the significant administrative burden such a requirement would impose on the Defendants, without any attendant enforcement benefit. Moreover, Energoprom suggests this comprehensive collection of data would be useful only in an effort to measure "divergence" of Seadrift sales from "the market as a whole," [13] which suggests a similar collection effort would have to be made of third parties; such a requirement not only would be burdensome, but also is beyond the scope of a settlement to a Clayton Act action brought by the United States.

Energoprom also objects to the ten-year duration of the requirements in the proposed Final Judgment, arguing that "[i]t is not clear" what the competitive environment will be like in ten years.[14] However, it is precisely because it is difficult to foresee competitive conditions more than ten years into the future that the proposed Final Judgment is limited in duration. Ten years is the standard term of most Department consent decrees, and reflects Department experience about the most appropriate period for ensuring the prevention of harm posed by most mergers. Upon expiration of the Final Judgment, the Defendants will remain fully subject to the Sherman Act and the Division will remain able to investigate any potential anticompetitive conduct.

In sum, the carefully constructed layers of requirements and prohibitions included in the proposed Final Judgment are more than sufficient to remedy the harm alleged in the Complaint, and Energoprom's suggested additions merely would impose an unnecessary burden without providing any commensurate benefit to consumers.

2. Expansion of the Complaint To Allege Unilateral Effects

Energoprom also argues that the United States should have alleged that the merger likely would lead to unilateral anticompetitive effects. Energoprom asserts that, even absent coordination with Conoco, the acquisition of Seadrift would be sufficient to allow GrafTech the ability to impose anticompetitive price increases or output restrictions on downstream customers of graphite electrodes. This argument, however, is not a valid basis for the Court to reject a proposed remedy during Tunney Act review. As discussed above, in a Tunney Act proceeding the Court must evaluate the adequacy of the remedy only for the antitrust violations alleged in the complaint. *See United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1459 (DC Cir. 1995). The Tunney Act does not usurp the United States's prosecutorial discretion to choose the type of case to bring; courts "cannot look beyond the complaint. . . unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc 'ns, 489 F. Supp. 2d at 15. Energoprom, however, seeks to "construct fits] own hypothetical case and then evaluate the decree against that case"—precisely the approach specifically forbidden in Tunney Act proceedings by the DC Circuit. *See* Microsoft, 56 F.3d at 1459. In this case, the United States did not allege that the acquisition of Seadrift was likely to generate a unilateral anticompetitive effect, and it is improper for Energoprom to measure the sufficiency of the remedy against such a hypothetical case.

Accordingly, the United States continues to believe that the proposed Final Judgment will remedy the competitive harm likely to result from GrafTech's acquisition of Seadrift and that entry of the proposed Final Judgment is in the public interest.

IV. Conclusion

The issues raised in the public comment were among the many considered by the United States when it evaluated the sufficiency of the proposed remedy. The United States has determined that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comment and this response are published in the **Federal Register**.

Dated: March 3, 2011

Respectfully submitted,

Stephanie A. Fleming, Esq., United States Department of Justice, Antitrust Division, Litigation II Section, 450 5th Street, NW., Suite 8700, Washington, DC 20530, *Phone:* (202) 514–9228, *Fax:* (202) 514–9033, *stephanie.fleming@usdoj.gov.*

CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on March 3, 2011, I caused a copy of the foregoing Response of Plaintiff United States to Public Comment on the Proposed Final Judgment to be served upon defendants GrafTech and Seadrift, mailing the documents electronically to their duly authorized legal representatives as follows:

Counsel for Defendant GrafTech: Jonathan Gleklen, Esq., Arnold & Porter LLP, 555 12111 Street, NW., Washington, DC 20004;

Counsel for Defendant Seadrift: Craig Seebald, Esq., Joel Grosberg, Esq., McDermott, Will & Emery, 600 13th Street, NW., Washington, DC 20006;

/s/

Stephanie A. Fleming, Esq., United States Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530, *Phone:* (202) 514–9228, *Fax:* (202) 514–9033, *stephanie.fleming@usdoj.gov*;

To: 450 Fifth Street, NW., Suite 8700, Washington DC., 20530.

Letter No: 9091–TM–01–2011

Date: January 25, 2011.

Attn.: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division United States Department of Justice

Fax:

Re: Comments to the proposed Final Judgment regarding acquisition of Seadrift Coke L.P. by GrafTech International Ltd.

Dear Ms Petrizzi:

In connection with filing a Complaint on 29.11.2010 by the United States of America, represented by Antitrust Division of the U.S. Department of Justice to the U.S. District Court, *District of Columbia* vs. *GrafTech International Ltd.* company ("GrafTech") and Seadrift Coke LP company ("Seadrift"), relating to the proposed acquisition of Seadrift by GrafTech, together with proposed Final Judgment and Competitive Impact Statement (published in the U.S. **Federal Register** dated December 7, 2010 Vol. 75 No. 234), being guided by Section 15 U.S.C. 16(d), Closed Joint Stock Company "ENERGOPROM MANAGEMENT" (Moscow, Russia), hereinafter—the Company, being the management company of electrode plants—JSC ENERGOPROM—

[13] Energoprom Comment at 2.

[14] *Id.*

Novocherkassk Electrode Plant" (Rostov region, Russia), JSC "ENERGOPROM—Chelyabinsk Electrode Plant" (Chelyabinsk, Russia), JSC "ENERGOPROM—Novosibirsk Electrode Plant" (Novosibirsk region, Russia), all these companies together form ENERGOPROM Group, hereby presents commentary to Final Judgment.

The above Complaint was filed by the United States of America in the announcement of GrafTech—the world's largest manufacturer of graphite electrode UHP, used in electric arc furnaces for electric steel smelting, about the proposed acquisition of Seadrift—the second largest world producer of petroleum needle coke—a key raw material used to produce graphite electrode UHP. The Complaint seeks to reduce the expected anticompetitive effect of the acquisition due to taking by the parties to the transaction a number of measures listed in the proposed Final Judgment.

ENERGOPROM Group is Russia's largest producer of graphite electrodes UHP, supplies the goods to Europe and the USA and uses petroleum needle coke in the production. ENERGOPROM Group considers that the aforementioned transaction is contrary to the basic principles of antitrust laws, which might result in substantial harm to the competition not only on the world petroleum needle coke market, but also as a consequence—on the market of graphite electrodes UHP and electric steel market.

According to subsection 2 of section II of the Competitive Impact Statement the alleged acquisition of Seadrift by GrafTech may substantially lessen competition in the worldwide sale of petroleum needle coke because it will allow Seadrift to be involved in the scope of the long-term petroleum needle coke supply agreements ("Supply Agreements") between GrafTech and Conoco Philips Company (hereinafter—"Conoco")—a competitor of Seadrift, the world's largest producer of needle coke, under which Conoco must provide petroleum needle coke to GrafTech with the most-favored-nation ("MFN") basis meaning that prices to GrafTech may not exceed the lowest price charged by Conoco to its other customers; [1] to ensure compliance with this MFN guarantee, GrafTech could demand to audit Conoco documents reflecting the company's costs, pricing to specific customers, volume of production to each customer and other commercially sensitive terms of sale. As a result of GrafTech and Seadrift merger Seadrift will be entitled to audit, which will allow it to monitor online prices charged by its direct competitor from the electrode producers and petroleum needle coke volume of sales to each customer.

However, even under the circumstances of absence of the MFN regime and rights to audit, acting between GrafTech and Conoco in respect of supply may provide GrafTech (and hence Seadrift) with inappropriate, in this situation, competitive information with respect to pricing, supply and production.

This situation creates the possibility of price fixing plot, coordination of industrial production volume and other anticompetitive agreements of Seadrift with its competitor—Conoco.

Sections IV and V of the proposed Final Judgment provide measures (the required conduct and prohibited conduct of parties to the transaction), which are designed to neutralize damage to the competition, which is applied by the acquisition in question.

In accordance with these sections of the proposed Final Judgment GrafTech and Seadrift shall:

—Amend the Supply Agreement in order to remove the most favored-nation basis price clause and audit rights clause;

—Provide the Antitrust Division of the U.S. Department of Justice with a copy of any agreements relating to the supply of petroleum needle coke, formed between defendants and Conoco for the duration of the proposed Final Judgment (10 years), as well as ordinary course of business documents, which provide information on the quantity of output and sales of Seadrift;

—Separate employees who are negotiating terms with Conoco from those who make decisions about pricing and production at Seadrift. Similarly, employees of Seadrift, who are negotiating agreements with competitors of GrafTech, will be prevented from sharing any competitively sensitive information thus obtained.

These provisions in the opinion of the Antitrust Division of the U.S. Department of Justice help to ensure that defendants comply with the proposed Final Judgment, as well as ensure that Conoco and Seadrift do not coordinate their actions in terms of production volumes and prices.

In our opinion the measures referred to in the proposed Final Judgment are not sufficient and proportionate to damage caused to competition by the acquisition.

In order to prevent coordination of the two largest producers of petroleum needle coke it is necessary to carry out systematic collection, storage and processing of information about functioning of these companies in the product market by analyzing the conditions of contracts entered into by each producer with consumers, price list of each company and other documents. In this case, the most important condition for determining coordination is fixed divergence by the dynamics of basic economic indicators of the activities of these companies with the average data of similar indicators for the market on the whole.

The proposed Final Judgment does not stipulate the need to provide by companies such documents and information.

In addition, the proposed Final Judgment is only valid for 10 years. It is not clear how will competitive environment be ensured at the end of this period.

Along with this, we would like to point out the following. The Complaint in question, Competitive Impact Statement, the proposed Final Judgment analyzes only one aspect of the anti-competitive acquisitions—possibility of action coordination of two competitors—Seadrift and Conoco companies. Another important aspect of the transaction is not touched upon. Before point it out, it is necessary to give a brief description of the world petroleum needle coke market.

World petroleum needle coke market is characterized by several features:

(1) A limited number of producers.

Only four companies work on the world petroleum needle coke market, including Conoco and Seadrift. The number and composition of producers did not change for a long time.

(2) High barriers to entry the market.

Specificity of petroleum needle coke market stipulates:

- Large capital-construction facility for the production of petroleum needle coke, and in case of the existing setup—a significant change in the organization of the refinery;
- High quality requirements for raw materials or need to prepare raw materials by its desulphurization.
- Use of the closed technologies that require long-term, debugging.
- Availability of skills and experience in technical and laboratory staff.
- Strict requirements for the quality of the original product.
- Limited sales market—only the electrode industry.

Thus, the market for petroleum needle coke is capital intensive and niche, and barriers to entry are high.

[1] Such provision was activated on September 27, 2010 and valid from 2011 until the end of 2013.

(3) Lack of substitute products to petroleum needle coke.

Neither pitch needle coke nor anode coke can neither be mixed with the petroleum needle coke, nor less serve as a complete substitute for petroleum needle coke. It is fully described in paragraphs 12–14, Section IV of the Complaint.

(4) Low-elasticity of demand for the goods, which means that increasing the price for the goods does not entail reducing the demand for it, which in turn is caused by the fact that the volume of demand exceeds the supply of goods on the market.[2]

All the above indicates that the world petroleum needle coke market is oligopolistic (market of collective dominance), so that each participant of the market, including the Seadrift company, occupies a dominant position and has a large market weight, regardless of the size of its market share.[3]

This fact in itself is a cause for heightened attention to the behavior of each such entity on the market because abuse by such entity a dominant position leads to serious negative consequences for competition.

In this situation Seadrift—a company with a dominant market position of the petroleum needle coke is acquired by the company, which is the world's largest producer of graphite electrode UHP.

This acquisition creates a situation where the production volume of petroleum needle coke and sales policy of this raw material to the producers of graphite electrodes is determined by another producer of graphite electrodes—their direct competitor. This situation creates a wide field for abuse and may lead to a significant deterioration of competition not only in the petroleum needle coke, but also in the market of graphite electrode UHP.

Section III of the Competitive Impact Statement states: "GrafTech anticipates substantial, merger-specific efficiencies by internal consumption of Seadrift petroleum needle coke, which would allow the elimination of double margins. Should this result in lower GrafTech prices for graphite electrodes downstream, it likely would incentivize other graphite electrodes competitors to reduce prices in response of that competition".

We do not believe that these conclusions are correct and, on the contrary, we would like to indicate the following possible ways to abuse by GrafTech and Seadrift companies:

(1) GrafTech may use the control over the supply of petroleum needle coke produced by Seadrift company to reduce the production of petroleum needle coke and higher prices for graphite electrodes.

By limiting the supply of petroleum needle coke GrafTech may interfere other producers of graphite electrodes to deliver the required amount of graphite electrodes to maintain the same level of production in industry.

(2) Prices for needle coke produced by Seadrift for other customers may be raised; so GrafTech may increase its market share at the expense of other producers of graphite electrodes because they couldn't provide consumers as low price for electrodes as GrafTech did.

(3) GrafTech may use the methods of unfair competition, forcing Seadrift waive or deviate without good reason to conclude contracts with particular buyers, to set different prices for coke for different customers, to impose needle coke consumers contract terms not profitable for them. This creates a situation where market players will be in different conditions and products of some may become uncompetitive.

In conclusion, we would like to draw attention to one point.

The market of petroleum needle coke and graphite electrodes UHP market are global and the Russian market is its integral part.

According to Russian law, if the transaction made outside the territory of the Russian Federation may have an impact on the state of competition in the Russian Federation it is subject to agreement with the Federal Antimonopoly Service of the Russian Federation. To our knowledge, Seadrift and GrafTech companies did not receive such approval, and therefore violated the laws of the Russian Federation.

Summarizing up the above said in its Complaint, the United States represented by Antitrust Division of the U.S. Department of Justice do not cover all the negative effects of the acquisition in question, but analyze only one aspect of it. But even in this aspect the measures stipulated by the proposed Final Judgment are not adequate and sufficient to prevent damage by the competition.

Public interests are to create maximum favorable conditions for the functioning of free market economy with there are separate, independent entities. The acquisition of Seadrift by GrafTech is inherently anti-competitive—GrafTech—the largest consumer of petroleum needle coke acquires the largest producer of petroleum needle coke, which forms the basis for discrimination of all other customers of this raw material in the whole world, which will negatively affect not only producers of graphite electrodes, but also producers of electric steel. In this connection the proposed Final Judgment by definition does not and can not be in the public interest, since the transaction should not be performed and approved under any circumstances, and therefore any proposed measures do not compensate for the damage which will be caused to competition in the petroleum needle coke market as well as and graphite electrodes market UHP that will negatively impact the electric steel market.

Based on the foregoing, ENERGOPROM Group requests Antitrust Division of the U.S. Department of Justice to withdraw its consent to the proposed Final Judgment.

Attachments:

—Articles of Association of CJSC "ENERGOPROM MANAGEMENT";

—Certificate of state registration of CJSC "ENERGOPROM MANAGEMENT";

—Decision of the sole shareholder on the appointment of the General Director of the company.

All documents are appostilled and translated into English.

Contacts: Closed Joint Stock Company <<ENERGOPROM MANAGEMENT>> 123001, Russia, Moscow, Sadovaya-Kudrinskaya, 32/1, Tel +7 495 789 96 46, fax +7 495 789 96 47, *Web-site: www.energoprom.ru, Contact e-mail: nproskurdina@energoprom.ru.*

Sincerely yours,

General Director Nadtochy A.

[FR Doc. 2011–6182 Filed 3–17–11; 8:45 am]

BILLING CODE 4410–11–M

[2] Reducing the price of petroleum needle coke, and consequently reducing the volume of its sales in 2009 is not indicative, because it is caused by the global financial crisis.

[3] The Competitive Impact Statement states that the Seadrift world market share is 19%.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0009]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Controlled Substances Import/Export Declaration—DEA Form 236

ACTION: 60-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with

the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until May 17, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; telephone: (202) 307–7297.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Cathy A. Gallagher at 202–307–7297 or the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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 agencies 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection

(2) *Title of the Form/Collection:* Controlled Substances Import/Export Declaration—DEA Form 236.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: DEA Form 236.

Component: Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: DEA–236 provides the DEA with control measures over the importation and exportation of controlled substances as required by United States drug control laws and international treaties.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that there are 313 respondents, 5,709 annual responses, and that each response takes 18 minutes to complete.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,712.7 annual burden hours.

If additional information is required, contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street, NE., Suite 2E–808, Washington, DC 20530.

Dated: March 15, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–6410 Filed 3–17–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0024]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Reports of Suspicious Orders or Theft/Loss of Listed Chemicals/Machines

ACTION: 60-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until May 17, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; telephone: (202) 307–7297.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Cathy A. Gallagher at 202–307–7297 or the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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 agencies 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Reports of Suspicious Orders or Theft/Loss of Listed Chemicals/Machines.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: Notification of suspicious orders and thefts is provided in writing on an as needed basis and does not occur using a form.

Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: Persons handling listed chemicals and tableting and encapsulating machines are required to report thefts, losses and suspicious orders pertaining to these items. These reports provide DEA with information regarding possible diversion to illicit drug manufacture.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that there are 300 responses to this collection and that responses occur on an as needed basis. Responses take 15 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* DEA estimates that this collection takes 75 annual burden hours.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street, NE., Suite 2E–808, Washington, DC 20530.

Dated: March 15, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–6412 Filed 3–17–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Comment Request for Information Collection for Work-Flex Plan Submission and Reporting Requirements; Extension With Revisions

AGENCY: Employment and Training Administration, DOL.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance 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. Currently, the Employment and Training Administration is soliciting comments concerning the collection of data about the Work Flex Plan Submission and Reporting Requirements.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before May 17, 2011.

ADDRESSES: Submit written comments to Kimberly Vitelli, Division of Workforce System Support, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4510, Washington, DC 20210, Telephone number: 202–693–3045 (this is not a toll-free number). Fax: 202–693–3015. E-mail: *Vitelli.Kimberly@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 192 of the Workforce Investment Act (Pub. L. 105–220, August 7, 1998) permits states to apply for a workforce flexibility (Work-Flex) waiver authority to implement reforms to their workforce investment systems in exchange for program improvements. The Act provides that the Secretary may grant Work-Flex waiver authority for up to five years pursuant to a Work-Flex Plan submitted by a state. Under Work-Flex, governors are granted the authority to approve requests submitted by their local areas to waive certain statutory and regulatory provisions of WIA Title I programs. States may also request waivers from the Secretary of certain requirements of the Wagner-Peyser Act (Sections 8–10) as well as certain provisions of the Older Americans Act for state agencies that administer the Senior Community Service Employment Program (SCSEP). The intent of the Work-Flex provision is to provide states and local areas with operational flexibility to improve employment and training program productivity for adult, dislocated, and youth populations. One of the underlying principles for granting Work-Flex waivers is that the waivers will result in improved performance outcomes for persons served and that waiver authority will be granted in consideration of improved performance.

The proposed Work-Flex Quarterly Reporting instructions are slightly different than the currently approved collection. The Department of Labor proposes to eliminate four questions requesting States to provide sums of waivers granted, and replaces it with a question asking States to explain any conditions it imposes on local areas granted a waiver under the Work-Flex authority.

Work-Flex Plan Instructions

States requesting designation as a Work-Flex state must submit a Work-Flex Plan which includes descriptions of:

a. The process by which local areas in the state may submit and obtain approval by the state of applications for waivers of requirements applicable under Title I of WIA, including provisions for public review and comment on local area waiver applications.

b. The statutory and regulatory requirements of Title I that are likely to be waived by the state under the plan.

c. The requirements applicable under Sections 8–10 of the Wagner-Peyser Act that are proposed to be waived, if any.

d. The statutory and regulatory requirements of the Older Americans Act of 1965 applicable to state agencies on aging with respect to administration of the Senior Community Service Employment Program (SCSEP) that are proposed to be waived, if any.

e. The outcomes to be achieved by the waiver authority including, where appropriate, revisions to adjusted levels of performance included in the State or Local Plan under Title I of WIA.

f. Special administrative measures (in addition to current procedures) to be taken to ensure appropriate accountability for Federal funds in connection with the waivers.

g. Prior to submitting a Work-Flex plan, the state must provide all interested parties and the general public adequate notice and a reasonable opportunity for comment on the waivers proposed to be implemented. The plan should describe the process used for ensuring meaningful public comment, including a description of the

Governor's and the state Workforce Investment Board's involvement in drafting, reviewing and commenting.

Work-Flex Quarterly Report: Instructions

Report for each waiver granted:
1. Waiver (assigned by State)
2. Date received
3. Date granted
4. Local Area(s) requesting waiver
5. Purpose (brief statement)
6. Regulation/statute affected.
7. State-imposed conditions of waiver use, as appropriate.

II. Review Focus

The Department of Labor 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 submissions of responses.

III. Current Actions

Type of Review: Extension with minor revisions.

Title: Work-Flex Plan Submission and Reporting Requirements.

OMB Number: 1205–0432.

Affected Public: State and local governments.

Form: See above instructions. There is no form.

Total Estimated Annual Respondents: 5.

Estimates Annual Frequency: 5 state plans annually; 20 quarterly reports.

Average Time per Response: 38.4 hours.

Estimated Total Annual Burden Hours: 960.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Signed at Washington, DC, this 14th day of March 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–6427 Filed 3–17–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this notice to announce the receipt of a "Certification of Non-Relocation and Market and Capacity Information Report" (Form 4279–2) for the following:

Applicant/Location: SoloPower, Inc., Wilsonville, Oregon.

Principal Product/Purpose: The loan, guarantee, or grant application is to expand operations and increase production capacity by opening a new facility in Wilsonville, Oregon. The NAICS industry code for this enterprise is: 334413 (Solar cells manufacturing).

DATES: All interested parties may submit comments in writing no later than April 1, 2011.

Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or e-mail *Dais.Anthony@dol.gov;* or transmit via fax (202) 693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202) 693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural Development Act of 1972, as established under 29 CFR Part 75, authorizes the United States Department of Agriculture to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated, or likely, to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) An increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Signed: At Washington, DC, this 14th day of March 2011.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2011–6402 Filed 3–17–11; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Mathematical and Physical Sciences; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Mathematical and Physical Sciences Advisory Committee (#66).

Date/Time: April 7, 2010 8 a.m.–6 p.m., April 8, 2010 8 a.m.–3 p.m.

Place: National Science Foundation, Room 1235, 4201 Wilson Boulevard, Arlington.

Type of Meeting: Open.

Contact Person: Dr. Morris L. Aizenman, Senior Science Associate, Directorate for Mathematical and Physical Sciences, Room 1005, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 292–8807.

Purpose of Meeting: To provide advice and recommendations concerning NSF science and education activities within the Directorate for Mathematical and Physical Sciences.

Agenda:

Update on current status of Directorate
Report of MPS Committee of Visitors
Report of NSF Advisory Working Groups
Meeting of MPSAC with Divisions within MPS Directorate
Discussion of MPS Long-term Planning Activities

Summary Minutes: May be obtained from the contact person listed above.

Dated: March 15, 2011.

Susanne E. Bolton,

Committee Management Officer.

[FR Doc. 2011–6397 Filed 3–17–11; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0060; Docket No. 50–271; License No. DPR–28]

In the Matter of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Director's Decision

I. Introduction

By letters dated January 12, 2010, from Mr. Michael Mulligan, February 8, 2010, from Mr. Raymond Shadis, and February 20, 2010, from Mr. Thomas Saporito, these individuals (collectively "Petitioners") filed separate petitions pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR), Section 2.206, requesting the Nuclear Regulatory Commission (NRC or the Commission) take actions with regard to the Vermont Yankee Nuclear Power Station (VY).

Mr. Mulligan requested in his petition that: (1) The radioactive leak into the environment of VY be immediately stopped, VY be immediately shut down, and all leaking paths be isolated; and (2) VY disclose its preliminary "root cause analysis," and the NRC release its preliminary investigative report on that analysis before plant startup.

Mr. Shadis on behalf of New England Coalition (NEC) requested in his petition that the NRC: (1) Require VY to go into cold shutdown and depressurize all systems in order to slow or stop the leak; (2) act promptly to stop or mitigate the leak(s); (3) require VY to reestablish its licensing basis by physically tracing records and reporting physical details of all plant systems that would be within scope as "Buried Pipes and Tanks," in NUREG–1801, "Generic Aging Lessons Learned (GALL) Report," and under the requirements of 10 CFR 50.54, "Conditions of licenses"; (4) investigate and determine why Entergy has been allowed to operate VY since 2002 without a working knowledge of all plant systems and why the NRC's Reactor Oversight Process (ROP) and review process for license renewal amendment did not detect this dereliction; (5) take notice of VY's many maintenance and management failures (from 2000–2010) and the ROP's failure to detect them early and undertake a full diagnostic evaluation team inspection using NRC Inspection Procedure 95003, "Supplemental Inspection for Repetitive Degraded Cornerstones, Multiple Degraded Cornerstones, Multiple Yellow Inputs or One Red Input"; and (6) require VY to apply for an amendment to its license renewal application that would address both aging analysis and aging management of all buried piping carrying or with the potential to carry radionuclides and/or the potential to interact with any safety or safety-related system.

Mr. Saporito requested in his petition that the NRC: (1) Order a cold shutdown mode of operation for VY because of leaking radioactive tritium; and (2) issue a confirmatory order modifying the NRC-issued license for VY so that the licensee must bring the nuclear reactor to a cold shutdown mode of operation until the licensee can provide definitive reasonable assurance to the NRC, under affirmation, that the reactor will be operated in full compliance with the regulations in 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," and Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 CFR Part 50, Criterion 60, "Control of Releases of Radioactive Materials to the Environment," and Criterion 64, "Monitoring Radioactivity Releases," and other NRC regulations and authority.

Mr. Shadis stated during a public teleconference with the PRB on March 3, 2010, that the tritium leak is just one example of many maintenance and management failures at VY. All three petitioners raised a concern regarding what they perceive as the NRC's failure to examine the deficiencies at VY in an integrated manner. This concern has met the criteria for review in accordance with NRC's Management Directive (MD) 8.11 "Review Process for 10 CFR 2.206 Petitions."

In an acknowledgment letter dated June 25, 2010, the petitioners were informed of the PRB's decision to deny the request for an immediate cold shutdown of VY because the PRB did not identify any urgent safety concerns. The NRC also informed the petitioners that their petitions were consolidated per the guidance in MD 8.11. The consolidated petition was accepted for review for the following specific issues and concerns stated by the petitioners in the petitions and/or supplemented during the teleconferences:

(1) Increasing concentrations of radiocontaminants in the soil and groundwater at VY, as well as an increasing area of contamination, are manifest on a daily basis. VY risks aggravating the contamination by continuing to run the reactor at full power while attempting over a period of a month to triangulate the location of a presumed leak by drilling a series of test wells in the affected area.

(2) During the license renewal application proceeding, the licensee averred that it was unaware of the existence of some buried pipes, now uncovered, and it has yet to discover their path and purpose.

(3) Entergy has, in 8 years of ownership, failed to learn and understand VY's design, layout, and construction. This failure to comprehend and understand the layout, function, and potentially the interaction of the plant's own piping systems constitutes a loss of design basis.

(4) The NRC's ROP has apparently failed to capture, anticipate, and prevent ongoing maintenance, engineering, quality assurance, and operation issues that have manifested themselves in a series of high-profile incidents since Entergy took over VY. The agency has repeatedly failed to detect root cause trends until they have, as in this instance, become grossly self-revealing.

(5) The NRC should ensure that Entergy has adequate decommissioning funds. The tritium leak will increase decommissioning costs because of the need for site radiological examination and soil remediation.

Copies of the petitions are available for inspection at the Commission's Public Document Room (PDR) at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, and from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession Nos. ML100190688, ML100470430, and ML100621374. Refer to NRC's Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions," (ADAMS Accession No. ML041770328), for a description of the petition review process. Persons who do not have access to ADAMS or who have problems in accessing the documents 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.*

II. Discussion

On January 7, 2010, Entergy reported to the NRC that water samples taken from groundwater monitoring well GZ–3 onsite at VY showed tritium levels above background. GZ–3 is about 70 feet from the Connecticut River. Tritium is another name for the radioactive nuclide hydrogen-3. Tritium occurs naturally in the environment because of cosmic ray interactions. It is also

produced by nuclear reactor operations, and can be legally discharged as a radioactive effluent under NRC regulations. Tritium is chemically identical to normal hydrogen (hydrogen-1), and, like normal hydrogen, tends to combine with oxygen to form water, which is referred to as tritiated water. The detection of tritiated water in the monitoring well indicated abnormal leakage from the nuclear plant. The Environmental Protection Agency's (EPA's) regulatory standard for tritium in drinking water is 20,000 picocuries per liter (pCi/L). Tritium was initially measured at levels up to about 17,000 pCi/L in monitoring well GZ–3, which is not used for drinking water. Samples at other monitoring wells have also shown some tritium. The highest reading from any monitoring well has been about 2.5 million pCi/L, from monitoring well GZ–10. Entergy immediately started an investigation to identify the source of the tritium, and later installed additional monitoring wells to help locate the source.

Upon notification on January 7, 2010, of the detection of tritium in the monitoring well, the NRC's staff initiated actions to review and assess the condition, by reviewing all available sampling data, hydrologic information, and analyses; conducting an onsite inspection and assessment of Entergy's plans and process for investigating the condition; and making an independent determination of public health and safety consequence based on available information. NRC inspectors provided close regulatory oversight of Entergy's investigation in order to independently assure conformance with applicable NRC regulatory requirements, assess licensee performance, and evaluate the condition with respect to NRC's radiological release limits.

On February 27, 2010, following excavation and leak testing of the Advanced Off Gas (AOG) system pipe tunnel, Entergy reported that it had identified leakage into the surrounding soil, and therefore to the groundwater, from an unsealed joint in the concrete tunnel wall. The AOG pipe tunnel is located about 15 feet underground. Also, piping inside the tunnel had previously been found to be leaking, and the drain inside the tunnel had been found to be clogged. Soil samples in the vicinity showed traces of radioactive isotopes. Entergy reported that the leakage to the environment had been stopped by isolating piping and containing the water leaking from the AOG pipe tunnel. However, on May 28, 2010, Entergy reported a second leak from AOG piping into the soil. Entergy quickly isolated this leak and has sealed off that piping to prevent further leaks in that area. The contaminated soil was removed from the excavated area and is being stored in containers onsite for eventual disposal in accordance with NRC regulatory requirements.

As part of its oversight effort, NRC staff conducted an evaluation in accordance with NRC Manual Chapter 0309, "Reactive Inspection Decision Basis for Reactors," from January 25 to April 10, 2010, to determine if the occurrence with the AOG piping constituted a significant operational event (i.e., a radiological, safeguards, or other safety-related operational condition) that posed an actual or potential hazard to public health and safety, property, or the environment. The evaluation reviewed the condition against the specified deterministic criteria that are based on regulatory safety limits, and determined that none of the criteria were met. Notwithstanding that determination, the NRC staff continued its review, oversight, and assessment of the condition, including an independent evaluation of any potential public health and safety consequences. The staff's activities included:

1. Several onsite inspections and reviews to assess radiological and hydrological data to establish reasonable assurance that members of the public were not, nor were they expected to be, exposed to radiation in excess of the dose limits for individual members of the public specified in 10 CFR 20.1301, (i.e., 100 millirem in a year) or the As Low As Is Reasonably Achievable (ALARA) dose objectives specified in 10 CFR Part 50, Appendix I.

2. Engagement of hydrological scientists from NRC's Office of Nuclear Reactor Regulation, Office of Regulatory Research, and the U.S. Geological Survey to independently assess the licensee's hydrological and geological data and conclusions on groundwater flow characteristics of the area.

3. Inspection in accordance with NRC Temporary Instruction TI–2515/173, "Review of the Implementation of the Industry Ground Water Protection Voluntary Initiative," to determine the licensee's implementation of the specifications in the industry's groundwater initiative document NEI–07–07, "Industry Ground Water Protection Initiative—Final Guidance Document," (ADAMS Accession No. ML072610036).

4. Confirmation of the basis, calculational methodology, and results obtained by the licensee to estimate a contaminated groundwater effluent release and off-site dose consequence to members of the public.

5. Analysis of selected ground water and environmental samples to aid in determining the adequacy of the licensee's analytical methods.

6. Approval for additional NRC inspection resources above the baseline inspection program to fully evaluate and provide continuing regulatory oversight of the licensee's investigation and remediation activities.

7. Documentation of the inspection scope and conclusions in publicly available NRC Inspection Reports.

As a result of these activities, the NRC established reasonable assurance, in a timely manner, that this groundwater condition would not result in any dose consequence that would jeopardize public health and safety. To date, information and data continue to support that the dose consequence attributable to the groundwater condition at VY remains well below the "As Low As Reasonably Achievable" (ALARA) dose objectives specified in 10 CFR Part 50, Appendix I; and that the NRC regulatory criteria of 10 CFR 20.1301, "Dose limits for individual members of the public," was never approached.

In addition, representatives from the State of Vermont observed NRC inspection activities and conducted independent analyses of collected groundwater samples.

As discussed in Section I, the specific concerns raised by the petitioners which are used as the basis for their requests are discussed in the following paragraphs.

A. NRC Response to the Consolidated Petition

1. Concern 1—Increasing Concentrations of Radiocontaminants in the Soil and Groundwater at VY

In order to address/remove the onsite contamination, Entergy installed an extraction well (GZ–EW1) on March 23, 2010. On April 7, 2010, Entergy placed into service a second extraction well (GZ–EW1A), with a higher flow capacity. As the plume progressed toward the Connecticut River, the extraction wells were sited accordingly, with GZ–15 being utilized for groundwater extraction at various times starting on July 28, 2010, followed by installation of extraction well EW–2 which began operation along with GZ–14 on September 13, 2010. As of December 21, 2010, Entergy has pumped approximately 307,000 gallons of groundwater out of these wells in order to reduce the amount of tritiated water in the groundwater. About 9,000 gallons of the extracted water was recycled to the facility, and about

298,000 gallons of the extracted water has been shipped off-site for processing. Data indicates that the remaining residual plume of tritiated groundwater is currently migrating from the source of the leak to the Connecticut River, which is the direction of flow for the groundwater in this location. Notwithstanding the hydrology, no detectable tritium has been found in the Connecticut River. The NRC's inspections to date confirm that no Federal regulatory limits have been exceeded, and public health and safety remain unaffected.

The soil in the vicinity of the leak was contaminated with small amounts of radioactive particulates associated with nuclear plant operations, including manganese-54, cobalt-60, zinc-65, strontium-90, and cesium-137. Sampling indicated very little migration in the immediate area, which is typical for these radionuclides. Entergy has removed about 150 cubic feet of contaminated soil and packaged it for eventual disposal in accordance with NRC regulatory requirements. Although some minor amounts of contaminated soil may remain, NRC inspections indicate that this soil poses no threat to public health and safety. Areas of remaining minor contamination are expected to be evaluated, and as appropriate, remediated during plant decommissioning. The NRC's experience with decommissioned nuclear plants such as Maine Yankee, Haddam Neck, and Yankee Rowe indicates that these areas can be successfully remediated during decommissioning. The NRC's inspections indicate that no Federal regulatory limits have been exceeded, and there are no health or safety concerns for members of the public or plant workers. The initial NRC inspection covered the period of January 25 through April 14, 2010. Inspection results were initially discussed in an NRC inspection report with preliminary results, dated April 16, 2010 (ADAMS Accession No. ML101060419). The NRC issued its completed report on May 20, 2010 (ADAMS Accession No. ML101400040), and continued to inspect the licensee's actions in these areas. The follow-up NRC Inspection Report 05000271/2010010 was issued on January 7, 2011, ADAMS Accession No. ML110070085.

As part of its corrective action program, Entergy performed a root cause analysis (RCA) of the leakage event. The NRC assessed the comprehensiveness of this analysis and documented this review in NRC Inspection Report 05000271/2010009 dated October 13, 2010 (ADAMS Accession No. ML102860037). The NRC concluded that Entergy's root and apparent cause evaluations for the tritium ground water leakage events were appropriate and no violation of NRC requirements was identified.

As discussed, Entergy has identified the source of the leak and stopped it, and has reduced the onsite contamination by pumping out contaminated groundwater and removing about 150 cubic feet of contaminated soil. The NRC's inspections confirm that no Federal regulatory limits have been exceeded, and the public health and safety remains unaffected. Thus, no enforcement action is warranted for this concern.

2. Concern 2—VY Was Unaware of the Existence of Some Buried Pipes During License Renewal Application Proceeding

On February 24, 2010, Entergy informed the NRC that some employees at VY had been removed from their site positions and placed on administrative leave. Entergy took these actions as a result of Entergy's independent internal investigation into alleged contradictory or misleading information provided to the State of Vermont that was not corrected. On May 27, 2010, an NRC audit team completed an onsite audit to independently verify that information provided by Entergy material to the renewal of the VY operating license was complete and accurate. The NRC staff reviewed the VY yard piping drawings to independently identify buried and underground piping located onsite. The NRC staff performed walk-downs of yard areas and conducted interviews with the buried piping program engineer. The NRC staff also reviewed the results of system walk-downs previously performed by NRC inspectors during the performance of NRC Inspection Procedure (IP) 71002, "License Renewal Inspection," as documented in NRC Inspection Report 05000271/2007006, dated June 4, 2007 (ADAMS Accession No. ML071550330). Additionally, the NRC staff had the opportunity to observe exposed portions of buried piping that had been previously excavated by Entergy in conjunction with actions taken to investigate the cause of a leak from an underground portion of piping in the AOG system. The NRC staff compared the results of this review to a list of buried and underground piping Entergy had provided in preparation of the audit. The NRC staff did not find any discrepancies between Entergy's current accounting of buried and underground safety-related piping and the description contained in the license renewal application, and so concluded that all information provided to the NRC in the license renewal application was complete and accurate in accordance with 10 CFR 50.9. Note that non-safety underground piping is excluded from the license renewal process. The complete audit report dated September 3, 2010, may be found under ADAMS Accession No. ML102070412. Because the NRC staff did not identify a violation of NRC requirements, no enforcement action is warranted for this concern.

3. Concern 3—Entergy's Failure To Comprehend and Understand the Layout, Function, and Potentially the Interaction of the Plant's Own Piping Systems Constitutes a Loss of Design Basis

The design basis for VY is the information that "identifies the specific functions to be performed by a structure, system or component of a facility, and the specific values or ranges of values chosen for controlling parameters as reference bounds for design." The design basis is submitted to the NRC and is approved by the NRC by issuance of the facility operating license. Any changes to the facility as described in the final safety analysis report (FSAR) must be either submitted to the NRC for approval through a license amendment, or changed in accordance with the provisions of 10 CFR 50.59. Licensees are required under 10 CFR 50.71(e) to update the FSAR, which was originally submitted as part of the application for the license, to assure that the information included in the FSAR contains the latest information developed. These submittals contain all the changes necessary to reflect information and analyses submitted to the Commission since the last update to the FSAR. The submittal includes the effects of all changes made in the facility or procedures as described in the FSAR and all safety analyses and evaluations performed by the licensee in support of approved license amendments or in support of conclusions that the plant design change did not require a license amendment.

As discussed in previous Section A.2, an NRC audit team compared the information Entergy provided in the license renewal application to the VY Technical Specifications and the FSAR. The NRC staff determined that the information in the FSAR would meet the requirements of 10 CFR 50.71(e) regarding maintenance of design basis information, consistent with the definition of "design bases" in 10 CFR

50.2, and reflects current plant design. Both safety and non-safety underground yard piping are depicted on drawings in the VY's controlled drawings system. The staff concluded that the information reviewed was accurate and complete and the NRC staff did not identify any loss of the design basis. Because no violations of NRC requirements were identified, enforcement action is not warranted for this concern.

4. Concern 4—The NRC's ROP Failure To Detect Root Cause Trends of a Series of High-Profile Incidents

While a failure of the NRC's ROP is not something for which the NRC could take enforcement action against VY, the NRC staff is responding to the petitioners' concern. Objectives of the ROP include: (1) Improving the objectivity of reactor oversight so that subjective decisions and judgment are not central process features; (2) improving the scrutability of reactor oversight so that NRC actions have a clear tie to licensee performance; and (3) risk-informing reactor oversight so that NRC and licensee resources are focused on those aspects of performance having the greatest impact on safe plant operation.

The ROP evaluates plant performance using objective, risk-informed thresholds, which include the safety significance of inspection findings and performance indicators (PIs). Objective performance thresholds are intended to help determine the level of regulatory engagement appropriate to licensee performance in each cornerstone area. The thresholds were established so that sufficient margin existed between nominal performance bands to allow for licensee initiatives to correct performance problems before they warrant escalated regulatory involvement. Sufficient margin exists to allow for both NRC and licensee corrective actions to be taken in response to declining performance before plant operation becomes unsafe. Under the ROP, performance deficiencies that have no impact on safety are considered minor and are entered into a licensee's corrective action program for appropriate attention, but they do not result in any specific action by the NRC. However, the NRC reviews the licensee's corrective action program on a routine basis while performing the baseline inspection program, and the staff performs more in-depth reviews on a periodic basis while performing the inspection procedure, "Problem Identification and Resolution."

In addition to continuous inspection and assessment of VY performance, annual and mid-cycle assessments of VY performance are conducted. Annual and mid-cycle assessments involve review of the safety significance and common factors associated with inspection findings, and review of licensee objective performance indicators. The results associated with the last several reviews indicate that VY is being operated in a manner which preserves public health and safety. The high profile events referenced by the petitioners were inspected by a combination of specialist inspectors from both the NRC regional office and NRC headquarters, and by the onsite resident inspector staff. These events were determined to either not involve systems important to plant safety, or involved performance deficiencies of very low safety significance. In June 2009, the NRC conducted a Problem Identification and Resolution inspection at VY. The results of this inspection indicated that VY was generally effective in the implementation of its corrective action program; additionally, the safety culture of station employees, including station management, indicated that personnel had a willingness to identify, evaluate, and resolve plant deficiencies. The current and past performance information, including the Mid-Cycle and Annual Assessment Letters and inspection reports issued to VY and other licensees, are publically available and presented on the NRC's public Web site.

The ROP Action Matrix is used to determine the level of regulatory oversight warranted for varying levels of performance. VY is in Column 1 (Licensee Response Column) of the ROP Action Matrix because all inspection findings and PIs at this site have very low (*i.e.,* green) safety significance. In accordance with Inspection Manual Chapter (IMC) 0305, "Operating Reactor Assessment Program," plants in Column 1 meet all cornerstone objectives and receive the NRC's baseline inspection program.

The deviation process described in IMC 0305 is used to address unique situations where the oversight defined by the ROP Action Matrix column might not be appropriate or sufficient. Even though performance at VY had not crossed any thresholds warranting additional regulatory oversight, the staff considered it appropriate to apply additional resources to monitor the licensee's efforts to address the onsite groundwater contamination and to follow up on the licensee's response to the NRC's Demand for Information dated March 1, 2010 (ADAMS Accession No. ML100570237). The staff requested and received authorization from the NRC's Executive Director for Operations (EDO) on April 5, 2010 (ADAMS Accession No. ML100960321), to deviate from the ROP Action Matrix to apply additional resources in these areas of licensee performance.

Although tritium has been found in onsite monitoring wells, the staff has not identified a hazard to public health and safety, and the staff expects any off-site radiological releases to be very small (*i.e.,* off-site doses, if any, would be negligible with respect to those received from normal background radiation levels). Nevertheless, as noted in the Action Matrix deviation memorandum, increased NRC oversight of the characterization, mitigation, and remediation of the tritium contamination was warranted given the extraordinary level of interest and concern by stakeholders. Although there is not currently, nor is there likely to be, a public health and safety issue, the NRC is conducting additional independent inspections and assessments of the licensee's activities, and has increased external stakeholder communications and outreach, to respond to stakeholder concerns and maintain public confidence.

The NRC staff considers the ROP adequate for ensuring public health and safety and notes that the groundwater contamination at VY does not pose a public health or safety hazard.

The staff further notes that it has exercised its authority to deviate from the ROP Action Matrix to be responsive to unique circumstances and stakeholder concerns. The NRC staff conducts annual ROP self-assessments, which include evaluations of deviations from the Action matrix to see if improvements are warranted in the ROP. The results of the calendar year 2010 self-assessment will be included in the annual Commission paper and metric report, which will be issued in early April of 2011 and discussed during the Agency Action Review Meeting (AARM): a meeting of senior NRC managers to confirm the results and effectiveness of the ROP. The results of the AARM will be presented to the Commission in a public meeting in May 2011.

5. Concern 5—VY's Decommissioning Fund Is Inadequate Due to the Increase in Decommissioning Costs

NRC establishes requirements for licensees to provide reasonable assurance that funds will be available for the decommissioning process. Reasonable assurance consists of a series of steps outlined in 10 CFR 50.75, "Reporting and record keeping for decommissioning planning." VY must

file an annual report to the NRC containing a certification that financial assurance for decommissioning will be or has been provided in an amount which may be more, but not less than, the amount stated in the regulations, adjusted as appropriate for changes in labor, energy, and waste burial costs. The formula for adequate decommissioning funds includes an estimated waste disposal volume based on the plant design. The actual waste disposal volume may increase due to a leak or spill at a level that requires remediation. The licensee is responsible for payment of any increased waste disposal costs, whether paid for out of the allocated funds from the decommissioning fund or other assets. The current remediation of the tritium in soil and groundwater at VY has been funded as an operating expense and no money was used from the decommissioning trust fund. VY previously submitted a site-specific decommissioning cost analysis, which was approved by the NRC by letter dated February 3, 2009 (ADAMS Accession No. ML083390193). VY must address any required changes in their next annual report. Because no violations of NRC requirements were identified, enforcement action is not warranted for this concern.

B. Additional NRC Actions Pertaining to Groundwater Contamination

In March of 2010, NRC's EDO established a Groundwater Task Force (GTF) to review the NRCs approach to ground water contamination conditions, given the recent incidents of leaking buried pipes at commercial nuclear power plants. The charter of the Task Force was to reevaluate the recommendations made in the Liquid Radioactive Release Lessons Learned Task Force Final Report dated September 1, 2006 (ADAMS Accession No. ML062650312); review the actions taken in Commission Paper SECY–09–0174 "Staff Progress in Evaluation of Buried Piping at Nuclear Reactor Facilities" (ADAMS Accession No. ML093160004); and review the actions taken in response to recent releases of tritium into groundwater by nuclear facilities.

The GTF completed its work in June 2010 and provided its report to the EDO. The report characterized a variety of issues ranging from policy issues to communications improvement opportunities. The complete report may be found under ADAMS Accession No. ML101740509. The GTF determined that the NRC is accomplishing its stated mission of protecting public health, safety, and protection of the environment through its response to groundwater leaks/spills. Within the current regulatory structure, the NRC is correctly applying requirements and properly characterizing the relevant issues. However, the GTF reported that there are further observations, conclusions, and recommendations that the NRC should consider in its oversight of groundwater contamination incidents.

The EDO appointed a group of NRC senior executives to review the report and consider its findings. The group reviewed the GTF final report, including the conclusions, recommendations, and their bases. They identified conclusions and recommendations that do not involve policy issues, and tasked the NRC staff to address them. They have also identified policy issues, and a policy paper has been sent to the Commission discussing those issues.

A public workshop was held on October 4, 2010, with external stakeholders to discuss the findings of the GTF Report and to receive input on the potential policy issues. In addition, a request for public comment was published in the **Federal Register** (75 FR 57987). These efforts help to ensure the NRC is considering the right issues on which to focus its attention as it moves forward. The transcript from this meeting is available on the NRC's Web site at: *http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/buried-pipes-tritium.html.*

III. Conclusion

As summarized above, the NRC staff did not identify any violations and the public health and safety remains reasonably assured. Thus, no enforcement action against VY is warranted. The NRC staff concludes that the petitioners' concerns have been addressed and resolved such that no further action is needed in response to the petitions.

As provided in 10 CFR 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

Dated at Rockville, Maryland, this 11th day of March 2011.

For the Nuclear Regulatory Commission.

Eric J. Leeds,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–6401 Filed 3–17–11; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket No. 50–271; NRC–2011–0060]

Entergy Nuclear Operations, Inc,. Entergy Nuclear Vermont Yankee, LLC, Vermont Yankee Nuclear Power Station; License No. DPR–28, Receipt of Request for Action

Notice is hereby given that petitions dated January 12, 2010, from Mr. Michael Mulligan, February 8, 2010, from Mr. Raymond Shadis, and February 20, 2010, from Mr. Thomas Saporito, have requested that, under Title 10 of the *Code of Federal Regulations* (10 CFR) 2.206, "Requests for Action under this Subpart," the U.S. Nuclear Regulatory Commission (NRC) take action with regard to the Vermont Yankee Nuclear Power Station (VY).

Mr. Mulligan requested in his petition that (1) the radioactive leak into the environment of VY be immediately stopped, VY be immediately shut down, and all leaking paths be isolated, and (2) VY disclose its preliminary root cause analysis and the NRC release its preliminary investigative report on this analysis before plant startup.

Mr. Shadis requested in his petition that the NRC (1) require VY to go into cold shutdown and depressurize all systems in order to slow or stop the leak, (2) act promptly to stop or mitigate the leak(s) and not wait until all issues raised by New England Coalition are resolved, (3) require VY to reestablish its licensing basis by physically tracing records and reporting physical details of all plant systems that would be within scope as "buried pipes and tanks" in NUREG–1801, "Generic Aging Lessons Learned (GALL) Report," and under the requirements of 10 CFR 50.54, "Conditions of Licenses," (4) investigate and determine why Entergy has been allowed to operate VY since 2002 without a working knowledge of all plant systems, and why the NRC's Reactor Oversight Process (ROP) and review process for license renewal amendment did not detect this dereliction, (5) take notice of Entergy Nuclear Vermont Yankee's many maintenance and management failures (from 2000 to 2010) and the ROP's failure to detect them early and undertake a full diagnostic evaluation team inspection or NRC Inspection

Procedure 95003, "Supplemental Inspection for Repetitive Degraded Cornerstones, Multiple Degraded Cornerstones, Multiple Yellow Inputs or One Red Input," and (6) require Entergy VY to apply for an amendment to its license renewal that would address both aging analysis and aging management of all buried piping carrying or with the potential to carry radionuclides and/or the potential to interact with any safety or safety-related system.

Mr. Saporito requested in his petition that the NRC (1) order a cold-shutdown mode of operation for VY because of leaking radioactive tritium and (2) issue a confirmatory order modifying the NRC-issued license for VY so that the licensee must bring the nuclear reactor to a cold-shutdown mode of operation until the licensee can provide definitive reasonable assurance to the NRC, under affirmation, that the reactor will be operated in full compliance with the regulations in 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," and General Design Criteria 60, "Control of Releases of Radioactive Materials to the Environment," and 64, "Monitoring Radioactivity Releases," of Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 CFR Part 50, and with other NRC regulations and authority.

The requests are being treated under 10 CFR 2.206 of the Commission's regulations. The requests have been referred to the Director of the Office of Nuclear Reactor Regulation (NRR). As provided by 10 CFR 2.206, the NRC will take appropriate action on this consolidated petition within a reasonable time.

Each petitioner stated that the tritium leak is just one example of many maintenance and management failures at VY. All three raised a concern about what they perceive as the NRC's failure to examine the deficiencies at VY in an integrated manner. Although the individual petition was written to request enforcement action specifically because of the tritium leak, during each of the transcribed phone calls, each petitioner urged the NRC to take a broader view and assess operational and performance failures at VY collectively instead of individually. This concern has met the criteria for review in accordance with Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions."

Subsequently, the Petition Review Board recommended that the NRC accept the consolidated petition for review for the following specific issues and concerns identified in the petitions and supplemented during the teleconferences:

1. Increasing concentrations of radiocontaminants in the soil and groundwater at VY, as well as an increasing area of contamination, are manifest on a daily basis. VY risks aggravating the contamination by continuing to run the reactor at full power while attempting over a period of a month to triangulate the location of a presumed leak by drilling a series of test wells in the affected area.

2. During the license renewal application proceeding, the licensee averred that it was unaware of the existence of some buried pipes, now uncovered, and it has yet to discover their path and purpose.

3. Entergy has, in 8 years of ownership, failed to learn and understand VY's design, layout, and construction. This failure to comprehend and understand the layout, function, and potentially the interaction of the plant's own piping systems constitutes a loss of design basis.

4. The NRC's ROP has apparently failed to capture, anticipate, and prevent ongoing maintenance, engineering, quality assurance, and operation issues that have manifested themselves in a series of high-profile incidents since Entergy took over VY. The agency has repeatedly failed to detect root cause trends until they have, as in this instance, become grossly self-revealing.

5. The NRC should ensure that Entergy has adequate decommissioning funds. The tritium leak will increase decommissioning costs because of the need for site radiological examination and soil remediation.

The NRC sent a copy of the proposed Director's Decision to the petitioners and the licensee for comment on January 20, 2011. The staff did not receive any comments on the proposed Director's Decision.

The NRR staff determined that the activities requested by the petitioners have been completed, with the exception of immediate cold shutdown of Vermont Yankee. Therefore, the Director of NRR concludes that the petition has been granted in part and denied in part. The reasons for this decision are explained in the Director's Decision (DD–11–03) pursuant to 10 CFR 2.206.

Copies of the petitions (Agencywide Documents Access and Management System (ADAMS) Accession Nos. ML100190688, ML100470430, and ML100621374) and the Director's Decision (ADAMS Accession No. ML110540558) are available for inspection at the Commission's Public Document Room (PDR) at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, and from the NRC's ADAMS Public Electronic Reading Room on the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html.* NRC Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions" (ADAMS Accession No. ML041770328), describes the petition review process. Persons who do not have access to ADAMS or who have problems in accessing the documents 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.*

A copy of the Director's Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206 of the Commission's regulations. As provided for by this regulation, the Director's Decision will constitute the final action of the Commission 25 days after the date of the decision, unless the Commission, on its own motion, institutes a review of the Director's Decision in that time.

Dated at Rockville, Maryland this 11th day of March, 2011.

For the Nuclear Regulatory Commission.

Eric J. Leeds,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–6400 Filed 3–17–11; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 611; SEC File No. 270–540; OMB Control No. 3235–0600.

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 extension and approval for Rule 611 (17 CFR 242.611)—Order Protection Rule.

On June 9, 2005, effective August 29, 2005 (*see* 70 FR 37496, June 29, 2005), the Commission adopted Rule 611 of Regulation NMS under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et*

seq.) to require any national securities exchange, national securities association, alternative trading system, exchange market maker, over-the-counter market maker and any other broker-dealer that executes orders internally by trading as principal or crossing orders as agent, to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution of a transaction in its market at a price that is inferior to a bid or offer displayed in another market at the time of execution (a "trade-though"), absent an applicable exception and, if relying on an exception, that are reasonably designed to assure compliance with the terms of the exception. Without this collection of information, respondents would not have a means to enforce compliance with the Commission's intention to prevent trade-throughs pursuant to the rule.

There are approximately 658 respondents [1] per year that will require an aggregate total of 39,480 hours to comply with this rule.[2] It is anticipated that each respondent will continue to expend approximately 60 hours annually: two hours per month of internal legal time and three hours per month of internal compliance time to ensure that its written policies and procedures are up-to-date and remain in compliance with Rule 611. The estimated cost for an in-house attorney is $354 per hour and the estimated cost for an assistant compliance director in the securities industry is $320 per hour. Therefore the estimated total cost of compliance for the annual hour burden is as follows: [(2 legal hours × 12 months × $354) × 658] + [(3 compliance hours × 12 months × $320) × 658] = $13,170,528.[3] There are no longer start-up costs associated with Rule 611.

Written comments are invited on: (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 estimates 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission 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 PRA that does not display a valid Office of Management and Budget (OMB) control number.

Please direct your written comments to: Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: March 14, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6313 Filed 3–17–11; 8:45 am]

BILLING CODE 8011–01–P

[1] This estimate includes thirteen national securities exchanges and one national securities association that trade NMS stocks. The estimate also includes the approximately 601 firms that were registered equity market makers or specialists at year-end 2009, as well as 43 alternative trading systems that operate trading systems that trade NMS stocks.

[2] The one-time hour burden associated with developing the required policies and procedures is no longer applicable.

[3] The total cost of compliance for the annual hour burden has been revised to reflect updated estimated cost figures for an in-house attorney and an assistant compliance director. These figures are from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

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:

Form N–8B–4; SEC File No. 270–180; OMB Control No. 3235–0247.

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 ("OMB") for extension and approval.

Form N–8B–4 (17 CFR 274.14) is the form used by face-amount certificate companies to comply with the filing and disclosure requirements imposed by Section 8(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–8(b)). Form N–8B–4 requires disclosure about the face-amount certificate company's organization, controlling persons, business, policies, securities, investment adviser, depositary, management personnel, compensation, and financial statements. The Commission uses the information provided in the collection of information to determine compliance with Section 8(b) of the Investment Company Act of 1940.

Based on the Commission's industry statistics, the Commission estimates that there would be approximately one annual filing on Form N–8B–4. The Commission estimates that each registrant filing a Form N–8B–4 would spend 171 hours in preparing and filing the Form and that the total hour burden for all Form N–8B–4 filings would be 171 hours. Estimates of the burden hours are made solely for the purposes of the PRA, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

The information provided on Form N–8B–4 is mandatory. The information provided on Form N–8B–4 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 OMB control number.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, 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: March 15, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6363 Filed 3–17–11; 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.

Revision and Extension:

Rule 203A–2(f); SEC File No. 270–501; OMB Control No. 3235–0559.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) ("PRA"), the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 203A–2(f),[1] which is entitled "Internet Investment Advisers," exempts from the prohibition on Commission registration an Internet investment adviser who provides investment advice to all of its clients exclusively through computer software-based models or applications, termed under the rule as "interactive websites." These advisers generally would not meet the statutory thresholds currently set out in section 203A of the Advisers Act [2] or the thresholds set out in section 203A as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") beginning on July 21, 2011[3]—they do not manage $25 million or more in assets and do not advise registered investment companies,[4] or they manage between $25 million and $100 million in assets, do not advise registered investment companies or business development companies, and are required to be registered as investment advisers with the states in which they maintain their principal offices and places of business and are subject to examination as an adviser by such states.[5] Eligibility under rule 203A–2(f) is conditioned on an adviser maintaining in an easily accessible place, for a period of not less than five years from the filing of Form ADV relying on the rule,[6] a record demonstrating that the adviser's advisory business has been conducted through an interactive website in accordance with the rule.[7]

This record maintenance requirement is a "collection of information" for PRA purposes. The Commission believes that approximately 58 advisers are registered with the Commission under rule 203–2A(f), which involves a recordkeeping requirement manifesting in approximately four burden hours per year per adviser and results in an estimated 232 of total burden hours (4 × 58) for all advisers.

This collection of information is mandatory, as it is used by Commission staff in its examination and oversight program in order to determine continued Commission registration eligibility for advisers registered under this rule. Responses generally are kept confidential pursuant to section 210(b) of the Advisers Act.[8] Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) The accuracy of the agency's estimate of the burden of the collection of information; (c) Ways to enhance the quality, utility, and clarity of the information collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, 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.*

[1] 17 CFR 275.203A–2(f). Included in rule 203A–2(f) is a limited exception to the interactive website requirement which allows these advisers to provide investment advice to no more than 14 clients through other means on an annual basis. 17 CFR 275.203A–2(f)(1)(i). The rule also precludes advisers in a control relationship with the SEC-registered Internet adviser from registering with the Commission under the common control exemption provided by rule 203A–2(c) (17 CFR 275.203A–2(c)). 17 CFR 275.203A–2(f)(1)(iii).

[2] 15 U.S.C. 80b–3a(a).

[3] Public Law 111–203, 124 Stat. 1376 (2010).

[4] 15 U.S.C. 80b–3a(a).

[5] *See* section 410 of the Dodd-Frank Act. A mid-sized adviser managing between $25 million and $100 million also will be permitted to register with the Commission if it would be required to register with 15 or more states. These amendments are effective on July 21, 2011.

[6] The five-year record retention period is a similar recordkeeping retention period as imposed on all advisers under rule 204–2 of the Adviser Act. See rule 204–2 (17 CFR 275.204–2).

[7] 17 CFR 275.203A–2(f)(1)(ii).

[8] 15 U.S.C. 80b–10(b).

Dated: March 15, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6367 Filed 3–17–11; 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 19b–1; SEC File No. 270–312; OMB Control No. 3235–0354.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l–3520), 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 ("OMB") for extension and approval.

Section 19(b) of the Investment Company Act of 1940 (the "Act") (15 U.S.C. 80a–19(b)) authorizes the Commission to regulate registered investment company ("fund") distributions of long-term capital gains made more frequently than once every twelve months. Rule 19b–1 under the Act [1] prohibits funds from distributing long-term capital gains more than once every twelve months unless certain conditions are met. Rule 19b–1(c)(17 CFR 270.19b–1(c)) permits unit investment trusts ("UITs") engaged exclusively in the business of investing in certain eligible fixed-income securities to distribute long-term capital gains more than once every twelve months, if: (i) The capital gains distribution falls within one of several categories specified in the rule [2] and (ii) the distribution is accompanied by a report to the unit holder that clearly describes the distribution as a capital gains distribution (the "notice requirement").[3] Rule 19b–1(e) (17 CFR 270.19b–1(e)) permits a fund to apply to

[1] 17 CFR 270.19b–1.

[2] 17 CFR 270.19b–1(c)(1).

[3] The notice requirement in rule 19b–1(c)(2) (17 CFR 270.19b–1(c)(2)) supplements the notice requirement of section 19(a) [15 U.S.C. 80a–19(a)] and rule 19a–1 [17 CFR 270.19a–1], which requires any distribution in the nature of a dividend payment made by a fund to its investors to be accompanied by a notice disclosing the source of the distribution.

the Commission for permission to distribute long-term capital gains more than once a year if the fund did not foresee the circumstances that created the need for the distribution. The application must set forth the pertinent facts and explain the circumstances that justify the distribution.[4] An application that meets those requirements is deemed to be granted unless the Commission denies the request within 15 days after the Commission receives the application.

Commission staff estimates that, on average, each year six funds file an application under rule 19b–1(e). The staff understands that funds that file an application generally use outside counsel to prepare the application. The cost burden of using outside counsel is discussed below. The staff estimates that, on average, the fund's investment adviser spends a total of approximately 4 hours to review an application, including 3.5 hours by an assistant general counsel, 0.5 hours by an administrative assistant, and the fund's board of directors spends an additional 1 hour, for a total of 5 hours. Thus, the Commission staff estimates that the annual hour burden of the collection of information imposed by rule 19b–1 is approximately five hours per fund, for a total burden of 30 hours.

The Commission staff estimates that there is no hourly burden associated with complying with the collection of information component of rule 19b–1(c).

As noted above, the Commission staff understands that funds that file an application under rule 19b–1(e) generally use outside counsel to prepare the application.[5] The staff estimates that, on average, outside counsel spends 10 hours preparing a rule 19b–1(e) application, including eight hours by an associate and two hours by a partner. Outside counsel billing arrangements and rates vary based on numerous factors, but the staff has estimated the average cost of outside counsel as $400 per hour, based on information received from funds, intermediaries, and their counsel. The staff therefore estimates that the average cost of outside counsel preparation of the 19b–(e) exemptive application is $4,000.[6] Thus, the staff estimates that the total annual cost burden imposed by the exemptive application requirements of rule 19b–1(e) is $24,000.[7]

The Commission staff estimates that there are approximately 3759 UITs[8] that may rely on rule 19b–1(c) to make capital gains distributions. The staff estimates that, on average, these UITs rely on rule 19b–1(c) once a year to make a capital gains distribution.[9] In most cases, the trustee of the UIT is responsible for preparing and sending the notices that must accompany a capital gains distribution under rule 19b–1(c)(2). These notices require limited preparation, the cost of which accounts for only a small, indiscrete portion of the comprehensive fee charged by the trustee for its services to the UIT. The staff believes that as a matter of good business practices, and for tax preparation reasons, UITs would collect and distribute the capital gains information required to be sent to unitholders under rule 19b–1(c) even in the absence of the rule. The staff estimates that the cost of preparing a notice for a capital gains distribution under rule 19b–1(c)(2) is approximately $50. There is no separate cost to mail the notices because they are mailed with the capital gains distribution. Thus, the staff estimates that the capital gains distribution notice requirement imposes an annual cost on UITs of approximately $187,950.[10] The staff therefore estimates that the total cost imposed by rule 19b–1 is $211,950 ($187,950 plus $24,000 equals $211,950).

Based on these calculations, the total number of respondents for rule 19b–1 is estimated to be 3,765 (3759 UIT portfolios + 6 funds filing an application under rule 19b–1(e)), the total annual hour burden is estimated to be 30 hours, and the total annual cost burden is estimated to be $211,950. These estimates of average annual burden hours and costs are made solely for purposes of the Paperwork Reduction Act. The collections of information required by 19b–1(c) and 19b–1(e) are necessary to obtain the benefits described above. Responses 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.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, 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: March 15, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6366 Filed 3–17–11; 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 17f–5; SEC File No. 270–259; OMB Control No. 3235–0269.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit the existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17f–5 under the Investment Company Act of 1940 (15 U.S.C. 80a) ("Investment Company Act" or "Act")

[4] Rule 19b–1(e) also requires that the application comply with rule 0–2 [17 CFR 270.02], which sets forth the general requirements for papers and applications filed with the Commission.

[5] This understanding is based on conversations with representatives from the fund industry.

[6] This estimate is based on the following calculation: 10 hours multiplied by $400 per hour equals $4,000.

[7] This estimate is based on the following calculation: $4,000 multiplied by 6 (funds) equals $24,000.

[8] The Investment Company Institute, Unit Investment Trust Data, (January 2011).

[9] The number of times UITs rely on the rule to make capital gains distributions depends on a wide range of factors and, thus, can vary greatly across years. A number of UITs are organized as grantor trusts, and therefore do not generally make capital gains distributions under rule 19b–1(c), or may not rely on rule 19b–1(c) as they do not meet the rule's requirements. Other UITs may distribute capital gains biannually, annually, quarterly, or at other intervals.

[10] This estimate is based on the following calculation: 3,759 UITs multiplied by $50 equals $187,950.

governs the custody of the assets of registered management investment companies ("funds") with custodians outside the United States.[1] Under Rule 17f–5, the fund's board of directors must find that it is reasonable to rely on each delegate it selects to act as the fund's foreign custody manager. The delegate must agree to provide written reports that notify the board when the fund's assets are placed with a foreign custodian and when any material change occurs in the fund's custody arrangements. The delegate must agree to exercise reasonable care, prudence, and diligence, or to adhere to a higher standard of care. When the foreign custody manager selects an eligible foreign custodian, it must determine that the fund's assets will be subject to reasonable care if maintained with that custodian, and that the written contract that governs each custody arrangement will provide reasonable care for fund assets. The contract must contain certain specified provisions or others that provide at least equivalent care. The foreign custody manager must establish a system to monitor the performance of the contract and the appropriateness of continuing to maintain assets with the eligible foreign custodian.

The collection of information requirements in rule 17f–5 are intended to provide protection for fund assets maintained with a foreign bank custodian whose use is not authorized by statutory provisions that govern fund custody arrangements,[2] and that is not subject to regulation and examination by U.S. regulators. The requirement that the fund board determine that it is reasonable to rely on each delegate is intended to ensure that the board carefully considers each delegate's qualifications to perform its responsibilities. The requirement that the delegate provide written reports to the board is intended to ensure that the delegate notifies the board of important developments concerning custody arrangements so that the board may exercise effective oversight. The requirement that the delegate agree to exercise reasonable care is intended to provide assurances to the fund that the delegate will properly perform its duties.

The requirements that the foreign custody manager determine that fund assets will be subject to reasonable care with the eligible foreign custodian and under the custody contract, and that each contract contain specified provisions or equivalent provisions, are intended to ensure that the delegate has evaluated the level of care provided by the custodian, that it weighs the adequacy of contractual provisions, and that fund assets are protected by minimal contractual safeguards. The requirement that the foreign custody manager establish a monitoring system is intended to ensure that the manager periodically reviews each custody arrangement and takes appropriate action if developing custody risks may threaten fund assets.

Commission staff estimates that each year, approximately 135 registrants[3] could be required to make an average of one response per registrant under rule 17f–5, requiring approximately 2.5 hours of board of director time per response, to make the necessary findings concerning foreign custody managers. The total annual burden associated with these requirements of the rule is up to approximately 337.5 hours (135 registrants × 2.5 hours per registrant). The staff further estimates that during each year, approximately 15 global custodians[4] are required to make an average of 4 responses per custodian concerning the use of foreign custodians other than depositories. The staff estimates that each response will take approximately 270 hours, requiring approximately 1,080 total hours annually per custodian. The total annual burden associated with these requirements of the rule is approximately 16,200 hours (15 global custodians × 1,080 hours per custodian). Therefore, the total annual burden of all collection of information requirements of rule 17f–5 is estimated to be up to 16,537.5 hours (337.5 + 16,200). The total annual cost of burden hours is estimated to be $4,914,000 (337.5 hours × $4,000/hour for board of director's time, plus 16,200 hours × $220/hour for a trust administrator's time).[5] Compliance with the collection of information requirements of the rule is necessary to obtain the benefit of relying on the rule's permission for funds to maintain their assets in foreign custodians.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, 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: March 15, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6365 Filed 3–17–11; 8:45 am]

BILLING CODE 8011–01–P

[1] 17 CFR 270.17f–5. All references to rules 17f–5, 17f–7, 17d–1, or 19b–1 in this notice are to 17 CFR 270.17f–5, 17 CFR 270.17f–7, 17 CFR 270.17d–1, and 17 CFR 270.19b–1, respectively.

[2] *See* section 17(f) of the Investment Company Act (15 U.S.C. 80a–17(f)).

[3] This figure is an estimate of the number of new funds each year, based on data reported by funds in 2010 on Form N–1A and Form N–2. In practice, not all funds will use foreign custody managers, and the actual figure may be smaller.

[4] This estimate is based on staff research.

[5] The board hourly rate is based on fund industry representations. The $220/hour figure for a trust administrator is from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

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 17f–7; SEC File No. 270–470; OMB Control No. 3235–0529.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Rule 17f–7 (17 CFR 270.17f–7) permits funds to maintain their assets in

foreign securities depositories based on conditions that reflect the operations and role of these depositories.[1] Rule 17f–7 contains some "collection of information" requirements. An eligible securities depository has to meet minimum standards for a depository. The fund or its investment adviser generally determines whether the depository complies with those requirements based on information provided by the fund's primary custodian (a bank that acts as global custodian). The depository custody arrangement has to meet certain risk limiting requirements. The fund can obtain indemnification or insurance arrangements that adequately protect the fund against custody risks. The fund or its investment adviser generally determines whether indemnification or insurance provisions are adequate. If the fund does not rely on indemnification or insurance, the fund's contract with its primary custodian is required to state that the custodian will provide to the fund or its investment adviser a custody risk analysis of each depository, monitor risks on a continuous basis, and promptly notify the fund or its adviser of material changes in risks. The primary custodian and other custodians also are required to agree to exercise reasonable care.

The collection of information requirements in rule 17f–7 are intended to provide workable standards that protect funds from the risks of using securities depositories while assigning appropriate responsibilities to the fund's primary custodian and investment adviser based on their capabilities. The requirement that the depository meet specified minimum standards is intended to ensure that the depository is subject to basic safeguards deemed appropriate for all depositories. The requirement that the custody contract state that the fund's primary custodian will provide an analysis of the custody risks of depository arrangements, monitor the risks, and report on material changes is intended to provide essential information about custody risks to the fund's investment adviser as necessary for it to approve the continued use of the depository. The requirement that the primary custodian agree to exercise reasonable care is intended to provide assurances that its services and the information it provides will meet an appropriate standard of care. The alternative requirement that the funds obtain adequate indemnification or insurance against the custody risks of depository arrangements is intended to provide another, potentially less burdensome means to protect assets held in depository arrangements.

The staff estimates that each of approximately 836 investment advisers[2] will make an average of 8 responses annually under the rule to address depository compliance with minimum requirements, any indemnification or insurance arrangements, and reviews of risk analyses or notifications. The staff estimates each response will take 6 hours, requiring a total of approximately 48 hours for each adviser. The total annual burden associated with these requirements of the rule will be approximately 40,128 hours (836 advisers × 48 hours per adviser). The staff further estimates that during each year, each of approximately 15 global custodians will make an average of 4 responses to analyze custody risks and provide notice of any material changes to custody risk under the rule. The staff estimates that each response will take 260 hours, requiring approximately 1040 hours annually per custodian.[3] The total annual burden associated with these requirements is approximately 15,600 hours (15 custodians × 1040 hours). Therefore, the staff estimates that the total annual burden associated with all collection of information requirements of the rule is 55,728 hours (40,128 + 15,600). The total annual cost of burden hours is estimated to be $14,948,736 (40,128 × $287 for a portfolio manager, plus 15,600 hours × $220/hour for a trust administrator's time).[4] The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Compliance with the collection of information requirements of the rule is necessary to obtain the benefit of relying on the rule's permission for funds to maintain their assets in foreign custodians.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, 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: March 15, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6364 Filed 3–17–11; 8:45 am]

BILLING CODE 8011–01–P

[1] Custody of Investment Company Assets Outside the United States, Investment Company Act Release No. IC–23815 (April 29, 1999) (64 FR 24489 (May 6, 1999)).

[2] At the start of 2011, 836 investment advisers managed or sponsored open-end (including ETFs) portfolios and closed-end registered funds.

[3] These estimates are based on conversations with representatives of the fund industry.

[4] The salaries for a portfolio manager and a trust administrator are from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

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:

Form N–17D–1; SEC File No. 270–231; OMB Control No. 3235–0229.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Section 17(d) (15 U.S.C. 80a–17(d)) of the Investment Company Act of 1940 ("Act") authorizes the Commission to adopt rules that protect funds and their security holders from overreaching by affiliated persons when the fund and the affiliated person participate in any joint enterprise or other joint arrangement or profit-sharing plan. Rule 17d–1 under the Act (17 CFR 270.17d–1) prohibits funds and their affiliated persons from participating in a joint enterprise, unless an application regarding the transaction has been filed with and approved by the

Commission. Paragraph (d)(3) of the rule provides an exemption from this requirement for any loan or advance of credit to, or acquisition of securities or other property of, a small business concern, or any agreement to do any of the foregoing ("investments") made by a small business investment company ("SBIC") and an affiliated bank, provided that reports about the investments are made on forms the Commission may prescribe. Rule 17d–2 (17 CFR 270.17d–2) designates Form N–17D–1 (17 CFR 274.00) ("form") as the form for reports required by rule 17d–1.

SBICs and their affiliated banks use form N–17D–1 to report any contemporaneous investments in a small business concern. The form provides shareholders and persons seeking to make an informed decision about investing in an SBIC an opportunity to learn about transactions of the SBIC that have the potential for self dealing and other forms of overreaching by affiliated persons at the expense of shareholders.

Form N–17D–1 requires SBICs and their affiliated banks to report identifying information about the small business concern and the affiliated bank. The report must include, among other things, the SBIC's and affiliated bank's outstanding investments in the small business concern, the use of the proceeds of the investments made during the reporting period, any changes in the nature and amount of the affiliated bank's investment, the name of any affiliated person of the SBIC or the affiliated bank (or any affiliated person of the affiliated person of the SBIC or the affiliated bank) who has any interest in the transactions, the basis of the affiliation, the nature of the interest, and the consideration the affiliated person has received or will receive.

Up to three SBICs may file the form in any year.[1] The Commission estimates the burden of filling out the form is approximately one hour per response and would likely be completed by an accountant or other professional. Based on past filings, the Commission estimates that no more than one SBIC is likely to use the form each year. Most of the information requested on the form should be readily available to the SBIC or the affiliated bank in records kept in the ordinary course of business, or with respect to the SBIC, pursuant to the recordkeeping requirements under the Act. Commission staff estimates that it should take approximately one hour for an accountant or other professional to complete the form.[2] The estimated total annual burden of filling out the form is 1 hour, at an estimated total annual cost of $198.[3] The Commission will not keep responses on Form N–17D–1 confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. 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.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, 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: March 15, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6362 Filed 3–17–11; 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:

Rule 15c3–3; SEC File No. 270–087; OMB Control No. 3235–0078.

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 a request for approval of extension of the previously approved collection of information provided for in Rule 15c3–3 (17 CFR 240.15c3–3), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 15c3–3 requires that a broker-dealer that hold customer securities obtain and maintain possession and control of fully-paid and excess margin securities they hold for customers. In addition, the Rule requires that a broker-dealer that holds customer funds make either a weekly or monthly computation to determine whether certain customer funds need to be segregated in a special reserve bank account for the exclusive benefit of the firm's customers. It also requires that a broker-dealer maintain a written notification from each bank where a Special Reserve Bank Account is held acknowledging that all assets in the account are for the exclusive benefit of the broker-dealer's customers, and to provide written notification to the Commission (and its designated examining authority) under certain, specified circumstances. Finally, paragraph (o) of Rule 15c3–3, which only applies to broker-dealers that sell securities futures products ("SFP") to customers, requires that such broker-dealers provide certain notifications to customers, and to make a record of any changes of account type.

There are approximately 279 broker-dealers fully subject to the Rule (i.e., broker-dealers that cannot claim any of the exemptions enumerated at paragraph (k)), of which approximately 13 make daily, 210 make weekly, and 56 make monthly, reserve computations. On average, each of these respondents require approximately 2.5 hours to complete a computation. Accordingly, Commission staff estimates that the resulting burden totals 36,780 hours annually ((2.5 hours × 240 computations × 13 respondents that calculate daily) + (2.5 hours × 52 computations × 210 respondents that calculate weekly) + (2.5 hours × 12 computations × 56 respondents that calculate monthly)).

A broker-dealer required to maintain the Special Reserve Bank Account prescribed by Rule 15c3–3 must obtain

[1] As of February 4, 2011, three SBICs were registered with the Commission.

[2] This estimate of hours is based on past conversations with representatives of SBICs and accountants that have filed the form.

[3] Commission staff estimates that the annual burden would be incurred by a senior accountant with an average hourly wage rate of $198 per hour. *See* Securities Industry and Financial Markets Association, Report on Management and Professional Earnings in the Securities Industry 2010, modified to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

and retain a written notification from each bank in which it has a Special Reserve Bank Account to evidence bank's acknowledgement that assets deposited in the Account are being held by the bank for the exclusive benefit of the broker-dealer's customers. As stated previously, 279 broker-dealers are presently fully-subject to Rule 15c3–3. In addition, 120 broker-dealers operate in accordance with the exemption provided in paragraph (k)(2)(i) which also requires that a broker-dealer maintain a Special Reserve Bank Account. The staff estimates that of the total broker-dealers that must comply with this rule, only 25%, or 100 ((279 + 120) × .25) must obtain 1 new letter each year (either because the broker-dealer changed the type of business it does and became subject to either paragraph (e)(3) or (k)(2)(i) or simply because the broker-dealer established a new Special Reserve Bank Account). The staff estimates that it would take a broker-dealer approximately 1 hour to obtain this written notification from a bank regarding a Special Reserve Bank Account because the language in these letters is largely standardized. Therefore, Commission staff estimates that broker-dealers will spend approximately 100 hours each year to obtain these written notifications.

In addition, a broker-dealer must immediately notify the Commission and its designated examining authority if it fails to make a required deposit to its Special Reserve Bank Account. Commission staff estimates that broker-dealers file approximately 33 such notices per year. Broker-dealers would require approximately 30 minutes, on average, to file such a notice. Therefore, Commission staff estimates that broker-dealers would spend a total of approximately 17 hours each year to comply with the notice requirement of Rule 15c3–3.

Finally, a broker-dealer that effects transactions in SFPs for customers also will have paperwork burdens associated with the requirement in paragraph (o) of Rule 15c3–3 to make a record of each change in account type.[1] More specifically, a broker-dealer that changes the type of account in which a customer's SFPs are held must create a record of each change in account type that includes the name of the customer, the account number, the date the broker-dealer received the customer's request to change the account type, and the date the change in account type took place. As of December 31, 2009, broker-dealers that were also registered as futures commission merchants reported that they maintained 35,242,468 customer accounts. The staff estimates that 8% of these customers may engage in SFP transactions (35,242,468 accounts × 8% = 2,819,397). Further, the staff estimates that 20% per year may change account type. Thus, broker-dealers may be required to create this record for up to 563,879 accounts (2,819,397 accounts × 20%). The staff believes that it will take approximately 3 minutes to create each record.[2] Thus, the total annual burden associated with creating a record of change of account type will be 28,194 hours (563,879 accounts × (3min/60min)).

Consequently, the staff estimates that the total annual burden hours associated with Rule 15c3–3 would be approximately 65,091 hours (36,780 hours + 100 hours + 17 hours + 28,194 hours).

In addition, a broker-dealer that effects transactions in SFPs for customers also will have an annualized cost burden associated with the requirements in paragraph (o) of Rule 15c3–3 to (1) provide each customer that plans to effect SFP transactions with a disclosure document containing certain information,[3] and (2) send each SFP customer notification of any change of account type.[4] Approximately 8% of the accounts held by broker-dealers that are also registered as FCMs, or 2,819,397 accounts, may engage in SFP transactions. The staff estimates that the cost of printing and sending each disclosure document will be approximately $.15 per document sent.[5] Thus, the staff estimates that the cost of printing and sending disclosure documents would be approximately $422,910 (2,819,397 accounts × $.15). In addition, approximately 563,879 accounts (2,819,397 accounts × 20%) may change account type per year requiring that broker-dealers provide notification to those customers. The staff estimates that the cost of sending this notification to customers will be about $84,582 (563,879 accounts × $.15). Consequently, the staff estimates that the total annual cost associated with Rule 15c3–3 would be $507,492 ($422,910 + $84,583).

Records required to be created and notices required to be filed with the Commission pursuant to Rule 15c3–3 must be maintained in accordance with Rule 17a–4 (17 CFR 240.17a–4). The collection of information is mandatory and the information required to be provided to the Commission pursuant to these Rules are deemed confidential, notwithstanding any other provision of law under Section 24(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78x(b)) and Section 552(b)(3)(B) of the Freedom of Information Act (5 U.S.C. 552(b)(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 control number.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov.* Comments should be directed to: (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 by sending an e-mail to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, 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: March 14, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6316 Filed 3–17–11; 8:45 am]

BILLING CODE 8011–01–P

[1] 17 CFR 240.15c3–3(o)(3)(i).

[2] In fact, the staff believes that most firms will have this process automated. To the extent that no person need be involved in the generation of this record, the burden will be very minimal.

[3] 17 CFR 240.15c3–3(o)(2).

[4] 17 CFR 240.15c3–3(o)(3)(ii).

[5] Based on past conversations with industry representatives regarding other rule changes as adjusted to account for inflation and increased postage costs.

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.

Extension:

Rule 17a–4; SEC File No. 270–198; OMB Control No. 3235–0279.

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 a request for extension of the previously approved collection of information discussed below.

Rule 17a–4 requires approximately 5,057 active, registered exchange members, brokers and dealers ("broker-dealers") to preserve for prescribed periods of time certain records required to be made by Rule 17a–3 and other Commission rules, and other kinds of records which firms make or receive in the ordinary course of business. Rule 17a–4 also permits broker-dealers to employ, under certain conditions, electronic storage media to maintain these required records. The records required to be maintained under Rule 17a–4 are used by examiners and other representatives of the Commission to determine whether broker-dealers are in compliance with, and to enforce their compliance with, the Commission's rules.

The staff estimates that the average number of hours necessary for each broker-dealer to comply with Rule 17a–4 is 254 hours annually. Thus, the total burden for broker-dealers is 1,284,478 hours annually. The staff believes that compliance personnel would be charged with ensuring compliance with Commission regulation, including Rule 17a–4. The staff estimates that the hourly salary of a Compliance Clerk is $67 per hour.[1] Based upon these numbers, the total cost of compliance for 5,057 respondents is the dollar cost of approximately $86.1 million (1,284,478 yearly hours × $67). The total burden hour decrease of 468,122 results from the decrease in the number of respondents from 6,900 to 5,057.

Based on conversations with members of the securities industry and based on the Commission's experience in the area, the staff estimates that the average broker-dealer spends approximately $5,000 each year to store documents required to be retained under Rule 17a–4. Costs include the cost of physical space, computer hardware and software, etc., which vary widely depending on the size of the broker-dealer and the type of storage media employed. The Commission estimates that the annual reporting and record-keeping cost burden is $25,285,000. This cost is calculated by the number of active, registered broker-dealers multiplied by the reporting and record-keeping cost for each respondent (5,057 active, registered broker-dealers × $5,000).

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov.* Comments should be directed to (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 by sending an e-mail to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, 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: March 14, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6317 Filed 3–17–11; 8:45 am]

BILLING CODE 8011–01–P

[1] This figure is based on SIFMA's *Office Salaries in the Securities Industry 2010,* modified by Commission staff to account for an 1,800-hour work-year multiplied by 2.93 to account for bonuses, firm size, employee benefits, and overhead.

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:

Rule 206(4)–6; SEC File No. 270–513; OMB Control No. 3235–0571.

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 ("OMB") a request for extension of the previously approved collection of information discussed below.

The title for the collection of information is "Rule 206(4)–6" under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) ("Advisers Act") and the collection has been approved under OMB Control No. 3235–0571. The Commission adopted rule 206(4)–6 (17 CFR 275.206(4)–6), the proxy voting rule, to address an investment adviser's fiduciary obligation to clients who have given the adviser authority to vote their securities. Under the rule, an investment adviser that exercises voting authority over client securities is required to: (i) Adopt and implement policies and procedures that are reasonably designed to ensure that the adviser votes securities in the best interest of clients, including procedures to address any material conflict that may arise between the interest of the adviser and the client; (ii) disclose to clients how they may obtain information on how the adviser has voted with respect to their securities; and (iii) describe to clients the adviser's proxy voting policies and procedures and, on request, furnish a copy of the policies and procedures to the requesting client. The rule is designed to assure that advisers that vote proxies for their clients vote those proxies in their clients' best interest and provide clients with information about how their proxies were voted.

Rule 206(4)–6 contains "collection of information" requirements within the meaning of the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The collection is mandatory and responses to the disclosure requirement are not kept confidential.

The respondents are investment advisers registered with the Commission that vote proxies with respect to clients' securities. Advisory clients of these investment advisers use the information required by the rule to assess investment advisers' proxy voting policies and procedures and to monitor the advisers' performance of their proxy voting activities. The information required by Rule 206(4)–6 also is used by the Commission staff in its examination and oversight program. Without the information collected under the rule, advisory clients would not have information they need to assess the adviser's services and monitor the adviser's handling of their accounts, and the Commission would be less efficient and effective in its programs.

The estimated number of investment advisers subject to the collection of information requirements under the rule is 10,207. It is estimated that each of these advisers is required to spend on average 10 hours annually documenting its proxy voting procedures under the requirements of the rule, for a total burden of 102,070 hours. We further estimate that on average, approximately 121 clients of each adviser would request copies of the underlying policies and procedures. We estimate that it would take these advisers 0.1 hours per client to deliver copies of the policies and procedures, for a total burden of 123,505 hours. Accordingly, we estimate that rule 206(4)–6 results in an annual aggregate burden of collection for SEC-registered investment advisers of a total of 225,575 hours.

Records related to an adviser's proxy voting policies and procedures and proxy voting history are separately

required under the Advisers Act recordkeeping rule 204–2 (17 CFR 275.204–2). The standard retention period required for books and records under rule 204–2 is five years, in an easily accessible place, the first two years in an appropriate office of the investment adviser. OMB has previously approved the collection with this retention period.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (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, D.C. 20503, or by sending an e-mail to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, 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: March 14, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6318 Filed 3–17–11; 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:

Rule 18f–1 and Form N–18f–1; SEC File No. 270–187; OMB Control No. 3235–0211.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l–3520), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 18f–1 (17 CFR 270.18f–1) enables a registered open-end management investment company ("fund") that may redeem its securities in-kind, by making a one-time election, to commit to make cash redemptions pursuant to certain requirements without violating section 18(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–18(f)). A fund relying on the rule must file Form N–18F–1 (17 CFR 274.51) to notify the Commission of this election. The Commission staff estimates that approximately 52 funds file Form N–18F–1 annually, and that each response takes approximately one hour. Based on these estimates, the total annual burden hours associated with the rule is estimated to be 52 hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. The collection of information required by rule 18f–1 is necessary to obtain the benefits of the rule. 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov*. Comments should be directed to: (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 by sending an e-mail to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Chief Information Officer, 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: March 14, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6319 Filed 3–17–11; 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:

Rule 482, SEC File No. 270–508, OMB Control No. 3235–0565.

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 ("OMB") a request for extension of the previously approved collection of information discussed below.

Like most issuers of securities, when an investment company [1] ("fund") offers its shares to the public, its promotional efforts become subject to the advertising restrictions of the Securities Act of 1933, (15 U.S.C. 77) (the "Securities Act"). In recognition of the particular problems faced by funds that continually offer securities and wish to advertise their securities, the Commission has previously adopted advertising safe harbor rules. The most important of these is rule 482 (17 CFR 230.482) under the Securities Act, which, under certain circumstances, permits funds to advertise investment performance data, as well as other information. Rule 482 advertisements are deemed to be "prospectuses" under Section 10(b) of the Securities Act.[2]

Rule 482 contains certain requirements regarding the disclosure that funds are required to provide in qualifying advertisements. These requirements are intended to encourage the provision to investors of information that is balanced and informative, particularly in the area of investment performance. For example, a fund is required to include disclosure advising investors to consider the fund's investment objectives, risks, charges and expenses, and other information described in the fund's prospectus, and highlighting the availability of the fund's prospectus. In addition, rule 482 advertisements that include performance data of open-end funds or insurance company separate accounts offering variable annuity contracts are required to include certain standardized performance information, information about any sales loads or other nonrecurring fees, and a legend warning that past performance does not guarantee future results. Such funds including performance information in rule 482 advertisements are also required to make available to investors month-end performance figures via Web site disclosure or by a toll-free telephone number, and to disclose the

[1] "Investment company" refers to both investment companies registered under the Investment Company Act of 1940 and business development companies.

[2] 15 U.S.C. 77j(b).

availability of the month-end performance data in the advertisement. The rule also sets forth requirements regarding the prominence of certain disclosures, requirements regarding advertisements that make tax representations, requirements regarding advertisements used prior to the effectiveness of the fund's registration statement, requirements regarding the timeliness of performance data, and certain required disclosures by money market funds.

Rule 482 advertisements must be filed with the Commission or, in the alternative, with Financial Industry Regulatory Authority ("FINRA").[3] This information collection differs from many other federal information collections that are primarily for the use and benefit of the collecting agency.

As discussed above, rule 482 contains requirements that are intended to encourage the provision to investors of information that is balanced and informative, particularly in the area of investment performance. The Commission is concerned that in the absence of such provisions fund investors may be misled by deceptive rule 482 performance advertisements and may rely on less-than-adequate information when determining in which funds they should invest their money. As a result, the Commission believes it is beneficial for funds to provide investors with balanced information in fund advertisements in order to allow investors to make better-informed decisions.

The Commission estimates that 58,368 responses are filed annually pursuant to rule 482 by 3,540 investment companies offering approximately 16,225 portfolios, or approximately 3.6 responses per portfolio annually. Respondents consist of all the investment companies that take advantage of the safe harbor offered by the rule for their advertisements. The burden associated with rule 482 is presently estimated to be 5.16 hours per response. The hourly burden is therefore approximately 301,179 hours (58,368 responses × 5.16 hours per response).

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

[3] See rule 24b–3 under the Investment Company Act (17 CFR 270.24b–3), which provides that any sales material, including rule 482 advertisements, shall be deemed filed with the Commission for purposes of Section 24(b) of the Investment Company Act upon filing with FINRA.

Cost burden is the cost of services purchased to comply with rule 482, such as for the services of computer programmers, outside counsel, financial printers, and advertising agencies. The Commission attributes no cost burden to rule 482. The provision of information under rule 482 is necessary to obtain the benefits of the safe harbor offered by the rule. The information provided is not 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.

The public may view the background documentation for this information collection at the following Web site, *http://www.reginfo.gov.* Comments should be directed to: (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 by sending an e-mail to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, 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: March 14, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6320 Filed 3–17–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64080; File No. SR–FINRA–2011–013]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Establish a Registration Category, Qualification Examination and Continuing Education Requirements for Certain Operations Personnel, and Adopt FINRA Rule 1250 (Continuing Education Requirements) in the Consolidated FINRA Rulebook

March 14, 2011.

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 March 4, 2011, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt FINRA Rule 1230(b)(6) to establish a registration category and qualification examination requirement for certain operations personnel. The proposed rule change also would adopt continuing education requirements for such operations personnel and adopt NASD Rule 1120 (Continuing Education Requirements) as FINRA Rule 1250 (Continuing Education Requirements) in the consolidated FINRA rulebook with minor changes.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA 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

Background

Given the growing complexity of the financial services industry and the importance of services provided by personnel in operations departments, FINRA is concerned about the potential for regulatory gaps in the area of registration and education requirements for individuals performing and overseeing member operations functions. Historically, federal and state law and self-regulatory organization

("SRO") rules, including NASD Rules 1021 and 1031, have required that individuals engaged in or supervising the securities or investment banking business of a member firm be qualified and registered persons. These requirements generally have applied to, among others, individuals with customer contact providing advice (sales persons and investment bankers) or effecting securities transactions (traders) and their supervisors. However, unregistered individuals who perform and oversee member operations functions also play an integral role in the business of the firm, and their activities often have a meaningful connection to client funds, accounts and transactions. FINRA believes registration and education requirements for certain operations personnel are needed to help ensure that investor protection mechanisms are in place in all areas of a member's business that could harm the member, a customer, the integrity of the marketplace, or the public.

Proposal

As described in detail below, FINRA is proposing to expand its registration provisions to require registration of certain individuals ("covered persons") who are engaged in, responsible for or supervising certain member operations functions ("covered functions") to enhance the regulatory structure surrounding these areas. The proposed rule change would amend proposed FINRA Rule 1230 (Registration Categories) to adopt a new representative registration category and qualification examination for such individuals ("Operations Professionals") [3] and would expand FINRA's continuing education requirements to require that Operations Professionals be subject to Regulatory Element and Firm Element training.

Generally, covered persons would be those persons who are directly responsible for overseeing that tasks within the covered functions are performed correctly in accordance with industry rules, firm protocols, policies and procedures, and who are charged with protecting the functional and control integrity of the covered functions for a member. Only persons who are both "covered persons" (*i.e.,* meet the depth of personnel criteria as discussed in Section A. below) and conduct activities or functions in one or more of the "covered functions" (discussed in Section B. below) would be subject to the new Operations Professional registration category.

A. Covered Persons for Inclusion in the New Registration Category

The proposed rule change would require the following covered persons to register with FINRA as an Operations Professional:

(1) Senior management with responsibility over the covered functions;

(2) Supervisors, managers or other persons responsible for approving or authorizing work, including work of other persons, in direct furtherance of the covered functions; and

(3) Persons with the authority or discretion materially to commit a member's capital in direct furtherance of the covered functions or to commit a member to any material contract or agreement (written or oral) in direct furtherance of the covered functions.

Persons who perform a covered function, but whose responsibilities are below these specified levels, would not be required to register as Operations Professionals. Members must determine, based on a person's activities and responsibilities, whether such person would be considered a covered person and subject to the proposed requirements for Operations Professionals. A person's job title may not be clearly indicative of his or her obligation to register as an Operations Professional.

For the purpose of the proposed third category of covered persons, any person who has the authority or discretion materially to commit firm capital in direct furtherance of the covered functions or commit a firm to a material contract or agreement in direct furtherance of the covered functions would be required to register as an Operations Professional. As proposed in supplementary material .06 (Scope of Operations Professional Requirement), the determination as to what constitutes "materially" or "material" would be based on a member's pre-established spending guidelines and risk management policies. Generally, persons who do not have the authority or discretion to commit a member's capital, or to commit a member to a contract or agreement, above such pre-established spending guidelines and risk management policies would not be subject to registration as an Operations Professional under this provision.

Additionally, proposed supplementary material .06 would provide that any person whose activities are limited to performing a function ancillary to a covered function, or whose function is to serve a role that can be viewed as supportive of or advisory to the performance of a covered function, or who engages solely in clerical or ministerial activities in a covered function would not be required to register as an Operations Professional pursuant to paragraph (b)(6)(A) of the proposed rule. For example, internal audit, legal or compliance personnel who review but do not have primary responsibility for any covered function would not be required to register as an Operations Professional.

Consistent with FINRA guidance, persons subject to the new Operations Professional registration category would be considered associated persons of a member irrespective of their employing entity, and would be subject to all FINRA rules applicable to associated persons and/or registered persons.[4] Moreover, any person who meets the depth of personnel criteria described above in Section A. and is engaged in one or more covered functions would be required to register as an Operations Professional. The proposed rule change does not alter the status of covered persons as associated persons of a member insofar as they are performing regulated broker-dealer functions on behalf of the member. Rather, the proposed rule change explicitly imposes registration, qualification examination and continuing education requirements on such persons.

B. Covered Functions for Inclusion in the New Registration Category

Any person who meets the threshold in one of the three categories of covered persons identified above in Section A. who conducts activities or functions for a member in one or more of the following covered functions would be required to register as an Operations Professional:

(1) Client on-boarding (customer account data and document maintenance);

[3] *See Regulatory Notice* 09–70 (December 2009) (FINRA Requests Comment on Proposed Consolidated FINRA Rules Governing Registration and Qualification Requirements). The proposed amendments discussed in this *Notice* would be included in proposed FINRA Rule 1230 (Registration Categories).

[4] *See Notice to Members* 05–48 (July 2005) (Members' Responsibilities When Outsourcing Activities to Third-Party Service Providers). The *Notice* reminds members that "in the absence of specific NASD [or FINRA] rules, MSRB rules, or federal securities laws or regulations that contemplate an arrangement between members and other registered broker-dealers with respect to such activities or functions (*e.g.,* clearing agreements executed pursuant to NASD Rule 3230), any third-party service providers conducting activities or functions that require registration and qualification under NASD [or FINRA] rules will generally be considered associated persons of the member and be required to have all necessary registrations and qualifications."

(2) Collection, maintenance, re-investment (*i.e.,* sweeps) and disbursement of funds;

(3) Receipt and delivery of securities and funds, account transfers;

(4) Bank, custody, depository and firm account management and reconciliation;

(5) Settlement, fail control, buy ins, segregation, possession and control;

(6) Trade confirmation and account statements;

(7) Margin;

(8) Stock loan/securities lending;

(9) Prime brokerage (services to other broker-dealers and financial institutions);

(10) Approval of pricing models used for valuations;

(11) Financial control, including general ledger and treasury;

(12) Contributing to the process of preparing and filing financial regulatory reports;

(13) Defining and approving business requirements for sales and trading systems and any other systems related to the covered functions, and validation that these systems meet such business requirements;

(14) Defining and approving business security requirements and policies for information technology, including, but not limited to, systems and data, in connection with the covered functions;

(15) Defining and approving information entitlement policies in connection with the covered functions; and

(16) Posting entries to a member's books and records in connection with the covered functions to ensure integrity and compliance with the federal securities laws and regulations and FINRA rules.

The proposed rule change would include persons engaged in or supervising stock loan/securities lending activities that meet the depth of personnel as a covered person in Section A. above. FINRA also is proposing separate registration categories for a "Securities Lending Representative" and a "Securities Lending Supervisor." [5]

[5] In *Regulatory Notice* 09–70, FINRA generally proposes to adopt the NYSE registration requirements for Securities Lending Representatives and Securities Lending Supervisors, requiring an associated person who has discretion to commit a member to any contract or agreement (written or oral) involving securities lending or borrowing activities with any other person, and the direct supervisor of the associated person to register as a Securities Lending Representative and Securities Lending Supervisor, respectively. These individuals would be required to register as such for tracking and oversight purposes, regardless of whether they are registered in other categories. However, solely for purposes of registering as a Securities Lending Representative or Securities Lending Supervisor, an individual will not be subject to a qualification examination at this time.

C. Operations Professional Qualification Examination

The proposed rule change would establish a new qualification examination for Operations Professionals that would provide reasonable assurance that such individuals understand their professional responsibilities, including key regulatory and control themes, as well as the importance of identifying and escalating red flags that may harm a member, a customer, the integrity of the marketplace, or the public.[6] So that applicants understand that they are functioning in a heavily regulated industry, the proposed Operations Professional qualification examination would test applicants on general securities industry knowledge and its associated regulations and rules. Subject to the proposed exception in Section D. below, any person required to register as an Operations Professional would be required to pass the Operations Professional qualification examination before such registration may become effective.

In general, given the diversity of functions performed by covered persons, the proposed Operations Professional qualification examination would be a principles-based qualification examination with a regulatory focus to test for a broad understanding of a broker-dealer's business at a basic level, a basic understanding of the operations functions that support a broker-dealer's business and the regulations designed to achieve investor protection and market integrity that drive the operations processes and procedures conducted at a broker-dealer. As further detailed in Section E. below, the continuing education components associated with the Operations Professional registration category would provide competency training specific to the covered functions, as applicable.

The breadth and depth of coverage of the qualification examination would be determined through the use of testing industry standards used to develop examinations, and would include input and advice from covered persons active in the securities industry. The following are the proposed key content themes of the new Operations Professional qualification examination:

• *Professional Conduct and Ethical Considerations:* This section of the examination would assess a candidate's core knowledge addressed on other FINRA examinations that are appropriate for an Operations Professional. The questions would assess knowledge of what are considered serious violations of securities industry rules. This section would include ethics-based questions that address issues such as data integrity, escalation of regulatory red flags and separation of duties.

• *Essential Product and Market Knowledge for an Operations Professional:* This section of the examination would assess a candidate's basic product and market knowledge, including definitions and characteristics of major product categories (*i.e.,* equities, debt, packaged securities, options and markets). An Operations Professional would not be expected to know the same level of detail about the products and markets as a product specialist or a representative selling products to customers.

• *Knowledge Associated with Operations Activities:* This section of the examination would assess a candidate's broad-based knowledge regarding the covered functions outlined above that support a broker-dealer's business and the underlying rules that drive the processes associated with these activities (*i.e.,* customer account set-up and transfers, recordkeeping requirements, rules associated with the protection of customer assets and transaction processing, uniform practices associated with making good delivery of securities, making payments for securities and meeting settlement requirements, and credit and margin rules). This section of the examination also would include ethics-based questions in the context of operations activities.

[6] Any individual whose activities go beyond those proposed for the Operations Professional registration category would be required to separately qualify and register in the appropriate category or categories of registration attendant to such activities.

D. Exception to Operations Professional Examination Requirement

The proposed rule change would include an exception to the Operations Professional qualification examination requirement for persons who currently hold certain registrations (each an "eligible registration") or have held one during the two years immediately prior to registering as an Operations Professional. The proposed exception also would apply to persons who do not hold an eligible registration, but prefer an alternative to taking the Operations Professional examination. Such persons would be permitted to register in an eligible registration category (subject to passing the corresponding qualification examination or obtaining a waiver) and use such registration to qualify for Operations Professional registration.

A person who wishes to obtain Operations Professional registration under the proposed exception would not be automatically waived-in, but would have to opt-in by requesting Operations Professional registration via Form U4 (the Uniform Application for Securities Industry Registration or Transfer) in the Central Registration Depository ("CRD®").[7] If there are no other deficiencies (*e.g.,* fingerprints), the Operations Professional registration would be approved automatically at the time such request is made. Information regarding the proposed implementation period is discussed in detail in Section F. below. FINRA would not assess a separate registration fee for persons relying on the proposed exception to register as Operations Professionals.

FINRA conducted a review of the content outlines for each qualification examination it recognizes and identified examinations with broad content coverage that would be eligible for an exception to the Operations Professional examination requirement. Accordingly, persons who hold the following representative-level registration categories, or who have held such registration categories within the two years immediately prior to registering as an Operations Professional, would be qualified to register as an Operations Professional without passing the Operations Professional qualification examination:

- Investment Company Products/ Variable Contracts Representative (Series 6)
- General Securities Representative (Series 7)
- United Kingdom Securities Representative (Series 17) or Canada Securities Representative (Series 37 or 38)

Additionally, persons who hold (or have held) certain principal-level registration categories would be qualified to register as an Operations Professional without passing the Operations Professional examination. Most principal-level qualification examinations have a prerequisite examination requirement that is satisfied with one of the representative qualification examinations listed above; however, FINRA also proposes to include principal-level qualification examinations that do not have a prerequisite, or have a prerequisite that can be met with a qualification examination not on the above list (*e.g.,* Series 62), because it is likely such principals are familiar with the content to be covered in the Operations Professional qualification examination as a result of the requirements of their positions. Specifically, persons who hold the following principal-level registration categories, or who have held such registration categories within the two years immediately prior to registering as an Operations Professional, would be qualified to register as an Operations Professional without passing the Operations Professional qualification examination:

- Registered Options Principal (Series 4)
- General Securities Sales Supervisor (Series 9/10)
- Compliance Officer (Series 14)
- Supervisory Analyst (Series 16)
- General Securities Principal (Series 24)
- Investment Company Products/ Variable Products Principal (Series 26)
- Financial and Operations Principal (Series 27)
- Introducing Broker-Dealer Financial and Operations Principal (Series 28)
- Municipal Fund Securities Limited Principal (Series 51)
- Municipal Securities Principal (Series 53)

The proposed exception would not apply to persons whose eligible registrations are revoked pursuant to FINRA Rules 8310 (Sanctions for Violation of the Rules) or 8320 (Payment of Fines, Other Monetary Sanctions, or Costs; Summary Action for Failure to Pay), suspended or otherwise deemed inactive.[8]

FINRA notes that covered persons are generally acting in a supervisory position, so many persons will already hold one of the eligible registrations that would qualify for the exception to the Operations Professional examination requirement. As noted in Section A. above, entry-level operations personnel would not typically be subject to the proposed requirements for Operations Professionals.

E. Continuing Education Requirements for Operations Professionals

The proposed rule change would require that individuals registered as Operations Professionals be subject to FINRA's Regulatory Element and Firm Element continuing education requirements as set forth in proposed FINRA Rule 1250 (Continuing Education Requirements).[9] The continuing education elements for this registration category would provide more specific learning materials appropriate for an Operations Professional, given the breadth of functions that are covered by this registration requirement.

The Regulatory Element program for Operations Professionals would provide instruction for Operations Professionals to: (1) Maintain and improve understanding of the regulatory and ethical aspects associated with the covered functions; (2) identify suspicious activities and/or red flags that could harm a customer, a firm, issuers of securities or the integrity of the marketplace; (3) maintain and improve knowledge and understanding of the covered functions; and (4) assist the Operations Professionals in keeping up with changes in the industry and regulations that impact their work.

Operations Professionals would be required to complete scenario-based modules based on the key content themes of the Operations Professional qualification examination, as described in Section C. above. The breadth and depth of coverage of the modules would be determined through the use of existing industry standards currently used to develop continuing education content and would include input and advice from operations professionals active in the securities industry. Individuals would be expected to complete the Regulatory Element continuing education requirement two years after passing the qualification examination and then every three years thereafter.

Individuals who avail themselves of the proposed exception to the Operations Professional qualification examination requirement with an eligible registration described above would be subject to the Regulatory Element program appropriate for such other registration category. For example, a person who registers as an Operations Professional by holding a General Securities Representative registration (Series 7) under the exception would be subject to the S101 continuing

[7] A person who qualifies for the proposed exception based on their having held an eligible registration within the two years immediately prior to registering as an Operations Professional would be required to first re-activate such eligible registration prior to requesting Operations Professional registration.

[8] If a person's registration in an eligible registration category was revoked within the prior two years, but such person re-qualifies and re-registers in such eligible registration category, he or she may rely on this eligible registration to qualify for the exception to the Operations Professional qualification examination requirement. Further, a suspended registration may not be relied upon as an eligible registration during the suspension period. Similarly, a registration deemed inactive for any reason (*e.g.,* failure to complete continuing education requirements) may not be relied upon as an eligible registration during such inactive period. *See also* FINRA Rule 8311 (Effect of a Suspension, Revocation, Cancellation, or Bar).

[9] *See* Section G. for further discussion of the adoption of NASD Rule 1120 (Continuing Education Requirements) as FINRA Rule 1250.

education program in lieu of the Operations Professional Regulatory Element training, and a person who registers by holding a General Securities Principal registration (Series 24) would be subject to the S201 continuing education program in lieu of the Operations Professional Regulatory Element training.

Operations Professionals also would be subject to Firm Element training. To implement this change, as further discussed in Section G. below, the proposed rule change would include Operations Professionals in the definition of "covered registered persons" in proposed FINRA Rule 1250, and would require that firms deliver Firm Element training to Operations Professionals subject to the new registration and qualification requirements.[10]

F. Implementation of the Proposed Rule Change

As noted above, any person who meets the depth of personnel criteria described in Section A. and is engaged in one or more covered functions described in Section B. would be required to register with FINRA as an Operations Professional. Such persons would be required to register by doing one of the following, as applicable: (1) Requesting Operations Professional registration via Form U4 in CRD and passing the Operations Professional qualification examination; (2) requesting Operations Professional registration via Form U4 in CRD and opting in to such registration based on their holding, or having held within the past two years, an eligible registration; [11] or (3) requesting Operations Professional registration via Form U4 in CRD, registering with FINRA in an eligible registration category and opting in to Operations Professional registration based on such eligible registration.[12]

Members must identify persons required to register as an Operations Professional as of the effective date of the proposed rule change ("Day-One Professionals") (*i.e.,* persons who meet the depth of personnel criteria and are engaged in one or more covered functions as of the effective date of the proposed rule change). FINRA is proposing a 60-day identification period beginning on the effective date of the proposed rule change during which Day-One Professionals must request registration as an Operations Professional via Form U4 in CRD. During this 60-day period, a Day-One Professional may function in the capacity of an Operations Professional. Day-One Professionals who are identified during the 60-day period and must pass the Operations Professional examination (or an eligible qualification examination) to qualify (*i.e.,* persons who do not hold, and have not within the past two years held, an eligible registration) would be granted 12 months beginning on the effective date of the proposed rule change to pass such qualifying examination, during which time such persons may function as an Operations Professional.[13] To be eligible to function as an Operations Professional for the 12-month transition period, Day-One Professionals subject to an examination requirement must request Operations Professional registration via Form U4 in CRD during the 60-day identification period and pass the Operations Professional examination (or an eligible qualification examination) before the expiration of 12 months from the effective date of the proposed rule change.[14] If a Day-One Professional does not pass an acceptable examination by the expiration of the 12-month transition period, such person must cease functioning as an Operations Professional.

The 12-month transition period to pass a qualification examination would only apply to Day-One Professionals. Any person who is not subject to the registration requirements for Operations Professionals as of the effective date of the proposed rule change (*i.e.,* a person who does not meet the depth of personnel criteria and/or is not engaged in one or more covered functions as of the effective date, or persons hired after the effective date of the proposed rule change who will be placed in such roles) ("non-Day-One Professionals") would be required to register as an Operations Professional and, if applicable, pass the Operations Professional qualification examination (or an eligible qualification examination), prior to engaging in any activities that would require such registration. The 60-day identification period and the 12-month transition period do not affect the obligations of non-Day-One Professionals to register as an Operations Professional prior to engaging in functions that would require such registration. However, any non-Day-One Professional associated with a non-clearing member who must pass the Operations Professional qualification examination (or an eligible qualification examination) to obtain registration would be granted a grace period of 120 days beginning on the date such person requests Operations Professional registration via Form U4 in CRD to pass such qualifying examination, during which time such person may function as an Operations Professional. FINRA believes that allowing a person associated with a non-clearing member to function as an Operations Professional for a 120-day period will enable these firms to manage their more limited staffs to comply with the proposed registration requirements without disrupting those firms' obligations to customers. Non-Day-One Professionals associated with a self-clearing or clearing member would not have the benefit of the 120-day grace period and would be required to register

[10] NASD Rule 1120(b) (Continuing Education Requirements) is currently limited to registered persons who have direct contact with customers in the conduct of the firm's securities sales, trading and investment banking activities, any person registered as a research analyst pursuant to NASD Rule 1050, and to the immediate supervisors of such persons. The proposed amendments are reflected in the new FINRA rule governing continuing education, FINRA Rule 1250, which is being proposed as part of this rule change. *See* Section G. below.

[11] Persons with an active eligible registration who request Operations Professional registration will be automatically granted Operations Professional registration once they submit such request via Form U4 in CRD, regardless of when such persons apply for Operations Professional registration (provided there are no existing deficiencies). *See also supra* note 7.

[12] If a person elects to register with FINRA as an Operations Professional by newly qualifying in an eligible registration (*i.e.,* does not have an active eligible registration when he or she requests Operations Professional registration via Form U4 in CRD), such person must contact FINRA upon passing the alternative examination to request that the eligible registration be applied to the request for Operations Professional registration. This would include, for example, a person who requests both the Operations Professional and General Securities Representative registrations via Form U4 in CRD and passes the Series 7 examination. Such person would be required to contact FINRA to alert FINRA staff that the General Securities Representative registration will be used as an eligible registration to qualify as an Operations Professional.

[13] When a person requests Operations Professional registration via Form U4 in CRD during the 60-day identification period, an examination window for the Operations Professional qualification examination will open in CRD that expires 12 months from the effective date of the proposed rule change. After the 60-day identification period, the examination window for the Operations Professional qualification examination will open for the standard 120 days.

[14] Members should note that the standard examination window in CRD applicable to a particular registration category will apply notwithstanding the 12-month examination window established for purposes of the transition period. The 12-month examination window is only for the Operations Professional qualification examination. Thus, a person who elects to qualify, for example, by passing the Series 7 examination would have only 120 days to take and pass the Series 7 examination once the window for such examination is opened in CRD. Members should plan accordingly so that associated persons are prepared to take the requisite examination within the prescribed window for that registration category, and that any requisite examination is passed before the expiration of the 12-month transition period for Day-One Professionals.

as an Operations Professional prior to engaging in activities that would require such registration.

Members would be responsible for tracking and monitoring their associated persons to ensure that such persons are registered, and conducting their activities, in compliance with the time frames described above.

G. FINRA Continuing Education Rule

The proposed rule change would adopt NASD Rule 1120 (Continuing Education Requirements) as new FINRA Rule 1250 (Continuing Education Requirements). In addition to the proposed change noted in Section E., which would expand the scope of "covered registered persons" subject to the Firm Element to include persons registered as Operations Professionals, the proposed rule change would make additional minor changes to NASD Rule 1120 to update cross-references and reflect the conventions of the consolidated FINRA Rulebook.

NASD Rule 1120 and Incorporated NYSE Rule 345A were adopted in 1995 in response to the recommendation of a task force, which subsequently became the Securities Industry Regulatory Council on Continuing Education (the "Council"),[15] to create uniform continuing education requirements in the securities industry. As advised by the Council, the continuing education requirements include a Regulatory Element and a Firm Element. The NASD and Incorporated NYSE rules are nearly identical in keeping with the goals of the Council to create uniform continuing education requirements.[16]

The Regulatory Element consists of periodic computer-based training on regulatory, compliance, ethical, supervisory subjects and sales practice standards. A registered person is required to participate and complete a designated Regulatory Element within a 120-day period that commences with the second anniversary of such person's initial securities registration, and reoccurs every three years thereafter for as long as such person remains in the securities business. Failure to complete the Regulatory Element will result in a registered person's registration becoming inactive and such person cannot conduct a securities business on behalf of the member until the requirement is met.[17]

The Firm Element requirements currently apply to any person registered with a member who has direct contact with customers in the conduct of the member's securities sales, trading and investment banking activities, any person registered as a research analyst pursuant to NASD Rule 1050, and to the immediate supervisors of such persons (collectively, "covered registered persons"). However, as noted above, the proposed rule change would expand the scope of "covered registered persons" subject to the Firm Element to include persons registered as Operations Professionals. The Firm Element consists of annual, member-developed and administered training programs designed to keep covered registered persons current regarding securities products, services and strategies offered by the member. The Firm Element requires members to annually evaluate and prioritize their training needs (*i.e.,* conduct a Needs Analysis and develop a written plan). In planning, developing and implementing the Firm Element training, each member must take into consideration its size, organizational structure, scope of business, types of products and services it offers, as well as regulatory developments and the performance of its covered registered persons in the Regulatory Element. FINRA may require a member to provide specific training to a member's covered registered persons as FINRA deems appropriate. Each member must administer its Firm Element Continuing Education Program in accordance with its annual Needs Analysis and written plan, and must maintain records documenting the content of the program and completion of the program by covered registered persons.

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The implementation date will be no later than 240 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[18] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change to expand FINRA's registration and continuing education requirements to Operations Professionals will help ensure that investor protection mechanisms are in place in all areas of a member's business that could harm the member, a customer, the integrity of the marketplace, or the public.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The proposed rule change was published for comment in *Regulatory Notice* 10–25 (May 2010) (the "*Notice*"). Forty-nine comment letters were received in response to the *Notice.*[19] A copy of the *Notice* is attached as Exhibit 2a. A list of the comment letters received in response to the *Notice* is attached as Exhibit 2b. Copies of the comment letters received in response to the *Notice* are attached as Exhibit 2c. Below is a summary of the comments and FINRA's responses.

General Concerns Regarding the Scope of the New Registration Category

Certain commenters generally opposed the proposed rule change stating that it is overly broad and ambiguous, poorly defined, imposes requirements that are unnecessary to meet FINRA's stated objectives and may have unintended consequences.[20] Other commenters argued that licensing requirements do not make people honest or increase their efficiency or proficiency[21] and that no amount of

[15] The Council is comprised of up to 16 industry members from broker-dealers, representing a broad cross section of industry firms, and representatives from SROs as well as liaisons from the SEC and the North American Securities Administrators Association ("NASAA").

[16] The proposed rule change would not delete Incorporated NYSE Rule 345A (and its Interpretation). Rather, FINRA expects to address Incorporated NYSE Rule 345A (and its Interpretation) and propose additional changes to proposed FINRA Rule 1250 as part of the consolidated registration and qualification rules. *See Regulatory Notice* 09–70 (December 2009).

[17] A registered person will be required to retake the Regulatory Element in the event such person is: (1) Subject to a statutory disqualification as defined by Section 3(a)(39) of the Exchange Act; (2) subject to a suspension or imposition of a fine of $5,000 or more by an SRO or other securities governmental agency; or (3) ordered to do so as a sanction in a disciplinary action by an SRO or other securities governmental agency.

[18] 15 U.S.C. 78*o*–3(b)(6).

[19] All references to the commenters under this Item are to the commenters as listed in Exhibit 2b.

[20] ACLI, AIC, Bank of America, Crowell, ESI, Horace Mann, IPA, IRI, Modern Woodmen, Navidar, NSCP, PSD, Quasar, UPFS, Scottrade, SIFMA, Sutherland, TIAA, Wellington and Wells Fargo.

[21] Mutual Trust.

licensing will change failures of human character.[22] Two commenters noted that frauds are almost always committed on the frontlines by individuals who are already licensed.[23] Additionally, certain commenters opposed registration requirements for covered persons because their work is already supervised and approved by a firm principal[24] and holding principals accountable for failures in these areas would be more cost effective.[25] Numerous commenters proposed an alternative approach under which firms would delegate each of the covered functions to existing registered principals of the firm and reflect such assignments in the firm's written supervisory procedures ("WSPs").[26] Other commenters noted the proposed rule change is unnecessary because people who handle customer funds go through background checks and fingerprinting.[27]

In response, FINRA notes that covered persons are performing regulated broker-dealer functions on behalf of a member, and believes such persons should be subject to registration, examination and continuing education requirements to ensure that they attain and maintain specified levels of competence and knowledge to properly carry out their responsibilities to the member and its customers. FINRA does not agree that principal approval or background checks and fingerprinting are sufficient safeguards to ensure members' operations departments are functioning in a manner that will promote investor protection to the highest level possible. The proposed rule change is intended, among other things, to increase covered persons' awareness and knowledge that they are operating in a regulated environment designed to protect investors' interests and the integrity of the operations of a broker-dealer. In addition, the proposed rule will help to ensure that any fraudulent activity that may start in the front office of a firm cannot be processed without passing through a properly registered and trained Operations Professional. Requiring registration, testing and training for Operations Professionals should further strengthen members' compliance with securities laws, rules and regulations.

Certain commenters expressed concern that requiring registration of covered persons will dramatically limit the pool of candidates that may be considered for hiring when personnel changes occur in operations departments.[28] As an initial matter, FINRA notes that it is always correct to state that conduct once regulated becomes constrained by that regulation, but that observation by itself is not a credible reason not to engage in the regulation. The proper test is whether that regulation is appropriately tailored and needed in furtherance of the interests of investors and the securities markets. The immediate prior paragraph restates those interests, and the depth of personnel as set forth in Section A. of the Purpose section demonstrates the appropriate tailoring of the proposed regulation. Finally, Section D. of the Purpose section indicates that many candidates for positions that would require registration may possess an eligible registration and qualify for an exception from the requirement to take the Operations Professional qualification examination.

Two commenters suggested FINRA reduce the obligations for Operations Professionals and specify that not all of the rules applicable to associated persons apply to such persons since they are generally not customer-facing personnel.[29] Certain other commenters sought clarification that the proposed rule change does not eliminate or limit the ability of a securities issuer and its associated persons to rely on the issuer exemption under Exchange Act Rule 3a4–1 [30] to avoid broker-dealer registration requirements.[31] Another commenter requested that FINRA provide guidance on the impact of the proposed rule change on FINRA Rule 2310 (Direct Participation Programs) and clearly state that the salaries of Operations Professionals be categorized as "non-transaction-based-compensation" and that there is a blanket exception from "underwriting compensation" for Operations Professionals.[32]

FINRA does not agree that Operations Professionals should be subject to a limited set of rules. Covered persons are not only associated persons of a member but their activities are crucial enough to the business of a member to require registration with FINRA. The proposed rule change does not alter a person's status as an associated person under Exchange Act Rule 3a4–1 or otherwise, nor does it address the definitions of certain types of compensation under FINRA rules. However, FINRA recognizes that additional guidance may be needed following the adoption of the proposed rule change and will address interpretive questions as needed, similar to FINRA's approach to other regulatory initiatives with wide-ranging and novel impacts.

Covered Persons for Inclusion in the New Registration Category

Certain commenters requested clarification with respect to proposed FINRA Rule 1230(b)(6)(A)(i) regarding scope of the term senior management and whether this provision applies beyond senior managers with primary or direct responsibility over the covered functions.[33] Two commenters advocated limiting the depth of personnel for the proposed rule change to a single category for senior management with responsibility over the covered functions, and requiring firms to maintain policies and procedures reasonably designed to ensure that operations personnel have an awareness of investor protection mechanisms in place at a firm.[34]

FINRA believes this provision is clear as originally proposed and, while FINRA understands titles may differ between firms, members should be able to identify operations personnel that would be subject to proposed Rule 1230(b)(6)(A)(i) based on their functions and responsibilities as senior managers overseeing the covered functions. FINRA would consider any senior manager in the chain of command responsible for a covered function to be subject to the proposed rule, up to and including the Principal Operations Officer.[35] FINRA does not agree that "covered persons" should be limited to senior management with responsibility over the covered functions because the proposed registration category is intended to include other individuals who exercise supervisory and discretionary authority in direct furtherance of the covered functions. Accordingly, FINRA has not proposed changes to proposed FINRA Rule 1230(b)(6)(A)(i).

Proposed FINRA Rule 1230(b)(6)(A)(ii) would include as covered persons supervisors, managers or other persons responsible for approving or authorizing work, including work of other persons, in direct furtherance of the covered functions. One commenter suggested the proposed rule explicitly state that

[22] AIC and Wells Fargo.

[23] AIC and PSD.

[24] Crowell, IRI, M. Griffith, PSD and RiverStone.

[25] Crowell and Wellington.

[26] IRI, Nationwide, PSD and Sutherland.

[27] PSD, RiverStone and Wells Fargo.

[28] NPB and RiverStone.

[29] TIAA and Wells Fargo.

[30] 17 CFR 240.3a4–1.

[31] PSD, Sutherland and TIAA.

[32] IPA.

[33] IRI, Nationwide, NSCP and TIAA.

[34] Wellington and Wells Fargo.

[35] *See Regulatory Notice* 09–70 (December 2009) for a discussion of the Principal Operations Officer registration category. *See also infra* note 61 and accompanying text.

covered persons are limited to those persons with decision-making and/or oversight authority.[36] Certain commenters requested that FINRA clarify what is meant by the phrase "approve or authorize work."[37] Other commenters stated that this provision is written too broadly;[38] creates potential for misinterpretation in determining how far up or down the reporting chain this registration requirement would apply;[39] could sweep in affiliate employees, mid or low level employees,[40] third-party vendors[41] and margin clerks;[42] and that it should be limited to supervisors, managers or other persons responsible for primary oversight of covered functions, including managers for dual hat employees.[43] One commenter suggested that FINRA revise this provision to clarify that supervisors and managers be senior members of their respective departments or units.[44] Numerous commenters recommended deleting the phrase "work of other persons" because it is unclear.[45]

FINRA believes proposed FINRA Rule 1230(b)(6)(A)(ii) is clear as proposed and notes that it consulted with industry representatives in developing the proposed rule change, including the definition and appropriate depth of personnel to be subject to the Operations Professional registration category. As noted above, FINRA believes members will be able to identify supervisors, managers or other persons responsible for approving or authorizing work in direct furtherance of the covered functions based on their functions and responsibilities. The phrases "approve or authorize work" and "work of other persons" are not legal terms of art but, rather, comport with commercially understood operating terms and do not require clarification. Accordingly, FINRA has not revised this provision as suggested by the commenters; however, FINRA proposes a minor modification to the original proposal by re-locating the phrase "including the work of other persons" to streamline the provision, as reflected in Section A. of the Purpose section.

As originally proposed in the *Notice,* FINRA Rule 1230(b)(6)(A)(iii) required registration as an Operations Professional for persons with the authority or discretion to commit the member's capital in direct furtherance of the covered functions or to commit the member to any contract or agreement (written or oral) in direct furtherance of the covered functions. Certain commenters stated this provision is unclear and too far-reaching[46] and noted it would capture persons who perform routine, daily activities, or enter into agreements consistent with firm policies that have no material impact on firm operations (including margin clerks, who often have flexibility to obligate firm capital up to certain limits).[47] Two commenters noted that the provision should only be triggered if the contracts are sufficiently material to the firm.[48] One commenter noted that it may be so broad as to require registration of junior associates if they sign or approve contracts, retain vendors or make clerical postings to the books of a member.[49] Another commenter noted that this provision is inconsistent with the first two categories of covered persons, which focus on senior managers, supervisors and those who approve work in the covered functions.[50] Another commenter requested clarification with respect to the term "firm capital" because it could sweep in persons who approve the payment of vendor invoices for services related to some aspect of a covered function.[51] Two commenters noted it is unclear what individuals, other than those engaged in or supervising securities lending activities, the proposed third category of covered persons intends to cover and suggested certain amendments to clarify the proposal with respect to such persons.[52]

Based on the comments, FINRA has revised the third category of covered persons from the original proposal in the *Notice,* as discussed in Section A of the Purpose section. Under the revised proposal, FINRA Rule 1230(b)(6)(A)(iii) would require persons with the authority or discretion materially to commit a member's capital in direct furtherance of the covered functions or to commit a member to any material contract or agreement (written or oral) in direct furtherance of the covered functions to register as an Operations Professional. FINRA purposefully did not limit the third category of covered persons to supervisors and managers because the capacity to make material discretionary decisions above a member's pre-established spending guidelines and risk management policies under this provision is not confined to senior or supervisory personnel.

Numerous commenters suggested that FINRA add language to the proposed rule to clarify, as stated in the *Notice,* that the proposed rule does not apply to persons who perform functions ancillary to a covered function or whose function is to serve a role that can be viewed as supportive of, or advisory to, the performance of a covered function, such as internal audit, legal or compliance personnel.[53] One commenter further urged FINRA to add rule language to note that individuals performing quality assurance and quality control functions in direct furtherance of a covered function are similarly excluded.[54] One commenter noted that registering clerical personnel only increases costs unnecessarily and creates hiring barriers for new applicants.[55] One commenter requested that FINRA provide specific examples of activities it deems ministerial or clerical in nature, especially when such activities require Financial and Operations Principal review and control procedures.[56]

Based on the comments, and as noted in Section A. of the Purpose section of this rule filing, FINRA is proposing supplementary material .06 to the proposed rule to clarify that any person whose activities are limited to performing a function ancillary to a covered function, or whose function is to serve a role that can be viewed as supportive of or advisory to the performance of a covered function (*e.g.,* internal audit, legal or compliance personnel who review but do not have primary responsibility for any covered function), or who engages solely in clerical or ministerial activities in a covered function would not be required to register as an Operations Professional. FINRA declines to provide examples of clerical and ministerial activities at this time, believing the term to be well understood in the industry;[57] however, as noted above, FINRA will consider issuing additional guidance as needed regarding the categories of persons subject to the Operations Professional registration category.

One commenter encouraged FINRA to clarify whether an Operations

[36] Morgan Stanley.
[37] ESI, NFP, TIAA and UPFS.
[38] ACLI, NSCP, Quasar and Wells Fargo.
[39] ACLI.
[40] Morgan Stanley.
[41] Schwab.
[42] Scottrade.
[43] ARM, TIAA and Wells Fargo.
[44] Bank of America.
[45] Bank of America, IPA, SIFMA and Wells Fargo.
[46] Bank of America, TIAA and NSCP.
[47] T. Rowe Price and Wells Fargo.
[48] Bank of America and TIAA.
[49] Bank of America.
[50] SIFMA.
[51] Scottrade.
[52] Morgan Stanley and SIFMA.
[53] Bank of America, FSI, NSCP, Scottrade, SIFMA and TIAA.
[54] TIAA.
[55] Martin Nelson.
[56] Quasar.
[57] *See, e.g.,* NASD Rule 1060 (Persons Exempt from Registration).

Professional must be supervised by a qualified supervisory principal.[58] Another commenter requested clarification regarding whether a firm must assign or designate an Operations Professional and whether a person who is already a registered principal must register as an Operations Professional.[59]

As noted above, as registered persons, Operations Professionals will be subject to all FINRA rules applicable to associated persons and/or registered persons. Accordingly, pursuant to NASD Rule 3010(a)(5), each Operations Professional must be assigned to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities. Additionally, FINRA expects that each member would have at least one registered Operations Professional, who often may be the member's Financial and Operations Principal and/or the Principal Operations Officer. In this regard, neither principal registration, nor representative registration in another category, obviates the requirement for a covered person to register as an Operations Professional. As noted in Section D. of the Purpose section, there are numerous eligible registrations that would except such registered persons from the requirement to pass the Operations Professional qualification examination.

Certain commenters inquired as to the proposed rule change's relationship to, and consistency with, the proposals set forth in *Regulatory Notice* 09–70[60] and two commenters requested clarification regarding how the proposed requirement under *Regulatory Notice* 09–70 that firms appoint a distinct Principal Operations Officer and a distinct Principal Financial Officer intersects with the proposed Operations Professional designation.[61]

The proposed rule change does not conflict with the proposals set forth in *Regulatory Notice* 09–70. The proposed rule change should be read as a separate registration requirement that will be added to the consolidated FINRA registration rules. To note, the proposed rule change would include persons engaged in or supervising stock loan/securities lending activities that meet the depth of personnel as a covered person in Section A. above. FINRA also is proposing separate registration requirements for a "Securities Lending Representative" and a "Securities Lending Supervisor" in *Regulatory Notice* 09–70; consequently, firms should be aware of both sets of proposed requirements.[62] With respect to the proposed requirements in *Regulatory Notice* 09–70 for Principal Operations Officers and Principal Financial Officers, such persons likely would be required to register as an Operations Professional, depending on whether they meet the criteria of a covered person as described in Section A. of the Purpose section. The requirement for a covered person to register as an Operations Professional applies regardless of any other, separate registration requirements; however, such other registration may be used as an eligible registration to qualify a covered person for an exception from the requirement to take the Operations Professional qualification examination.

One commenter noted the proposed rule change could have costly and burdensome implications regarding state registration and licensing so FINRA should be as clear as possible in defining who is covered under the proposed rule change.[63] As noted above, FINRA believes the definitions of covered persons are sufficiently clear and will provide additional guidance as needed regarding the scope of persons subject to the new requirements.

Covered Functions for Inclusion in the New Registration Category

Numerous commenters stated that the covered functions as proposed in the *Notice* are too broad, unclear and inconsistent, and will incur unnecessary costs for firms.[64] The commenters requested more precise descriptions of the covered functions.[65] One commenter requested that FINRA clarify that the covered functions apply only to activities performed by or on behalf of a firm's securities and investment banking business.[66] Two commenters urged FINRA to group dependent technology-related covered functions into a single entry.[67] Another commenter suggested that certain functions be deleted because they are roles that support other covered functions and are not stand-alone functions.[68]

Based on the comments, FINRA has made certain changes to the covered functions as originally proposed in the *Notice* to clarify and streamline the proposed rule. As a general matter, FINRA has revised the list of covered functions, as reflected in Section B. of the Purpose section, to group related functions together. Substantive revisions to the covered functions are described in detail below.

To clarify the proposed rule change, FINRA has revised Rule 1230(b)(6)(B)(i) (as originally proposed in the *Notice*) by limiting this covered function to the "[a]pproval of pricing models used for valuations," instead of the "[d]evelopment and approval of pricing models used for valuations." FINRA also moved this provision to proposed Rule 1230(b)(6)(B)(x).

Two commenters requested a definition for the term "client on-boarding" in proposed FINRA Rule 1230(b)(6)(B)(v) (as originally proposed in the *Notice*).[69] FINRA notes from its consultation with industry representatives in the rule development process that this is a term commonly used for this covered function and believes the proposed rule text provides sufficient clarity (*i.e.,* "[c]lient on-boarding (customer account data and document maintenance)").

Numerous commenters requested clarification with respect to the scope of proposed FINRA Rule 1230(b)(6)(B)(vi) (as originally proposed in the *Notice*), the covered function addressing the "[c]apturing of business requirements for sales and trading systems and any other systems related to the covered functions, and validation that these systems meet such business requirements."[70] One commenter noted that this provision should apply only to individuals who "define and approve" business requirements, rather than individuals who "capture" such requirements.[71] Similarly, to reduce the likelihood of inadvertently capturing personnel who merely prepare initial drafts of business requirements documents and who perform routine quality assurance or quality control testing, two commenters suggested incorporating the concepts of "accepting" and "approving" in lieu of "capturing" and "defining" for the covered functions that include these terms.[72]

Based on the comments, FINRA has revised the original proposal to

[58] Pershing.

[59] Crowell.

[60] PSD, Sutherland and Wells Fargo.

[61] IRI and TIAA.

[62] *See supra* note 5.

[63] NSCP.

[64] Commonwealth, Crowell, ESI, FSI, IPA, IRI, Modern Woodmen, Morgan Stanley, NFP, Northwestern Mutual, NSCP, PSD, TIAA, SIFMA, Sutherland, UPFS and WSFG.

[65] Commonwealth, Crowell, ESI, FSI, IPA, IRI, Modern Woodmen, Morgan Stanley, NFP, Northwestern Mutual, NSCP, PSD, TIAA, SIFMA, Sutherland, UPFS and WSFG.

[66] TIAA.

[67] Morgan Stanley and NSCP.

[68] Schwab.

[69] PSD and Sutherland.

[70] ESI, FSI, Horace Mann, Modern Woodmen, NFP, Scottrade, TIAA and UPFS.

[71] Northwestern Mutual.

[72] Bank of America and SIFMA.

eliminate the concept of "capturing" in proposed FINRA Rule 1230(b)(6)(B)(vi). The proposed rule change renumbers this provision as proposed FINRA Rule 1230(b)(6)(B)(xiii) and includes as a covered function, "[d]efining and approving business requirements for sales and trading systems and any other systems related to the covered functions, and validation that these systems meet such business requirements." FINRA has not eliminated the concept of "defining" from the covered functions because it believes covered persons who are responsible for defining and approving business system requirements are professional level staff that should be subject to registration with FINRA. The covered functions generally would not include a person who engages in administrative responsibilities, such as an initial drafter or a code developer. However, a person who supervises or approves such activities generally would be required to register as an Operations Professional.

Additionally, certain commenters requested clarification with respect to proposed Rule 1230(b)(6)(B)(vii) (as originally proposed in the *Notice*), which includes as a covered function, "[w]ith respect to the covered functions, defining and approving business security requirements and policies for information technology (including, but not limited to, systems and data)."[73] One commenter noted that this function should only require persons who "approve" business requirements for systems and information technology to register so that the final approvals for technology requirements are performed by licensed Operations Professionals.[74]

FINRA has made minor changes to the original proposal with respect to Rule 1230(b)(6)(B)(vii). The proposed rule change renumbers this provision as proposed FINRA Rule 1230(b)(6)(B)(xiv) and includes as a covered function, "[d]efining and approving business security requirements and policies for information technology, including, but not limited to, systems and data, in connection with the covered functions." As noted above, FINRA believes that covered persons engaged in defining and approving business security requirements and policies for information technology should be registered as Operations Professionals.

One commenter requested clarification with respect to proposed Rule 1230(b)(6)(B)(viii) (as originally proposed in the *Notice*), which includes as a covered function, "[d]efining information entitlement policy in connection with the covered functions."[75]

Based on the comments and in line with the changes noted above, FINRA has revised Rule 1230(b)(6)(B)(viii). The proposed rule change renumbers this provision as proposed FINRA Rule 1230(b)(6)(B)(xv) and includes as a covered function, "[d]efining and approving information entitlement policies in connection with the covered functions."

One commenter recommended that FINRA combine paragraphs (b)(6)(B)(vii) and (viii) (as originally proposed in the *Notice*) since both sections cover overlapping sets of supervisors in the Information Management area.[76] Another commenter noted that proposed FINRA Rules 1230(b)(6)(B)(vi), (vii), (viii) and (xv) are not separate functions but are ancillary to other covered functions and may require managers from both the actual covered functions and these ancillary areas to register.[77] One commenter requested clarification that FINRA Rules 1230(b)(6)(B)(vi), (vii) and (viii) (as originally proposed in the *Notice*) are limited to only those individuals directly employed by the FINRA member.[78] Another commenter suggested limiting these provisions to individuals responsible for ensuring that systems related to sales and trading and to covered functions meet business and regulatory requirements and "information security" (firewalls, data access, and system entitlements in connection with the covered functions).[79]

FINRA believes that the proposed revisions to these provisions noted above clarify the proposed rule and is not proposing further changes at this time. FINRA notes that these covered functions should remain as separate items since they address different activities (*e.g.,* defining, approving and validating business requirements for sales and trading systems or other systems relating to the covered functions vs. defining and approving entitlement policies in connection with the covered functions) and firms may have different internal reporting structures so that these activities are not part of the same area or subject to the same supervisory scheme.

Certain commenters suggested deleting proposed Rule 1230(b)(6)(B)(xv) (as originally proposed in the *Notice*), which includes as a covered function, "[p]osting entries to the books and records of a member in connection with the covered functions," because it is ambiguous, too broad[80] and may sweep in clerical staff.[81] Another commenter requested clarification regarding the term "books and records" and requested that FINRA add a reference to Exchange Act Rule 17a–3[82] or MSRB Rule G–8.[83] Two commenters recommended that FINRA revise this provision to tailor it to separate regulatory issues such as customer protection or financial responsibility concerns.[84]

FINRA has revised Rule 1230(b)(6)(B)(xv) to clarify this covered function. The proposed rule change renumbers this provision as FINRA Rule 1230(b)(6)(B)(xvi) and includes as a covered function, "[p]osting to a member's books and records in connection with the covered functions to ensure integrity and compliance with the federal securities laws and regulations and FINRA rules."

One commenter noted that some of the covered functions may cause confusion with respect to other registration categories, including proposed FINRA Rules 1230(b)(6)(B)(ix) and (xiv) (as originally proposed in the *Notice*), the covered functions for "[f]inancial controller (including general ledger)" and "[f]inancial regulatory reporting," respectively, and the functions supervised by the financial and operations principal, and may overlap with the proposed designation of the Principal Operations Officer under *Regulatory Notice* 09–70.[85] Based on the comment, FINRA has revised these items. The proposed rule change renumbers these items as proposed FINRA Rules 1230(b)(6)(B)(xi) and (xii), respectively, and includes as covered functions, "[f]inancial control, including general ledger and treasury" and "[c]ontributing to the process of preparing and filing financial regulatory reports." FINRA does not agree that the proposed rule change causes confusion with respect to other registration requirements. Members must determine whether the proposed registration requirements for Operations Professionals would apply to an associated person based on his or her functions and responsibilities

[73] ESI, FSI, Horace Mann, Modern Woodmen, NFP, Scottrade and UPFS.

[74] Morgan Stanley.

[75] Scottrade.

[76] Bank of America.

[77] NSCP.

[78] IPA.

[79] SIFMA.

[80] Bank of America and SIFMA.

[81] Crowell and SIFMA.

[82] 17 CFR 240.17a–3.

[83] Rockfleet.

[84] Morgan Stanley and SIFMA.

[85] IRI.

notwithstanding any other, separate registration requirements.

One commenter noted that the title of the proposed registration category is too narrow and not reflective of the covered functions. Alternatively, the commenter suggested that the registration category should be titled "Operations, Support or Securities Lending Professionals."[86] FINRA believes that the proposed title for the new registration category, Operations Professionals, is appropriate and succinctly captures the individuals to which the proposed requirements would apply given the breadth of activities covered under the proposed rule change.

Certain commenters requested clarification that ongoing insurance company functions relating to variable annuity contracts as well as other functions performed by insurance company staff are not included in the covered functions.[87] FINRA does not intend to make any categorical exclusions from the covered functions. The proposed requirements will apply if a person meets the depth of personnel criteria and engages in one or more covered function on behalf of a member regardless of where they are employed.

Operations Professional Qualification Examination

One commenter noted that elements of the qualification examination and continuing education requirements have no relevance to the products and operations of limited purpose broker-dealers that comprise more than 50% of FINRA's membership.[88] Other commenters noted that the two areas of proposed examination coverage, "essential product and market knowledge for an Operations Professional" and "knowledge associated with operations activities," should be eliminated from the examination curriculum because they undercut FINRA's premise that it will not be a "competency" examination and render the test extremely challenging for many operations personnel since they lack the background and experience to pass the examination and have little testing experience.[89] Another commenter similarly noted that the proposed examination requirement could result in well-qualified employees losing their jobs and firms' operations departments could have compromised functionality, and supervision (*i.e.,* a "brain drain") of qualified operations personnel, thus undermining the goals of the proposal.[90]

Numerous commenters stated that an examination is unnecessary because training and education for operations personnel should be addressed in a member's WSPs[91] and registered principals are responsible for training operations personnel.[92] To reduce cost burdens on firms, certain commenters recommended ongoing training requirements as an alternative to registration and testing of operations personnel.[93] Certain other commenters noted that FINRA can address operations personnel through registration and continuing education[94] and an examination not based on competency serves no essential function.[95] One commenter stated that the Series 27 and 28 examinations already test for the covered functions, so a new exam is a poor use of member firm fees and will unnecessarily delay implementation of the proposal.[96]

One commenter noted that based on the definition of a covered person, the Operations Professional qualification examination should be a principal-level examination with corresponding continuing education requirements.[97] One commenter requested that FINRA publish a study outline for notice and comment prior to making the test effective.[98] Another commenter recommended that FINRA offer the proposed examination as an optional test for people who want to learn about back-office, but not as a mandatory examination for Operations Professional registration.[99]

FINRA believes the qualification examination requirement is appropriate as proposed. The proposed examination is being tailored to test for basic securities industry knowledge and ethics. Although the examination will not test for proficiency with respect to the specific covered functions, FINRA believes there is value in an examination that tests for general knowledge about the securities industry. The proposed examination will be appropriately tailored to individuals subject to the proposed registration requirements. It is crucial for covered persons to understand their professional responsibilities, including key regulatory and control themes, as well as the importance of identifying and escalating red flags that may harm a firm, its customers, the integrity of the marketplace, or the public.

Additionally, FINRA believes a representative-level examination is appropriate for Operations Professionals because the proposed registration category is based on functions performed by operations personnel and is not limited to supervisory or managerial staff (*e.g.,* persons who fall within proposed FINRA Rule 1230(b)(6)(A)(ii) and (iii)).

One commenter suggested that FINRA modify the period for retaking the Operations Professional qualification examination if an applicant fails to 30 days like the Series 55.[100] FINRA does not intend to change its policy regarding the re-taking of qualification examinations for the proposed Operations Professional examination at this time. FINRA will reconsider the policy if it finds it to be a necessary step when the qualification examination for Operations Professionals is administered.

Exception to Operations Professional Examination Requirement

One commenter noted that the proposed exceptions are so numerous that they dilute the regulatory intent of the proposed rule change; instead, FINRA should grant a limited number of exceptions to current operations employees.[101] One commenter recommended FINRA incorporate an exception for certain small firms.[102] One commenter suggested that registered principals should be completely exempt from the proposed Operations Professional requirements;[103] other commenters suggested that the proposed rule change should only apply to currently unregistered persons because the potential costs and burdens involved with tracking and monitoring multiple registrations outweigh the benefits.[104] One commenter suggested FINRA permit firms to identify any relied upon registration for the proposed exception in their WSPs instead of a U4 amendment, as is required currently for any person in a supervisory role.[105]

Certain other commenters recommended a grandfather provision for experienced persons who have worked in operations areas for a certain

[86] SIFMA.

[87] IRI, PSD and Sutherland.

[88] ACLI.

[89] NSCP and ACLI.

[90] NSCP.

[91] FSI, M. Griffith, Navidar and PSD.

[92] Modern Woodmen and Martin Nelson.

[93] Harrison, NSCP, RMOA and Wells Fargo.

[94] Commonwealth, ESI, FSI, Horace Mann, NFP, UFPS and WSFG.

[95] Horace Mann, JRCO, Modern Woodmen, NSCP, RMOA, Rockfleet, UPFS and WSFG.

[96] Rockfleet.

[97] Rockfleet.

[98] NSCP.

[99] M. Griffith.

[100] Schwab.

[101] NASAA.

[102] Freestone.

[103] NSCP.

[104] Northwestern Mutual and T. Rowe Price.

[105] T. Rowe Price.

time period (*e.g.,* three [106] or five [107] years) prior to the implementation of the proposed rule.[108] Two commenters requested that FINRA extend the proposed exception to registrations held beyond the two-year look back.[109] One commenter noted that there are costs and burdens of a two-year look back without a concomitant benefit.[110] Additionally, one commenter suggested that FINRA consider incorporating standards within its Qualification Examination Waiver Guidelines that will accommodate individuals that possessed an eligible registration within a reasonably recent time period and have been performing an Operations Professional role for a reasonable period of time.[111] This commenter also suggested that FINRA finalize the permissive registration regime contemplated in *Regulatory Notice* 09–70 prior to implementing a new Operations Professional designation, which would provide firms and their personnel with the option to maintain licenses while the registered person occupies a non-registered position.[112]

FINRA believes the proposed rule change clearly articulates the exception to the Operations Professional qualification examination requirement.[113] A primary purpose of the proposed qualification examination is to assess a covered person's basic understanding of the securities industry and the requirement to take a registration examination serves to alert such person of the role he or she plays in this highly regulated environment. Thus, FINRA believes the eligible registrations (and corresponding examinations) serve as a valid proxy for the Operations Professional examination requirement.

FINRA believes the two-year look back for the eligible registrations is appropriate and has not revised the proposal to extend this time period. The proposed look back is based on the window during which an associated person remains eligible to re-activate his or her registration based on previously qualifying for and holding such registration. A person who qualifies for the proposed exception based on their having held an eligible registration within the two years immediately prior to registering as an Operations Professional would be required to first re-activate such eligible registration prior to requesting Operations Professional registration.[114] Under NASD Rules 1021 and 1031, members are permitted to maintain or make application for registration as a registered principal or registered representative for a person who performs back-office operations, among other things. As such, firms are not currently prohibited from carrying registrations for back-office personnel. FINRA has determined not to incorporate a grandfather provision for previously unregistered operations personnel. FINRA believes that all covered persons benefit from an examination requirement even if they have been working in the same position for an extended period. As noted above, the proposed Operations Professional examination will not test on specific job functions but will focus on general securities industry knowledge and key regulatory themes.

Continuing Education

Certain commenters encouraged FINRA to clarify whether the proposal requires currently registered principals to take both the S101 continuing education module and the S201 [115] and requested that FINRA refine the continuing education requirements to reflect FINRA's diverse membership.[116]

As stated in the *Notice* and Section E. of the Purpose section, individuals who avail themselves of the proposed exception to the Operations Professional qualification examination requirement with an eligible registration would be subject to the Regulatory Element program appropriate for such other registration category. FINRA believes the proposed continuing education requirements for Operations Professionals are clear and notes that such requirements will be appropriately suited for those subject to registration, similar to the continuing education training for other FINRA registration categories.

Outsourced and Shared Functions

One commenter requested confirmation that FINRA does not intend to alter indirectly the definition of "associated person" or the existing regulatory guidance on outsourcing arrangements with the proposed rule change.[117] Numerous commenters requested clarification that covered persons are limited to persons who have been empowered by a broker-dealer to oversee the covered functions and would not include individuals who perform operations functions for affiliated entities, outsourced operations functions for a third-party service provider or supervisors within a large, diversified financial services organization who are far-removed from a member's securities business.[118] Certain commenters requested clarification with respect to who must register where clearing and introducing firms share responsibility for operations functions ("shared functions") [119] and whether such persons would be considered associated persons of both the introducing and clearing firms.[120] Several commenters suggested that an exemption be provided when covered functions are performed by another registered broker-dealer, bank, investment advisor, foreign entity [121] or affiliated insurance company.[122] Given a member's obligation to supervise any outsourced activity, numerous commenters stated that it should be sufficient for FINRA to confine application of the proposed registration and examination requirements to "employees" of the member.[123] One commenter questioned the legal ramifications that would result from requiring the registration of vendor employees with more than one member.[124] Certain commenters requested clarification with respect to how the proposed rule change affects Office of Supervisory Jurisdiction ("OSJ") requirements relating to currently outsourced activities [125] and back-office and support locations.[126] One commenter stated the proposed rule change would place an unfair burden on small firms that outsource many of the covered functions.[127]

As noted above, FINRA believes anyone who meets the criteria of a covered person and engages in one or more of the covered functions on behalf of a member must register as an

[106] Commonwealth.

[107] FSI, PSD and Sutherland.

[108] FSI, Modern Woodmen, NFP, UPFS and WSFG.

[109] Nationwide and TIAA.

[110] IRI.

[111] TIAA.

[112] TIAA.

[113] The *Notice* included as an eligible registration the General Securities Principal—Sales Supervisor Module (Series 23). FINRA has removed this examination from the list of eligible registrations. A person who passes the Series 9/10 and the Series 23 may obtain the General Securities Principal (Series 24) registration, but a person who passes solely the Series 23 is not considered registered in any capacity.

[114] *See supra* note 7.

[115] Great Nation.

[116] ACLI.

[117] SIFMA.

[118] ACLI, A&P, ARM, Bank of America, Horace Mann, IRI, Nationwide, PSD, Sutherland and TIAA.

[119] ESI, FSI, NFP, UPFS, Wells Fargo and WSFG.

[120] Northwestern Mutual, Pershing and Wells Fargo.

[121] AIC and Pershing.

[122] ACLI and AIC.

[123] NSCP, Pershing, Schwab, Scottrade and TIAA.

[124] Pershing.

[125] IRI.

[126] Scottrade and TIAA.

[127] Zelman.

Operations Professional, regardless of whether such person works internally at a member, an affiliate or third-party service provider. Also as previously noted, the proposed rule change does not alter the definition of an "associated person" but rather imposes registration, qualification examination and continuing education requirements on persons who meet the depth of personnel criteria and engage in one or more of the covered functions on behalf of a member. The proposed registration category is function-based so persons are not shielded from the requirements based on their job title or employment by an entity other than a member.

Additionally, FINRA notes that the proposed rule change would apply to all members regardless of firm size. FINRA reminds members that the depth of personnel included as covered persons generally is focused on positions with higher-level responsibilities, so entry level staff will likely not be required to register.

With respect to clearing arrangements and consistent with *Notice to Members* 05–48, a covered person would not be considered an associated person of both the introducing and clearing firms based solely on functions performed pursuant to a carrying agreement approved under FINRA Rule 4311 (Carrying Agreements),[128] so FINRA would not expect dual registration as an Operations Professional in such cases. However, as noted above, FINRA expects each member will designate at least one Operations Professional, who often may be the Financial and Operations Principal and/or the Principal Operations Officer.[129]

One commenter suggested that treating persons that fall within the covered categories as associated persons of a member will impact state law prohibitions on dual registration and vendor agreements.[130] FINRA has stated throughout this filing the need for this proposed rule change and its belief that the proposal is appropriately tailored to meet its stated objectives. FINRA believes it is, therefore, required additional regulation. That being the case, ill-defined collateral effects that can be avoided by a member do not serve as a reason to modify or negate such proposed rulemaking. Finally, FINRA already views the persons treated as covered persons in the covered functions, and indeed all non-clerical persons reporting to such covered persons, as associated persons irrespective of this proposed rule.

Small Firms Concerns

Numerous commenters noted the proposed rule change places an undue burden on, unnecessarily increases costs for, and is anticompetitive for small firms with no apparent benefit to the public.[131] One commenter noted the proposal is appropriate only in its application to personnel and broker-dealers that handle customer accounts, customer funds and/or securities.[132]

FINRA does not agree that small firms would be overly burdened by the proposed rule change since almost all other FINRA registration requirements apply to small firms and do not provide an exemption for personnel performing activities that would require registration based on a firm's limited business. FINRA also anticipates that many persons who would be subject to the new Operations Professional registration category would qualify for the proposed exception from the qualification examination based on existing registrations, and, as noted above, FINRA would not assess a separate registration fee for persons relying on the proposed exception to register as Operations Professionals. Moreover, the impact of the proposed rule change is expected to be minimal as the majority of the covered functions are generally performed by the carrying and clearing firm and, as noted above, a covered person would not be considered an associated person of both the introducing and clearing firms based solely on functions performed pursuant to a carrying agreement approved under FINRA Rule 4311 (Carrying Agreements),[133] so FINRA would not expect dual registration as an Operations Professional in such cases. However, as further detailed in Section F. above, in light of the limitations on personnel at certain smaller firms, FINRA is proposing a 120-day grace period for covered persons associated with a non-clearing member to transition into the proposed registration category.

Implementation of the Proposed Rule Change

Numerous commenters suggested that the proposed transition period of six to nine months for persons acting as Operations Professionals as of the effective date of the proposed rule change is insufficient for firms to fully comply because a significant number of personnel will need to become registered. The commenters noted that firms will likely need to phase-in such persons' preparation for, and taking of, the qualification examination to mitigate the impact on customer service and operational functions.[134] Also, certain commenters suggested that personnel may not pass the qualification examination on the first attempt since good test preparation services may not be available and certain operations personnel may not have test-taking skills.[135] The commenters suggested extending the transition period to between 12 to 18 months [136] or up to 24 months.[137] Other commenters noted that all persons should have the benefit of the transition period regardless of when they begin work in a covered function.[138]

Certain commenters suggested that persons who begin work as Operations Professionals following the effective date of the proposed rule change (*i.e.,* new hires or associated persons who meet the depth of personnel and transfer into a covered function) should be granted a grace period to transition into the proposed registration category.[139] According to one commenter, subjecting these persons to the proposed licensing regime immediately undercuts the purpose of the transition period and may chill hiring of operations personnel while the transition period is in effect.[140] Numerous commenters recommended a 90-day grace period for new hires or those who transition into a covered function, consistent with current NASD Rule 1021(d), which generally allows a registered representative to act in a principal capacity for 90 days while preparing for an applicable exam.[141] Two commenters suggested a 120-day grace period for personnel who transition into a covered function after the transition period has expired, conditioned on supervision by a licensed Operations Professional.[142]

[128] FINRA replaced NASD Rule 3230 (Clearing Agreements) and NYSE Rule 382 (Carrying Agreements) with new consolidated FINRA Rule 4311 (Carrying Agreements). *See* Securities Exchange Act Release No. 63999 (March 1, 2011) (Order Approving File No. SR–FINRA–2010–061).

[129] *See supra* note 61 and accompanying text.

[130] TIAA.

[131] Crowell, Freestone, Martin Nelson, Mutual Trust, Navidar, RiverStone, Wellington and Zelman.

[132] FirstBank PR.

[133] *See supra* note 128 and accompanying text.

[134] ARM, Bank of America, Commonwealth, ESI, FSI, Horace Mann, Modern Woodmen, M. Griffith, Morgan Stanley, NFP, NSCP, Scottrade, SIFMA and WSFG.

[135] Nationwide, UPFS and Wells Fargo.

[136] ARM, Bank of America, Commonwealth, ESI, FSI, Horace Mann, Modern Woodmen, M. Griffith, Morgan Stanley, NFP, NSCP, Scottrade, SIFMA and WSFG.

[137] Schwab.

[138] Schwab, SIFMA and TIAA.

[139] IRI, Nationwide, NSCP, Scottrade and Wells Fargo.

[140] Morgan Stanley.

[141] ARM, Bank of America, PSD, Schwab, Scottrade, Sutherland and Wells Fargo.

[142] Morgan Stanley and SIFMA.

One commenter suggested a 180-day grace period.[143]

Based on the comments, FINRA has amended the transition period that was proposed in the *Notice.* As further detailed in Section F. above, FINRA is proposing a 60-day identification period beginning on the effective date of the proposed rule change during which Day-One Professionals must request registration as an Operations Professional via Form U4 in CRD. Day-One Professionals who are identified during the 60-day period and must pass the Operations Professional examination (or an eligible qualification examination) would be granted 12 months beginning on the effective date of the proposed rule change to pass such qualifying examination, during which time such persons may function as an Operations Professional.

With respect to non-Day-One Professionals, any person associated with a clearing or self-clearing member must register as an Operations Professional and, if applicable, pass the Operations Professional qualification examination (or an eligible qualification examination) prior to engaging in any activities that would require such registration. Any non-Day-One Professional associated with a non-clearing member who must pass the Operations Professional qualification examination (or an eligible qualification examination) to obtain registration would be granted a grace period of 120 days beginning on the date such person requests Operations Professional registration via Form U4 in CRD to pass such qualifying examination, during which time such person may function as an Operations Professional.

Two commenters expressed sentiments regarding their general disagreement with FINRA spending[144] and the current regulatory structure for broker-dealers.[145] These comments are outside the scope of the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be 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 Number SR–FINRA–2011–013 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–FINRA–2011–013. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2011–013 and should be submitted on or before April 8, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[146]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6315 Filed 3–17–11; 8:45 am]

BILLING CODE 8011–01–P

[143] Wells Fargo.

[144] Mutual Trust.

[145] Wellington.

[146] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64070; File No. SR–CBOE–2011–022]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated: Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to PAR Official Fees

March 11, 2011.

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 March 1, 2011, Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by CBOE. On March 9, 2011, CBOE filed Amendment No. 1 to the proposed rule change.[3] 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

Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") proposes to amend its Fees Schedule to (i) establish separate PAR Official Fees for Volatility Index Options that are consistent with the Floor Brokerage Fees assessed in Volatility Index Options, and (ii) waive PAR Official Fees for all classes except Volatility Index Options for March 2011. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The purpose of Amendment No. 1 was to (i) remove the proposal to waive PAR Official Fees for February 2011 from the filing; and (ii) provide additional details for the statutory basis for waiving the fees in all classes except Volatility Index Options for March 2011.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE 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

CBOE is proposing to amend its Fees Schedule effective March 1, 2011 to establish separate PAR Official Fees for Volatility Index Options that are consistent with the Floor Brokerage Fees assessed in Volatility Index Options. CBOE amended its Fees Schedule to establish PAR Official [4] Fees in January 2011.[5] These fees apply to all orders executed by a PAR Official in all options classes traded at CBOE, except for customer orders ("C" origin code) that are not directly routed to the trading floor (an order that is directly routed to the trading floor is directed to a PAR Official for manual handling by use of a field on the order ticket). Such orders are charged $.02 per contract and, like floor brokerage fees, a discounted rate of $.01 per contract applies for crossed orders.[6] These fees help to offset the Exchange's costs of providing PAR Official services (*e.g.,* salaries, etc).

CBOE is proposing to add language that would assess distinct PAR Official Fees for orders in Volatility Index Options. Specifically, CBOE is proposing to assess PAR Official Fees in Volatility Index Options in the amount of $.03 per contract for standard (non-cross) orders and $.015 per contract for all cross orders (per side). CBOE only assesses Floor Brokerage Fees [7] for brokerage activity in its proprietary products, including SPX, OEX and Volatility Index Options. Floor Brokerage Fees in Volatility Index Options are assessed in the amount of $.03 per contract for standard (non-cross) orders and $.015 per contract for all cross orders (per side). A PAR Official is available to execute orders in Volatility Index Options. Because both Floor Brokerage Fees and PAR Official Fees are assessed in Volatility Index Options, there is an incentive to Floor Brokers to route orders in Volatility Index Options to a PAR Official due to the disparity that exists between the amounts assessed for Floor Brokerage Fees and PAR Official Fees. As the PAR Official Fees are currently less than the Floor Brokerage Fees that are assessed in Volatility Index Options, CBOE is proposing to make this change to eliminate the incentive for Floor Brokers to rely on PAR Officials to execute their business at a lower cost through a PAR Official in Volatility Index Options.

The issue described above with respect to Volatility Index Options does not apply to OEX and SPX because there are no PAR Officials available to execute orders in the OEX and SPX trading crowds. Furthermore, this disparity does not exist in other classes traded at the Exchange because there are no Floor Brokerage Fees assessed in classes other than OEX, SPX and Volatility Index Options.

CBOE is continuing to evaluate the existing structure of PAR Official Fees and is considering additional changes in the manner in which it assesses PAR Official Fees. For this reason, CBOE proposes to waive the PAR Official Fees in all classes except for Volatility Index Options for March 2011. CBOE is proposing to assess the PAR Official Fees in Volatility Index Options in March 2011 to eliminate the disparity between the PAR Official Fees and Floor Brokerage Fees as described above.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 ("Act"),[8] in general, and furthers the objectives of Section 6(b)(4) [9] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its trading permit holders and other persons using its facilities. The Exchange believes the proposed change is equitable, reasonable and not unfairly discriminatory, in that the PAR Official Fees and the Floor Brokerage Fees will be assessed in the same manner to all order originating firms for orders executed in Volatility Index Options. Further, CBOE believes the proposed waiver of PAR Official Fees for March 2011 is equitable, reasonable and not unfairly discriminatory, in that it will apply to all order originating firms in all classes except Volatility Index Options as CBOE continues to evaluate the existing structure of PAR Official Fees and is considering additional changes in the manner in which it assesses PAR Official Fees. CBOE believes it would be appropriate to exclude PAR Official Fees in Volatility Index Options from the fee waiver as a waiver of these fees would perpetuate the disparity between PAR Official Fees and Floor Brokerage Fees in Volatility Index Options that this proposal is otherwise seeking to eliminate.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of at the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and subparagraph (f)(2) of Rule 19b–4 [11] thereunder. 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

[4] A PAR Official is an Exchange employee or independent contractor whom the Exchange may designate as being responsible for (i) operating the PAR workstation in a Designated Primary Market-Maker trading crowd with respect to the classes of options assigned to him/her; (ii) when applicable, maintaining the book with respect to the classes of options assigned to him/her; and (iii) effecting proper executions of orders placed with him/her. The PAR Official may not be affiliated with any Trading Permit Holder that is approved to act as a Market-Maker. *See* CBOE Rule 7.12.

[5] *See* Securities Exchange Act Release No. 67301 (January 11, 2011), 76 FR 2934 (January 18, 2011) (SR–CBOE–2010–116).

[6] PAR Official Fees and Floor Brokerage Fees for cross orders are assessed at a discounted rate because these Fees are assessed "per side" and thus, these fees are equal to the amount assessed for one standard (non-cross) order.

[7] In accordance with Footnote 5 of the CBOE Fees Schedule, Floor Brokerage Fees are charged to the executing broker. If a Market-Maker executes an order for an account in which the Market-Maker is not a registered participant as reflected in the TPH Department records, the Market-Maker will be assessed a floor brokerage fee. To be eligible for the discounted "crossed" rate, the executing broker acronym and executing firm number must be the same on both the buy and sell side of an order. Floor Brokerage Fees are not assessed to orders effected by a PAR Official.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[12]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2011–022 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–CBOE–2011–022. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–022 and should be submitted on or before April 8, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–6301 Filed 3–17–11; 8:45 am]

BILLING CODE 8011–01–P

[12] For purposes of calculating the 60-day period within which the Commission summarily may temporarily suspend such rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on March 9, 2011, the date on which the Exchange submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[13] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Social Security Administration (SSA).

ACTION: 30-day notice of submission of information collection approval from the Office of Management and Budget (OMB) and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the SSA has submitted a Generic Information Collection Request (Generic ICR): "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et. seq.*).

Your comments would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than April 18, 2011. Mail, email, or fax your comments and recommendations to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov*.

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with SSA's commitment to improving service delivery. By qualitative feedback, we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training, or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between the agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback we collect under this generic clearance will provide useful information, but it will not yield data that we can generalize to the overall population. We will not use this type of generic clearance (qualitative information) for quantitative information collections designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms designed to yield quantitative results.

The agency received no comments in response to the 60-day notice published in the **Federal Register** of December 22, 2010 (75 FR 80542).

Below we provide SSA's projected average estimates for the next three years: [1]

[1] The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance federal-wide:

Average Expected Annual Number of activities: 25,000.

Average number of Respondents per Activity: 200.

Annual responses: 5,000,000.

Frequency of Response: Once per request.

Continued

Current Actions: New collection of information.

Type of Review: New collection.

Affected Public: Individuals and households, businesses and organizations, State, Local or Tribal Government.

Average Expected Annual Number of Activities: 125.

Respondents: 1,604,168.

Annual responses: 1,604,168 responses.

Frequency of Response: Once per request.

Average minutes per response: 5.46545 minutes.

Burden hours: 146,125 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 OMB control number.

Dated: March 15, 2011.

Faye Lipsky,

Reports Clearance Officer, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2011–6452 Filed 3–17–11; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 7371]

Office of the Chief of Protocol; Gifts to Federal Employees From Foreign Government Sources Reported by Employing Agencies in Calendar Year 2009; Correction

AGENCY: Department of State.

ACTION: Notice; Correction.

SUMMARY: The Department of State published a document in the **Federal Register** of January 18, 2011 concerning Gifts to Federal Employees from Foreign Government Sources Reported to Employing Agencies in Calendar Year 2009. The document contained the incorrect title of a foreign dignitary.

FOR FURTHER INFORMATION CONTACT: David Solomon, Office of the Chief of Protocol (202) 647–1333/ *Solomonda@State.gov.*

Correction

In the **Federal Register** of January 18, 2011 in FR Vol. 76, No. 11, page 2983, in the third entry in the third column under "Identity of foreign donor and government", the title of the President of the Constitutional Court of Korea is incorrect and should be changed from "President Kang-Kook Lee, Constitutional Court of Korea, Democratic People's Republic of Korea" to read: "President Kang-Kook Lee, Constitutional Court of Korea, Republic of Korea".

Dated: March 14, 2011.

Patrick F. Kennedy,

Under Secretary for Management, Department of State.

[FR Doc. 2011–6457 Filed 3–17–11; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice: 7324]

Advisory Committee on International Postal and Delivery Services

AGENCY: Department of State.

ACTION: Notice; FACA Committee meeting announcement.

SUMMARY: As required by the Federal Advisory Committee Act, Public Law 92–463, the Department of State gives notice of a meeting of the Advisory Committee on International Postal and Delivery Services. This Committee has been formed in fulfillment of the provisions of the 2006 Postal Accountability and Enhancement Act (Pub. L. 109–435) and in accordance with the Federal Advisory Committee Act.

DATES: April 7, 2011 from 2 p.m. to about 5 p.m. (open to the public).

Location: The American Institute of Architects (Boardroom), 1735 New York Ave., NW., Washington, DC 20006.

Meeting agenda: The agenda of the meeting will include a review of the results of the October 2010 UPU Council of Administration, the major issues to arise at the April 2011 UPU Postal Operations Council and other subjects related to international postal and delivery services of interest to Advisory Committee members and the public.

Public input: Any member of the public interested in providing public input to the meeting should contact Mr. Mohammed Nauage, whose contact information is listed below. Each individual providing oral input is requested to limit his or her comments to five minutes. Requests to be added to the speaker list must be received in writing (letter, e-mail or fax) prior to the close of business on March 31, 2011; written comments from members of the public for distribution at this meeting must reach Mr. Nauage by letter, e-mail or fax by this same date. A member of the public requesting reasonable accommodation should make the request to Mr. Nauage by that same date.

For further information, please contact Mohammed Nauage, Office of Global Systems (IO/GS), Bureau of International Organization Affairs, U.S. Department of State, at (202) 647–1044, *NauageM@state.gov.*

Dated: February 18, 2011.

Dennis M. Delehanty,

Foreign Affairs Officer, Department of State.

[FR Doc. 2011–6454 Filed 3–17–11; 8:45 am]

BILLING CODE 4710–19–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2010–0831]

Airport Improvement Program (AIP): Interim Policy Regarding Access to Airports From Residential Property

AGENCY: Federal Aviation Administration (FAA).

ACTION: Interim policy; amendment to sponsor grant assurance 5.

SUMMARY: This action adopts an interim policy amending and clarifying FAA policy concerning through-the-fence access to a federally-obligated airport from an adjacent or nearby property, when that property is used as a residence, and permits continuation of existing access subject to certain standards. This action also modifies sponsor grant assurance 5, Preserving Rights and Powers, to prohibit new residential through-the-fence access to a federally-obligated airport. Prior FAA policy discouraged through-the-fence access to a federally-obligated airport from an off-airport residence. Owners of properties used both as a residence and for the storage of personal aircraft, sometimes called "hangar homes," had urged the agency to permit an exception to the through-the-fence policy for residents who own aircraft.

At this time, the FAA is adopting an interim policy. The policy review conducted in 2010 highlighted a number of differences among the airports identified as having residential through-the-fence arrangements. As a result, the FAA believes it will take more time and more detailed information to better understand these arrangements and how they impact each airport sponsor's ability to comply with its grant assurances. However, the agency also acknowledges that interested stakeholders have a more immediate need for resolution. The goal of the interim policy is to strike a careful balance by accommodating residential through-the-fence access where it already exists.

To date, the FAA has not been able to clearly define the specific criteria or

Average minutes per response: 30.
Burden hours: 2,500,000.

requirements that would allow airport sponsors to enter into new residential through-the-fence arrangements while ensuring ongoing compliance with their grant obligations. Therefore, the interim policy requires airports with existing residential through-the-fence arrangements to develop access plans outlining how the airport sponsor meets certain standards for control of airport operations and development and for self-sustaining and nondiscriminatory airport rates.

In adopting this interim policy, the FAA is announcing its intent to initiate another policy review of residential through-the-fence access to federally-obligated airports in 2014. This timeframe will give the FAA the experience it needs in reviewing residential through-the-fence arrangements via the access plans and understanding how to mitigate the real and potential adverse effects of these arrangements. Additionally, it will allow the agency to complete a separate, ongoing general aviation airport study that is analyzing the federally assisted general aviation airport system.

The interim policy adopts the changes proposed to sponsor grant assurance 5, Preserving Rights and Powers, to prohibit new residential through-the-fence access to a federally-obligated airport. However, it is the agency's intent to reconsider this change as part of the policy review that will be conducted in 2014. In the interest of obtaining all available information relevant to the review, the FAA invites any person who would be interested in a specific approval of new residential through-the-fence access at a federally-obligated airport to contact the FAA Airport Compliance Division to discuss the particular circumstances so this can be considered in our 2014 review.

DATES: The effective date of this interim policy and the amendment to the grant assurance is March 18, 2011.

FOR FURTHER INFORMATION CONTACT: Randall S. Fiertz, Director, Office of Airport Compliance and Field Operations, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3085; facsimile: (202) 267–5257.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You can get an electronic copy of this policy and all other documents in this docket using the Internet by:

(1) Searching the Federal eRulemaking portal (*http://www.regulations.gov/search*);

(2) Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies;* or

(3) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Airport Compliance and Field Operations, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–3085. Make sure to identify the docket number, notice number, or amendment number of this proceeding.

Authority for the Interim Policy and Grant Assurance Modification

This notice is published under the authority described in subtitle VII, part B, chapter 471, sections 47107 and 47122 of Title 49, United States Code.

Background

Sponsors of airports that accept planning and development grants from the FAA under the Airport Improvement Program (AIP), 49 U.S.C. 47101 *et seq.,* agree to a list of standard conditions, or grant assurances. Similar obligations also attach to the transfer of federal surplus property to airport sponsors and are often contained in surplus property deeds. These include responsibilities to retain the rights and powers necessary to control and operate the airport; to maintain the airport in a safe condition; to take reasonable steps to restrict land adjacent to the airport to compatible land uses; to allow access to the airport on terms that are reasonable and not unjustly discriminatory to any category of user; and to maintain a rate structure for airport fees that makes the airport as self-sustaining as possible.

A complete list of the current grant assurances can be viewed at: *http://www.faa.gov/airports/aip/grant_assurances/.*

Administration of the AIP, including sponsor compliance with grant assurances, is the responsibility of the FAA Associate Administrator for Airports. The Airport Compliance Manual, FAA Order 5190.6B, issued on September 30, 2009, contains policy guidance for agency employees monitoring sponsor compliance with the grant assurances.

Agency guidance that preceded Order 5190.6B discouraged through-the-fence access at airports with grant obligations, and Order 5190.6B contained specific objections to residential through-the-fence access based on more recent agency experiences. Typically, through-the-fence access allows an aircraft owner to store an aircraft at an off-airport property, and to use the airport by way of a taxiway that crosses the airport boundary and connects the owner's property or neighborhood to the airport's runway-taxiway system.

The Notice of Proposed Policy

Following review of written comments, meetings with state aviation officials, visits to airports with residential through-the-fence access, listening sessions with homeowners and homeowners' associations, and discussions with aviation membership associations, the FAA published a proposed revision in agency policy on residential through-the-fence access for public comment in September 2010: *Airport Improvement Program (AIP): Policy Regarding Access to Airports From Residential Property* (75 FR 54946; September 9, 2010). That notice contained a background history of the residential through-the-fence access issue, and addressed the comments the agency had received prior to issuing the proposed policy.

Comments Received on the Notice

The agency received more than 75 comments on the proposed policy, including comments from members of Congress, state aviation agencies, industry associations, and private homeowners with current through-the-fence access to an airport. Most commenters supported not only the continuation of existing residential through-the-fence uses, but also the accommodation of new access arrangements in the future. While commenters supporting residential through-the-fence access were often critical of the FAA's continuing concern about such access, many of these commenters also expressed appreciation that the proposed policy would allow virtually all existing residential through-the-fence access to continue. The National Air Transportation Association commented in support of the proposed policy, and described it as striking the right balance between future needs of airports and existing residential through-the-fence access.

As a preliminary matter, some commenters apparently assumed that the FAA objected to all residential through-the-fence access, at any airport. On the contrary, the interim policy relates only to residential through-the-fence access at airports that receive taxpayer funds through FAA grants. The FAA has no objection whatsoever to the development of private airparks, where property owners can manage and operate the airport in any manner they like, without federal assistance.

In recent years, the FAA has identified cases in which residential

through-the-fence access arrangements at federally-obligated airports resulted in an airport sponsor's inability to meet specific grant assurance obligations. In working with airport sponsors to correct their grant assurance violations, the FAA has found these arrangements impose long-term limitations on the airport and compromise the airport's ability to retain the inherent features expected of public use airports.

The question for the FAA, therefore, is not whether to allow hangar homes next to airports, but whether to use public funds to support airports with hangar homes. Over time, some of these airports may function more as private airparks than as public-use airports available to all users as part of a national system of airports. The standards for compliance adopted in this interim policy are not regulations; rather, they are mitigations needed to address the sponsor's ongoing ability to meet its obligations. The FAA considers these mitigations necessary to fulfill its obligation to assure that grant funds are used for the legal purposes for which these funds are authorized and appropriated, and that taxpayer dollars are used in the manner that will have the most benefit for the national airport system and its users.

Many of the comments supportive of residential through-the-fence access were similar to comments received in the FAA's outreach efforts in the past year, and repeated arguments that were summarized and addressed in the preamble to the proposed policy published on September 9, 2010. For example, these comments typically asserted benefits from residential through-the-fence access, including the presence of a supportive airport community; a source of income and aviation activity the airport would not otherwise have; and improved security resulting from constant observation of the airport by close neighbors. Some commenters argued that residents who own aircraft on adjacent property should not be covered by the same policies that apply to residential land use generally. Some commenters also reiterated that a decision on residential through-the-fence access should be left to the local community. The agency believes these particular comments were addressed in the notice of proposed policy, and the agency's position remains the same on these points.

Approval of New Residential Through-the-Fence Access

A substantial number of comments criticized the proposed prohibition on approval of new residential through-the-fence arrangements. The FAA understands that future residential through-the-fence access could be controlled, to a great extent, by making any approval conditional upon the airport operator taking any steps the FAA considers necessary to mitigate potential problems with that access. Accordingly, we would agree that many of the issues experienced with existing locations could be avoided. However, as the FAA stated in the notice, the agency has continuing concerns about the existence of residential properties on the airport boundary. First, it is virtually impossible to assure that these properties will not be used as residences by non-aircraft owners at some point. Second, even residents who now own aircraft and use the airport may still not be supportive of changes in the airport that result in more noise or night operations, or changes in airport boundaries. Also, federal law and policy make no distinction between residents that own aircraft and those that do not. As a result, approval of hangar homes next to an airport makes it more difficult for the FAA and airport operators to oppose other residential communities near an airport, which are the primary source of incompatible land use encroachment at airports nationally. Finally, homeowners have an expectation of perpetual title to their homes to retain the value of their investment, to obtain financing on a long-term schedule, and to simply avoid being uprooted from their residence. As a result, residential through-the-fence uses are typically very difficult for the airport operator to relocate or terminate if the need arises. There is no option of allowing new residential through-the-fence access on a trial basis; if it is allowed, it will probably be there as long as the airport. As noted in the summary, the interim policy is designed to help the FAA better understand possible ways to reconcile these issues.

The Experimental Aircraft Association (EAA) submitted detailed comments supporting approval of new residential through-the-fence locations, including several points not raised in earlier comments. EAA commented that the FAA does not have the authority to amend the grant assurances; however, that authority does exist, at 49 U.S.C. 47107(h), and the agency has fully complied with the requirements of that statute. EAA also stated that it had done a survey of ten airports in Georgia, and found no available hangars. That fact could argue for through-the-fence access to off-airport hangars, if there were some reason the hangars could not be built on-airport, but it does not support the need for hangar homes. Residential use, not the storage of aircraft, is the issue. Through-the-fence access to private hangars at general aviation airports is not generally a compliance issue, and is not the subject of this interim policy.

EAA offered specific criteria for FAA approval of individual new projects, in lieu of the general prohibition proposed in the interim policy, similar to the standards proposed in the notice for assuring compliance at existing residential through-the-fence locations. The criteria suggested by the FAA are intended to mitigate the adverse impacts that arise from residential through-the-fence arrangements. They may not necessarily allow an airport sponsor to eliminate these impacts, and EAA did not identify any new methods to ensure that these arrangements do not compromise the public-use features of the airport.

Accordingly, as an interim measure, the FAA is adopting the proposed general policy against approval of new residential through-the-fence access at this time, and is revising AIP grant assurance 5, *Preserving Rights and Powers,* as proposed. However, the agency also accepts that both the agency and airport operators will learn more about the effects of residential through-the-fence access at airports as airports with existing access develop access plans and FAA staff has the opportunity to review and approve a substantial number of those plans. The FAA recently initiated a study of general aviation airports to better understand how these airports are utilized and the roles they serve in the national airport system. EAA, in its comments, recommended that the FAA study general aviation airport capacity through a new Future Airport Capacity Task (FACT) study. The FAA's current review of the public-use general aviation airport system is not technically a successor to the most recent FACT study (FACT 2). This study recognizes the diversity that exists within the general aviation airport community, and it will develop detailed data about the roles, operations, and profiles of these facilities to provide more useful information about our current airport system. While we believe that the majority of airports with existing residential through-the-fence arrangements fall within a category of less than 50,000 operations and less than 50 based aircraft, other characteristics that may better define their role locally and nationally are less transparent. As a result of these efforts, the agency expects to have reliable information on the utilization of federally assisted general aviation airports, and also on the ability of the

access plans to resolve potential compliance issues at airports with residential through-the-fence access. On that basis, it is the agency's intent to initiate a review of this interim policy in fiscal year 2014.

Existing Residential Through-the-Fence Locations

As with comments received before the proposed policy was issued, most commenters supported FAA's proposal to allow existing residential through-the-fence access to continue, with less restrictions and oversight than proposed by the FAA in the notice. Some commenters supported the FAA's proposal to allow through-the-fence access where it exists, if the airport can meet certain standards, and not allow new access. Several commenters opposed allowing even the existing uses to continue, and urged the eventual elimination of the residential through-the-fence access at federally-obligated airports. For reasons discussed in the notice, the FAA believes it is neither feasible nor necessary to eliminate existing residential through-the-fence arrangements. The FAA's proposed alternative (having these airports take certain actions to mitigate the adverse effects of through-the-fence access) should be adequate to protect the government's investment in these airports in most cases and avoids unnecessary hardship on current property owners.

In addition to existing and new residential through-the-fence access, many commenters had specific comments on what if anything should be required of airport operators and residents at existing residential through-the-fence locations, and if new standards do apply, what the FAA's approval process should involve. The FAA found these comments very useful in developing the interim policy statement.

Comments not previously addressed in the notice of proposed policy can be summarized as follows:

Comment: The FAA should do a case-by-case review of new requests for residential through-the-fence access, rather than prohibit new access, because of the different conditions at each airport.

Response: The interim policy adopted toward existing uses does allow agency staff to take full account of the individual conditions at each airport. The interim policy provides certain general minimum standards of compliance for safety, cost recovery and efficient operation of these airports, for evaluation of each airport's circumstances. As the FAA explained in the introduction to comments on new access in this notice, the agency does not believe that the mitigation of existing conditions is a reason to create new through-the-fence uses, given the inherent problems with residential use next to an airport, and the fact that residential use tends to be permanent once established. However, the FAA intends to review the issue of approval of new residential through-the-fence access in fiscal year 2014, after experience with individual airport access plans and completion of an FAA study on general aviation airports now in progress. In the interest of obtaining all available information relevant to that review, the FAA invites any person who would be interested in a specific approval of new residential through-the-fence access at a federally-obligated airport in the future to contact the FAA Airport Compliance Division to discuss the particular circumstances so it can be considered as part of the FAA's 2014 review.

Comment: Residential through-the-fence access could be approved at new locations if the airport agreed to additional safety regulations, such as prohibitions on commercial flights, charter flights, and flight training.

Response: This is exactly the kind of limitation on airport use that the interim policy is intended to avoid. An airport that receives taxpayer assistance for its role in the national system should not have limits on aviation use just so that residences can be located adjacent to the airport.

Comment: EAA proposed, as part of a request that FAA allow new residential through-the-fence access, that each airport with that access develop a safety management system (SMS).

Response: The FAA supports the adoption of SMS at airports, and the agency has recently issued a notice of proposed rulemaking proposing to require SMS at airports with 14 CFR part 139 certification, *Safety Management System for Certificated Airports* (75 FR 62008, October 7, 2010). However, the agency does not believe that it is necessary or appropriate to adopt a special requirement for SMS, as a condition of AIP grants, at airports with through-the-fence access. First, although safety issues are one of the potential problems with residential through-the-fence access, the FAA is not aware of broad evidence that such airports are necessarily more prone to specific safety problems. Second, the SMS process involves costs for airport sponsors and staff time for both sponsors and the FAA. A requirement for an SMS plan at all such airports would be an unjustified expense and administrative burden on sponsors of many small airports that have no unresolved safety issues at this time. The FAA would encourage any general aviation operator to consider an SMS program, but is not making SMS a condition of approval of residential through-the-fence access at this time.

Comment: All NAS users pay into funds through fuel taxes and should not have to pay additional fees. Paying property taxes and airport fees is "double taxation."

Response: Grant-assisted airports are required to be as self-sufficient as possible and develop rate structures that fully support the capital and operating expenses of the airport. While fuel taxes go to fund AIP grants that assist with capital projects, AIP grants are not available to pay for an airport's operating and maintenance expenses. Local and state property taxes, even taxes collected on hangars built on airports by tenants, go to support general local government expenses, and may not contribute anything to the airport. Most airports rely almost exclusively on rent and fees from tenants and users to cover their operating and maintenance expenses. A through-the-fence user who does not pay a fee for access may not be contributing any revenue to the airport itself, even though the user has special access to a valuable asset in the airfield.

Comment: The owner of a hangar home with through-the-fence access should not have to pay the same amount an on-airport hangar tenant pays for rent of the hangar, since that rent includes the capital costs of providing that hangar.

Response: While airport sponsors can establish their own rate-setting methodology for access through the fence, the methodology used must be consistent with the sponsor's grant assurance obligations. In other words, the methodology should provide for recovery of costs and ensure fairness to airport tenants and users. The FAA has included several examples of fees that would accomplish the general goals of recovering costs and fairly distributing costs among airport users. The example related to hangar rent has been revised to make clear the amount represents an access fee based on the ground rental rate, and not the full rental for lease of an on-airport hangar.

Comment: The notice used three different references to cost recovery, which made it unclear how much airport sponsors are expected to recover from through-the-fence users.

Response: The preamble to the policy summarizes standards for through-the-fence access that include recovery of

airport operating costs. That standard states the airport can collect, and does collect, fees from through-the-fence users that are comparable to those charged to airport tenants so that all users bear a fair proportion of airport costs. That is an accurate statement of the agency's general policy goal for through-the-fence charges. The specific list of standards the FAA expects to be included in a sponsor's access plan includes more specific guidance on various fees that could be used to accomplish this goal, but the two statements both state the same principles of recovery of airport costs and fairness to airport tenants and users. However, nothing in the interim policy precludes an airport sponsor from establishing a higher rate for its through-the-fence users.

Comment: The compliance standards stated in the proposed policy address situations that are not common at airports with through-the-fence access. These conditions addressed by the standards are also found at airports that do not have through-the-fence access, where they have no effect on compliance.

Response: Each of the standards listed for inclusion in an airport's access plan is based on experience with conditions at airports with residential through-the-fence access. If the condition addressed by a particular standard does not apply at an airport (for example, the airport already recovers airport costs from both tenants and off-airport users), then the sponsor would be required to do no more than document that fact in the access plan.

Comment: The effective date of the policy should be the date of publication of the final policy, and not September 9, 2010.

Response: The effective date of the interim policy adopted is March 18, 2011. However, the definition of "existing access" retains the status date of September 9, 2010, the first date that the public was on notice of the FAA's intended policy. Retaining the September 9, 2010 date in the definition simply prevents an attempt to establish new residential through-the-fence access in the brief period between publication of the notice and publication of this interim policy.

Comment: The proposed policy on "additional" access provided that a change or extension of new access would be effective for 20 years. First, that is a disincentive for through-the-fence users to agree to changes in access that improve airport operation and safety; if the owner's current access rights are longer than 20 years. The developer of a through-the-fence residential project at an obligated general aviation airport in Sandpoint, Idaho, is willing to agree to relocation of its access taxiway to improve airport safety, but only if its current perpetual access rights transfer to the new configuration. Other commenters noted that the 20-year extension is not enough to amortize a standard residential mortgage of 30 years.

Response: The FAA agrees that the proposed definition of "additional access" and the 20-year limitation would have had some unintended effects. The interim policy adopted combines extensions and renewals of access into the single definition of "extend an access." The interim policy makes clear that a change that serves to improve airport safety or implement the sponsor's long-term planning decisions will not be considered an "extend an access." In this case, the 20-year limit on access extensions will not apply, and whatever rights of access the owner has in the current access location may transfer to the new access location.

On the second point, the FAA does not believe the 20-year limit on extension of access would be a hardship. First, many extensions of access would not involve financing or refinancing at all. Second, homeowners with significantly shorter access terms, such as one year, have obtained financing for construction. This is also a reasonable timeframe for airport sponsors as airport planning is typically based on a 20-year forecast and planning horizon.

Comment: Revisions to the airport layout plan (ALP) and access plans required by the policy should be eligible for AIP planning grants.

Response: By law, AIP funds may only be used for airport development projects, planning associated with airport development, and noise, air, and water quality mitigation. As a result, FAA Order 5100.38C, Airport Improvement Program Handbook, states that AIP grants may fund updates to an ALP when the update is done as part of an airport's master plan study or update. Airport master plans routinely identify adjacent land uses to determine what, if any, constraints they might have on an airport's development. Therefore, the work items associated with an airport sponsor's implementation of the interim policy are directly related to airport master planning which is eligible for AIP grant funding. Airport sponsors should work with FAA Airports District Office (ADO) and regional division staff to develop an appropriate scope of work for their master plan. However, airport sponsors that choose to undertake these work items outside of a master planning process will need to fund them through local means.

Comment: Some commenters expressed concern that the definition of "existing access" may be too narrow. For example, how will the FAA address a situation in which a property owner develops a lot adjacent to an airport, but residential through-the-fence access is not currently being used and has not been formally granted by the airport sponsor. The policy should permit the airport sponsor to grant those property owners residential through-the-fence access.

Response: Based on the limited information provided, the future access through the fence described in the comment would not be permitted under the interim policy if the property is used as a residence. This scenario does not meet the definition of "existing access". However, the airport sponsor will have the opportunity to demonstrate how its specific situation meets the definition of "existing access" as stated in the interim policy. The FAA notes that the interim policy would not prevent the owner from requesting that the sponsor permit through-the-fence access for a hangar on the property if the property is not being used as a residence. Additionally, this is an interim policy and is subject to review. As stated in the introduction of the interim policy, FAA invites any person who would be interested in a specific approval of new residential through-the-fence access at a federally-obligated airport to contact the FAA Airport Compliance Division to discuss the particular circumstances so this can be considered in our 2014 review.

Comment: If the FAA considers removing an airport from the National Plan of Integrated Airport Systems (NPIAS), that consideration should be based on the general criteria for inclusion in the NPIAS, and not simply the fact that the airport has not met the special standards included in the policy for residential through-the-fence access.

Response: The FAA agrees with the comment. While failure to meet the compliance standards will trigger an FAA review of whether it is appropriate to retain an airport in the NPIAS, and possibly a compliance action, the final decision on whether to remove an airport from the NPIAS will take into account all of the criteria for inclusion in the NPIAS.

Comment: The policy does not address on-airport housing. Existing on-airport housing should be subject to the same policy as off-airport properties with through-the-fence access, and the FAA should not consider the airport in noncompliance if the airport meets the

listed standards for through-the-fence access.

Response: Airport property is not a safe or appropriate location for a residence. However, the FAA will review individual existing situations as necessary, to determine if special circumstances exist that make it appropriate to apply the criteria for through-the-fence residential use to on-airport housing.

Comment: The policy should make clear that FAA is not softening its position on commercial through-the-fence access.

Response: The interim policy on residential through-the-fence access does not affect the agency's policy on through-the-fence access from property used for commercial purposes. Through-the-fence access for any reason is generally discouraged, particularly from property used to provide aviation services. However, the FAA understands that there may be reasons for access to property used for aircraft storage or an owner's business, without the potential problems or permanent rights associated with residential use. Accordingly, a sponsor's permission for through-the-fence access for commercial purposes is not, in itself, considered a violation of the grant assurances. The FAA cautions that any attempts to convert commercial through-the-fence access into a residential arrangement is inconsistent with this interim policy and could result in a violation of sponsor assurance 5 as amended by this interim policy.

Comment: It is not necessary for the FAA to consult the Transportation Security Administration (TSA) when reviewing access plans.

Response: The FAA lacks the expertise to determine what impact, positive or negative, through-the-fence residential access may have on airports with regard to security. The TSA did not express any preference for residential use of land near the airport in our consultation with them in 2010. As noted in the proposed policy, the TSA plans to undertake its own review, and the FAA will review and consider any recommendations that may follow. In the interim, the FAA may consult the TSA as part of its review of the access plans.

Comment: The proposed policy is inconsistent with Homeland Security Presidential Directive 16 and its supporting Domestic Outreach Plan.

Response: The TSA did not raise any concerns related to this specific directive or any others when the FAA consulted with their staff in the spring of 2010. However, the FAA will forward these concerns to the TSA for further evaluation.

Discussion of FAA Clarifications

Interim Policy

In reviewing the comments, the FAA determined that it will take more time and more detailed information to better understand how residential through-the-fence arrangements impact a sponsor's ability to comply with its grant assurances and whether or not specific criteria can be developed to ensure a sponsor's ongoing compliance with its assurances. Therefore, the FAA is adopting an interim policy and will initiate a policy review in 2014.

Changes: All references to the policy now clarify that it is an interim measure.

Applicability

In reviewing the proposed policy, the FAA determined that the scope identified for applicability was too narrow. The scope has been broadened to include federally-obligated airports where new residential-through-the-fence access is proposed. The FAA's implementation of the policy will require all federally-obligated airports to certify their status with regard to the policy.

Changes: The interim policy clarifies this statement to read, "this interim Policy applies to all federally-obligated airports, including those with existing residential through-the-fence access or proposing to establish new residential through-the-fence access." Additionally, the interim policy states that all federally-obligated airports will be required to certify their status with regard to the policy.

Applicability—"Additional Through-the-Fence Access"

In reviewing the comments, the FAA recognized the unintentional confusion created by the use of this term. The proposed policy defined "additional through-the-fence access" to capture two specific circumstances: an airport sponsor's ability to permit a new access point and extension or renewal of access agreements at airports with existing residential through-the-fence arrangements. Upon further review, given the clear, specific conditions used to define "existing access," it is not necessary to contemplate new points of entry for the residential through-the-fence users covered by the interim policy at this time.

Changes: The interim policy replaces this term with a definition for "extend an access" and deletes references to the development of new access points.

Applicability—"Development"

In reviewing the comments, the FAA recognized this term was vague. The interim policy offers a refined definition to better specify residential development.

Changes: The interim policy amends this definition to specify the excavation or grading of land needed to construct a residential property or construction of a residence.

Applicability—"Residential Property"

Some comments noted that the proposed policy lacked a clear definition of "residential property". The interim policy defines this term.

Changes: The interim policy defines residential property as a piece of real property used for single- or multi-family dwellings; duplexes; apartments; primary or secondary residences even when co-located with a hangar, aeronautical facility, or business; hangars that incorporate living quarters for permanent or long-term use; and time-share hangars with living quarters for variable occupancy of any term.

Section I. Existing Through-the-Fence Access From Residential Property at Federally-Obligated Airports

In reviewing the proposed policy, the FAA found many of the statements in this section to be duplicative of statements made in the preamble. The interim policy incorporates these statements by reference to the proposed policy.

Changes: The two subsections have been combined and shortened to succinctly summarize the interim policy.

Relocation of Access Points

One comment noted that holders of through-the-fence access rights would be discouraged from relocating their access point if that relocation triggered a higher level of review or potentially diminished their legal rights. The interim policy adopts the change proposed in the comments.

Changes: Section II of the interim policy allows the relocation of through-the-fence access points to be considered as "existing access" when the access point is relocated to improve the airport's overall safety or better address issues associated with the sponsor's long-term planning needs. The interim policy clarifies that the first access point must be removed, and this provision is not intended to be used to create new access points.

Section III. Standards for Compliance at Airports Proposing Additional Through-the-Fence Access at Airports Covered by This Policy

The title and text of this section has been changed to reflect the FAA's decision to replace the term "additional through-the-fence access" with "extend an access". Additionally, some of the language has been re-worded to better reflect FAA's intent to review these proposals carefully.

Changes: Section III of the interim policy is now titled, "Standards for compliance at airports proposing to extend through-the-fence access". Similar changes have been made throughout the text of the interim policy, and the requirements applicable to new access points have been deleted. This section clearly states the FAA's intent to review proposals to extend residential through-the-fence access carefully.

Access Fee Methodology

In reviewing the comments, the FAA found that the phrasing used to describe various fee methodologies was confusing. The interim policy revises this phrasing to clarify that residential through-the-fence access fees should, at a minimum, be equivalent to the ground rental rate for on-airport tie-downs and hangars. Additionally, the FAA identified two other potential methodologies that could be used to set rates for through-the-fence access.

Changes: Section III has been revised to better specify various methodologies that may be used to establish through-the-fence access fees, and adds two methodologies not included in the notice of proposed policy.

Section III. Standards for Compliance at Airports Proposing To Extend Through-the-Fence Access

In reviewing the proposed policy, the FAA broadened the scope of some considerations to better capture the potential for an airport's growth and/or the use of new aircraft at that airport over time. Other changes were incorporated to better protect the sponsor's rights and powers.

Changes: Section III is revised to better clarify:

- Sponsors should obtain perpetual avigation easements for overflight.
- Residential through-the-fence users acknowledge that their property will be affected by aircraft noise, emissions, and operations that may change over time.
- Residential through-the-fence users waive any right to bring an action against the airport sponsor for existing and future operations and activities at the airport.
- The airport sponsor has a mechanism for requiring a residential through-the-fence user to comply with the FAA's determination with regard to FAA Form 7460–1, Notice of Proposed Construction or Alteration.

In reviewing the proposed policy, the FAA identified three additional criteria it will consider when an airport sponsor proposes to extend existing through-the-fence access. Consistent with other changes made to the interim policy, one reference to new access points has been deleted.

Changes: Section III has been revised to delete the reference to additional access and include the additional considerations:

- The sponsor has a mechanism for ensuring residents with through-the-fence access do not create or permit conditions or engage in practices that could result in airport hazards, including wildlife attractants.
- The access agreement is subordinate to the sponsor's current and all future grant assurances.
- The airport sponsor has developed a process for educating residents with through-the-fence access about their rights and responsibilities.

Section IV. Process and Documentation

Some comments questioned the process and timeline for how the FAA will review residential through-the-fence access plans. To address this, the interim policy now states that the FAA will establish implementation guidance in the form of a Compliance Guidance Letter available on the FAA's Web site at *http://www.faa.gov/airports.*

Changes: Section IV references the forthcoming Compliance Guidance Letter on FAA Implementation of Interim Policy on Residential Through-the-Fence and Review of Access Plans. The interim policy encourages airport sponsors to review this Compliance Guidance Letter that will be available on the FAA's Web site at www.faa.gov/airports.

In reviewing the proposed policy, the FAA re-worded some of the language in Section IV to better clarify that airport sponsors should provide residential through-the-fence access plans.

Changes: A sentence in Section IV has been re-worded to more clearly convey airport sponsors' responsibility to provide residential through-the-fence access plans.

In reviewing the proposed policy, the FAA re-evaluated its proposal to require airport sponsors with existing residential through-the-fence arrangements to initiate a formal airport layout plan (ALP) revision after the FAA accepts their access plan. The FAA believes that the sponsor's pen and ink change should be sufficient to provide the information needed. Thus, the interim policy provides a more flexible approach and allows the airport sponsor to undertake this task on its own schedule as part of its planning process.

Changes: Section IV no longer requires airport sponsors to initiate a formal ALP revision within three years from the date their access plan is accepted. Instead, the airport sponsor will be expected to complete a formal ALP revision that fully depicts the scope of the existing residential through-the-fence arrangements the next time the sponsor initiates an airport master plan study or update.

In reviewing the proposed policy, the FAA found it was vague with regard to when an airport sponsor would need to re-evaluate its access plan. The interim policy clarifies that the FAA's acceptance of an access plan represents an agency determination, as opposed to a finding, that the airport sponsor has met the compliance standards for existing residential through-the-fence access for a period not to exceed 20 years.

Changes: The interim policy notes that the FAA will make a determination, which is more consistent with other actions made by the FAA Airport Compliance Division. It is also more specific with regard to the frequency at which sponsors will need to update their residential through-the-fence access plans. The interim policy identifies four events which would trigger an update of the access plans. Those events include: development of a new master plan, significant updates to an ALP, requests for federal participation in land acquisition, or any changes to the access agreement.

In reviewing the proposed policy, the FAA determined that language used to describe airports serving a function in the NPIAS, but unable to meet the standard of compliance, should be revised. The interim policy states that the FAA will consider the constraints placed on the utility of the airport to be a significant factor.

Changes: The interim policy has been revised to state, "The sponsor will not lose eligibility for entitlement grants on the basis of through-the-fence access, but the FAA will have to consider the constraints on the utility of the airport as a significant factor in AIP funding decisions."

In reviewing the proposed policy, the FAA revised the language used to describe airports that no longer have significant value in the national system. The interim policy states the FAA will address cases in which the residential

through-the-fence access cannot be reasonably mitigated through the development of an access plan and the use of that access adversely affects the airport's public use characteristics.

Changes: The interim policy has been revised to clarify the FAA will consider removing an airport from the NPIAS if residential through-the-fence access cannot be reasonably mitigated through development of an access plan and the use of that access affects the airport's public use characteristics.

In reviewing the proposed policy, the FAA found it was vague in its treatment of airport sponsors with existing residential through-the-fence access that fail to submit an access plan. The interim policy explains that failure to submit an access plan may jeopardize an airport sponsor's ability to compete for AIP grant funding beginning in Fiscal Year 2013.

Changes: The interim policy adds paragraph 6.c. to Section IV. This paragraph discusses the FAA's expectation that airports with existing residential through-the-fence access will develop appropriate access plans. Failure to do so may jeopardize an airport sponsor's AIP eligibility beginning in Fiscal Year 2013.

In reviewing this section, the FAA replaced all references to requests for "additional" residential through-the-fence access to "extend" residential through-the-fence access. The FAA also deleted any requirements that would be necessitated by a new access point.

Changes: Paragraph B of Section IV is titled "Requests to extend residential through-the-fence access at airports covered by this interim Policy". Similar changes have been made throughout this section, and references to new access points have been deleted. The interim policy also deletes the requirement that sponsors submit a revised ALP depicting any new access points.

In reviewing the requirements for sponsors proposing to extend residential through-the-fence access, the FAA refined its intent with regard to master plans. The interim policy specifies that airport sponsors should work with FAA staff to develop an appropriate scope of work for their master plan.

Changes: The paragraph describing the master plan requirements directs airport sponsors to work with the FAA ADO or regional division staff to develop an appropriate scope of work for their master plan.

Section V. Eligibility for AIP grants

In reviewing the proposed policy, the FAA found it was not clear in its explanation of future AIP eligibility and how the Agency will evaluate requests to fund public infrastructure and facilities that provide substantial benefit to private through-the-fence users. The proposed policy states the FAA will reduce its investment in such projects; however, the FAA will consider the constraints on the utility of the airport and determine if the project is sufficiently justified before making an investment decision.

Changes: The interim policy states the FAA will have to consider the constraints on the utility of the airport as a significant factor in AIP funding decisions. It also more clearly explains that the FAA may not be able to justify the federal investment in projects that result in substantial benefit to residential through-the-fence users.

Amendment to Grant Assurance 5

In reviewing the proposed policy, the FAA found many of the statements in this section to be duplicative of statements made in the preamble. The interim policy deletes these statements.

Changes: The description of item 2 has been shortened to succinctly summarize the interim policy.

1. Interim Policy on Existing Through-the-Fence Access From a Residential Property

In consideration of the foregoing, the Federal Aviation Administration adopts the following interim Policy on existing through-the-fence access to a federally-obligated airport from residential property:

Interim Policy on Existing Through-the-Fence Access to Airports from A Residential Property

Applicability

This interim Policy applies to all federally-obligated airports, including those with existing residential through-the-fence access or proposing to establish new residential through-the-fence access. All federally-obligated airports will be required to certify their status with regard to this policy.

For the purposes of this interim Policy statement:

In this sense "access" means:

1. An access point for taxiing aircraft across the airport boundary; *or*

2. The right of the owner of a particular off-airport residential property to use an airport access point to taxi an aircraft between the airport and that property.

"Existing access" through the fence is defined as any through-the-fence access that meets one or more of the following conditions:

1. There was a legal right of access from the property to the airport (e.g., by easement or contract) in existence as of September 9, 2010; *or*

2. There was development of the property prior to September 9, 2010, in reliance on the airport sponsor's permission for through-the-fence aircraft access to the airport; or

3. The through-the-fence access is shown on an FAA-approved airport layout plan (ALP) or has otherwise been approved by the FAA in writing, and the owner of the property has used that access prior to September 9, 2010.

"Extend an access" is defined as an airport sponsor's consent to renew or extend an existing right to access the airport from residential property or property zoned for residential use, for a specific duration of time, not to exceed 20 years.

"Development" is defined as excavation or grading of land needed to construct a residential property; or construction of a residence.

"Residential property" is defined as a piece of real property used for single- or multi-family dwellings; duplexes; apartments; primary or secondary residences even when co-located with a hangar, aeronautical facility, or business; hangars that incorporate living quarters for permanent or long-term use; and time-share hangars with living quarters for variable occupancy of any term.

"Transfer of access" through the fence is defined as one of the following transactions:

1. Sale or transfer of a residential property or property zoned for residential use with existing through-the-fence access; or

2. Subdivision, development, or sale as individual lots of a residential property or property zoned for residential use with existing through-the-fence access.

I. Existing Through-the-Fence Access From Residential Property at Federally-Obligated airports

The agency understands that it may not be practical or even possible to terminate through-the-fence access at many of those airports where that access already exists. Where access could be terminated, property owners have claimed that termination could have substantial adverse effects on their property value and investment, and airport sponsors seeking to terminate this access could be exposed to costly lawsuits. Accordingly, the FAA will not consider the existence of existing residential through-the-fence access by itself to be in noncompliance with the airport sponsor's grant assurances.

In some cases, the FAA has found that through-the-fence access rights can

interfere with the sponsor's ability to meet its obligations as sponsor of a federally assisted public use airport. This is discussed in detail at 75 FR 54946, 54948 (Sept. 9, 2010). As a result, the FAA believes that sponsors with existing through-the-fence access arrangements must adopt measures to substantially mitigate the potential problems with residential through-the-fence access where it exists to avoid future grant compliance issues. Therefore, the FAA, as a condition of continuing grants to airports with residential through-the-fence access, will require that sponsors adopt the measures to substantially mitigate the potential problems with residential through-the-fence access to avoid future grant compliance issues.

Accordingly, the sponsor of an airport where residential through-the-fence access or access rights already exist will be considered in compliance with its grant assurances if the airport depicts the access on its airport layout plan (ALP) and meets certain standards for safety, efficiency, ability to generate revenue to recover airport costs, and mitigation of potential noncompatible land uses. Those standards are listed in section II, *Standards for compliance at airports with existing through-the-fence access.* The FAA's review of those standards will be detailed in a Compliance Guidance Letter which will be issued concurrently and published on the FAA's Web site at www.faa.gov/airports. An airport sponsor covered by this interim Policy must seek FAA approval before entering into any arrangement that would extend (including renewal of access) through-the-fence access. Sponsors are reminded that nearby homeowners possess no right to taxi aircraft across the airport's property boundary, and no off-airport property owner will have standing to file a formal complaint under 14 CFR Part 16 with the FAA to challenge the sponsor's decision not to permit such access.

II. Standards for Compliance at Airports with Existing Through-the-Fence Access

The FAA understands that municipally-owned airports have varying degrees of zoning authority. For example, one airport sponsor may have strong zoning powers, while another may have none. Also, the nature of existing through-the-fence rights can greatly affect the sponsor's ability to implement measures to control access. Accordingly, the FAA does not expect every airport with existing residential through-the-fence access to adopt a uniform set of rules and measures to mitigate that access. However, the FAA does expect each such sponsor to adopt reasonable rules and implement measures that accomplish the following standards for compliance, to the fullest extent feasible for that sponsor. In general, the greater the number of residential through-the-fence access points and users of the airport and the higher the number of aircraft operations, the more important it is to have formal measures in effect to ensure the sponsor retains its proprietary powers and mitigates adverse effects on the airport.

The FAA's standards for compliance for any sponsor of an airport with existing residential through-the-fence access are as follows:

1. *General authority for control of airport land and access.* The airport sponsor has sufficient control of access points and operations across airport boundaries to maintain safe operations, and to make changes in airport land use to meet future needs.

2. *Safety of airport operations.* By rule, or by agreement with the sponsor, through-the-fence users are obligated to comply with the airport's rules and standards.

3. *Recovery of costs of operating the airport.* The airport sponsor can and does collect fees from through-the-fence users comparable to those charged to airport tenants, so that through-the-fence users bear a fair proportion of airport costs.

4. *Protection of airport airspace.* Operations at the airport will not be affected by hangars and residences on the airport boundary, at present or in the future.

5. *Compatible land uses around the airport.* The potential for noncompatible land use adjacent to the airport boundary is minimized consistent with grant assurance 21, Compatible Land Use.

These standards will be applied, on a case-by-case basis, in the FAA's evaluation of whether each airport with existing residential through-the-fence access meets the above requirements to the fullest extent feasible for that airport. In situations when access can be legally transferred from one owner to another without the airport sponsor's review, the FAA will treat the access as existing. Because the ability of some sponsors to control access has been compromised as a result of legal rights previously granted to through-the-fence users, existing access locations may be evaluated under the alternative criteria for some standards as indicated below, if applicable to that airport.

In some cases, an airport sponsor may seek to relocate an existing access point. If the sponsor can demonstrate that this action will improve the airport's overall safety or better address issues associated with the sponsor's long-term planning needs, the FAA will not consider the access rights associated with the replacement access point to extend an access. In order to transfer the terms of the existing access point to a new access point without a change in compliance status, the former existing access point must be removed. Such requests should be coordinated with the FAA Airports District Office (ADO) or Regional Airports Division and clearly depicted on the sponsor's ALP.

III. Standards for Compliance at Airports Proposing to Extend Through-the-Fence Access

Once allowed, residential through-the-fence access is very difficult to change or eliminate in the future. This is because residential owners, more so than commercial interests, typically expect that their residential property will remain suitable for residential use and protected from adverse effects for a long time. Residential buyers and their mortgage lenders may ensure that the property is purchased with rights that guarantee no change in the access to the airport for decades, or indefinitely. Because each additional residential through-the-fence access location introduces the potential for problems for the airport in the future, and because this access is effectively permanent and resistant to change once permitted, the FAA will review extensions of existing residential through-the-fence access at public use airports carefully.

The following supplemental standards will be applied to the FAA's case-by-case review of sponsors' proposals to extend residential through-the-fence access. In situations when the transfer of access from one owner to another requires the airport sponsor's concurrence, the FAA will treat the access as an extension. The FAA will not approve requests to extend access that are inconsistent with the sponsor's grant assurances (excluding grant assurance 5, Preserving Rights and Powers, paragraph "g" as amended by this notice). Furthermore, the sponsor will be required to demonstrate the following standards for compliance:

- The term of the access does not exceed 20 years.
- The sponsor provides a current (developed or revised within the last five years) airport master plan identifying adequate areas for growth that are not affected by the existence of through-the-fence access rights, or the sponsor has a process for amending or terminating existing through-the-fence access in order to acquire land that may

be necessary for expansion of the airport in the future.

• The sponsor will impose and enforce safety and operating rules on through-the-fence residents utilizing this access while on the airport identical to those imposed on airport tenants and transient users.

• The sponsor will charge through-the-fence residents utilizing this access fees that recover airport costs and fairly distribute the burden of airport fees across all airport users, to both tenants and through-the-fence users. Rates should increase on the same schedule as tenant fees. Fees that may be sufficient for this purpose include, without limitation:

○ Fees equal to tenant tie-down charges.

○ A fee that is based on the methodology used to establish tenant rates for land rental on the airport, e.g., 25 cents per square foot.

○ Ground leases for dedicated taxiway connections to off-airport properties.

○ Assessment of capital costs for general infrastructure.

○ A local tax assessment or levy on off-airport aircraft owners that is dedicated to airport's account.

○ Any methodology that reflects the high value of through-the-fence access.

• Through-the-fence residents will bear all the costs of infrastructure, including snow removal and maintenance, related to this access.

• Through-the-fence residents utilizing this access will grant the sponsor a perpetual avigation easement for overflight, including unobstructed flight through the airspace necessary for takeoff and landing at the airport.

• Through-the-fence residents utilizing this access, by avigation easement; deed covenants, conditions or restrictions; or other agreement, have acknowledged that the property will be affected by aircraft noise and emissions and that aircraft noise and emissions may change over time.

• Through-the-fence residents utilizing this access have waived any right to bring an action against the airport sponsor for existing and future operations and activities at the airport associated with aircraft noise and emissions.

• The sponsor has a mechanism for ensuring through-the-fence residents utilizing this access will file FAA Form 7460–1, Notice of Proposed Construction or Alteration, if necessary and complying with the FAA's determination related to the review of Form 7460–1.

• The sponsor has a mechanism for ensuring through-the-fence residents do not create or permit conditions or engage in practices that could result in airport hazards, including wildlife attractants.

• Where available, the airport sponsor or other local government has in effect measures to limit future use and ownership of the through-the-fence properties to aviation-related uses (in this case, hangar homes), such as through zoning or mandatory deed restrictions. The FAA recognizes this measure may not be available to the airport sponsor in all states and jurisdictions.

• If the residential community has adopted restrictions on owners for the benefit of the airport (such as a commitment not to complain about aircraft noise), those restrictions are enforceable by the airport sponsor as a third-party beneficiary, and may not be cancelled without cause by the community association.

• The access agreement is subordinate to the sponsor's current and all future grant assurances.

• The airport sponsor has developed a process for educating through-the-fence residents about their rights and responsibilities.

IV. Process and Documentation

A. Existing residential through-the-fence access.

1. *General.* The sponsor of an airport with existing residential through-the-fence access will be considered in compliance with its grant assurances, and eligible for future grants, if the FAA determines that the airport meets the applicable standards listed above under *Standards for compliance at airports with existing residential through-the-fence access.* The sponsor may demonstrate that it meets these standards by providing the ADO or regional division staff with a written description of the sponsor's authority and the controls in effect at the airport ("residential through-the-fence access plan" or "access plan"). Airport sponsors are encouraged to review the FAA's Compliance Guidance Letter on FAA Implementation and Review of Residential-Through-Fence Access Arrangements, which will be issued concurrently, prior to submitting their access plan. This guidance letter will be published on the FAA's Web site at *http://www.faa.gov/airports.* The ADO or regional division will review each access plan, on a case-by-case basis, to confirm that it addresses how the sponsor meets each of these standards at its airport. The ADO or regional division will forward its recommendations regarding each access plan to the Manager of Airport Compliance. Only the Manager may accept an airport sponsor's residential through-the-fence access plan. In reviewing the access plan, the Manager may consult with the Transportation Security Administration (TSA). The FAA will take into account the powers of local government in each state, and other particular circumstances at each airport. In every case, however, the access plan must address each of the basic requirements listed under section II of this interim Policy.

2. *Residential through-the-fence access plan.* The FAA will require evidence of compliance before issuing an AIP grant, beginning in Fiscal Year 2013. FY 2013 and later grants will include a special grant condition requiring the ongoing implementation of these access plans. Generally, the FAA will not award discretionary grants to the airport until the FAA accepts the sponsor's access plan as meeting the standards to the extent feasible for that airport. Therefore, airport sponsors should provide a residential through-the-fence access plan no later than the October 1st of the fiscal year in which the sponsor will request an AIP grant (i.e., sponsors that will request an AIP grant in Fiscal Year 2013 must submit an access plan no later than October 1, 2012; sponsors requesting an AIP grant in Fiscal Year 2014 must submit no later than October 1, 2013).

3. *Airport Layout Plan.* The FAA will require all residential through-the-fence access points to be identified on the airport's layout plan. A temporary designation may be added through a sponsor's pen and ink change to immediately identify the locations on the airport property that serve as points of access for off-airport residents. A formal ALP revision that fully depicts the scope of the existing residential through-the-fence arrangements should be completed the next time the airport sponsor initiates an airport master plan study or update.

A sponsor's failure to depict all residential through-the-fence access points may be considered an apparent violation of the sponsor's grant assurances, and the agency may consider grant enforcement under 14 CFR part 16.

4. *FAA review.* The FAA's acceptance of the access plan represents an agency determination that the airport has met the compliance standards for existing residential through-the-fence access for a period not to exceed 20 years. The following actions will require an airport sponsor to update its access plan prior to its 20-year expiration: development of a new master plan, significant updates

to an ALP, requests for federal financial participation in land acquisition, or any changes to the access agreement. An airport sponsor's failure to implement its access plan could result in a violation of the special grant condition and potentially lead to a finding of noncompliance.

5. *Airports currently in noncompliance.* Airports currently in noncompliance due to grant assurance violations related to through-the-fence access, such as grant assurance 19, Operation and Maintenance, will need to continue to work with ADO and regional division staff to establish an appropriate corrective action plan. An FAA-approved corrective action plan, once accepted by the FAA, will serve as the sponsor's access plan. The decision to restore the sponsor's compliance status will be made by the Manager of Airport Compliance. In cases where the airport's safety and utility have been compromised, the Manager may require the sponsor to take definitive steps to address those concerns before restoring the sponsor to a compliant status.

6. *Airports with existing residential through-the-fence access that do not meet the compliance standards.* The FAA recognizes that some airport sponsors will not be able to fully comply with the standards listed above, due to limits on the powers of the sponsor and/or other local governments, or on other legal limits on the sponsor's discretion to adopt certain measures. Other airports have the capability to adopt measures to satisfy the compliance standards but have not done so. The FAA will take the following action with respect to any obligated airport with existing residential through-the-fence access that does not meet the minimum compliance standards:

a. *Airports that serve a function in the National Plan of Integrated Airport Systems (NPIAS) but cannot fully meet the through-the-fence compliance standards.* Where the airport still substantially serves its intended function in the NPIAS, but residential through-the-fence access at the airport will have an adverse effect on the airport's operations, its ability to grow, or its ability to accept new kinds of aviation use, the FAA will consider a reduced level of future AIP investment in the airport. FAA evaluation of investment needs will reflect any impairment in the airport's utility due to residential through-the-fence use. The sponsor will not lose eligibility for entitlement grants on the basis of the through-the-fence access, but the FAA will have to consider the constraints on the utility of the airport to be a significant factor in AIP funding decisions.

b. *Airports that no longer have significant value in the national system.* Where the residential through-the-fence access cannot be reasonably mitigated through the development of an access plan, and use of that access adversely affects the airport's public use characteristics, the FAA will consider removal of the airport from the NPIAS consistent with the requirements of FAA Order 5090.3C *Field Formulation of the National Plan of Integrated Airport Systems (NPIAS).* The FAA may either take steps to recover unamortized grant funds, or may leave grant assurances in effect for the life of existing grants but award no new grants.

c. *Airports that fail to submit an access plan.* The FAA expects airport sponsors with existing residential through-the-fence access to develop an access plan which preserves their proprietary rights and powers and mitigates the inherent challenges posed by this practice. Beginning in Fiscal Year 2013, a sponsor's failure to comply with the interim policy may jeopardize its ability to compete for AIP grant funding.

B. *Requests to extend residential through-the-fence access at airports covered by this interim Policy*

As of the date of this notice March 18, 2011, a sponsor proposing to extend an access arrangement must submit a current airport master plan and a revised residential through-the-fence access plan as detailed below. The ADO or regional division will forward its recommendations regarding each request to extend access to the Manager of Airport Compliance (Manager). Only the Manager may approve an airport sponsor's request to extend access. In reviewing the proposal, the Manager may consult with the TSA.

1. *Master Plan.* A sponsor wishing to extend an existing residential through-the-fence access arrangement must submit a recent airport master plan to the ADO or regional division. The FAA considers a master plan to be recent if it was developed or updated within the past five years. The master plan should explain how the sponsor plans to address future growth, development, and use of the airport property over the next 20 years; airport sponsors should work with ADO or regional division staff to develop an appropriate scope of work for these master plans.

2. *Residential through-the-fence access plan.* The sponsor is responsible for revising its access plan, as discussed under section IV.A.2 of this interim Policy, to reflect how it will meet the standards for compliance for the extended access. Once accepting the revised access plan, the FAA will condition future AIP grants upon its ongoing implementation.

3. *Continuing obligations.* Once the revised access plan is accepted by the FAA, and if required, the revised ALP, is approved by the FAA, the sponsor must continue to comply with obligations described in section IV.A of this interim Policy.

V. Eligibility for AIP grants

A. *General.* Beginning in Fiscal Year 2013, a sponsor will be required to submit their residential through-the-fence access plans prior to notifying the FAA of its intent to apply for an AIP grant. The sponsor will not lose eligibility for entitlement grants on the basis of the through-the-fence access, but the FAA will have to consider the constraints on the utility of the airport to be a significant factor in AIP funding decisions.

B. *Public infrastructure and facilities with substantial benefit to private through-the-fence users.* The FAA may be unable to justify the federal investment in a proposed project when private residential developments with through-the-fence access will receive substantial value from that federally assisted airport infrastructure and/or facility.

C. *Exclusive or primary private benefit.* On-airport infrastructure and facilities used exclusively or primarily for accommodation of through-the-fence users are considered private-use and are ineligible for AIP grants.

2. The Proposed Amendment to the Standard AIP Sponsor Assurances

At this time, the FAA considers a sponsor's consent to any permission for through-the-fence access to the airport from a residential property that does not meet the definition of "existing access" in this interim policy to be inconsistent with the sponsor's grant assurances, specifically, the obligation to maintain rights and powers to control airport development and operation. Permitting such access to the airport may also result in violations of the obligation to impose a reasonable, not unjustly discriminatory rate structure that makes the airport as self-sustaining as possible, and the obligation to restrict areas adjacent to the airport to compatible land uses.

Accordingly, the FAA will consider a new through-the-fence access arrangement from a property used as a residence or zoned for residential use to be an apparent violation of the sponsor's grant assurances, and the agency may investigate any report of such action for

possible enforcement under 14 CFR part 16. Any action taken to strengthen, memorialize, or codify existing access in perpetuity beyond that described in an FAA approved residential through-the-fence access plan at an airport with existing access will also be considered a new grant of through-the-fence access. The sponsor will, of course, have the opportunity to present information and arguments to the FAA during the Part 16 process.

In consideration of the above, the FAA adds new paragraph g. to standard AIP sponsor assurance 5, to read as follows:

C. Sponsor Certification. The sponsor hereby assures and certifies, with respect to this grant that:

* * * * *

5. Preserving Rights and Powers.

* * * * *

g. It will not permit or enter into any arrangement that results in permission for the owner or tenant of a property used as a residence, or zoned for residential use, to taxi an aircraft between that property and any location on airport.

Issued in Washington, DC on March 14, 2011.

Randall S. Fiertz,

Director, Airport Compliance and Field Operations.

[FR Doc. 2011–6346 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Government/Industry NextGen Advisory Committee

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Charter Renewal.

SUMMARY: The FAA is issuing this notice to advise the public of the renewal of the RTCA Charter (FAA Order 1110.77T) for two years, effective April 2, 2011. The administrator is the sponsor of the committee. The objective of the advisory committee is to seek solutions to issues and challenges involving air transportation concepts, requirements, operational capabilities, and the associated use of technology and related considerations to aeronautical operations that impact the future Air Traffic Management System. RTCA provides the following two categories of recommendations to the FAA: Broad gauged policy and investment priority recommendations used by FAA when considering policy and program decisions; and minimum performance standards, reports, and guidance documents used by the FAA in regulatory decisions and rulemaking. Government regulatory and procurement practices reference or use RTCA standards (with or without change). The Secretary of Transportation has determined that that information and use of committee are necessary in the public interest in connection with the performance of duties imposed on the FAA by law.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org* or the FAA Business Operations Group, NextGen and Operations Planning, 800 Independence Avenue, SW., Washington, DC: telephone (202) 493–4409; fax (202) 267–5071.

SUPPLEMENTARY INFORMATION: Steering Committee and Special Committee meetings are open to the public and announced in the **Federal Register**, except as authorized by Section 10(d) of the Federal Advisory Committee Act.

Issued in Washington, DC, on March 15, 2011.

Kathy Hitt,

RTCA Advisory Committee.

[FR Doc. 2011–6525 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Grants Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request for grant proposals for the Commercial Space Transportation Grant Program.

SUMMARY: This notice solicits Fiscal Year (FY) 2011 grant proposals to continue the development of a Commercial Space Transportation infrastructure system, which supports the National Space Policy and Congressional intent. Begun in 2010, the program supports the Commercial Space Transportation industry by identification, prioritization, and funding for Commercial Space Transportation infrastructure projects.

It must be noted that with the FY 2011 Congressional appropriation not yet enacted, the FAA's Office of Commercial Space Transportation (AST) does not currently have funding for the Commercial Space Transportation Grants Program. Should there be an appropriation for the Commercial Space Transportation Grants Program; the FAA/AST intends to swiftly execute grant awards within FY 2011. To facilitate this, the FAA/AST is requesting grant applications at this time. The FAA/AST intends to receive, process, and evaluate the applications in a timely manner, and in accordance with the notional schedule listed below, so should there be an appropriation, the recipients will already be selected and the awards can be made within FY 2011. There remains the possibility that no funds will be appropriated in FY 2011 for the Commercial Space Transportation Grants Program. If no funds are appropriated, no grant applications submitted in response to this Notice will be approved and funded.

Due to time constraints, this Notice will be the only solicitation made for FY 2011 projects and proposals. The FAA/AST will review and evaluate all applications for a grant received by the deadline, pursuant to 49 United States Code (U.S.C.) Chapter 703 (to be recodified at 51 U.S.C. Chapter 511). The FAA/AST may make one or more grant awards based upon its evaluations of the submissions. All grants awarded under the Commercial Space Transportation Grants Program are discretionary awards. Projects to be funded under the Commercial Space Transportation Grants Program must carry out commercial space transportation infrastructure development, as defined in 49 U.S.C. 70301 (to be recodified as 51 U.S.C. 51101).

DATES: In order for the FAA/AST to award funds (if appropriated) prior to the end of FY 2011, the following notional schedule is provided.

Submission Open Period Opens: March 18, 2011

Submission Open Period Closes: May 13, 2011

Review and Approval Period: May 16, 2011 thru June 30, 2011

Announcement: July 15, 2011

ADDRESSES: Applicants can get more information about the Commercial Space Transportation Grants Program, to include a checklist for the submission package, by:

1. Accessing the Office of Commercial Space Transportation website at: *http://www.faa.gov/go/ast;* or

2. Contacting Glenn Rizner or Julie Price, AST–100, for program questions; or

3. Contacting Greg Carter, AGC–510, for legal questions.

	Office	Fax	E-mail
Glenn Rizner	202–267–3194	202–267–5463	*Glenn.H.Rizner@faa.gov.*
Julie Price	202–493–5486	202–267–5463	*Julie.Price@faa.gov.*
Greg Carter	202–267–3186	202–267–5261	*Greg.Carter@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Commercial Space Transportation Grants Program is intended to "ensure the resiliency of the space transportation infrastructure in the United States." To help further establish United States' Commercial Space Transportation-related goals, Congress established a Space Transportation Infrastructure Grants Program codified under 49 U.S.C. Chapter 703—Space Transportation Infrastructure Matching Grants. Congressional authorization was established FY 1994 for the use of Federal monies to fund up to fifty percent (50%) of total project cost in conjunction with state and local government funding. The legislation also requires a minimum of ten percent (10%) of the total project cost come from private funding. The first Congressional appropriation for the Commercial Space Transportation Grants Program came in FY 2010.

The FAA/AST reviews, evaluates, and oversees the Commercial Space Transportation Grants Program. Notionally, the award of the grant monies will be on or about July 15, 2011. To meet this award date, applicants must submit their grant proposals on or before May 13, 2011. Additional information related to the Commercial Space Transportation Grants Program can be found at the Office of Commercial Space Transportation website or by contacting one of the Points of Contacts; this information is listed above.

The Commercial Space Transportation Grants Program

To meet the intent of the program, development projects eligible for funding include:

1. Technical and environmental studies; or

2. Construction, improvement, design, and engineering of space transportation infrastructure (including facilities and associated equipment).

The Commercial Space Transportation Grants Program will not fund more than 50% of the total project cost, and project financing must include a private component of at least 10% of the total project cost.

Given that the FAA/AST may award multiple grants, applicants may submit multiple grant proposals, provided they are for separate projects and meet the matching requirements independently.

Environmental Requirements

Approval of grant funding is a major federal action subject to review under the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.,* as implemented by the regulations of the Council on Environmental Quality at 40 CFR part 1500 and FAA Order 1050.1E, and other Federal environmental laws. Because of this, the FAA anticipates that it may be most cost-effective for applicants who have already undergone NEPA review to apply for a grant this fiscal year.

In order for a launch site to receive a license to operate, a NEPA review will already have been conducted. The launch site operator could seek a grant for projects that the FAA considered as part of that license. Although having a license is not a requirement for a grant award, the environmental requirements may already be met for launch sites with a license.

Under 49 U.S.C. 70304 (to be recodified as 51 U.S.C. 51104), infrastructure development projects selected for a Commercial Space Transportation Grant must meet three additional environmental requirements:

1. The project must provide for the protection and enhancement of the natural resources and the quality of the environment of the United States. Specifically, if a project will have a significant, adverse environmental impact, the FAA/AST shall approve the grant application only after finding that no feasible and prudent alternative to the project exists and that all reasonable steps have been taken to minimize the adverse effect.

2. The sponsor must certify that an opportunity for a public hearing has been provided to consider the economic, social, and environmental impacts of the project and its consistency with the goals of any planning carried out by the community.

3. The Governor of the State in which the project is located, or his/her designee, must certify that there is reasonable assurance the project will be located, designed, constructed, and operated to comply with applicable air and water quality standards.

Planning projects, such as technical and environmental studies, normally qualify for categorical exclusion (CATEX) under NEPA and would not trigger the requirements listed above. If, the project normally qualifies for a CATEX from environmental review, the grant proposal should reference the relevant paragraph in FAA Order 1050.1E, *Policies and Procedures from Considering Environmental Impacts,* and address whether extraordinary circumstances exist that warrant preparation of an environmental assessment (EA) or environmental impact statement (EIS).

For more details about the environmental review for commercial space transportation activities, *please see Guidelines for Compliance with the National Environmental Policy Act and Related Environmental Review Statutes for the Licensing of Commercial Launches and Launch Sites* at *http://www.faa.gov/about/office_org/headquarters_offices/ast/environmental/review.*

Who May Apply for a Commercial Space Transportation Grant

The FAA/AST may make project grant awards to "sponsors," per 49 U.S.C. 70302 (to be recodified as 51 U.S.C. 51102). Per 49 U.S.C. 70301(6) (to be recodified as 51 U.S.C. 51101(6)), a "sponsor" is a public agency that submits an application for a project grant. Per 49 U.S.C. 70301(5) (to be recodified as 51 U.S.C. 51101(5)), a "public agency" is a State or agency of a State, a political subdivision of a State, or a tax-supported organization.

Grant Award

The FAA/AST intends to award Commercial Space Transportation Grants on or about July 15, 2011. An FAA/AST grant offer letter may contain requirements for assurances to ensure the grants are consistent with 49 U.S.C. Chapter 703 (to be recodified as 51 U.S.C. Chapter 511).

How To Apply for a Commercial Space Transportation Grant

The application submission must include the following:

1. Cover letter, signed by public agency senior official, demonstrating the legal authority to engage in the project.

2. Detail as to how the proposed grant project meets the requirements of Chapter 703 (recodified as Chapter 703):

a. Documentation demonstrating authority as a public agency.

b. Demonstration that the grant will not be for more than 50% of the total cost of the project.

c. Letter(s) of Commitment from the private sector for at least 10% of the total cost of the project

d. Detailed description of the project

e. Contributions to capabilities that serve the United States' space transportation needs

f. Impacts on the competitiveness of the United States space transportation industry

g. Discussion of environmental considerations, if applicable

3. Consent from the head of the appropriate agency, should the project use Government property (land, equipment, etc.)

4. SF–424, Application for Federal Assistance (OMB Number 4040–0004)

5. One of the following:

a. SF–424A for non-construction proposals

b. SF–424C for construction proposals

The forms request specific applicant information, project information, and an estimate of the funding and duration of the project. They are available at *http://www.grants.gov.*

Applicants for the Commercial Space Transportation Grants Program must submit grant applications to the FAA/AST. Applicants must submit an original copy of the completed grant proposal, plus four additional copies. One copy (not the original) may be submitted electronically to Mr. Glenn Rizner at *Glenn.H.Rizner@faa.gov* and Ms. Julie Price at *Julie.Price@faa.gov,* however the original and additional copies must be submitted to: Federal Aviation Administration, Office of Commercial Space Transportation, AST–100, c/o Mr. Glenn Rizner or Ms. Julie Price, 800 Independence Avenue, SW., Suite 325, Washington, DC 20591.

Should one copy be submitted electronically, a time stamp will be recorded for the submission. The original and all other copies must reach the office on or before 12 p.m. (noon), Eastern Time, Friday, May 13, 2011. Should no copy be submitted electronically, the original and additional copies still must reach the office on or before 12 p.m. (noon), Eastern Time, Friday, May 13, 2011. There will be no allowance for extensions of time.

Previously submitted grant applications do not carry over and will not be considered. Applicants must resubmit past projects for consideration in the new fiscal year.

Issued in Washington, DC, March 10, 2011.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 2011–6325 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee—Public Teleconference

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Commercial Space Transportation Advisory Committee Teleconference.

SUMMARY: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 2), notice is hereby given of a teleconference of the Space Transportation Operations Working Group (STOWG) of the Commercial Space Transportation Advisory Committee (COMSTAC). The teleconference will take place on Tuesday, April 5, 2011, starting at 11 a.m. Eastern Daylight Time. Individuals who plan to participate should contact Susan Lender, DFO, (the Contact Person listed below) by phone or e-mail for the teleconference call in number. The proposed agenda for this teleconference is to review the issues discussed at the February 17, 2011, STOWG teleconference. These issues include Orbital Debris and the costs of compliance with orbital debris standards, the Concept of Operations draft report on reentry debris, Space Operations framework, and the International Code of Conduct being drafted by the European Union. The working group will also finalize plans for the May Working Group meetings to be held in Washington, DC.

Interested members of the public may submit relevant written statements for the COMSTAC working group members to consider under the advisory process. Statements may concern the issues and agenda items mentioned above or additional issues that may be relevant for the U.S. commercial space transportation industry. Interested parties wishing to submit written statements should contact Susan Lender, DFO, (the Contact Person listed below) in writing (mail or e-mail) by March 30, 2011, so that the information can be made available to COMSTAC members for their review and consideration before the April 5, 2011, teleconference. Written statements should be supplied in the following formats: One hard copy with original signature or one electronic copy via e-mail.

An agenda will be posted on the FAA Web site at *http://www.faa.gov/go/ast.*

Individuals who plan to participate and need special assistance should inform the Contact Person listed below in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Susan Lender (AST–100), Office of Commercial Space Transportation (AST), 800 Independence Avenue, SW., Room 325, Washington, DC 20591, telephone (202) 267–8029; E-mail *susan.lender@faa.gov.* Complete information regarding COMSTAC is available on the FAA Web site at: *http://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/.*

Issued in Washington, DC, March 11, 2011.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 2011–6324 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Availability of the Draft Tier I Environmental Impact Statement

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Availability of the Draft Tier I Environmental Impact Statement.

SUMMARY: The FHWA, on behalf of the California Department of Transportation (Caltrans), announces the availability of the Draft Tier I Environmental Impact Statement (EIS) for a proposed route adoption study in Fresno County, California.

DATES: Public circulation of this document will begin on March 16, 2011 and will end on May 9, 2011. An open forum public hearing will be held for this project on Wednesday, March 30, 2011 between 4:30 p.m. and 7:30 p.m. in Kerman. The location is Kerman Community Center, 15101 W. Kearney Boulevard, Kerman, CA 93630.

ADDRESSES: This document will be available at the Caltrans District 6 Office, 1352 West Olive Avenue, Fresno, CA 93728 on weekdays from 8 a.m. to 4 p.m.. Copies of the document can also be read at the Fresno County Library, 2420 Mariposa Street, Fresno, CA 93721; the Kerman Branch Library, 15081 West Kearney Boulevard, Kerman, CA, 93630; and the Mendota

Branch Library, 1246 Belmont Avenue, Mendota, CA, 93640. The Draft Tier I EIS is also available at *http://www.dot.ca.gov/dist6/environmental/projects/sr180westside/.*

FOR FURTHER INFORMATION CONTACT: G. William "Trais" Norris III, Sierra Pacific Environmental Analysis Branch, 2015 East Shields Avenue, Suite 100, Fresno, CA 93726. E-mail *trais_norris@dot.ca.gov.* Telephone (559) 243–8178.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans as the delegated National Environmental Policy Act (NEPA) agency, has prepared a Draft Tier I EIS on a proposal for a route adoption of State Route 180 between Interstate 5 and the end of the freeway portion of State Route 180, just west of the Fresno City limits in Fresno County. Caltrans approved the Draft Tier I EIS on March 8, 2011.

The proposed route adoption will identify the most appropriate location for an ultimate four-lane expressway for State Route 180 within the study area. Three route adoption alternatives and the No-Action/No-Project Alternative are under consideration. For the purposes of a route adoption, each alternative is 1,000 feet wide.

Alternative 1 extends approximately 48 miles across the valley, beginning at a point where a direct westerly extension of Belmont Avenue would intersect Interstate 5 and generally follows existing State Route 180 until it reaches a connection with the existing State Route freeway terminus at Brawley Avenue. This alternative contains three variations that were developed to bypass or provide access to affected communities.

Alternative 2 extends approximately 49 miles across the valley, beginning at a point where a direct westerly extension of Belmont Avenue would intersect Interstate 5 and follows the same alignment at Alternative 1 until just east of State Route 33. It then travels northeasterly to generally follow the McKinley Avenue, Belmont, and Nielsen Avenue alignments as it travels east to join the existing State Route 180 freeway.

Alternative 3 extends approximately 50 miles across the valley. This alternative begins at an existing interchange on Interstate 5 at Shields Avenue and runs eastward 18 miles to State Route 33, north of Mendota. From here, the route continues eastward generally paralleling to the south of the San Joaquin River/Madera County line. The route veers southeasterly to coincide with Alternative 2 for the remainder of the alignment. The No-Action/No-Project Alternative would result in no action being taken.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: March 14, 2011.

Maiser Khaled,

Acting Director, State Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. 2011–6374 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Transfer of Federally Assisted Land or Facility

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of intent to transfer Federally assisted land or facility.

SUMMARY: Section 5334(h) of the Federal Transit Laws, as codified, 49 U.S.C. 5301, *et seq.,* permits the Administrator of the Federal Transit Administration (FTA) to authorize a recipient of FTA funds to transfer land or a facility to a public body for any public purpose with no further obligation to the Federal Government if, among other things, no Federal agency is interested in acquiring the asset for Federal use. Accordingly, FTA is issuing this Notice to advise Federal Agencies that the City of Terre Haute by and through its Board of Public Works intends to transfer a portion of a facility to Indiana State University for use as a parking garage for students, faculty and general public. The portion of the facility being transferred is located on land owned by Indiana State University Board of Trustees and leased to the City of Terre Haute under a forty (40) year ground lease dated January 1, 2006. The facility is located at 750 Cherry Street, Terre Haute, Indiana and is bounded on the west by 7th Street, on the east by 8th Street, on the north by Larry Bird Avenue and on the south by Cherry Street. It is taxed as one parcel # 84–06–22–307–002.000–002 but is more specifically comprised of Lots 98, 99, 100, and part of Lots 118, 119, 120 and 120 in Chauncey Rose's Addition to the Town (now city) of Terre Haute. The facility is located on the campus of Indiana State University and is adjacent to the Hulman Civic Center, a commercial office building housing State of Indiana Offices, Hilton Garden Inn and is one block north of the downtown Terre Haute area.

The facility to be transferred is comprised of approximately Two-hundred Twenty-eight Thousand (228,000) square feet of parking structure including Six Hundred Twenty-six (626) parking spaces. Construction material includes concrete with brick façade.

The transfer does not include Eighteen Thousand Three Hundred (18,300) square feet on the east end of the structure occupied by the City of Terre Haute Transit Department.

DATES: *Effective Date:* Any Federal agency interested in acquiring the facility must notify the FTA Region V Office of its interest by April 17, 2011.

ADDRESSES: Interested parties should notify the Regional Office by writing to Marisol R. Simon, Regional Administrator, Federal Transit Administration, 200 West Adams, Suite 320, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Cecelia M. Comito, Regional Counsel, at 312–353–4118.

SUPPLEMENTARY INFORMATION:

Background

49 U.S.C. 5334(h) provides guidance on the transfer of capital assets. Specifically, if a recipient of FTA assistance decides an asset acquired under this chapter at least in part with that assistance is no longer needed for the purpose for which it was acquired, the Secretary of Transportation may authorize the recipient to transfer the asset to a local governmental authority to be used for a public purpose with no further obligation to the Government. 49 U.S.C. 5334(h)(l).

Determinations

The Secretary may authorize a transfer for a public purpose other than mass transportation only if the Secretary decides:

(A) The asset will remain in public use for at least 5 years after the date the asset is transferred;

(B) There is no purpose eligible for assistance under this chapter for which the asset should be used;

(C) The overall benefit of allowing the transfer is greater than the interest of the Government in liquidation and return of the financial interest of the Government in the asset, after considering fair market value and other factors; and

(D) Through an appropriate screening or survey process, that there is no interest in acquiring the asset for

Government use if the asset is a facility or land.

Federal Interest in Acquiring Land or Facility

This document implements the requirements of 49 U.S.C. 5334(h)(l)(D) of the Federal Transit Laws. Accordingly, FTA hereby provides notice of the availability of the land or facility further described below. Any Federal agency interested in acquiring the affected facility should promptly notify the FTA.

If no Federal agency is interested in acquiring the existing facility, FTA will make certain that the other requirements specified in 49 U.S.C. 5334(h)(1)(A) through (C) are met before permitting the asset to be transferred.

This facility was constructed as a multi modal transportation facility and commenced operation in 2008. It contains approximately Two Hundred Forty-six Thousand, Three Hundred (246,300) square feet of which Two Hundred Twenty-eight Thousand (228,000) is utilized for vehicular parking and Eighteen Thousand, Three Hundred (18,300) square feet are utilized by the City of Terre Haute Transit Department for operation of a bus transfer and office location.

The land upon which the facility is located is leased by the City of Terre Haute by and through its Board of Public Works from Indiana State University under a forty (40) year ground lease. The City of Terre Haute will retain the transit portion of the facility until the lease expires.

Issued on: March 8, 2011.

Marisol Simón,

Regional Administrator.

[FR Doc. 2011–6331 Filed 3–17–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD–2011–0021]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel TOP FLIGHT.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0021 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before April 18, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2011–0021. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION:

As described by the applicant the intended service of the vessel TOP FLIGHT is:

Intended Commercial Use of Vessel: "I intend to use the vessel for carrying 6 passengers for hire for the intent of sport fishing. The fish will not be sold at any time."

Geographic Region: "Michigan, New York, Ohio, Pennsylvania."

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78)

Dated: March 3, 2011.

By Order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2011–6181 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–81–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[NHTSA Docket No. NHTSA–2011–0038]

National Emergency Medical Services Advisory Council (NEMSAC); Notice of Federal Advisory Committee Meeting

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Meeting Notice—National Emergency Medical Services Advisory Council.

SUMMARY: NHTSA announces a meeting of NEMSAC to be held in the Metropolitan Washington, DC area. This notice announces the date, time and location of the meeting, which will be open to the public. The purpose of NEMSAC is to provide a nationally recognized council of emergency medical services representatives and consumers to provide advice and recommendations regarding Emergency Medical Services (EMS) to the U.S. DOT's NHTSA.

DATES: The meeting will be held on April 14, 2011, from 1 p.m. to 5 p.m., and on April 15, 2011, from 8 a.m. to 12 Noon. A public comment period will take place on April 14, 2011, between 3:15 p.m. and 4:15 p.m.

Comment Date: Written comments or requests to make oral presentations should be received by April 11, 2011.

ADDRESSES: The meeting will be held at the Crowne Plaza Hotel National Airport, 1480 Crystal Drive, Arlington, VA 22202. Persons wishing to make an oral presentation or who are unable to attend or speak at the meeting may

submit written comments. Written comments and requests to make oral presentations at the meeting should reach Drew Dawson at the address listed below and should be received by April 11, 2011.

All submissions received may be submitted by either one of the following methods: (1) You may submit comments by e-mail: *drew.dawson@dot.gov* or *noah.smith@dot.gov* or (2) you may submit comments by fax: (202) 366–7149.

FOR FURTHER INFORMATION CONTACT: Drew Dawson, Director, Office of Emergency Medical Services, NHTSA, 1200 New Jersey Avenue, SE., NTI–140, Washington, DC 20590, telephone number (202) 366–9966; e-mail *Drew.Dawson@dot.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. 1 *et seq.*) The NEMSAC will be holding its tenth meeting on Thursday and Friday, April 14 and 15, 2011, at the Crowne Plaza Hotel National Airport, 1480 Crystal Drive, Arlington, VA 22202.

Agenda of Council Meeting, April 14–15, 2011

The tentative agenda includes the following:

Thursday, April 14, 2011

(1) Opening Remarks.
(2) Introduction of Members and all in attendance.
(3) Review and Approval of Minutes of last Meeting.
(4) Update from NHTSA Office of EMS.
(5) Discussion of Role of the Federal Government in EMS.
(6) Public Comment.
(7) Discussion of New and Emerging Issues.

Friday, April 15, 2011

(1) Introductions.
(2) Committee Presentations.
(3) 2011 Meeting Dates.
(4) Federal Partner Update—Health Resources and Services Administration (HRSA).
(5) Culture of Safety Presentation and Discussion of NEMSAC Role.
(6) Unfinished Business/Continued Discussion from Previous Day.
(7) Next Steps and Adjourn.

A public comment period will take place on April 14, 2011, between 3:15 p.m. and 4:15 p.m.

Public Attendance: The meeting is open to the public. Persons with disabilities who require special assistance should advise Drew Dawson of their anticipated special needs as early as possible. Members of the public who wish to make comments on Thursday, April 14 between 3:15 p.m. and 4:15 p.m. are requested to register in advance. In order to allow as many people as possible to speak, speakers are requested to limit their remarks to 3 minutes. For those wishing to submit written comments, please follow the procedure noted above.

This meeting will be open to the public. Individuals wishing to register are encouraged to provide their name, affiliation, phone number, and e-mail address to Drew Dawson by e-mail at *drew.dawson@dot.gov* or by telephone at (202) 366–9966 no later than April 11, 2011. There will be limited seating, so please register early.

Minutes of the NEMSAC Meeting will be available to the public online through *http://www.ems.gov.*

Issued on: March 15, 2011.

Drew E. Dawson,

Director, Office of Emergency Medical Services.

[FR Doc. 2011–6463 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[NHTSA Docket No. NHTSA–2011–0037]

Federal Interagency Committee on Emergency Medical Service (FICEMS) Teleconference Meeting

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Meeting Notice—Federal Interagency Committee on Emergency Medical Services.

SUMMARY: NHTSA announces a teleconference meeting of the Federal Interagency Committee on Emergency Medical Services (FICEMS) to be held as a stakeholder input call-in session to receive input regarding the current and future role of the Federal government in EMS and options for establishing or designating a Federal lead office for EMS. This notice announces the date and time of the meeting, which will be open to the public, as well as call-in information.

DATES: The meeting will be held on Monday, April 11, 2011, from 1:30 p.m. to 3 p.m.

FOR FURTHER INFORMATION CONTACT: Drew Dawson, Director, Office of Emergency Medical Services, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., NTI–140, Washington, DC 20590, Telephone number (202) 366–9966; E-mail *Drew.Dawson@dot.gov.*

SUPPLEMENTARY INFORMATION: The Federal Interagency Committee on Emergency Medical Services (FICEMS) was created by law to help ensure coordination among Federal agencies involved with State, local, tribal, or regional emergency medical services and 9–1–1 systems. As discussed at their December 16, 2010 meeting, FICEMS is assessing the current and future role of the Federal government in EMS and evaluating the options for establishing or designating a Federal lead office or agency for EMS. The National Security Staff Resilience Directorate has requested that FICEMS engage with stakeholders and develop an options paper by May 15, 2011.

FICEMS is interested in any stakeholder input about the role of the Federal government in the full continuum of emergency medical services and emergency and trauma care for adults and children–including medical 9–1–1 and emergency medical dispatch, prehospital emergency medical services (both ground and air), hospital-based emergency care and trauma care, and medical-related disaster preparedness.

With respect to this full continuum of emergency medical services and emergency and trauma care for adults and children, any stakeholder input would be appreciated regarding topics such as:

- The role of the Federal government
- Activities or functions that should not be the role of Federal government
- The role of a Federal lead office for EMS if it were established, including the functions/issues it should perform and address
- Other comments or suggestions

This meeting of the FICEMS will focus specifically on receiving input from Stakeholders on the above issues. The meeting will be open to the public via telephone.

Call-In Information: Members of the public wishing to attend the meeting or provide input to FICEMS should call 1–877–804–0827 using the meeting ID number 51813069, on Monday, April 11, 2011, from 1:30 p.m. to 3 p.m.

Minutes of the FICEMS meeting will be available to the public online at *http://*www.ems.gov.

Issued on: March 15, 2011.

Michael L. Brown,

Acting Associate Administrator for Research and Program Development.

[FR Doc. 2011–6379 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2011–0033; Notice 1]

Goodyear Tire and Rubber Company, Receipt of Petition for Decision of Inconsequential Noncompliance

Goodyear Tire and Rubber Company, (Goodyear),[1] has determined that approximately 26,224 Goodyear Assurance ComforTred Touring passenger replacement car tires manufactured between January 4, 2010 and September 11, 2010, do not fully comply with paragraph S5.5(e) of Federal Motor Vehicle Safety Standard (FMVSS) No. 139, *New Pneumatic Radial Tires for Light Vehicles.* Goodyear has filed an appropriate report pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports, dated December 16, 2010.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Goodyear has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Goodyear's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 26,224 Goodyear Assurance ComforTred Touring passenger car replacement tires, size 215/70R15 that were manufactured between January 4, 2010 and September 11, 2010.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, these provisions only apply to the 26,224 [2] tires that have already passed from the manufacturer to an owner, purchaser, or dealer.

Paragraph S5.5(e) of FMVSS No. 139 require in pertinent part:

> S5.5 Tire markings. Except as specified in paragraphs (a) through (i) of S5.5, each tire must be marked on each sidewall with the information specified in S5.5(a) through (d) and on one sidewall with the information specified in S5.5(e) through (i) according to the phase-in schedule specified in S7 of this standard. The markings must be placed between the maximum section width and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area that is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, those markings must appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings must be in letters and numerals not less than 0.078 inches high and raised above or sunk below the tire surface not less than 0.015 inches * * *
>
> (e) The generic name of each cord material used in the plies (both side-wall and tread area) of the tire; * * *

Goodyear explains that the noncompliance is that, due to a mold labeling error, the sidewall marking on the reference side of the tires incorrectly describes the generic name of the cord material in the tread area of the tires as required by paragraph S5.5(e). Specifically, the tires in question were inadvertently manufactured with "Tread: 1 Polyester Cord + 2 Steel Cords + 1 Polyester Cord. The labeling should have been "Tread: 1 Polyester Cord + 2 Steel Cords + 1 Nylon Cord."

Goodyear argues that this noncompliance is inconsequential to motor vehicle safety because while the non-compliant tires are mislabeled they meet or exceed all applicable Federal Motor Vehicle Safety Standards, the noncompliant sidewall marking does not create an unsafe condition, and all other labeling requirements have been met.

Goodyear points out that NHTSA has previously granted similar petitions for non-compliances in sidewall marking.

Goodyear additionally states that it has corrected the affected tire molds and all future production will have the correct material shown on the sidewall.

In summation, Goodyear believes that the described noncompliance of its tires to meet the requirements of FMVSS No. 139 is inconsequential to motor vehicle safety, and that its petition, to exempt from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120, and should be granted.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.

c. Electronically: by logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/.* Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Documents submitted to a docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets. DOT's complete Privacy Act Statement is available for review in the **Federal Register** published on April 11, 2000, (65 FR 19477–78).

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: April 18, 2011.

[1] Goodyear Tire and Rubber Company (Goodyear) is a replacement equipment manufacturer incorporated in the state of Ohio.

[2] Goodyear's petition, which was filed under 49 CFR part 556, requests an agency decision to exempt Goodyear as a replacement equipment manufacturer from the notification and recall responsibilities of 49 CFR part 573 for 26,224 of the affected tires. However, the agency cannot relieve Goodyear distributors of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant tires under their control after Goodyear recognized that the subject noncompliance existed. Those tires must be brought into conformance, exported, or destroyed.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: March 14, 2011.

Claude H. Harris,

Acting Associate Administrator for Enforcement.

[FR Doc. 2011–6380 Filed 3–17–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modification of special permits (*e.g.* to provide for additional hazardous materials, packaging design changes, additional mode of transportation, *etc.*) are described in footnotes to the application number. Application numbers with the suffix "M" denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before April 4, 2011.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, Southeast, Washington DC or at *http://regulations.gov.*

This notice of receipt of applications for modification of special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5 117(b); 49 CFR 1.53(b)).

Issued in Washington, DC on March 10, 2011.

Donald Burger,

Chief, Special Permits and Approvals Branch.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
MODIFICATION SPECIAL PERMITS				
7765–M		Carleton Technologies, Inc., Orchard Park, NY.	49 CFR 173.302(a)(4); 175.3	To modify the special permit to authorize a new pressure vessel for use as part of a missile gas storage system.
11911–M		Transfer Flow, Inc., Chico, CA.	49 CFR 178.700 thru 178.819	To modify the special permit to authorize new part numbers; to add several new refueling systems; to add two new fuel caps; and to add several new fuel tanks to the special permit.
13199–M		Carrier Corporation, Jamesbug, NJ.	49 CFR 173.302 (c);173.306(e)(1)	To modify the special permit to authorize a broader range for the amount of refrigerant gas.
13997–M		Maritime Helicopters, Homer, AK.	49 CFR 172.101(9b); 172.302(c)	To modify the special permit to authorize the transportation in commerce of Class I explosives by helicopter sling load.
14966–M		Vulcore Industrial LLC, Fort Wayne, IN.	49 CFR 173.302 and 180.205	To modify the special permit to authorize a change in mating sealing surface configuration design.
15118–M		Mystery Creek Resources Inc., McGrath, AK.	49 CFR 172.101 Column (9B)	To reissue the special permit originally issued as an emergency as a permanent special permit.

[FR Doc. 2011–6184 Filed 3–17–11; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before April 18, 2011.

Address Comments To: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New

Jersey Avenue, Southeast, Washington, DC or at *http://regulations.gov.*

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on March 10, 2011.

Donald Burger,

Chief, Special Permits and Approvals Branch.

NEW SPECIAL PERMITS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
15276–N		Ecotec Manufacturing Inc. d.b.a Yiwu City Machine Factory, Okeechobee, FL.	49 CFR 173.304a and 178.33	To authorize the manufacture, marking, sale and use of non-refillable non-DOT specification inside metal container similar to a DOT specification 2Q for the transportation in commerce of Division 2.2 compressed gases. (mode 1).
15279–N		University of Colorado at Boulder, CO.	49 CFR Parts 171–180	To authorize the transportation in commerce of Division 6.2 materials without being subject to the Hazardous Materials Regulations when transported for short distances by motor vehicle (less than 2 miles). (mode 1).
15282–N		Lockheed Martin Space Systems Company, Denver, CO.	49 CFR 172.101 Column (9B), 173.301(f), 173.302a(a)(1) and 173.304 a(a)(2)	To authorize the transportation in commerce of anhydrous ammonia in heat pipes (modes 1, 2, 3, 4).
15284–N		Solvay Fluorides, LLC, Houston, TX.	49 CFR 179.15(a), 173.31(e)(2)(ii) and 173.244 (a)(2)	To authorize the transportation in commerce of anhydrous hydrogen fluoride in a DOT 112S500I car with a minimum shell thick-thickness of 1.263″ and full height headshields. (mode 2).
15296–N		ATK Launch Systems Inc., Brigham City, UT.	49 CFR 172.101 Column (8C) and 173.211	To authorize the transportation in commerce of a Division 4.1 material in alternative packaging by motor vehicle. (mode 1).

[FR Doc. 2011–6183 Filed 3–17–11; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35475]

Port of Ivory, LLC—Operation Exemption—Line of Railroad in Tulare County, CA

Port of Ivory, LLC (Port), a limited liability company and noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to operate about 1,500 track feet of existing railroad trackage inside an existing industrial facility it owns in Tulare County, California. The current rail facilities on Port's property consist of 2 sidings that connect with a rail line operated by the San Joaquin Valley Railroad Company (SJVR) at a point known as Ivory (milepost 232.3 on SJVR's Exeter Subdivision).[1] Port currently conducts operations as a private switching carrier to at least 2 customers located inside its facility, but now wishes to convert its operations to common carrier rail service. Port states that, upon receipt of the requested exemption, it intends to reconstruct and upgrade the existing trackage and extend it as indicated on the map attached to its notice.

Port states that it intends to consummate the transaction 30 days after the exemption was filed, which will be April 3, 2011, the effective date of the exemption.

Port certifies that its projected revenues as a result of this transaction will not result in Port becoming a Class I or Class II rail carrier and further certifies that its projected annual revenue will not exceed $5 million.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than March 25, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35475, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on John D. Heffner, John D. Heffner, PLLC, 1750 K Street, NW., Suite 200, Washington, DC 20006.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: March 14, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–6228 Filed 3–17–11; 8:45 am]

BILLING CODE 4915–01–P

[1] Port states that, because its track is located inside an industrial facility, it has no mileposts.

DEPARTMENT OF THE TREASURY

United States Mint

Pricing for 2010 United States Mint America the Beautiful Quarters Silver Proof Set™, etc.

ACTION: Pricing for 2010 United States Mint America the Beautiful Quarters Silver Proof Set™; 2010 United States Mint Silver Proof Set™; 2011 United States Mint America the Beautiful Quarters Silver Proof Set™.

SUMMARY: The United States Mint is announcing an increase in the price of the 2010 United States Mint America the Beautiful Quarters Silver Proof Set, the 2010 United States Mint Silver Proof Set and the 2011 United States Mint America the Beautiful Quarters Silver Proof Set.

In accordance with 31 U.S.C. 9701(b)(2)(B), the United States Mint is setting the price of these products to reflect recent increases in the market price of silver.

The 2010 United States Mint America the Beautiful Quarters Silver Proof Set will be priced at $39.95.

The 2010 United States Mint Silver Proof Set will be priced at $64.95.

The 2011 United States Mint America the Beautiful Quarters Silver Proof Set will be priced at $41.95.

FOR FURTHER INFORMATION CONTACT: B. B. Craig, Associate Director for Sales and Marketing; United States Mint; 801 9th Street, NW., Washington, DC 20220, or call 202–354–7500.

Authority: 31 U.S.C. 5111, 5112, 5132 & 9701.

Dated: March 14, 2011.

Richard A. Peterson,

Acting Director, United States Mint.

[FR Doc. 2011–6344 Filed 3–17–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0666]

Proposed Information Collection (Information Regarding Apportionment of Beneficiary's Award); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine a spouse and children entitlement to a portion of a veteran or beneficiary's compensation and pension benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0666" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Information Regarding Apportionment of Beneficiary's Award, VA Form 21–0788.

OMB Control Number: 2900–0666.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans and claimants complete VA Form 21–0788 to report their income information that is necessary for VA to determine whether their compensation and pension benefits can be apportion to his or her dependents.

Affected Public: Individuals or households.

Estimated Annual Burden: 12,500 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 25,000.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6391 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0404]

Proposed Information Collection (Veteran's Application for Increased Compensation Based on Unemployability); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to apply for increased disability compensation based on unemployability.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0404" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility;

(2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Veteran's Application for Increased Compensation Based on Unemployability, VA Form 21–8940.

OMB Control Number: 2900–0404.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–8940 is used by veterans to file a claim for increased disability compensation based on unemployability. Claimants are required to provide current medical, educational, and occupational history in order for VA to determine whether he or she is unable to secure or follow a substantially gainful employment due to service-connected disabilities.

Affected Public: Individuals or households.

Estimated Annual Burden: 18,000 hours.

Estimated Average Burden per Respondent: 45 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 24,000.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6393 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0262]

Proposed Information Collection (Designation of Certifying Official(s)); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to identify individuals authorized to certify reports on behalf of an educational institution or job training establishment.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0262" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Designation of Certifying Official(s), 22–8794.

b. Designated Official(s) Electronic Fund Transfer (EFT) Information, VA Form 22–8794a.

OMB Control Number: 2900–0262.

Type of Review: Extension of a currently approved collection.

Abstracts:

a. Educational institutions and job training establishments complete VA Form 22–8794 to provide the name of individuals authorized to certify reports on student enrollment and hours worked on behalf of the school or training facility. VA will use the data collected to ensure that education benefits are not awarded based on reports from someone other than the designated certifying official.

b. Educational institution complete VA Form 22–8794a when there is a change to their financial institution.

Affected Public: State, Local or Tribal Government.

Estimated Annual Burden:

a. VA Form 22–8794–750

b. VA Form 22–8794a–167

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:

a. VA Form 22–8794—4,500

b. VA Form 22–8794a—1,000

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6388 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0455]

Agency Information Collection (Equal Opportunity Compliance Review Report); Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before April 18, 2011.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316.

(Please refer to "OMB Control No. 2900–0455" in any correspondence

For Further Information or a Copy of the Submission Contact: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail: *denise.mclamb@va.gov.* (Please refer to "OMB Control No. 2900–0455)."

SUPPLEMENTARY INFORMATION: *Titles:*

a. Equal Opportunity Compliance Review Report, VA Form 20–8734.

b. Supplement to Equal Opportunity Compliance Review Report, VA Form 20–8734a.

OMB Control Number: 2900–0455.

Type of Review: Extension of a currently approved collection.

Abstract: Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws, delegated authority to the Attorney General to coordinate the implementation and enforcement by Executive agencies of various equal opportunity laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance. The Order extended the delegation to cover Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973. The Department of Justice issued government-wide guidelines (29 CFR 42.406) instructing funding agencies to provide for the collection of data and information from applicants for and recipients of Federal assistance.

VA Forms 20–8734 and 20–8734a are used by VA personnel during regularly scheduled educational compliance survey visit, as well as during investigations of equal opportunity complaints, to identify areas where there may be disparate treatment of members of protected groups. VA Form 20–8734 is used to gather information from post-secondary proprietary schools below college level. The information is used to assure that VA-funded programs comply with equal opportunity laws. VA Form 20–8734a, is used to gather information from students and instructors at post-secondary proprietary schools below college level. The information is used to assure that participants have equal access to equal treatment in VA-funded programs. If this information were not collected, VA would be unable to carry out the civil rights enforcement responsibilities established in the Department of Justice's guidelines and VA's regulations.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 5, 2011, at pages 623–624.

Affected Public: Business or other for-profit.

Estimated Annual Burden and Average Burden per Respondent: Based on past experience, VBA estimates that 76 interviews will be conducted with recipients using VA Form 20–8734 at an average of 1 hour and 45 minutes per interview (133 hours). This includes one hour for an interview with the principal facility official, plus 45 minutes for reviewing records and reports and touring the facility. It is estimated that 76 interviews will be conducted with students using VA Form 20–8734a at an average of 30 minutes per interview (38 hours) and with instructors at an average of 30 minutes per interview (38 hours). Interviews are also conducted with 76 students without instructors at an average time of 30 minutes (38 hours). The total burden hour is 247.

Frequency of Response: On occasion.

Estimated Number of Respondents: 228.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6387 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0458]

Proposed Information Collection (Certification of School Attendance or Termination) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to verify whether a veteran's child between the ages of 18 and 23 years old is attending school.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0458" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Certification of School Attendance or Termination, VA Forms 21–8960 and 21–8960–1.

OMB Control Number: 2900–0458.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 21–8960 and VA Form 21–8960–1 to certify that a child between the ages of 18 and 23 years old is attending school. VA uses the information collected to determine the child's continued entitlement to benefits. Benefits are discontinued if the child marries, or no longer attending school.

Affected Public: Individuals or households.

Estimated Annual Burden: 11,667 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 70,000.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6396 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0215]

Proposed Information Collection (Request for Information To Make Direct Payment to Child Reaching Majority); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine a schoolchild's eligibility to VA death benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov*. Please refer to "OMB Control No. 2900–0215" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Request for Information to Make Direct Payment to Child Reaching Majority, VA Form Letter 21–863.

OMB Control Number: 2900–0215.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form Letter 21–863 is used to determine a schoolchild's continued eligibility to death benefits and eligibility to receive direct payment at the age of majority. Death pension or dependency and indemnity compensation is paid to an eligible veteran's child when there is not an eligible surviving spouse and the child is between the ages of 18 and 23 is attending school. Until the child reaches the age of majority, payment is made to a custodian or fiduciary on behalf of the child. An unmarried schoolchild, who is not incompetent, is entitled to begin receiving direct payment on the age of majority.

Affected Public: Individuals or households.

Estimated Annual Burden: 3 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: One–time.

Estimated Number of Respondents: 20.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6395 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0390]

Proposed Information Collection (Restored Entitlement Program for Survivors); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine a surviving spouse or child's eligibility to REPS (Restored Entitlement Program for Survivors) benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov*. Please refer to "OMB Control No. 2900–0215" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the

information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Application of Surviving Spouse or Child for REPS Benefits (Restored Entitlement Program for Survivors), VA Form 21–8924.

OMB Control Number: 2900–0390.

Type of Review: Extension of a currently approved collection.

Abstract: Survivors of deceased veteran's complete VA Form 21–8924 to apply for Restored Entitlement Program for Survivors (REPS) benefits. REPS benefits is payable to certain surviving spouses and children of veterans who died in service prior to August 13, 1981, or who died as of a result of a service-connected disability incurred or aggravated prior to August 13, 1981.

Affected Public: Individuals or households.

Estimated Annual Burden: 600 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 1,800.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6394 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0510]

Proposed Information Collection (Application for Exclusion of Children's Income); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine whether children's incomes can be excluded from consideration in determining a parent's eligibility for non-service-connected pension.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0510" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Application for Exclusion of Children's Income, VA Form 21–0571.

OMB Control Number: 2900–0510.

Type of Review: Extension of a currently approved collection.

Abstract: The data collected on VA Form 21–0571 is use to determine whether children's income can be excluded from consideration in determining a parent's eligibility for non-service connected pension. A veteran's or surviving spouse's rate of improved pension is determined by family income. However, children's income may be excluded if it is unavailable or if including that income would cause a hardship.

Affected Public: Individuals or households.

Estimated Annual Burden: 2,025 hours.

Estimated Average Burden Per Respondent: 45 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 2,700.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6392 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0379]

Proposed Information Collection (Time Record (Work-Study Program); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to verify the actual number of hours worked by a work-study claimant.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to

nancy.kessinger@va.gov. Please refer to "OMB Control No. 2900–0379" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Time Record (Work-Study Program)), VA Form 22–8690.

OMB Control Number: 2900–0379.

Type of Review: Extension of a currently approved collection.

Abstract: Training establishments complete VA Form 22–8690 to report the number of work-study hours a claimant has completed. When a claimant elects to receive an advance payment, VA will advance payment for 50 hours, but will withhold benefits (to recoup the advance payment) until the claimant completes 50 hours of service. If the claimant elects not to receive an advance payment, benefits are payable when the claimant completes 50 hours of service. VA uses the data collected to ensure that the amount of benefits payable to a claimant who is pursuing work-study is correct.

Affected Public: State, Local or Tribal Governments.

Estimated Annual Burden: 21,752 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Annual Responses: 261,020.

Estimated Number of Respondents: 65,255.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6390 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0161]

Proposed Information Collection (Medical Expense Report); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to report medical expenses paid in connection with claims for pension and other income-based benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0161" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L.104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Medical Expense Report, VA Form 21–8416.

OMB Control Number: 2900–0161.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–8416 is completed by claimants in receipt of or claiming income-based benefits to report medical expenses paid. Unreimbursed medical expenses may be excluded as countable income in determining a claimant's entitlement to income-based benefits and the rate payable.

Affected Public: Individuals or households.

Estimated Annual Burden: 96,400 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On ocassion.

Estimated Number of Respondents: 48,200.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6384 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0038]

Proposed Information Collection (Information From Remarried Widow/er) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the

proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine a child's eligibility for death pension once a surviving spouse remarries.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0038" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Information from Remarried Widow/er, VA Form 21–4103.

OMB Control Number: 2900–0038.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–4103 is used to collected data necessary to determine whether a child or children of a deceased veteran who served during a wartime period are eligible to receive death pension benefits when the surviving spouse's entitlement to death pension is permanently discontinued when he or she remarries.

Affected Public: Individuals or households.

Estimated Annual Burden: 334 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 1,000.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6385 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0115]

Proposed Information Collection (Supporting Statement Regarding Marriage); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine eligibility for benefits based on a common law marriage.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0115" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Supporting Statement Regarding Marriage, VA Form 21–4171.

OMB Control Number: 2900–0115.

Type of Review: Extension of a currently approved collection.

Abstract: The data collected on VA Form 21–4171 is used to determine a claimant's eligibility for benefits based on a common law marital relationship. Benefits cannot be pay unless the marital relationship between the claimant and the veteran is established.

Affected Public: Individuals or households.

Estimated Annual Burden: 800 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 2,400.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6389 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0601]

Proposed Information Collection (Requirements for Interest Rate Reduction Refinancing Loans); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to refinance a delinquent VA-guaranteed loan with a lower interest rate.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 17, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0601" in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Requirements for Interest Rate Reduction Refinancing Loans.

OMB Control Number: 2900–0601.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans may refinance an outstanding VA guaranteed, insured, or direct loan with a new loan at a lower interest rate provided the veteran still owns the property used as security for the loan. The new loan will be guaranteed only if VA approves it in advance after determining that the borrower, through the lender, has provided reasons for the loan deficiency, and has provided information to establish that the cause of the delinquency has been corrected, and qualifies for the loan under the credit standard provisions.

Affected Public: Business or other for profit.

Estimated Annual Burden: 25 hours.

Estimated Annual Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 50.

Dated: March 15, 2011.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2011–6386 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

National Research Advisory Council; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the National Research Advisory Council will hold a meeting on Monday, April 18, 2011, in conference room 23 at 131 M Street, NE., Washington, DC. The meeting will convene at 10 a.m. and end at 3 p.m. The meeting is open to the public. The purpose of the Council is to provide external advice and review for VA's research mission.

The agenda will include a review of the VA research portfolio and a summary of current budget allocations. The Council will also provide feedback on the direction/focus of VA's research initiatives.

Oral comments from the public will not be accepted at the meeting. Members of the public may submit written statements for the Council's review to Margaret Hannon, Designated Federal Officer, Office of Research and Development (12), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail at *Margaret.Hannon@va.gov.* Any member of the public wishing to attend the meeting or wishing further information should contact Ms. Hannon at (202) 443–5614.

By Direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of the General Counsel.

[FR Doc. 2011–6348 Filed 3–17–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Minority Veterans; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Minority Veterans will meet on April 4–8, 2011. The sessions will be open to the public on April 4–6, April 7 (from 2:45 p.m. until 5 p.m.) and April 8. The Committee will meet at the following locations and times:

Room C–7 at Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC:

April 4, 8 a.m. until 5 p.m.;
April 5, 8 a.m. until 6 p.m.;
April 6, 8 a.m. until 4:15 p.m.; and
April 8, 8 a.m. until 3 p.m.

VA Medical Center, 50 Irving Street, NW., Washington, DC:

April 7, 8 a.m. until 12:30 p.m.

Suite 400 at 1575 I Street, NW., Washington, DC:

April 7, 2:45 p.m. until 5 p.m.

The purpose of the Committee is to advise the Secretary on the administration of VA benefits and services to minority Veterans, to assess the needs of minority Veterans and to evaluate whether VA compensation, medical and rehabilitation services, outreach, and other programs are meeting those needs. The Committee makes recommendations to the Secretary regarding such activities.

On April 4, the Committee will receive briefings and updates on the roles of the advisory committee, ethics,

Center for Minority Veterans, Office of Policy and Planning, Human Resources and Administration, and a round table discussion with ex-officio members. On April 5, the Committee will receive briefings and updates on the National Cemetery Administration, Veterans Health Administration, senior executive staff briefing, and Veterans Benefits Administration. In the morning on April 6, the Committee will have a panel discussion with Center for Women Veterans, Center for Faith Based, Office of Survivors Assistance, and Non-Governmental Organizations Ombudsman and receive updates from the Office of Small and Disadvantaged Business Utilization and the Office of Public and Intergovernmental Affairs. In the evening, the Committee will attend a Town Hall meeting in the Springfield, Virginia area, exact time and location to be determined. On the morning of April 7, the Committee will convene a closed session in order to protect patient privacy as the Committee tours the VA Medical Center. Closing portion of the session is in accordance with 5 U.S.C. 552b(c)(6). In the afternoon, the Committee will have exit briefings with the Veterans Health Administration, Veterans Benefits Administration, and the National Cemetery Administration. The Committee will also work on their After Action Report. On April 8, the Committee will receive public comments from 9 a.m. to 9:30 a.m. A sign-up sheet to give comments will be available at the meeting. Individuals who speak are invited to submit a 1–2 page summary of their comments at the time of the meeting for inclusion in the official meeting record. In the afternoon, the Committee will continue work on their After Action Report.

Members of the public may also submit written statements for the Committee's review to Mr. Ronald Sagudan at Department of Veterans Affairs, Center for Minority Veterans (00M), 810 Vermont Avenue, NW., Washington, DC 20420, or e-mail at *Ronald.sagudan@va.gov.* Any member of the public wishing to attend or seeking additional information should contact Mr. Sagudan or Mr. Dwayne Campbell at (202) 461–6191 or by fax at (202) 273–7092.

By Direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of the General Counsel.

[FR Doc. 2011–6349 Filed 3–17–11; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 76 Friday,
No. 53 March 18, 2011

Part II

Department of Labor

Employee Benefits Security Administration

Notice of Proposed Exemption; BlackRock, Inc. and Its Investment Advisory, Investment Management and Broker-Dealer Affiliates and Their Successors (Applicants) Located in New York; Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11588]

Notice of Proposed Exemption; BlackRock, Inc. and Its Investment Advisory, Investment Management and Broker-Dealer Affiliates and Their Successors (Applicants) Located in New York, NY

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of proposed exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), the Federal Employees' Retirement System Act of 1986, as amended (FERSA), and the Internal Revenue Code of 1986, as amended (the Code). The proposed transactions involve BlackRock, Inc. and its investment advisory, investment management and broker-dealer affiliates and their successors. The proposed exemption, if granted, would affect plans for which BlackRock, Inc. and its investment advisory, investment management and broker-dealer affiliates and their successors serve as fiduciaries, and the participants and beneficiaries of such plans.

DATES: *Effective Date:* If granted, this proposed exemption will be effective as of December 1, 2009.

Written Comments and Hearing Requests: All interested persons are invited to submit written comments and/or requests for a hearing on the proposed exemption within forty-five (45) days from the date of the publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address and telephone number of the person making the comment or the request for a hearing and (2) the nature of the person's interest in the proposed exemption and the manner in which the person would be adversely affected by the proposed exemption. A request for a hearing must also state the issues to be addressed at the requested hearing and include a general description of the evidence to be presented at the requested hearing.

ADDRESSES: All written comments and requests for a public hearing concerning the proposed exemption should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 202010, *Attention:* Application No. D–11588. Interested persons are also invited to submit comments and/or hearing requests to the Employee Benefits Security Administration by e-mail or FAX. Any such comments or requests should be sent either to: *moffitt.betty@dol.gov,* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The application for exemption and the comments received will be available for inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

FOR FURTHER INFORMATION CONTACT: Brian L. Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693–8552. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This document contains a notice of proposed individual exemption from the restrictions of ERISA sections 406(a)(1) and 406(b), FERSA sections 8477(c)(1) and (c)(2) and the sanctions resulting from the application of Code section 4975, by reason of Code section 4975(c)(1). The proposed exemption has been requested by BlackRock, Inc. and its investment advisory, investment management and broker-dealer affiliates and their successors pursuant to ERISA section 408(a), Code section 4975(c)(2) and FERSA section 8477(c)(3), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed exemption is being issued solely by the Department.

Summary of Facts and Representations [1]

1. BlackRock, Inc. (BlackRock), based in New York, NY, is the largest publicly-traded investment management firm in the United States. BlackRock, through its investment advisory and investment management subsidiaries, currently manages assets for institutional and individual investors worldwide through a variety of equity, fixed income, cash management and alternative investment products. As of September 30, 2010, BlackRock, through its advisor subsidiaries, had approximately $3.446 trillion in assets under management, including assets managed by BlackRock Institutional Trust Company, N.A. (BTC) (formerly known as Barclays Global Investors, N.A. (BGI)) and its affiliates. The Applicants [2] together with any other entity presently or subsequently under the direct or indirect control, through one or more intermediaries, of BlackRock and successors of any of the foregoing are referred to herein as the "BlackRock Entities."

2. BTC is a national banking association headquartered in San Francisco, California. Prior to its acquisition by BlackRock on December 1, 2009 (the Acquisition), BTC (then BGI) was the largest asset manager in the U.S. A significant amount of BTC's assets under management in the U.S. consist of assets of employee benefit plans subject to ERISA, FERSA and/or the Code. BTC is a market leader in index and model-driven investment products. Until its sale to BlackRock, BGI was an indirect subsidiary of Barclays PLC, a public limited company

[1] Capitalized terms used but not defined in the Summary of Facts and Representations have the meaning set forth in Section VI of the proposed exemption.

[2] For purposes of this application, references to the "Applicants" include each of the banks, investment advisors and investment managers directly or indirectly, through one or more intermediaries, under the control of BlackRock, and any other bank, investment advisor or investment manager which subsequently becomes directly or indirectly, through one or more intermediaries, under the control of BlackRock, and successors of the foregoing. As of the date hereof, banks, investment advisors and investment managers under the control of BlackRock include, but are not limited to, BlackRock Advisors, LLC, BlackRock Financial Management, Inc., BlackRock Capital Management, Inc., BlackRock Institutional Management Corporation, BlackRock International, Ltd., State Street Research and Management Company, BlackRock Realty Advisors, Inc., BlackRock Investment Management, LLC, BlackRock Fund Advisors, and BTC (collectively, the BlackRock Managers). "Applicants" also includes broker-dealers presently or subsequently under the direct or indirect control, through one or more intermediaries, of BlackRock.

organized under the laws of England and Wales. BTC, as of the date of the Acquisition, is now a wholly-owned subsidiary of BlackRock.

3. The Applicants represent that they are regulated by various federal government agencies such as the SEC and the Office of the Comptroller of the Currency, as well as state government agencies and industry self-regulatory organizations (*e.g.,* the Financial Industry Regulatory Authority or, in the case of some broker-dealers and banks, corresponding foreign regulatory authorities). As with the Applicants, each of (a) Barclays PLC (Barclays), (b) Bank of America Corporation (BOA), (c) The PNC Financial Services Group, Inc. (PNC), and (d) each entity directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with one or more of Barclays, BOA or PNC [3] has previously made representations to the Department regarding the significant extent to which they are regulated.[4]

The Acquisition

4. There have recently occurred extraordinary circumstances in both the U.S. financial services industry and the global financial services industry. Many entities in the financial services industry have faced severe economic hardship. During this period of upheaval, the recent trend of industry consolidation amongst significant banks, broker-dealers and other providers of financial services has accelerated. For example, BOA became the parent company of the Merrill Lynch Group, Inc. (the Merrill Group) as of January 1, 2009; in September 2008, Barclays Bank PLC (Barclays Bank), a subsidiary of Barclays PLC, acquired most of the U.S. broker-dealer business of Lehman Brothers Holdings Inc.; and, in May 2008, Bear Stearns Companies Inc. was acquired by JPMorgan Chase & Co.

5. In this context, BlackRock, in June 2009, made a binding offer to Barclays pursuant to an Amended and Restated Stock Purchase Agreement by and among BlackRock, Barclays Bank and (for limited purposes) Barclays, which ultimately resulted in the Acquisition. BlackRock completed the Acquisition on December 1, 2009, in exchange for an aggregate of 37,566,771 shares of BlackRock common stock and participating preferred stock (which ownership is discussed in more detail below) and approximately $6.6 billion in cash. Barclays' decision to enter into the Acquisition was based upon a variety of factors that Barclays stated would be beneficial to its shareholders, including the creation of material economic exposure to a highly competitive global asset manager.

6. Prior to the Acquisition, PNC, indirectly through its subsidiary PNC Bancorp, Inc. (PNC Bancorp), held an approximately 31.9% economic interest and an approximately 43.2% voting interest in BlackRock. BOA, through its (indirect) wholly-owned subsidiary the Merrill Group, held an approximately 48.3% economic interest and approximately 4.6% voting interest in BlackRock. Immediately following the Acquisition, the MPS ownership was as follows:

(a) *Bank of America/Merrill Group.* The Merrill Group owned approximately 3.7% of BlackRock voting common stock and approximately 34.2% of BlackRock equity by value, consisting of Series B Non-Voting Preferred Stock [5] in addition to the voting common stock held. The Merrill Group also owned (and owns) the equity of the Merrill brokerage firms (including Merrill Lynch, Pierce, Fenner & Smith Incorporated) and other financial service providers, which firms are owned down different chains of ownership from the Merrill Group's stake in BlackRock. The Merrill Group is 100% owned by Merrill Lynch & Co. Inc. (the former publicly traded holding company), which in turn is 100% owned by BOA, the publicly traded overall Bank of America holding company. BOA owns Bank of America, N.A. down a different ownership chain from the Merrill Group-BlackRock ownership chain.

(b) *PNC Ownership Interest.* PNC Bancorp owned approximately 35.2% of BlackRock voting common stock and approximately 24.5% of BlackRock equity by value, consisting of Series B, C and D [6] Non-Voting Preferred Stock. PNC Bancorp owned (and owns) PNC Bank, N.A. down a different chain of ownership. PNC Bancorp is wholly-owned by PNC, the publicly traded overall PNC holding company.

(c) *Barclays Ownership Interest.* Barclays BlackRock Holdings, S.a.r.l. (Barclays Luxembourg), a wholly-owned Luxembourg subsidiary of Barclays Bank, owned approximately 4.8% of BlackRock voting common stock and approximately 19.8% of BlackRock equity by value, consisting of Series B Non-Voting Preferred Stock and Series D Non-Voting Preferred Stock in addition to the voting common stock. Barclays Bank is a 100% owned subsidiary of Barclays PLC, the publicly traded Barclays holding company.[7]

7. Post-Acquisition, a secondary offering of BlackRock common stock was completed on November 15, 2010, by the Merrill Group and PNC Bancorp (the Secondary Offering). BlackRock's ownership structure following the Secondary Offering was as follows: (a) The Merrill Group owned 0% of BlackRock's voting common stock and approximately 7.1% of BlackRock's equity by value, consisting of Series B Non-Voting Preferred Stock; (b) PNC Bancorp owned approximately 25.3% of BlackRock's voting common stock and approximately 20.3% of BlackRock's equity by value, consisting of Series B and C Non-Voting Preferred Stock in addition to the voting common stock held; and (c) Barclays Bank owned approximately 2.3% of BlackRock's voting common stock and approximately 19.7% of BlackRock's equity by value, consisting of Series B Non-Voting Preferred Stock in addition to the voting common stock held.

8. Immediately following the Acquisition, the approximately 56.3% of BlackRock's voting common stock not owned by the MPSs (representing an approximately 21.5% economic interest in BlackRock) was beneficially owned by the employees of BlackRock and retail and institutional investors unrelated to BlackRock or an MPS. Immediately following the Secondary Offering, the approximately 72.4% of BlackRock's voting common stock not owned by the MPSs (representing an approximately 52.9% economic interest in BlackRock) was beneficially owned

[3] Each of Barclays, BOA and PNC is a "Minority Passive Shareholder" or "MPS," but, for avoidance of doubt, an MPS does not include any BlackRock Entity.

[4] *See* applications associated with PTE 2009–25, 74 FR 45300 (September 1, 2009) (Barclays); PTE 2009–22, 74 FR 45284 (September 1, 2009) (PNC); and proposed exemption for application D–11576, 75 FR 61932 (October 6, 2010) (Bank of America/Merrill Lynch).

[5] Series B Non-Voting Preferred Stock provides for the same economic rights as BlackRock common stock, but it is non-voting. The Series B Non-Voting Preferred Stock is automatically converted to common stock when transferred to a third party.

[6] Series C Non-Voting Preferred Stock provides for the same terms as Series B Non-Voting Preferred Stock, except that it (a) has a liquidation preference of $40 per share as opposed to $.01 for Series B Non-Voting Preferred Stock, (b) is only convertible to common stock upon the termination of a Share Surrender Agreement between BlackRock, and (c) can only be transferred to BlackRock pursuant to such Share Surrender Agreement. Series D Non-Voting Preferred Stock provides for the same terms as Series B Non-Voting Preferred Stock and was automatically converted to Series B Non-Voting Preferred Stock on January 31, 2010.

[7] On November 17, 2010, Barclays Luxembourg transferred approximately ninety nine percent (99%) of its BlackRock voting common stock and approximately ninety nine (99%) of its Series B Non-Voting Preferred Stock to Lapis (Gers Investments) LP, a newly-formed Delaware limited partnership and an indirect subsidiary of Barclays Bank PLC.

by the employees of BlackRock and retail and institutional investors unrelated to BlackRock or an MPS.

All BlackRock stock beneficially owned by each MPS (other than stock held in certain fiduciary capacities and customer or market making accounts) is subject to a stockholders agreement entered into by and between that MPS and BlackRock (collectively, the Stockholders Agreements). Pursuant to each Stockholders Agreement, each MPS has or had the right to identify to BlackRock two (2) prospective directors, and, if such nominees are reasonably acceptable to the BlackRock Board of Directors (the Board), BlackRock and each respective MPS agrees to use best efforts to cause the election of such nominees to the Board. The Stockholder Agreements also contemplate a reduction in the number of Board seats which an MPS is entitled to designate to one upon the MPS' interest falling below a ten percent (10%) equity interest for ninety (90) consecutive days, and to zero upon the MPS' interest falling below a five percent (5%) equity interest for ninety (90) consecutive days. The Board may waive this provision. As a result of the Secondary Offering, the Merrill Group fell below a ten percent (10%) equity interest, and, assuming that it remains below this level, the Merrill Group lost the right to identify to BlackRock one representative director on or about February 13, 2011 (the Merrill Director Reduction). It is anticipated that the Board will not waive the Merrill Director Reduction.

At least 10 of the current 19 directors must be "independent" (within the meaning of New York Stock Exchange (NYSE) rules [8]) of the MPSs and BlackRock management and each MPS must vote its BlackRock voting common stock in accordance with the recommendations of the Board. In addition, the Audit Committee, the Management Development and Compensation Committee, and the Nominating and Governance Committee of the Board consist entirely of independent directors, and a majority of each other Board committee (if any), with the exception of the Executive Committee,[9] must consist of independent directors. With limited exceptions, all decisions of any committee of the Board require the presence of a majority of the directors at a meeting at which a quorum is present. As of the date hereof, none of the directors representing an MPS serve on any Board committee, except that one director representing PNC serves on the Executive Committee. Further, no MPS representative directors sit on any of the Board of Directors of BlackRock Managers. While each MPS monitors its investment in BlackRock through its Board representatives and each MPS has certain limited governance rights,[10] no MPS has or will have any involvement in the day-to-day management of BlackRock, any BlackRock Manager or any other BlackRock Entity.

In addition, the respective Stockholder Agreements provide for the following additional restrictions on the ability of an MPS to control BlackRock or any BlackRock Manager:

(a) *Standstill Agreements.* The Stockholder Agreements cap the MPSs' ownership interest in BlackRock's capital stock at certain prescribed levels of voting power on an issued and outstanding basis, and economic interest on a fully diluted basis, and they generally restrict each MPS from purchasing additional stock if doing so would cause its respective interests in BlackRock to exceed the applicable ownership cap.[11]

(b) *Transfer Restrictions.* The Stockholder Agreements include limitations on the transfer of an MPS' BlackRock capital stock, and provide for a right of first refusal in BlackRock's favor should the MPS desire to sell its BlackRock capital stock privately.

(c) *Arm's Length Business Relationships.* The MPSs and BlackRock conduct business on a competitive basis, including executions and other services for the clients of each. Under the Stockholder Agreements, any new material transaction between BlackRock or its affiliates and an MPS or its affiliates not in the ordinary course of business on behalf of clients or not pursuant to a policy, transaction or agreement (or form of agreement) previously approved must generally be approved by a majority of the BlackRock directors (other than the directors designated by the applicable MPS).

Requested Relief

9. Given the unique nature of the BlackRock ownership structure following the Acquisition, the Applicants believe that no MPS should be regarded for ERISA purposes as an "affiliate" of BlackRock or any BlackRock Manager because the Applicants believe that no MPS, alone or with another MPS, will be in a position to "control" BlackRock. In addition to the BlackRock ownership structure itself preventing MPS control of BlackRock, the Stockholder Agreements provide several important safeguards to mitigate the possibility of an MPS exerting any form of control that might otherwise raise concerns under ERISA. In particular, the standstill agreements, transfer restrictions and arm's length business relationship provisions are designed to ensure that BlackRock maintains its independence. Even if the MPSs wished to act together to control BlackRock, BlackRock believes that the MPSs would not be able control BlackRock because the Stockholder Agreements mandate that each MPS vote its BlackRock shares in accordance with the recommendations of the Board, which is dominated by persons other than MPS nominees. Lastly, the MPSs are competitors in the financial services industry, and as such, concerted action among the MPSs is extremely unlikely.

10. Nevertheless, the Applicants represent that when a BlackRock

[8] Section 303A.01 of the NYSE Listed Company Manual requires listed companies to have a majority of independent directors. Although an exception is made for companies controlled by a group of shareholders, the Stockholders Agreements among BlackRock and the MPSs preclude the MPSs from becoming part of any such group. BlackRock represents that the Board must include a minimum of fourteen (14) directors total, which minimum would be applicable only if one or more of the MPSs has its equity stake drop to the point where it loses the ability to identify representative BlackRock directors, due to the interplay of the Shareholders Agreements and NYSE rules.

[9] While the Executive Committee may exercise the powers of the Board during intervals between Board meetings or at times when the Board is unable to convene, the Executive Committee has not met for over five (5) years.

[10] Pursuant to the BOA Stockholder Agreement, the following significant actions would require BOA's consent: (a) Certain amendments to the certificate of incorporation or bylaws; (b) entering into certain regulatory settlements with specified adverse consequences to BOA; (c) amending or modifying the PNC Stockholder Agreement in a manner that would be viewed as materially adverse to BOA or materially more advantageous to PNC, and (d) any voluntary bankruptcy filing by BlackRock. Pursuant to the PNC Stockholder Agreement, the following significant actions would require approval by two-thirds of all directors or all of the independent directors: (a) Appointment of a new Chief Executive Officer; (b) certain major acquisitions, divestures or share issuances; (c) amendments to the certificate of incorporation or bylaws applicable to BlackRock; and (d) any amendment, modification or waiver of any obligation of another significant stockholder pursuant to a stockholder agreement with such significant stockholder. Further, the PNC Stockholder Agreement provides that the following actions would require the consent of PNC: (a) Certain major acquisition or divestitures; and (b) the same matters for which BOA has a consent right as described previously. Pursuant to the Barclays Stockholder Agreement, the following significant actions would require the consent of Barclays: (a) Amending the certificate of incorporation or bylaws in a manner that would in any material respect adversely change the powers or preferences of any capital stock; (b) entering into certain regulatory settlements with specified adverse consequences to Barclays and (c) any voluntary bankruptcy of BlackRock.

[11] The following are the caps on voting interests: BOA = 4.9%; PNC = 49.9%; and Barclays = 4.9%. The following are the caps on economic interest: BOA = 9.9%; PNC = 38%; and Barclays = 19.9%.

Manager is a fiduciary with investment discretion with respect to a Client Plan,[12] and the BlackRock Manager is deciding whether to enter into a Covered Transaction [13] with or involving an MPS, the ownership interest of the MPS in BlackRock could affect the BlackRock Manager's best judgment as a fiduciary, raising issues under ERISA section 406(b). The Applicants note that the Department's regulation at 29 CFR 2550.408b–2(e)(1) provides that "[a] person in which a fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary includes, for example, a person who is a party in interest by reason of a relationship to such fiduciary described in section 3(14)(E), (F), (G), (H), or (I)" of ERISA. ERISA section 3(14)(H) provides that a 10% or more shareholder of a service provider (which may include a plan fiduciary) is a party in interest to the plan in question by reason of that relationship to the service provider. Accordingly, the Applicants seek relief from the prohibitions of ERISA section 406(b) to cover the Covered Transactions described hereinafter. Further, if BlackRock Entities and one or more MPS are deemed affiliates, and because each MPS and its affiliates are very likely parties in interest within the meaning of ERISA section 3(14) with respect to many Client Plans, the Applicants also seek relief from the prohibitions of ERISA section 406(a) with respect to such Covered Transactions. Specifically, many prohibited transaction class exemptions from ERISA section 406(a) require as a condition for relief that the plan fiduciary and the party in interest not be "affiliates." Although the Applicants believe that no MPS should be regarded for ERISA purposes as an "affiliate" of BlackRock, the Applicants desire the certainty of relief which the proposed exemption would provide if Covered Transactions are entered into in conformance therewith. The Applicants, however, are seeking relief with respect to BOA only until the day after the effective date of the Merrill Director Reduction.

11. As discussed above, there have recently occurred extraordinary circumstances in both the U.S. and the global financial services industry. Many entities in the financial services industry have faced severe economic hardship. During this period of upheaval, the trend of industry consolidation amongst significant banks, broker-dealers and other providers of financial services has accelerated. Thus, it is the Applicants' belief that each MPS' involvement in financial services has expanded at the same time as the number of participants in the capital markets has declined. As a result, the Applicants believe that the failure to obtain exemptive relief proposed herein would deny Client Plans access to a significant portion of the financial markets and that such denial would unduly harm Client Plans and their participants and beneficiaries.

12. The Applicants request that the proposed exemption provide relief for certain enumerated types of Covered Transactions entered into after the Acquisition and, in certain cases, before the Acquisition and that have continued after the Acquisition.

Structure of Relief

13. The structure of the Applicants' requested relief is founded upon compliance with five sets of general conditions. The five sets of general conditions are: (a) Modified conditions derived from PTE 84–14, as amended (sometimes referred to as the QPAM Exemption);[14] (b) restrictions on the compensation of BlackRock Managers and their employees; (c) the establishment and implementation of certain policies and procedures (the Exemption Polices and Procedures or EPPs); (d) the appointment by BlackRock of an Exemption Compliance Officer (ECO); and (5) the retention by BlackRock of an Independent Monitor (IM). The purpose of these general conditions is, when coupled with the restrictions of the Stockholders Agreements and the BlackRock ownership structure, to foster independence of action by the BlackRock Managers notwithstanding the equity interests in BlackRock held by the MPSs. This unique overarching structure includes a comprehensive compliance function and an independent monitor, each of which work together for the benefit of Client Plans and their participants and beneficiaries by allowing Covered Transactions with or involving an MPS only if the Covered Transaction is, as best as can be determined, as favorable to the Client Plans as arm's length transactions with third parties.

14. In addition to the general conditions, each Covered Transaction has its own set of additional conditions deemed suitable for it in light of the nature of the transaction. Many of the conditions for individual Covered Transactions are derived from statutory exemptions, administrative class exemptions or administrative individual exemptions frequently relied upon by fiduciaries and parties in interest (sometimes affiliated and sometimes not) to exempt similar transactions. The general and transaction-specific conditions for relief attempt to strike a balance that takes into account both the MPSs' unique equity interests in BlackRock and the ability of BlackRock Managers acting on behalf of Client Plans to engage in arm's length Covered Transactions with or involving institutions as significant in their markets as are the MPSs.

15. With respect to the relief for all Covered Transactions described herein, Section II of the proposed exemption provides that the following general safeguards must be met:

Section II.A—Compliance with the QPAM Exemption. With certain exceptions, the conditions for relief under Part I of PTE 84–14 must be satisfied with respect to each Covered Transaction.[15] Compliance with the QPAM Exemption conditions, as modified, is intended to assure that BlackRock Managers will be independent of the MPSs with which they enter into transactions. These conditions impose, among other requirements, the requirement that there be no agreement, arrangement or understanding designed to benefit an MPS, and the requirement that the terms of the Covered Transaction be at least as favorable to the Client Plans as the terms generally available in arm's length transactions between unrelated parties. Each BlackRock Manager utilizing the requested relief must meet the definition of a "qualified professional asset manager" as described in Section VI(a) of the QPAM Exemption, and each Covered Transaction must satisfy the

[12] "Client Plan" means any plan subject to ERISA section 406, Code section 4975 or FERSA section 8477(c) for which a BlackRock Manager is a fiduciary as described in ERISA section 3(21), including, but not limited to, any Pooled Fund, MPS Plan, Index Account or Fund, Model-Driven Account or Fund, Other Account or Fund, or In-House Plan, as defined in Section VI of the proposed exemption, except where specified to the contrary.

[13] "Covered Transaction" means each transaction set forth in Section III of the proposed exemption by a BlackRock Manager for a Client Plan with or involving, directly or indirectly, an MPS and/or a BlackRock Entity.

[14] 49 FR 9494 (Mar. 13, 1984), as amended, 70 FR 49305 (Aug. 23, 2005), and as amended, 75 FR 38837 (July 6, 2010).

[15] The QPAM Exemption may not be relied upon for securities lending. *See* Section I(b)(1) of the QPAM Exemption. However, for purposes of this proposed exemption, securities lending constituting Covered Transactions involving an MPS must comply with the QPAM Exemption conditions set forth in Section II.A. of the proposed exemption as well as the specific conditions (modeled on PTE 2006–16, 71 FR 63786 (October 31, 2006)) set forth in Section III.M. of the proposed exemption.

conditions described in the following paragraphs.

With certain exceptions discussed in the descriptions of the Covered Transactions, Section II.A.2. of the proposed exemption provides that, at the time of a Covered Transaction with or involving an MPS, the MPS, or its affiliate (within the meaning of section VI(c) of the QPAM Exemption),[16] must not have the authority to appoint or terminate the BlackRock Manager as a manager of the Client Plan assets involved in the Covered Transaction, or negotiate on behalf of the Client Plan the terms of the management agreement with the BlackRock Manager (including renewals or modifications thereof) with respect to the Client Plan assets involved in the Covered Transaction. Under Section II.A.3(a), notwithstanding the foregoing, in the case of an investment fund in which two or more unrelated Client Plans have an interest, a Covered Transaction with an MPS will be deemed to satisfy the requirements of the foregoing condition if the assets of a Client Plan on behalf of which the MPS or its affiliate possesses the authority described above and which is managed by the BlackRock Manager in the investment fund, when combined with the assets of other Client Plans established or maintained by the same employer (or an affiliate thereof) or by the same employee organization, on behalf of which the same MPS possesses such authority and which are managed in the same investment fund, represent less than ten percent (10%) of the assets of the investment fund (this rule is referred to herein as the 10% Rule).

In this regard, the Applicants represent that, in certain cases, as of the date of the Acquisition, assets of MPS Plans, whether or not combined with the assets of other plans of the same employer, represented ten percent (10%) or more of a BTC bank collective trust fund. These investments in the BTC bank collective trust fund, at the time they were made or authorized, were selected by fiduciaries of MPS Plans (or participants therein) as being in the interests of the MPS Plans and their participants and beneficiaries when no relationship existed between BlackRock and the MPSs in question that might be viewed as affecting the best judgment of the fiduciaries of the MPS Plans. While the appropriate fiduciary of these Client Plans, rather than the MPS itself, appointed the BlackRock Manager by investing or permitting investment in the bank collective trust fund, the Applicants nevertheless desire certainty that Section II.A.2. of this proposed exemption will be deemed to be met during the an unwind period that shall last until July 1, 2010 (the Unwind Period). There were practical obstacles to otherwise achieving compliance with the ten percent (10%) limitation in a shorter time frame, such as the need of the MPS Plans for sufficient time to adequately explore replacement investment managers. During the Unwind Period, such MPS Plans would be deemed for purposes of the proposed exemption to satisfy the 10% Rule if certain conditions are met; such conditions focus on fees paid by MPS Plans to BlackRock Managers during the Unwind Period, the termination provisions of the MPS Plans' investments in the Pooled Fund, and the IM's oversight of the terms of the investments in the Pooled Fund.[17]

The remaining conditions of Section II.A. of the proposed exemption generally track conditions set forth in Sections I(c)–I(g) of the QPAM Exemption, with an exception for the condition set forth in Section I(d) of the QPAM Exemption because MPSs are deemed not "related to" BlackRock for purposes of the proposed exemption.[18]

Section II.B.—Compensation Restrictions. The Applicants recognize that an unrestricted ability for employees of BlackRock to receive compensation in connection with the Covered Transactions could give rise to potential ERISA conflicts. In order to address this potential for conflicts, the Applicants will agree that no employees of a BlackRock Manager can receive any compensation that is based on any Covered Transaction having taken place between Client Plans and any of the MPSs (as opposed to with another institution that is not an MPS). The fact that a specific Covered Transaction occurred with an MPS as opposed to a non-MPS counterparty must be ignored by BlackRock and BlackRock Managers for compensation purposes. None of the employees of BlackRock or a BlackRock Manager can receive any compensation from BlackRock or a BlackRock Manager which consists of equity Securities issued by an MPS, which fluctuates in value based on changes in the value of equity Securities issued by an MPS, or which is otherwise based on the financial performance of an MPS independent of BlackRock's performance, provided that this condition shall not fail to be met because of the compensation of an employee of a BlackRock Manager fluctuates with the value of a broadly-based index which includes equity Securities issued by an MPS.

Section II.C.—Exemption Policies and Procedures. The Applicants recognize that in order for BlackRock to successfully manage and monitor Covered Transactions, the establishment of systematic policies and procedures is essential. The proposed exemption requires that BlackRock adopt and implement Exemption Policies and Procedures (EPPs), as defined in the proposed exemption, that address each of the Covered Transactions and that are reasonably designed to achieve the goals of: (a) Compliance with the terms of the exemption, (b) ensuring BlackRock's decisionmaking with respect to the Covered Transactions on behalf of Client Plans is done in the interests of the Client Plans and their participants and beneficiaries and, (c) to the extent possible, verifying that the terms of such Covered Transactions are at least as favorable to Client Plans as the terms generally available in arm's length transactions with unrelated parties. The EPPs are to be developed with the cooperation of both the ECO and the IM, and such EPPs are subject to the approval of the IM. The EPPs need not address transactions which are not within the definition of the term Covered Transactions.

Transgressions of the EPPs fall into three categories: (a) transgressions that constitute prohibited transactions under ERISA sections 406, Code section 4975, or FERSA section 8477(c) and which are not exempt by reason of a failure to comply with the proposed exemption or another administrative or statutory exemption (referred to herein as Violations), (b) transgressions that involve material amounts or material deviations from the EPPs, taking into account the amount of Client Plan assets affected by such transgressions (EPP Corrections), but that do not constitute Violations, and (c) transgressions that involve immaterial amounts and deviations from the EPPs and do not constitute Violations. The ECO will make a written determination as to whether such transgressions constitute Violations and require corrective action pursuant to Section V of the proposed exemption, require EPP Correction, or

[16] For the avoidance of doubt, no BlackRock Entity will be regarded as an affiliate of an MPS for these purposes.

[17] For purposes of Section I.A.3.(b) of the proposed exemption and for the 10% Rule set forth in Sections III.I., III.L., III.M. and III.U. of the proposed exemption, the MPS Plans of each of the MPS Groups (the PNC MPSs, the BOA MPSs, and the Barclays MPSs) are separately aggregated (*e.g.,* all MPS Plans of BOA MPSs are aggregated together but are not aggregated with MPS Plans of Barclays MPSs or PNC MPSs).

[18] For the avoidance of doubt, MPSs are excluded from the terms "affiliate" and "owner" for purposes of Section II.A. of the proposed exemption.

require no action. If the ECO determines a Violation has occurred, the provisions of Section V of the proposed exemption are applicable. If the ECO determines an EPP Correction is required, the ECO will provide written notice to the IM of the EPP Correction and the IM would have the authority to mandate further corrective action. The ECO will provide summaries for the IM of any such EPP Corrections as part of the required quarterly report.

To illustrate the implementation of the rules with respect to the three categories outlined above, the Applicants have provided the following hypothetical examples.

(a) Hypothetical Example One: A portfolio manager (PM) at a BlackRock Manager purchases Barclays common stock on the secondary market on behalf of several Client Plan portfolios, which if such purchases were below fifteen percent (15%) of the aggregate average daily trading volume (ADTV) for the previous ten trading days or below fifteen percent (15%) of the trading volume on the day of the purchase would otherwise appear to satisfy the criteria for relief under Section III.S. of the proposed exemption. The PM fails to aggregate the purchases of all of the accounts, and it purchases 15.2% of the ten trading day ADTV (which is also higher than the day in question's volume), thereby exceeding fifteen percent (15%) of both the ten day ADTV and the trading volume on the day of the transactions. As a result, they are no longer eligible for purchase under Section III.S. of the proposed exemption. Unless timely corrected under Section V of the proposed exemption, the purchase would constitute a Violation.

(b) Hypothetical Example Two: A PM at a BlackRock Manager purchases Barclays common stock on the secondary market on behalf of several Client Plan portfolios. The PM purchases an amount of Barclay stock equal to thirteen percent (13%) of the ten trading day ADTV. In order to simplify a compliance monitoring process that oversees three separate trading desks, the EPPs provide that purchases with respect to certain groups of portfolios be limited to purchases of MPS stock that equal no more than five percent (5%) of the ten day ADTV, unless approved in advance by the ECO. The purchases are made and no Violation has occurred because BlackRock is well below fifteen percent (15%) of the ten trading day ADTV, but there has been a serious transgression of the EPPs in that the PM failed to adhere to the carefully designed EPPs. Assuming for these purposes no mitigating further circumstances, the ECO Function would make a determination of an appropriate EPP Correction, including whether the implicated Client Plans would be better served by keeping or selling the securities acquired. The ECO would provide written notice to the IM of the EPP Correction. The IM would have the authority to mandate further corrective action.

(c) Hypothetical Example Three: The circumstances of the Barclays stock purchase are essentially the same as those in Hypothetical Example Two, except the PM at the BlackRock Manager in question, when he checks his trade list and aggregates the total percentage of Barclays stock to be purchased, issues instructions to cancel enough of the proposed purchase to bring it below five percent (5%). However, through inadvertence of the broker, the cancellation is not implemented and the full thirteen percent (13%) purchase is made of Barclays stock. There is no Violation, the original purchase order was a transgression of the EPPs, and correction may or may not be necessary depending on the circumstances, including why it was that the original purchase order was given and why it was the cancellation was not effected.

Section II.D.—Exemption Compliance Officer. In order to comply with the proposed exemption, the Applicants represent that it is essential to appoint an ECO and an ECO Function.[19] The ECO and the ECO Function will be developed and maintained by BlackRock to monitor compliance with the Code, ERISA, FERSA and the proposed exemption. The use of a dedicated ECO is more advantageous than simple reliance upon the Applicants' existing compliance department because the ECO will have a single focus on ERISA compliance as well as the expertise to ensure such compliance. In addition, the ECO and the ECO Function provide a centralized resource that is well suited to providing and receiving information to and from the IM (as discussed below).

The proposed exemption requires that BlackRock appoint an ECO. If the ECO resigns or is removed, BlackRock shall appoint a successor ECO within a reasonable period of time, not to exceed thirty (30) days, which successor shall be subject to the affirmative written approval of the IM. The ECO is a professional with at least ten years of experience and extensive knowledge of the regulation of financial services and products, including such regulation under ERISA and FERSA.

The conditions of Section II.D. of the proposed exemption govern the ECO's employment with BlackRock, including compensation, termination, treatment and responsibilities. The responsibilities set forth in Section II.D. of the proposed exemption generally include, but are not limited to: Monitoring Covered Transactions (including transactions and situations resulting from transactions with MPSs), monitoring compliance with the EPPs, determining whether corrective action, if any, is necessary with respect to Violations and EPP Corrections, determining whether revisions are necessary to the EPPs, the supervision of the ECO Function, the provision of a quarterly report to the IM, and the provision of certain certifications to the IM.

Section II.E.—Independent Monitor. The applicant represents that the ECO and the ECO Function alone may not be sufficient to completely avoid potential conflicts of interests. Conversely, the Applicants also believe that a wholly independent third party alone would not be able to efficiently or effectively monitor and oversee all of the relevant BlackRock activities. Therefore, BlackRock will appoint an IM that will provide an independent perspective, be capable of making independent decisions when necessary, and, to the extent any Violations occur or corrections are necessary, pass upon the same without any risk of self-interested motives that could be perceived if the ECO alone were to be responsible for making such decisions. The IM serves some of the same functions that a Qualified Professional Asset Manager might under similar circumstances but, as discussed above, due to the unique nature and complexities of the requirements contained in the proposed exemption, reliance upon the IM alone, without the support of the ECO and the ECO Function (and the EPPs) would be inadequate. The Applicants believe that the ECO, the ECO Function and the IM together will complement each other in serving their respective roles and combine, through frequent communication and coordination, to provide the necessary compliance regime.

The proposed exemption, therefore, requires that BlackRock retain an IM. If the IM resigns or is removed, BlackRock

[19] "ECO Function" means the ECO and such other BlackRock Entity employees in legal and compliance roles working under the supervision of the ECO in connection with the Covered Transactions. The list of BlackRock Entity employees shall be shared with the IM from time to time, not less than quarterly, and such employees will be made available to discuss the relevant Covered Transactions with the IM to the extent the IM or the ECO deem it reasonably prudent.

shall appoint a successor IM within a reasonable period of time, not to exceed thirty (30) days. The IM agrees in writing to serve as IM, and he or she is independent within the meaning of the proposed exemption.

The conditions of Section II.E. of the proposed exemption set forth the IM's responsibilities. The IM's responsibilities generally include, but are not limited to, the following: approval of the ECO and his or her compensation, assistance in the development, alteration and monitoring of the EPPs, consulting with the ECO regarding EPP Corrections and Violations (including modifications regarding such), exercising discretion for Client Plans when BlackRock Managers may have conflicts, reviewing the ECO's quarterly reports and certifications, determining whether a pattern or practice of BlackRock non-compliance exists, and the completion of an annual report.

Section II.F.—Special Notice Provisions. As an added safeguard to affected Client Plans, the proposed exemption requires specific disclosure to a plan fiduciary independent of BlackRock with respect to certain Covered Transactions. Such additional disclosure makes the provision of exemptive relief for certain Covered Transactions consistent with existing exemptive relief regimes. In that vein, a Special Notice containing (a) a notice of all of the conditions for relief under Sections III.C., E., F., G., Q., R., S. and V. of the proposed exemption and (b) a copy of the Notice to Interested Persons, must be provided to affected Client Plans in writing (which may be provided by U.S. mail or electronically, including by e-mail or use of a centralized electronic mailbox, so long as such electronic communication is reasonably calculated to result in the applicable Client Plan's receipt) as soon as practical, but no later than fifteen (15) days, following the date that the Notice to Interested Persons is provided to Client Plans generally, through publication in the **Federal Register**. As soon as practical following the Special Notice, a Client Plan fiduciary independent of any BlackRock Entity must be provided any additional material information regarding Covered Transactions described in Sections III.C., E., F., G., Q., R., S. and V. of the proposed exemption by the applicable BlackRock Manager on reasonable request; provided, that, solely for purposes of this provision, the fiduciary of an In-House Plan is not required to be independent of any BlackRock Entity.

Covered Transactions

16. As discussed above, the structure of the requested relief is founded upon compliance with five sets of general conditions. These five sets of general conditions are then modified by additional conditions deemed suitable for each Covered Transaction. Many of the conditions for individual Covered Transactions are derived from statutory exemptions, administrative class exemptions or administrative individual exemptions frequently relied upon by fiduciaries and parties in interest (sometimes affiliated and sometimes not) to exempt similar transactions. Section III of the proposed exemption sets forth the Covered Transactions for which the Applicants are seeking exemptive relief and the conditions which must be satisfied in respect of such Covered Transactions in order to be accorded such relief. Each Covered Transaction is set forth below, corresponding to the subsections of Section III of the proposed exemption.

A. Continuing Covered Transactions

17. The Applicants represent that as of the closing date of the Acquisition, there were three types of continuing Covered Transactions still in place which were previously entered into between BlackRock Managers and one or more of the MPSs in reliance on PTE 84–14 (the QPAM Exemption) and/or PTE 91–38 [20] (a class exemption for transactions entered into on behalf of bank collective trust funds), with such transactions relying upon the continuing transaction provisions therein (*i.e.,* Section VI(i) of the QPAM Exemption and Section IV(h) of PTE 91–38). The three types of continuing transactions (Continuing Covered Transactions) are defined in the proposed exemption as Type A, Type B and Type C.

18. The three types of Continuing Covered transactions can be described as follows:

(a) *Type A:* Continuing Covered transactions where there is no discretion on the part of either party, other than the ability of the BlackRock Manager to sell or otherwise transfer the Client Plan's position to a third party, the ability of the MPS to sell or otherwise transfer its position to a third party, or the ability of an MPS to otherwise terminate the transaction on previously specified terms. This could include, for example, the holding by a Client Plan of a corporate debt instrument issued by an MPS, which the BlackRock Manager may sell on behalf of a Client Plan or which the MPS may redeem. Another example is a commercial mortgage loan made to a Client Plan by an MPS that does not include a prepayment provision, which loan the MPS might sell to a third party.

(b) *Type B:* Continuing Covered Transactions such as those described as Type A, with the additional feature that the BlackRock Manager, on behalf of a Client Plan, has the option to terminate the Transaction with the MPS on previously specified terms. This could include a note issued by an MPS which the BlackRock Manager, on behalf of a Client Plan, has the ability to sell to a third party, or could choose to "put" back to the MPS on previously specified terms.

(c) *Type C:* Continuing Covered Transactions similar to Type B where the BlackRock Manager may terminate or modify the Transaction on behalf of a Client Plan under certain circumstances, but only with negotiation and/or payment of consideration to the MPS or to the Client Plan which was not predetermined. An example of such a Transaction could include a swap between a Client Plan and an MPS with a fixed term, under which the BlackRock Manager can seek novation to a third party if the MPS consents (perhaps for a price, for example, to reflect any credit differences between the selling Client Plan and the buyer), or which the BlackRock manager can terminate at any time if there is agreement on the termination payments.

The Applicants represent that each continuing Covered Transaction was believed to be in the interests of Client Plans and their participants and beneficiaries as of the date entered into.

19. With respect to Type A Covered Transactions in reliance on PTE 84–14 or PTE 91–38, the Applicants' position is that relief for any prohibited transaction that might arise under ERISA section 406(a) should continue to be available, if such relief applied pre-Acquisition, whether or not needed, pursuant to Section VI(i) of PTE 84–14 and Section IV(h) of PTE 91–38, the "continuing transactions" provisions of the exemptions, until or unless a modification, renewal or other discretionary action becomes necessary. The Department has previously concurred with a similar analysis of the "continuing transaction" provisions of PTE 84–14 and 91–38 in the Notice of Proposed Exemption with respect to PTE 2009–11.[21] However, the Department additionally noted that no relief is provided from ERISA section

[20] 56 FR 31966 (July 12, 1991), as corrected at 56 FR 59299 (Nov. 25, 1991).

[21] 73 FR 63200, 63204 (Oct. 23, 2008).

406(b) for an act of self-dealing that arises if circumstances change during the course of the continuing transaction.

20. With respect to Type B and Type C Continuing Covered Transactions, and the unwind, settlement or other termination thereof, ERISA section 406(a) and 406(b) relief is afforded under the proposed exemption, subject to the conditions outlined below. In conjunction therewith, the Applicants' position is that the provision of the exemptive relief from ERISA sections 406(a) and (b) for Type B and Type C continuing Covered Transactions does not necessarily mean that ERISA section 406(a) relief was not available for at least some of these Continuing Covered Transactions under PTE 84–14 or PTE 91–38. The Applicants acknowledge, however, that the Department is expressing no view as to whether such relief was otherwise available.

21. A list of all Type B Covered Transactions and all Type C Covered Transactions (B and C List) as of the Acquisition must be prepared and provided to the ECO and the IM. Any discretionary act by a BlackRock Managers with respect to a transaction on the B and C List must be approved in writing in advance by the ECO. Such approval is required for, but not limited to, sales and other transfers to a third party, redemptions, the exercise of options and the declaration of default or other credit impairment driven decisions. The ECO must determine that the terms of the action are in the interests of the affected Client Plans. The ECO Function periodically monitors outstanding transactions on the B and C List to inquire if an affirmative discretionary act, such as a credit driven action would be appropriate. If the ECO makes such a determination, the ECO must direct the action be taken and must approve the terms thereof as being in the interests of the affected Client Plans. The ECO Function must send to the IM an updated copy of the B and C List as of the end of each fiscal quarter summarizing the Type B Covered Transactions and the Type C Covered Transactions remaining at the end of the quarter and any discretionary actions taken during the quarter by BlackRock Managers with respect to such transactions. Upon the determination by the IM that an action taken with respect to a Type B Covered Transaction or a Type C Covered Transaction was inappropriate or that the compensation the Client Plans received was inadequate, or that an action should have been taken but was not, the Client Plans will be made whole by BlackRock.

B. Purchases and Holdings by BlackRock Managers of Fixed Income Obligations Issued by an MPS in an Underwriting on Behalf of Client Plans Invested in an Index Account or Fund, or in a Model-Driven Account or Fund

22. The MPSs are significant issuers of Fixed Income Obligations [22] both in the United States and in the United Kingdom. The Applicants represent that BlackRock Managers in their normal course may determine that an investment for Client Plans in Fixed Income Obligations newly issued by an MPS will be a beneficial investment for Client Plans. In the case of Index Funds or Model-Driven Funds, BlackRock Managers will need to make purchases of MPS Fixed Income Obligations for Index Funds for purposes of tracking the relevant Index, and for Model-Driven Funds for purposes of tracking the relevant Model. The Applicants represent that the purchase of such MPS Fixed Income Obligations for Index Funds or Model-Driven Funds in the primary market may be the best way to acquire such Fixed Income Obligations. The purchase of such Fixed Income Obligations, however, may convey an economic benefit on the issuing MPS, and establishes a debtor-creditor relationship. In addition, if an MPS is a member or manager of the selling syndicate, the purchase might convey an economic benefit on such MPS.

23. The Applicants represent that: (a) Each BlackRock Manager makes investment decisions on behalf of, or renders investment advice to, its Client Plans in accordance with the governing document of the particular Client Plan and the guidelines and objectives established in the relevant trust agreement or investment management or advisory agreement; (b) a decision to invest in a particular offering of Fixed Income Obligations is made on the basis of price, value, and a Client Plan's investment criteria; (c) a BlackRock Manager has little incentive to make purchases from offerings in which an MPS is an issuer that are not in the interests of a Client Plan because the BlackRock Manager's compensation for its services is generally based upon assets under management; and (d) if the assets under its management do not perform well, the BlackRock Manager will over time receive less compensation and could lose clients.[23]

24. In order for relief under the proposed exemption to be available for this transaction, such purchase and holding must be for the sole purpose of maintaining quantitative conformity with the weight of such Securities prescribed by the relevant Index, for Index Accounts or Funds, or the weight of such Securities prescribed by the relevant Model, for Model-Driven Accounts or Funds, and such purchase may not exceed the purchase amount necessary for such Model or quantitative conformity. In addition, such purchase shall not be made from any MPS and no BlackRock Entity shall be in the selling syndicate. Furthermore, the responsible BlackRock Manager must notify the ECO if circumstances arise in which an action or inaction on the part of the BlackRock Manager regarding an MPS Fixed Income Obligation so acquired might be thought to be motivated by an interest which may affect the exercise of such BlackRock Manager's best judgment as a fiduciary (*e.g.,* participation in a creditor's committee, exercise of a put, waiver of covenants or other substantially similar actions), and the BlackRock Manager must comply with decisions of the ECO regarding the taking, or the refraining from taking, of actions in such circumstances. After the purchase, any decision regarding the conversion of an MPS Fixed Income Obligation into equity in the MPS must be made by the IM.

C. Purchase and Holding by BlackRock Managers of Fixed Income Obligations Issued by an MPS in an Underwriting on Behalf of Client Plans Invested in an Other Account or Fund

25. Because the MPSs are significant issuers of Fixed Income Obligations in the United States and the United Kingdom, the Applicants represent that BlackRock Managers in their normal course may determine that an investment in a new offering of Fixed Income Obligations issued by an MPS will be a beneficial investment for Client Plans in an account or a pooled fund which is not an Index Fund or Model-Driven Fund (an Other Account or Fund). As stated above, the purchase of such Fixed Income Obligations, however, may convey an economic benefit on the issuing MPS, and establishes a debtor-creditor relationship. In addition, if an MPS is a member or manager of the selling

[22] For purposes of the proposed exemption, Fixed Income Obligations is a defined term generally meaning fixed income obligations characterized as debt pursuant to 29 CFR 2510.3–101 (other than loans with respect to which an MPS is the entity which acts as lead lender and other than Asset-Backed Securities).

[23] The Applicants' representations in this regard are equally applicable to other Covered Transactions.

syndicate, the purchase might convey an economic benefit on such MPS.

26. In order for relief under the proposed exemption to be available for this transaction, such purchase and holding must satisfy the conditions of Section IV.A. (Affiliated Underwritings) of the proposed exemption, except that for purposes of the ratings requirement described therein, the MPS-issued Fixed Income Obligations at the time of purchase must be rated in one of the three highest rating categories by a Rating Organization and none of the Rating Organizations may rate the Fixed Income Obligations lower than in the third highest rating category. In addition, such purchase must not be made from an MPS and no BlackRock Entity can be in the selling syndicate.

27. After purchase, the responsible BlackRock Manager must notify the ECO if circumstances arise in which an action or inaction on the part of the BlackRock Manager regarding an MPS Fixed Income Obligation so acquired might be thought to be motivated by an interest which may affect the exercise of such BlackRock Manager's best judgment as a fiduciary, and the BlackRock Manager must comply with decisions of the ECO regarding the taking, or the refraining from taking, of actions in such circumstances. After purchase, any decision regarding conversion of an MPS Fixed Income Obligation into equity in the MPS must be made by the IM.

D. Certain Transactions in the Secondary Market by BlackRock Managers of Fixed Income Obligations Including Fixed Income Obligations Issued by or Traded With an MPS

28. Because the MPSs and their affiliates are significant issuers of Fixed Income Obligations in the United States and the United Kingdom, the Applicants represent that BlackRock Managers in their normal course may determine that a secondary market investment for Client Plans in Fixed Income Obligations issued by an MPS will be a beneficial investment for Client Plans. The Applicants further represent that BlackRock Managers in the normal course may determine that the purchase from or sale to an MPS in the secondary market of third party Fixed Income Obligations will be beneficial investments for Client Plans. The MPSs are significant participants in the fixed income markets as broker-dealers and offer significant sources of trading liquidity to investment managers. Furthermore, multiple MPSs are often ranked in the top five counterparties in the debt markets in the aggregate as well as many asset classes and geographies. A leading 2008 survey (completed before Barclays/Lehman and BOA/Merrill Group acquisitions) of investment managers ranking the quality of fixed income broker-dealers ranked Bank of America, Barclays, Lehman Brothers, and Merrill Lynch in the top 10 broker-dealers.[24]

29. While purchases of Fixed Income Obligations in the secondary market convey no economic benefit on the issuing MPS, a debtor-creditor relationship is still established thereby. Also, such a purchase from an MPS may be a prohibited transaction in and of itself, requiring exemptive relief.

30. The Applicants state that obtaining the best available purchase or sales price for a particular trade presents special challenges in the fixed income markets, which trade a very large array of different Fixed Income Obligations with specific features, including some Fixed Income Obligations issued in relatively small numbers and/or in which markets are made by only a small number of dealers. The diminution in the number of market makers due to the recent exit of several major participants from the financial services industry through bankruptcies or acquisitions has heightened these challenges. Accordingly, the Applicants represent that purchases and sales to or from an MPS will be done in compliance with the Three Quote Process,[25] which will demonstrate that the MPS provides the best available purchase or sale price for the Fixed Income Obligation being traded.

31. In order for relief under the proposed exemption to be available for this transaction, the following additional conditions are applicable solely to the extent that the Fixed Income Obligations are issued by an MPS and are purchased and held by a BlackRock Manager for a Client Plan: (a) The purchase of the Fixed Income Obligation issued by an MPS is not made from the issuing MPS; (b) after purchase, the responsible BlackRock Manager must notify the ECO if circumstances arise in which an action or inaction on the part of the BlackRock Manager regarding an MPS Fixed Income Obligation so acquired might be thought to be motivated by an interest which may affect the exercise of such BlackRock Manager's best judgment as a fiduciary, and must comply with the decisions of the ECO regarding the taking, or the refraining from taking, of actions in such circumstances; (c) after purchase, any decision regarding conversion of an MPS Fixed Income Obligation into equity in the MPS must be made by the IM; and (d) if purchased for an Index Account or Fund, or a Model-Driven Account or Fund, such purchase must be for the sole purpose of maintaining quantitative conformity with the weight of such Securities prescribed by the relevant Index, for Index Accounts or Funds, or the weight of such Securities prescribed by the relevant Model, for Model-Driven Accounts or Funds, and such purchase may not exceed the purchase amount necessary for such Model or quantitative conformity.

32. With respect to Fixed Income Obligations, whether or not issued by an MPS, held by a BlackRock Manager for a Client Plan under which an MPS has an ongoing function, such as servicing of collateral for asset-backed debt, or the potential for liability, such as under representations or warranties made by an MPS with respect to collateral for such asset-backed debt which the MPS originated, the taking of or refraining

[24] Greenwich Associates, Leading Dealers (2008).

[25] As defined in the proposed exemption, "Three Quote Process" means three bids or offers (either of which being sometimes referred to as quotes) are received by a trader for a BlackRock Manager each of which such quotes such trader reasonably believes is an indication that the dealer presenting the bid or offer is willing to transact the trade at the stipulated volume under discussion, and all material terms (including volume) under discussion are materially similar with respect to each other such quote. In selecting the best of three such quotes, a BlackRock Manager may maintain books and records for the three firm bids/offers in a convention that it reasonably believes is customary for the specific asset class (such as "price" quotes, "yield" quotes or "spread" quotes). For example, corporate bonds are often quoted on a spread basis and dealers customarily quote the spread above a certain benchmark bond's yield (*e.g.,* for a given size and direction a BlackRock trader may ask for quotes to sell $1 million of a particular bond, dealer 1 may quote 50 bps above the yield of the ten (10) year treasury bond, dealer 2 might quote 52 bps above the yield of the ten (10) year treasury bond and dealer 3 might quote 53 bps above the yield of the ten (10) year treasury bond). If only two firm bids/offers can be obtained, the trade requires prior approval by the ECO and the ECO must inquire as to why three firm bids/offers could not be obtained. If in the case of a sale or purchase a trader for a BlackRock Manager reasonably believes it would be injurious to the Client Plan to specify the size of the intended trade to certain bidders, a bid on a portion of the intended trade may be treated as a firm bid if the trader documents (a) why the bid price is a realistic indication of the economic terms for the actual amount being traded despite the difference in the size of the actual trade and (b) why it would be harmful to the Client Plan to solicit multiple bids on the actual amount of the trade. If a trader for a BlackRock Manager solicits bids from three or more dealers on a sale or purchase of a certain volume of Securities, and receives back three or more bids, but at least one bid is not for the full amount of the intended sale, if the price offered by the partial bidder(s) is less than the price offered by the full bidder(s), the trader may assume a full bid by the partial bidder(s) would not be the best bid, and the trader can consummate the trade, in the case of at least two full bids, with the dealer making the better of the full bids, or in the case of only one full bid, with the dealer making that full bid.

from taking of any action (*e.g.,* instituting legal action for breach of representation) by the responsible BlackRock Manager which could have a material positive or negative effect upon the MPS must be decided upon by the ECO. For purposes of this Covered Transaction, Asset-Backed Securities,[26] as defined in the proposed exemption, are not Fixed Income Obligations.

E. Purchase in an Underwriting and Holding by BlackRock Managers of Fixed Income Obligations Issued by a Third Party When an MPS is Underwriter, Manager or Member of the Selling Syndicate, or a Debt Trustee

33. The Applicants represent that BlackRock Managers in their normal course may determine that an investment in a new offering of third-party Fixed Income Obligations where an MPS is an underwriter, manager or member of the selling syndicate and/or where an MPS is the debt trustee will be a beneficial investment for Client Plans. As discussed above, the purchase of Securities in an offering when an MPS is a member or manager of the syndicate might convey an economic benefit on such MPS. In addition, if an MPS is a debt trustee of such Securities, the purchase might enable such MPS to earn a fee, or earn a larger fee.[27]

34. The Applicants estimate that the majority of the syndicated offerings that they review as potentially attractive investments for Client Plans include one or more MPS as an underwriter. Additionally, multiple MPS are often ranked in the top five underwriters for total debt issued in the Americas and globally. Thus, the failure to obtain relief for primary market offerings due to an MPS acting as an underwriter, whether as a manager or member, would deny Client Plans access to a majority of primary market offerings for Fixed Income Obligations.

35. In order for relief under the proposed exemption to be available for this transaction, the following conditions apply: (a) The conditions of Section IV.A. (Affiliated Underwritings) of the proposed exemption must be satisfied; (b) such purchase must not be made from an MPS; (c) no BlackRock Entity may be in the selling syndicate; and (d) with respect to Fixed Income Obligations under which an MPS has either an ongoing function, such as debt trustee, servicer of collateral for asset–backed debt, or the potential for liability, such as under representations or warranties made by an MPS with respect to collateral for such asset-backed debt which the MPS originated, the taking of or refraining from taking any action by the responsible BlackRock Manager which could have a material positive or negative effect upon the MPS must be decided upon by the ECO. For purposes of this Covered Transaction, Asset-Backed Securities are not Fixed Income Obligations.

F. Purchase in an Underwriting and Holding by BlackRock Managers of Asset-Backed Securities, When an MPS is Underwriter, in the Capacity as Either a Manager or a Member of the Selling Syndicate, Trustee, or, in the Case of Asset-Backed Securities Which Are CMBS, Servicer[28]

36. The Applicants represent that BlackRock Managers in their normal course may determine that an investment in a new offering of Asset-Backed Securities treated as equity for ERISA purposes where an MPS is an underwriter, in the capacity as either a manager or a member of the selling syndicate, or trustee (or, in the case of CMBS, servicer, when the MPS serves solely as servicer and not as underwriter or trustee while being such servicer) will be a beneficial investment for Client Plans. The Applicants also represent that multiple MPSs are often ranked in the top ten underwriters for Asset-Backed Securities. Thus, the failure to obtain relief for primary market offerings due to an MPS acting as an underwriter or CMBS Servicer would have a significant impact on Client Plans. A failure to obtain relief would prevent Client Plans from investing in a large part of the Asset-Backed Securities market, resulting in tracking error for Index or Model Driven Funds and greatly reducing opportunities for Other Funds or Accounts.

37. In order for relief under the proposed exemption to be available for this transaction, the following conditions apply: (a) The conditions of Section IV.A. (Affiliated Underwritings) of the proposed exemption must be satisfied, except that (i) for purposes of the ratings requirement therein, the Asset-Backed Securities at the time of purchase must be rated in one of the three highest rating categories by a Rating Organization and none of the Rating Organizations may rate the Asset-Backed Securities lower than the third highest rating category; and (ii) in the case of Asset-Backed Securities which are CMBS and for which the MPS is servicer, the conditions of Section IV.B. (Affiliated Servicing) of the proposed exemption must be satisfied instead of the conditions of Section IV.A. (Affiliated Underwritings) of the proposed exemption (if an MPS serves in both an Affiliated Underwriting capacity and an Affiliated Servicing capacity, both Section IV.A. and Section IV.B. of the proposed exemption must be satisfied, with respect to the applicable capacity); (b) such purchase must not be made from an MPS; (c) no BlackRock Entity may be in the selling syndicate; (d) in the case of Asset-Backed Securities with respect to which either (i) an MPS has an ongoing function (such as trustee, or servicer of collateral for CMBS) or (ii) the potential for liability exists (such as under representations or warranties made by an MPS with respect to collateral for CMBS which collateral the MPS originated), the taking of or refraining from taking of any action by a responsible BlackRock Manager which could have a material positive or negative effect upon the MPS must be decided upon by the ECO; [29] and (e) the purchase must meet the conditions of an applicable "Underwriter Exemption." [30]

[26] As defined in the proposed exemption, Asset-Backed Securities means Securities which are pass-through certificates or trust certificates characterized as equity pursuant to 29 CFR 2510.3–101 that represent a beneficial ownership interest in the assets of an issuer which is a trust, with any such trust limited to (a) a single or multi-family residential or commercial mortgage investment trust, (b) a motor vehicle receivable investment trust, or (c) a guaranteed governmental mortgage pool certificate investment trust, and which entitles the holder to payments of principal, interest and/or other payments made with respect to the assets of the trust, the corpus or assets of which consist solely or primarily of secured obligations that bear interest or are purchased at a discount. For purposes of Section IV.A. of the proposed exemption, Asset-Backed Securities are treated as debt Securities.

[27] The Department has issued individual exemptions for situations where an asset manager purchases securities in an underwriting and an affiliate is trustee of the issuer. *See, e.g.,* PTE 2003–24, granted to Deutsche Bank AG and JPMorgan Chase Bank, 68 FR 48637 (August 14, 2003).

[28] Applicants note that the Department concluded under similar circumstances that relief is not necessary for the purchase of investment grade CMBS Securities on behalf of employee benefit plans during an underwriting syndicate, where the investment manager is related to an originator of one or more of the loans in the CMBS pool, once the loan originator has transferred the loans to the pool because the loan originator has no other responsibilities to the pool other than a limited repurchase obligation. *See* Notice of Proposed Exemption with respect to PTE 2008–16, 73 FR 60325, 60328 (Oct. 10, 2008).

[29] Relief is not provided in the proposed exemption for purchases of Asset-Backed Securities in the primary market if an MPS is a sponsor, swap counterparty, servicer (except in the case of CMBS), originator (except in the case of CMBS), liquidity provider, or insurer with respect to the Asset-Backed Securities. With respect to originators and CMBS, see footnote 28.

[30] As defined in the proposed exemption, "Underwriter Exemption(s)" means a group of individual exemptions granted by the Department to provide relief for the origination and operation

Continued

G. Purchase and Holding by BlackRock Managers of Equity Securities Issued by an Entity Which Is Not an MPS and Is Not a BlackRock Entity, in an Underwriting When an MPS is an Underwriter, in Either a Manager or Member Capacity, of the Selling Syndicate

38. The Applicants represent that BlackRock Managers in their normal course may determine that equity Securities issued by an independent third party where an MPS is an underwriter, in either a manager or a member capacity, of the selling syndicate will be a beneficial investment for Client Plans.

39. The Applicants estimate that the majority of the syndicated offerings that they review as potentially attractive investments for Client Plans include one or more MPS as an underwriter. Additionally, multiple MPS are often ranked in the top ten underwriters for equity securities issued in the Americas and globally. Thus, a failure to obtain relief for primary market offerings due to an MPS acting as an underwriter would deny Client Plans access to a majority of primary markets offerings for equity securities.

40. In order for relief under the proposed exemption to be available for this transaction, such purchase and holding must meet the following conditions: (a) The conditions of Section IV.A. (Affiliated Underwritings) of the proposed exemption must be satisfied; (b) such purchase must not be made from an MPS; (c) no BlackRock Entity may be in the selling syndicate; and (d) the Securities must not be Asset-Backed Securities.

H. Purchase and Sale by BlackRock Managers of Asset-Backed Securities in the Secondary Market, From or to an MPS, and/or When an MPS is Sponsor, Servicer, Originator, Swap Counterparty, Liquidity Provider, Trustee or Insurer, and the Holding Thereof

41. The Applicants represent that BlackRock Managers in their normal course may determine that the purchase in the secondary market of Asset-Backed Securities treated as equity for ERISA purposes where an MPS fills one of the captioned roles will be a beneficial investment decision for Client Plans. There may also be situations where the purchase or sale of such instruments to or from an MPS is in the interests of Client Plans.

42. The Applicants represent that multiple MPSs are significant counterparties for Asset-Backed Securities in the Secondary Market and have large businesses as sponsor, servicer, originator, swap counterparty, liquidity provider, trustee or insurer thereof. Thus, the failure to obtain relief for secondary market purchases and sales with an MPS or where an MPS is a CMBS servicer or fills one of the captioned roles would have a significant impact on Client Plans. The failure to obtain relief would prevent Client Plans from investing in a large part of the Asset-Backed Securities market, resulting in tracking error for Index or Model-Driven Funds and greatly reducing opportunities for Other Funds or Accounts.

43. In order for relief under the proposed exemption to be available for this transaction, the following conditions apply: (a) The Asset-Backed Securities are purchased from or sold to an MPS as a result of the Three Quote Process as defined in the proposed exemption; (b) regardless of from whom the BlackRock Manager purchases the Asset-Backed Securities, the purchase and holding of the Asset-Backed Security otherwise must meet the conditions of an applicable Underwriter Exemption;[31] and (c) regardless of from whom the BlackRock Manager purchased the Asset-Backed Securities, if an MPS is, with respect to such Asset-Backed Securities, a sponsor, servicer, originator, swap counterparty, liquidity provider, insurer or trustee, as those terms are utilized or defined in the Underwriter Exemption, and circumstances arise in which the taking of or refraining from taking of any action (*e.g.,* instituting legal action for breach of representation, a decision with respect to dismissing or retaining a special servicer, etc.) by the responsible BlackRock Manager could have a material positive or negative effect upon the MPS, the taking of or refraining from taking of any such action must be decided upon by the ECO.

I. Repurchase Agreements When MPS Is the Seller

44. The Applicants represent that a BlackRock Manager may transfer cash of a Client Plan to an MPS in exchange for Securities (*e.g.,* Treasuries, corporate debt, etc.). The MPS will agree to buy back the same Securities from the Client Plan at a fixed price or fixed spread at an agreed upon later date. The Securities transferred serve as collateral in the case of a default by the MPS. Applicants believe that the value to plans of engaging in repurchase transactions was tacitly recognized by the Department by including such transactions in PTE 81–8, the prohibited transaction class exemption covering certain short-term investments.[32]

45. The Applicants represent that historically a BTC cash management program has held a significant amount of Client Plan assets invested in repurchase agreements with a counterparty who is now an MPS (constituting roughly 25% of BTC's repurchase positions). Generally, these Covered Transactions are "on open," which means that they roll over automatically but are subject to termination by either party every business day. In practice, the "on open" repurchase transactions may continue indefinitely with rates changing daily to reflect market conditions as continually mutually agreed upon by the parties.

46. The Applicants further represent that there are an extremely limited number of counterparties available for these large "on open" repurchase Covered Transactions. On any given day, it is very likely that a single MPS will be the only counterparty for these overnight "on open" repurchase transactions. While BlackRock Managers may be able to find another counterparty to bid on a repurchase transaction, with like collateral and like terms, for a part of the overall amount, it is likely that only one MPS would be available as a counterparty for the full balance.

47. The Applicants represent further that on a daily basis, when such Covered Transactions roll over, another counterparty may offer a better rate than the one MPS, on that day for a partial size of the repurchase balance. Despite this rate differential, for overnight repurchase, on each business day, BlackRock Managers still need to consider whether continuing the repurchase with the MPS for some or all of the full repurchase balance is in the interests of the Client Plans. If BlackRock Managers pull part of the

of certain asset pool investment trusts and the acquisition, holding and disposition by plans of Asset-Backed Securities representing undivided interests in those trusts. Such group of individual exemptions was collectively amended by PTE 2009–31, 74 FR 59001 (Nov. 16, 2009).

[31] In Advisory Opinion 99–03A (January 25, 1999) (sometimes called the "Lawson Letter"), the Department provided that an affiliate of an ERISA fiduciary could provide sub-servicer services to a trust invested in mortgage loans without violating ERISA section 406(b) if the ERISA fiduciary could not use any of its authority or control to change or influence, in any way, compensation paid to the sub-servicer affiliate. The Applicants represent that unless and until a decision must be made which could materially affect an MPS performing one or more roles with respect to Asset-Backed Securities the reasoning articulated in the Lawson Letter should apply to such MPS roles.

[32] 46 FR 7511 (January 23, 1981); as amended, 50 FR 14043 (April 9, 1985).

trades to place with another counterparty offering a better rate on a particular day, such action can jeopardize the ability to re-place that amount with the MPS, and to continue to place large amounts with the MPS, since the MPS seeks consistent ongoing funding. Thus, over time, BlackRock Managers may continue to roll over large repurchase transactions with the MPS even though another counterparty may have offered somewhat better terms for a fraction of the repurchase amount.

48. In order for relief under the proposed exemption to be available for this transaction, the conditions of PTE 81–8 applicable to repurchase agreements, with some revisions and additional conditions, generally apply. Such revisions and additional conditions include, but are not limited to: (a) The written agreement that is referenced in Section III.A. of PTE 81–8 is required to be a standardized industry form, with the exception of certain written agreements entered into prior to the Acquisition and disclosed to the ECO; and (b) the limitation on "restricted securities" that is referenced in Section III.G. of PTE 81–8 is modified to permit Client Plans to receive Securities that are "restricted securities" within the meaning of Rule 144 under the 1933 Act, until July 31, 2010. Additionally, while this proposed exemption, consistent with PTE 81–8, provides that neither the MPS seller nor any MPS which is a member of the same MPS Group may have discretionary authority or control with respect to the investment of the Client Plan assets involved in the transaction or render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets, it also provides an exception to such condition in the form of the 10% Rule.

49. In addition to the conditions of PTE 81–8, in order for relief under the proposed exemption to be available for this transaction, two additional conditions must be met:

(a) In the event of any dispute between a BlackRock Manager and an MPS seller involving a Covered Transaction under Section I of the proposed exemption, the IM must have the responsibility to decide whether, and if so how, BlackRock is to pursue relief on behalf of the Client Plan(s) against the MPS Seller; and

(b) At time of entry into or renewal of each Covered Transaction under this Section III.I., including both term repurchase transactions and daily renewals for "open" or "overnight" transactions, either (i) each Covered Transaction under Section III.I. of the proposed exemption, must be as a result of the Three Quote Process, or, (ii) the BlackRock Manager must determine that the yield on the proposed transaction, or the renewal thereof, is at least as favorable to the Client Plans as the yield of the Client Plan on two (2) other available transactions which are comparable in terms of size, collateral type, credit quality of the counterparty, term and rate. The methodology employed for purposes of the comparison in (ii) above must (iii) be approved in advance by the ECO Function and (iv), to the extent possible, refer to objective external data points, such as the Eurodollar overnight time deposit bid rate, the rate for repurchase agreements with U.S. government Securities, or rates for commercial paper issuances or agency discount note issuances sourced from Bloomberg, or another third party pricing service or market data provider (which providers may use different terminology to refer to these same external data points). The applicable BlackRock Manager must record a description of the comparable transactions, if reliance is placed upon same, and such data must be periodically reviewed by the ECO Function. The procedures described in this paragraph 49(b) must be designed to ensure that BlackRock Managers determine to only enter into Covered Transactions with MPS sellers which are in the interests of Plan Clients, and such procedures must be reviewed and may be commented on by the IM.

J. Responding to Tender Offers and Exchange Offers Solicited by an MPS

50. One or more of the MPS are commonly hired by issuers of securities to solicit holders of Securities regarding tender offers, exchange offers and similar transactions. In such capacity, the MPS acts as agent for its client. As the holder of trillions of dollars in Securities, the Applicants commonly receive solicitations from such agents in situations where BlackRock Managers are responsible for exercising discretion on behalf of Client Plans to respond to such solicitations. The compensation of the MPS for such services will be paid by its client, may or may not vary with the relative success of the offer, and the BlackRock Managers might or might not know how the MPS is compensated. Client Plans would suffer harm if the BlackRock Managers were unable to respond to such tender offers and exchanges.

51. In order for relief under the proposed exemption to be available for this transaction, the following conditions must be met: (a) The Client Plan pays no fees to the MPS in connection with this Covered Transaction; (b) the BlackRock Manager must submit to the ECO in advance of participation a written explanation of the reasons for such participation; and (c) the ECO Function must determine that the reasons for participation by the BlackRock Manager in the Covered Transaction are appropriate from the vantage point of the Client Plans. Effective October 1, 2010, the ECO Function must affirmatively make this determination in writing prior to the BlackRock Manager participating in the Covered Transactions under Section III.J. of the proposed exemption.

K. Purchase in Underwritings of Securities Issued by an Entity Which Is Not an MPS When the Proceeds Are Used To Repay a Debt to an MPS

52. The Applicants represent that the MPSs are very significant lenders to domestic and foreign corporate and other third party borrowers. Such third party borrowers may issue debt or equity Securities in primary market offerings. BlackRock Managers might decide that the purchase of such Securities would be in the interest of Client Plans. The proceeds of such offerings might be used by the third party issuers to repay debt owed to an MPS. BlackRock Managers purchasing such Securities in a primary market offering might or might not know whether the proceeds of the offering would be used to repay debt to an MPS. The BlackRock Managers represent that Client Plans would be harmed if they were unable to participate in primary market offerings based on the possibility that some of the proceeds may be used to repay a pre-existing debt to an MPS.

53. Relief under the proposed exemption is available for this transaction if the BlackRock Manager does not know (within the meaning of the proposed exemption) that the proceeds will be applied to the repayment of debt owed to an MPS. If the BlackRock Manager does know that proceeds of the offering will be applied to the repayment of debt owed to an MPS, the purchase of the Securities and the payment of the proceeds to the MPS qualify for relief under the proposed exemption provided that no more than twenty percent (20%) of the offering is purchased by BlackRock Managers for Client Plans, and no more than fifty percent (50%) of the offering in the aggregate is purchased by BlackRock, BlackRock Managers and other BlackRock Entities for Client Plans, other clients of BlackRock Managers, or as proprietary investments.

L. Bank Deposits and Commercial Paper

54. The Applicants represent that BlackRock Managers might decide that it would be in the interest of Client Plans to invest in certificates of deposit, time deposits or other bank deposits at an MPS, or in commercial paper issued by an MPS. The applicants believe that the potential merit of such investments was recognized by Congress in enacting the statutory prohibited transaction exemption set forth in ERISA section 408(b)(4) and by the Department in promulgating PTE 81–8.

55. The Applicants represent that the MPSs are significant issuers of high quality bank debt including certificates of deposit, time deposits, other bank deposits and commercial paper, and they are able to take large deposits on short notice. The universe of large domestic issuers of such instruments is contracting as a result of the consolidation outlined above. Thus, BlackRock believes having MPSs available to provide such instruments provides necessary liquidity and portfolio diversification to Client Plans. The MPS are recognizable, household names that Client Plans are familiar with and with which Client Plans are comfortable with BlackRock holding on behalf of Client Plans.

56. In order for relief under the proposed exemption to be available for this transaction, the following conditions must be met:

(a) With respect to Covered Transaction involving bank deposits, either (i)(A) the bank must be supervised by the United States or a State, and at the outset of the Covered Transaction or renewal thereof of, such bank must have a credit rating in one of the top two (2) categories by at least one of the Rating Organizations; (B) neither the bank nor an affiliate of the bank may have discretionary authority or control with respect to the investment of Client Plan assets involved in the Covered Transaction or render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets; and (C) such deposit must bear a reasonable interest rate, or (ii) the BlackRock Manager and the MPS must comply with ERISA section 408(b)(4);

(b) With respect to Covered Transactions involving investments in commercial paper, the conditions of PTE 81–8 applicable to commercial paper generally apply, except that the commercial paper is required to be ranked in one of the two highest rating categories of one of the Rating Organizations instead of one of the three highest rating categories of one of the Rating Organizations, as permitted under PTE 81–8; and

(c) For purposes of the Covered Transactions set forth in this Section III.L. of the proposed exemptions, (i) no BlackRock Entity shall be regarded as an affiliate of an MPS bank at which a deposit is made of Client Plan assets, nor of an MPS issuer of commercial paper in which a BlackRock Manager invests Client Plan assets, and (ii) the 10% Rule shall apply.

M. Securities Lending to an MPS

57. The Applicants represent that Securities loans, for this purpose, consist of different types of loans, "General Collateral Open Loans," "Special Open Loans," "Term Loans," and "Exclusive Loans." In the past, BGI adopted a process to ensure, in accordance with PTE 2002–46,[33] that the terms of every loan made to an affiliate of BGI (such as Barclays Capital Inc. (BCI)) were at least as favorable to the Client Plan as those of comparable arm's length transactions between unrelated parties. With effect from the date of the Acquisition, BTC has adopted the same process for loans to an MPS as previously employed with respect to loans to BCI.

58. *General Collateral (GC) Open Loans:* The Applicants represent that without regard to the identity of any given approved borrower, the large majority of Securities loans are made using an "auto borrow" functionality by which the borrower can borrow "general collateral," or very liquid Securities, in a non-negotiated manner, at a flat rate that applies to all borrowers. Accordingly, all loans of GC collateral are re-rated based on prevailing rates for the relevant Securities. An MPS may be an approved borrower.

59. *Special Open Loans:* The Applicants represent that for those loans not made using auto borrow, which involve more illiquid and thus more desirable or "special" Securities, BlackRock Managers negotiate the rebate rate individually with each borrower. The BlackRock Managers rely upon technology built into BlackRock's trading systems which shows them the rates for all other loans of the same Security to other borrowers, as well as the general market rates for that Security from third party data suppliers.

60. *Term Loans:* The Applicants represent that BTC may agree to lend a specific Security, Securities (a basket), or fixed notional value of non-specific Securities at a negotiated price for an agreed upon duration longer than overnight. Such term loans can be GC or Special. Term agreements with MPS borrowers must be executed at the best pricing available at the time of negotiation. Since such agreements include pricing terms for a specified period of time, they are not subject to re-pricing or comparison to other loans through the agreed upon term.

61. *Exclusive Loans:* The Applicants represent that BTC may agree to provide a single borrower with exclusive borrowing access to a fund for a fixed duration. Exclusive access is awarded to the qualified borrower with the highest bid. Income is accrued daily by charging a fee on the notional value of the fund and not related to the Securities actually borrowed, if any. Exclusive loan agreements with MPS borrowers must be executed at the best pricing available at the time of negotiation. Since such agreements include pricing terms for a specified period of time, they are not subject to re-pricing or comparison to other loans through the agreed upon duration of the agreement.

62. The Applicants represent that Open Loans, both GC and Special, to an MPS must be subject to competitive pricing comparisons on the day of execution and each day that the loans remain outstanding. All Special Open Loans are re-priced on a periodic basis as market conditions and supply/demand change. More specifically, BTC runs a daily pricing comparison report that compares all Open Loans to all borrowers, including an MPS, from its proprietary system, known as Global Loan Manager. The report highlights loans that are no longer priced in accordance with the arm's length transaction requirements of PTE 2002–46, i.e., where market conditions such as supply and demand have changed. If a loan to an MPS is not currently priced at least equal to or better than the least favorable pricing to a non-MPS, such loan is re-priced to the market pricing for such Security on the same day. If the MPS does not accept the re-price, the loan is recalled.

63. The Applicants represent that if the price of a loan is identified as not meeting the criteria described above but BlackRock traders determine that the loan is not comparable to outstanding loans with comparable non-MPS borrowers and therefore should not be re-priced, the BlackRock trader must insert comments into Global Loan Manager with a relevant explanation. This may be due to the size or other characteristics of the various trades being compared. The Global Loan Manager rate comparison report, including any such comments, will then be re-generated and stored

[33] Granted to Barclays Global Investors, N.A., 67 FR 59569 (September 23, 2002).

electronically. The regenerated report is reviewed on a regular basis (usually weekly) by the trading desk manager and signed off on by such trading desk manager; hard copies of the report are saved. The ECO performs a periodic review of this process.

64. The Applicants represent that it is generally more beneficial to have a Security on loan than not, and it may not be possible to relend the same Security to another borrower. In repricing a loan, the loan will only be re-priced to a rate that is within the range of other loans of that Security to non-MPS borrowers, and the loan will only be re-priced to a rate at which, in the BlackRock Manager's judgment, it would be more favorable to the lending Client Plan to re-price the loan at that rate than to terminate the loan.

65. The Applicants represent that based on the foregoing, ongoing loans will meet an arm's length standard but may not always remain at the absolute "best" rate in the market during the entire time the loan is outstanding. Borrowers are not fungible (*e.g.,* they don't have infinite demand for a given Security, and the willingness to pay varies by broker). Thus, rates will vary across borrowers over time, and the only way to ensure all loans to MPSs are always at the absolute best rate paid by all other borrowers would be to simply lend less to the MPS. Unfortunately, however, lending less would reduce client revenue and consequently is not in the Client Plans' interests.

66. The proposed exemption will only apply (a) to the lending of Securities by a BlackRock Manager that are assets of a Client Plan to an MPS which is a "U.S. Broker-Dealer" (as defined in the proposed exemption) or a "U.S. Bank" (as defined in the proposed exemption), provided that the conditions set forth in Section III.M.2. of the proposed exemption are met; (b) to the lending of Securities by a BlackRock Manager that are assets of a Client Plan to an MPS which is a "Foreign Broker-Dealer" (as defined in the proposed exemption) or "Foreign Bank" (as defined in the proposed exemption), provided that the conditions set forth in Sections III.M.2 and III.M.3. of the proposed exemption are met; and (c) to the payment to a BlackRock Manager of compensation for services rendered in connection with loans of Client Plan assets that are Securities to an MPS, provided that the conditions set forth in Section III.M.4. of the proposed exemption are met.

67. In order for relief under the proposed exemption to be available for Covered Transactions described in paragraphs 66(a) and (b), the conditions of Section II of PTE 2006–16 [34] shall generally apply, with some revisions and additional conditions. For example, in addition to the conditions of Section II of PTE 2006–16, the proposed exemption requires that the length of a securities loan to an MPS must not exceed a one-year term. Additionally, although the proposed exemption, consistent with PTE 2006–16, provides that neither the MPS borrower nor any MPS affiliate which is a member of the same MPS Group as the MPS borrower has or exercises discretionary authority or control with respect to the investment of the Client Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets, it also provides an exception to such condition in the form of the 10% Rule.

68. In addition to the general conditions of PTE 2006–16, in order for relief under the proposed exemption to be available for this transaction, additional conditions must be met:

(a) The written loan agreement must be a standardized industry form; provided, that, with the approval of the ECO on or about the date of the Acquisition, written loan agreements with an MPS borrower that were in effect as of the date of the Acquisition may continue to be used until there is a material modification of the same, at which time standardized industry forms must be adopted (Section III.M.2.(h));

(b) all fees and other consideration received by the Client Plan in connection with the loan of Securities must be reasonable. The identity of the currency in which the payment of fees and rebates will be made must be set forth either in the written loan agreement or the loan confirmation as agreed to by the MPS borrower and the BlackRock Manager prior to the making of the loan;

(i) Pricing of a loan to an MPS borrower must be based on rates for comparable loans of the same Security to non-MPS borrowers and third-party market data:

(A) For loans of liquid Securities (sometimes referred to as general collateral loans) an automatic system may be used to price loans so long as the resulting rate the Client Plan receives from the MPS borrower is at least as favorable to the Client Plan as the rate the BlackRock Managers are receiving for Client Plans or other clients from non-MPS borrowers of the same Security; and

(B) For purposes of pricing loans of less liquid Securities (sometimes referred to as special loans), and for purposes of determining whether to terminate or continue a loan which does not have a set term, pricing may also be based on a BlackRock trader determination that continuing the loan is in the interest of the Client Plan based on all relevant factors, including price (provided that price is within the range of prices of other loans of the same Security to comparable non-MPS borrowers by BlackRock Managers for Client Plans or other clients) and potential adverse consequences to the Client Plan of terminating the loan, provided that the pricing data used in making these decisions must be retained and made available for possible review by the ECO; and

(ii) Automatic pricing mechanisms and pricing decisions by traders must be subject to ongoing periodic review by the ECO Function, and the results of such review must be included in reports by the ECO to the IM. Specifically, the quarterly reports by the ECO to the IM must address the lending patterns of (I) illiquid Securities to the MPS borrowers from all Client Plans, including the percentage that loans of such Securities to the MPSs represent of all loans of such Securities from all Client Plans; and (II) illiquid Securities to the MPS borrowers from all Other Accounts or Funds, including the percentage that loans of such Securities to the MPSs represent of all loans of such Securities from all Other Accounts or Funds (Section III.M.2.(j));

(c) If the Securities being loaned to an MPS borrower are managed in an Index Account or Fund, or a Model-Driven Account or Fund where the Index or the Model are created or maintained by the MPS borrower, the ECO Function periodically must perform a review, no less than quarterly, of the use of such MPS-sponsored Index or Model, and the Securities loaned from such an account or fund to the MPS, which review is designed to enable a reasonable judgment as to whether the use of such Index or Model, or any changes thereto, were for the purpose of benefitting BlackRock or the MPS through the Securities lending activity described in this Section III.M. of the proposed exemption. If the ECO forms a reasonable judgment that the use of such Index or Model, or any changes thereto were for the purpose of benefitting BlackRock or the MPS, the ECO must promptly inform the IM (Section III.M.2.(p));

(d) In the event of any dispute between the BlackRock Manager on behalf of a Client Plan and an MPS borrower involving a Covered Transaction under Section III.M. of the

[34] 71 FR 63786 (Oct. 31, 2006).

proposed exemption, the IM shall decide whether, and if so, how the BlackRock Manager is to pursue relief on behalf of the Client Plan(s) against the MPS borrower (Section III.M.2.(q)); and

(e) If the Securities being loaned to an MPS borrower are managed in an Other Account or Fund, the employees of the BlackRock Manager who exercise discretionary authority or control over the Other Account or Fund shall not have access to the information regarding whether the particular Securities are on loan to an MPS, with such access limitations imposed on or about September 30, 2010 and implemented through the EPPs on or about September 30, 2010 (Section III.M.2.(q)).

69. In order for relief under the proposed exemption to be available for Covered Transactions described in paragraph 66(b), BlackRock must comply with the conditions of Section III of PTE 2006–16.

70. In order for relief under the proposed exemption to be available for Covered Transactions described in paragraph 67(c), the conditions of Section IV of PTE 2006–16 generally apply, with one revision. The proposed exemption provides that the compensation received by the BlackRock Managers must be paid under terms at least as favorable to the Client Plan as an arm's length transaction with an unrelated party.

N. To-Be-Announced Trades (TBAs) of GNMA, FHLMC or FNMA Mortgage-Backed Securities With an MPS Counterparty

71. The Applicants represent that BlackRock Managers might decide it would be advantageous to trade GNMA (as defined in the proposed exemption), FHLMC (as defined in the proposed exemption) or FNMA (as defined in the proposed exemption) mortgage-backed Securities with an MPS counterparty on a "to-be-announced" basis. A "TBA" is a contract for the purchase or sale of such agency mortgage-backed Securities to be delivered at a future agreed-upon date. The actual pool identities or the number of pools that will be delivered to fulfill the trade obligation or terms of the contract are unknown at the time of the trade but must meet the "Guidelines of Good Delivery" established by the Depository Trust & Clearing Corporation. TBA trading is based on the assumption that the specific mortgage pools which will be delivered are fungible, and thus do not need to be explicitly known at the time a trade is initiated. The TBA market for agency mortgage-backed Securities has been referred to as the most liquid, and consequently most important, secondary market for mortgage loans in the world. Given that TBAs allow institutional accounts to buy and sell mortgage exposure in a large and liquid manner, TBAs are a useful tool in furthering the investment objectives of such clients. Certain of the MPSs maintain deep franchises in the agency mortgage-backed Securities trading market. As TBAs are one of the largest and most active parts of the mortgage-backed Securities market, having the ability to trade agency mortgage-backed Securities with an MPS counterparty on a TBA basis in the ordinary course of business could significantly assist BlackRock Managers in providing high quality and competitive service to Client Plans managed by BlackRock. BlackRock Client Plans could be disadvantaged if BlackRock Managers are unable to access the platforms of the MPSs in agency mortgage-backed Securities trading.

72. The Applicants represent that while there has been concern recently with respect to public debt issued by FHLMC and FNMA and specifically whether such debt would be backed by the federal government, there has been little concern regarding default risk with respect to the FHLMC or FNMA mortgage-backed Securities. Such mortgage-backed Securities currently trade with virtually no difference on return from GNMA mortgage-backed Securities based on any perceived difference in credit quality due to the implicit guarantee of FHLMC and FNMA mortgage-backed Securities (in contrast to the explicit government guarantee of GNMA mortgage-backed Securities), as a result of recent actions by the US government. Even before those actions, any difference in return based on a perception of credit differences was minimal, in the order of two to five basis points. Furthermore, other factors, such as depth of liquidity (for example, FHLMC Securities typically have deeper liquidity than FNMA or GNMA Securities) have as great an effect, if not a greater effect, on returns as perceived credit differences.

73. In order for relief under the proposed exemption to be available for these transactions: (a) The Covered Transactions must be a result of the Three Quote Process; provided, that, solely for purposes of these transactions, firm quotes under the Three Quote Process may also include firm quotes obtained on comparable Securities, as described below, when firm quotes with respect to the applicable TBA transactions are not reasonably attainable; (b) with regard to purchases of FHLMC and FNMA mortgage-backed Securities on a TBA basis (i) the BlackRock Manager must make a determination that such Securities are of substantially similar credit quality as GNMA guaranteed governmental mortgage pool certificates; (ii) the ECO (in regular consultation with and under the supervision of the IM) must monitor the credit spread between GNMA and FHLMC/FNMA mortgage-backed Securities; and (iii) each of the ECO and the IM (independently) must have the authority and responsibility to determine whether purchases of FHLMC and/or FNMA mortgage-backed Securities on a TBA basis should not be permitted due to such credit spread, and such authority and responsibility must be reflected in the EPPs; and (c) with regard to possible delivery of underlying Securities to Client Plans, as opposed to cash settlement, the ECO Function must approve any such delivery in advance.

74. For purposes of these transactions, "comparable Securities" described in clause (a) of paragraph 73 are Securities that: (a) Are issued and/or guaranteed by the same agency, (b) have the same coupon, (c) have a principal amount at least equal to but no more than two percent (2%) greater than the Security purchased or sold, (d) are of the same program or class, and (e) either (i) have an aggregate weighted average monthly maturity within a 12-month variance of the Security purchased or sold, but in no case can the variance be more than ten percent (10%) of such aggregate weighted average maturity of the Securities purchased or sold, or (ii) meet some other comparable objective standard containing a range of variance that is no greater than that described in (i) above and that assures that the aging of the Securities is properly taken into account.[35]

O. Foreign Exchange Transactions With an MPS Counterparty

75. The BlackRock Managers represent that they frequently engage in foreign exchange transactions on behalf of Client Plans. For example, foreign exchange transactions are typically necessary to facilitate the settlement of the purchase or sale of a non-US security. The Applicants represent that the types of foreign currency Covered Transactions at issue are those described in PTE 94–20,[36] the prohibited transaction class exemption relating to certain employee benefit plan foreign exchange transactions, i.e., options, spot trades, forwards and splits.

[35] The Department has previously adopted a similar concept for "replacement" mortgage-backed Securities in the context of lending such Securities in PTE 94–88, 60 FR 483 (January 4, 1995).

[36] 59 FR 8022 (Feb. 17, 1994).

The Applicants represent that the primary market makers in foreign exchange are the largest banks in the world, and external surveys consistently rank multiple MPSs as major counterparties in this market.[37] Client Plans would be harmed if they were forced to exclude such MPS counterparties from the limited number of large banks that make markets in foreign exchange. These banks deal with each other constantly, either on behalf of themselves or their customers. The market on which these banks conduct foreign exchange transactions is called the "interbank market."

Parties transacting other than in the interbank market transact by referencing the interbank rate, which is the rate representative of the rate at which dealers in currencies (i.e., banks) are willing to transact with one another. Transacting in the actual foreign exchange interbank market is limited to dealers only, and does not include buy side firms such as investment managers. Accordingly, full transparency in terms of quotes (bids and offers) is limited to the dealers only.

76. In order for relief under the proposed exemption to be available for this transaction, the following conditions must be met: (a)(i) The Foreign Exchange Transaction must be as a result of the Three Quote Process; or (ii) the total net amount of the Foreign Exchange Transaction on behalf of Client Plans by BlackRock Managers must be greater than $1 million and the exchange rate must be within 0.5% above or below the Interbank Rate (as defined in the proposed exemption) as represented to the BlackRock Managers by the MPS; (b) the Foreign Exchange Transactions with an MPS counterparty will only involve currencies of countries that are classified as "developed" or "emerging" markets by a third party Index provider that divides national economies into "developed," "emerging" and "frontier" markets. The Index provider shall be selected by BlackRock, provided, however, the IM shall have the right to reject the Index provider in its sole discretion at any time; and (c) each Foreign Exchange Transaction complying with paragraph 76(a)(ii) must be set forth in the applicable quarterly reports of the ECO to the IM.

P. Agency Execution of Equity and Fixed Income Securities Trades and Related Clearing as Described in PTE 86–128, Including Agency Cross Trades, When the Broker Is an MPS

77. MPS broker-dealers are key brokers in both the equity and fixed income markets. For example, the NASDAQ Stock Market ranked two MPS brokers as top ten liquidity providers for September 2010.[38] The Applicants represent that: BlackRock Managers need the ability to utilize the brokerage services offered by the MPSs, especially in light of the consolidation of the financial services sector; BlackRock Managers have a long history of using MPS brokers to affect Securities trades, and to continue normal trading practices with these brokers will benefit Client Plans; and, Client Plans would be harmed if they were unable to access the liquidity provided by such MPS brokers. The proposed exemption would include the relief available under Section II of PTE 86–128,[39] the prohibited transaction class exemption for securities transactions involving employee benefit plans and broker-dealers, as if BlackRock Managers and MPS broker-dealers were "affiliates" as defined in Section I(b) of PTE 86–128; however, certain conditions would be modified, as described herein.

78. The conditions applicable to this transaction are:

(a) The MPS must be selected to perform Securities brokerage services for Client Plans pursuant to the normal brokerage placement practices, policies and procedures of the BlackRock Manager designed to ensure best execution;

(b) The conditions of PTE 86–128 set forth in the following sections of that exemption must be complied with: Section III(e); Section III(f); Section III(g)(2); and Section III(h); provided, however, that the first sentence of section III(h) of PTE 86–128 is amended for purposes of this paragraph to provide as follows: "A trustee [other than a nondiscretionary trustee] may only engage in a covered transaction with a plan that has total net assets with a value of at least $50 million and in the case of a pooled fund, the $50 million requirement will be met if fifty percent (50%) or more of the units of beneficial interest in such pooled fund are held by investors having total net assets with a value of at least $50 million." The conditions of Section III of PTE 86–128 that are not included as conditions herein are generally the conditions that would relate to actions required of, or information to be provided to, a Client Plan's independent fiduciary, and the revision to the first sentence of Section III(h) of PTE 86–128 changes the $50 million calculation to include all investors, instead of limiting such calculation to only employee benefits plans;

(c) The ECO Function must receive the information required to be provided to the "authorizing fiduciary" under Section III(e), Section III(f) and Section III(g)(2) of PTE 86–128, and the ECO must have the authority to terminate the use of the MPS as broker-dealer without penalty to Client Plans at any time;

(d) With respect to agency cross transactions described in Section III(g) of PTE 86–128 that are being effected or executed by an MPS broker, (i) neither the MPS broker effecting or executing the agency cross transaction nor any member of the same MPS Group as the MPS broker effecting or executing the agency cross transaction may have discretionary authority to act on behalf of, and/or provide investment advice to another party to the agency cross transaction which is a seller when the Client Plan is a buyer, or which is a buyer, when the Client Plan is a seller (Another Party), and (ii), the BlackRock Manager instituting the transaction for the Client Plan must not have knowledge that a BlackRock Entity has discretionary authority and/or provides investment advice to Another Party to the agency cross transaction;

(e) The exceptions in Sections IV(a), (b) and (c) of PTE 86–128 are applicable to the proposed exemption; and

(f) Notwithstanding the other conditions of Section III.P. of the proposed exemption, with respect to Client Plans which as of the date of the Acquisition had in place with BlackRock Managers either directed brokerage and/or wrap fee arrangements which required the BlackRock Managers to use an MPS as a Securities broker, BlackRock Managers may continue to use that MPS as the Securities broker for such Client Plans under the brokerage procedures in place as of the date of the Acquisition; provided that a list of all such arrangement has been provided to the ECO and no material changes are made to arrangements. This last condition is referred to herein as the "Existing Directed Brokerage and/or Wrap Fee Arrangement Exception."

[37] FX Poll: Euromoney's Annual FX Market Ranking, *http://www.Euromoney.com, http://www.euromoney.com/poll/3301/PollsAndAwards/* (last visited Jan. 31, 2011).

[38] Top Ten Liquidity Providers—December 2010, *http://www.NASDAQOMXtrader.com, http://www.nasdaqtrader.com/trader.aspx?ID=topliquidity* (last visited Jan. 28, 2011).

[39] 51 FR 41686 (November 18, 1986), as amended, 67 FR 64137 (October 17, 2002).

Q. Use by BlackRock Managers of Exchanges and Automated Trading Systems on Behalf of Client Plans

79. As outlined above, BlackRock is the largest publicly-traded U.S. investment management firm. Funds and Accounts buy, sell, or otherwise transact in securities, futures contracts, and foreign exchange to the extent contemplated by Fund or Account investment guidelines. A number of Index and Model-Driven Funds attempt to either track or outperform the index for a specific non-U.S. country or geographic region (such as Emerging Markets, World ex U.S., Asia Pacific, etc.). To do so, such Index and Model-Driven Funds must be able to buy and sell securities that are listed on the relevant non-U.S. exchanges. Additionally, a number of Index and Model-Driven Funds hold long positions in stock or bond index futures contracts to "equitize" or "bondize" dividends or other cash to be received by the Index and Model-Driven Fund (including for liquidity purposes). Foreign currency trading is a necessary adjunct to such trading. As of November 30, 2010, BlackRock managed, in the aggregate, more than $100 billion in assets for more than 100 Index and Model Driven Funds or Accounts with non-U.S. geographic benchmarks that include more than 50 countries.

The evolution of electronic trading over the last few decades has led to improvements in the trading processes within established exchanges. For example, computerized trading systems have largely replaced trading pits utilizing paper tickets as the primary execution method within numerous established exchanges. Additionally, over the last few decades a number of established Automated Trading Systems have gained widespread market acceptance for transacting in equities, fixed income obligations and foreign currency which permits BlackRock Managers to reduce the transaction costs for Client Plans.

The establishment of electronic trading over the last few decades has led to increased operational efficiencies, improved price discovery, and higher overall liquidity for plans and other investors. As financial markets have embraced electronic markets and decimal pricing, spreads have been reduced significantly. The advent of multiple execution venues for Securities and other assets encourages competition amongst market participants, driving transaction costs lower for plans and other investors.

80. The Applicants represent that one or more of the MPSs have ownership interests in one or more U.S. or non-U.S. exchanges and Automated Trading Systems. The use of such exchanges and Automated Trading Systems by BlackRock Managers increases operational efficiencies, minimizes transaction costs and improves liquidity, all of which are inherently beneficial to Client Plans. The Applicants represent that Client Plans would be harmed if they were unable to access such trading venues.

81. In order for relief under the proposed exemption to be available for this transaction, the following conditions must be met:

(a) Prior to January 1, 2011:

(i) No single MPS (together with other members of the same MPS Group) may have a greater than twenty percent (20%) ownership interest in the exchange or the ATS; and

(ii) The ECO does not make a determination, summarized in the ECO quarterly report, that a BlackRock Manager or all BlackRock Managers must discontinue such direct or indirect use of or the directing of trades to any such exchange or ATS on the basis that either the amount of use or the volume of trades is unwarranted or not in the interests of the Client Plans and their participants and beneficiaries; and

(b) From and after January 1, 2011, either:

(i) No one MPS (together with other members of the same MPS Group) may have (A) a greater than ten percent (10%) ownership interest in the exchange or ATS or (B) the BlackRock Managers do not know the level of such ownership interest; or

(ii) A BlackRock Manager knows that an MPS (together with other members of the same MPS Group) has a greater than ten percent (10%) ownership interest but no greater than twenty percent (20%) ownership interest in the exchange or ATS,

(A) The ECO makes a determination, summarized in the ECO quarterly report, that there is no reason for a BlackRock Manager or all BlackRock Managers to discontinue such direct or indirect use of or the directing of trades to any such exchange or ATS on the basis that the amount of use or the volume of trades is unwarranted or not in the interests of the Client Plans and their participants and beneficiaries, and does not make a determination that a BlackRock Manager or all BlackRock Managers must discontinue such direct or indirect use of or the directing of trades to any such exchange or ATS on the basis that the amount of use or the volume of trades is unwarranted or not in the interests of the Client Plans and their participants and beneficiaries. The IM may request any additional information relating to any such determination summarized in the ECO quarterly report and may, after consultation with the ECO, make a determination that a BlackRock Manager or all BlackRock Managers must discontinue such direct or indirect use of or the directing of trades to any such exchange or ATS on the basis that the amount of use or the volume of trades is unwarranted or not in the interests of the Client Plans and their participants and beneficiaries;

(B) The price and compensation associated with any purchases or sales utilizing such exchange or ATS must not be greater than the price and compensation associated with an arm's length transaction with an unrelated party; and

(C) All such exchanges and ATSs must be situated within the jurisdiction of the U.S. District Courts and regulated by a U.S. federal regulatory body or a U.S. federally approved self-regulatory body provided that this condition shall not apply to the direct or indirect use of or the directing of trades to an exchange in a country other than the United States which is regulated by a government regulator or a government approved self-regulatory body in such country and which involve trading in Securities (including the lending of Securities) or futures contracts.

The Applicants further request that the Department confirm that for purposes of PTE 2002–30[40] BlackRock Entities and MPSs are not regarded as "affiliates." The Department concurs.

R. Purchases in the Secondary Market of Common and Preferred Stock Issued by an MPS by BlackRock Managers for Client Plans Invested in an Index Account or Fund, or a Model-Driven Account or Fund

82. The MPS include several issuers of publicly traded equity securities with combined market capitalizations, as of November 11, 2010, of nearly $200 billion. As a result, the Applicants represent that common or preferred stock issued by an MPS may be included as an important constituent in an Index used by an Index Fund or a Model used by Model-Driven Fund managed by a BlackRock Manager. Thus, although the purchase of Securities issued by MPSs may convey an economic benefit on the MPS, the purchase may be necessary for a portfolio to track the underlying benchmark. If Client Plans were unable to invest in such Securities, it could result in tracking error for applicable

[40] 67 FR 39069 (June 6, 2002).

funds and accounts. The Applicants believe there is a sound basis for concluding that an exemption is not necessary to acquire and hold MPS stock under such circumstances, but, given the breadth of the exemption, the Applicants believe that requesting the certitude of exemptive relief on this point is appropriate.

83. In order for relief under the proposed exemption to be available for this transaction, the following conditions must be satisfied: (a) Such purchase is for the sole purpose of maintaining quantitative conformity with the weight of such Securities prescribed by the relevant Index, for Index Accounts or Funds, or the weight of such Securities prescribed by the relevant Model, for Model-Driven Accounts or Funds, and such purchase may not exceed the purchase amount necessary for such Model or quantitative conformity; and (b) the purchases must not be made from the issuing MPS. The Existing Directed Brokerage and/or Wrap Fee Arrangement Exception applies.[41]

S. Purchase in the Secondary Market of Common and Preferred Stock Issued by an MPS by BlackRock Managers for Client Plans Invested in an Other Account or Fund

84. As stated above, the MPSs include several issuers of publicly traded equity securities with combined market capitalizations, as of November 11, 2010, of nearly $200 billion. As a result, such securities may comprise an important portion of an Other Account or Fund's investment universe. The Applicants represent that BlackRock Managers might decide that common or preferred stock of an MPS is an appropriate investment for a Client Plan account or a pooled fund that is not an Index Fund or a Model-Driven Fund. If Client Plans were unable to invest in such Securities, it could adversely result in the loss of investment opportunity for such funds and accounts.

85. In order for relief under the proposed exemption to be available for this transaction, the following conditions must be satisfied:

(a) Such purchase must not be made from the issuing MPS;

(b) The Existing Directed Brokerage and/or Wrap Fee Arrangement Exception applies with respect to this transaction as well; and

(c) With respect to such Client Plans with existing directed brokerage and/or wrap fee arrangements, the ECO Function periodically must monitor purchases of MPS stock for such Client Plans to ensure that the amount of stock of an MPS purchased for such Client Plans is not disproportionate to the amount of such stock of the same MPS purchased for Client Plans invested in Other Accounts or Funds not subject to directed brokerage and/or wrap fee arrangements;

(d) As a consequence of a purchase of MPS stock, the class of stock purchased must not constitute more than five percent (5%) of the Other Account or Fund. In the case of a Pooled Fund, the class of stock purchased and attributed to each Client Plan must not exceed five percent (5%) of such Client Plan's proportionate interest in the Pooled Fund.

(e) Aggregate daily purchases of a class of MPS stock for Client Plans must not exceed the greater of (i) fifteen percent (15%) of the aggregate average daily trading volume (ADTV) for the previous ten (10) trading days, or (ii) fifteen percent (15%) of trading volume on the date of the purchase. These volume limitations must be met on a portfolio manager by portfolio manager basis unless purchases are coordinated among portfolio managers, in which case the limitations are applied to the coordinated purchase.[42] Any coordinated purchases of the same class of MPS stock in the secondary market for Index Accounts or Funds or for Model-Driven Accounts or Funds must be taken into account when applying these ADTV limitations on purchases for an Other Account or Fund; provided, however, if coordinated purchases for Index Accounts or Funds, or for Model-Driven Accounts or Funds, would cause the fifteen percent (15%) limitation to be exceeded, BlackRock Managers can nonetheless acquire for Other Accounts or Funds up to the greater of five percent (5%) of ADTV for the previous ten (10) trading days or five percent (5%) of trading volume on the day of the Covered Transaction. For purposes of this paragraph 85(e), cross trades of MPS equity Securities which comply with an applicable statutory or administrative prohibited transaction exemption are not taken into account; and

(f) The ECO Function must monitor the volume limits on purchases of MPS stock described in paragraph 85(e) and must provide a monthly report to the IM with respect to such purchases and limits. The IM shall impose lower volume limitations and take other appropriate action with respect to such purchases if the IM determines on the basis of these reports by the ECO and publicly available information materially related to the trading of the Securities of an MPS on its primary listing exchange (or market) that the purchases described have a material positive impact on the market price for such Securities.

T. The Provision of Custodial, Administrative and Similar Ministerial Services by an MPS for a Client Plan as a Consequence of a BlackRock Manager Exercising Investment Discretion on Behalf of the Client Plan or Rendering Investment Advice to the Client Plan

86. The Applicants represent that MPSs commonly provide custodial, administrative and similar ministerial services (e.g., collective fund custodial services, recordkeeping, etc.) to numerous entities, including plans and ERISA look-through entities, and BlackRock Managers may decide that retaining an MPS to provide custodial or administrative services is in the interests of Client Plans.

87. In order for relief under the proposed exemption to be available for this transaction, the proposed exemption provides that (a) the terms of such service are comparable to those a Client Plan would receive in an arm's length transaction with an unrelated party and (b) the ECO approves in advance and in writing (which may include electronic communication if retrievable by the ECO) the choice or recommendation of the MPS by the BlackRock Manager and the terms of the services, including but not limited to, the associated fees.[43]

U. Purchases, Sales and Holdings by BlackRock Managers for Client Plans of Commercial Paper Issued by ABCP Conduits, When an MPS Has One or More Roles

88. The Applicants represent that in the past, the BGI cash management program purchased and sold, and at present and in the future BTC and other BlackRock Managers may purchase and sell, significant amounts of commercial paper for Client Plans through

[41] BlackRock Managers may rely on other exemptive relief, whether statutory, class or individual, when acquiring stock of an MPS for Client Plans under either Section III.R. or Section III.S. of the proposed exemption through an MPS broker, including the issuing MPS.

[42] For example, if two portfolio managers send their purchase orders to the same trading desk and the traders on that trading desk coordinate the purchases of the same MPS equity Securities, the limitations apply to the trading desk.

[43] The Applicants did not request relief, and the Department agrees that such a request would be unnecessary, in situations where such services are performed for Client Plans at the direction of a Client Plan fiduciary independent of a BlackRock Entity (or an MPS) if neither BlackRock (nor an MPS) renders "investment advice" in connection with such determination.

commercial paper conduits, with respect to some of which an MPS, such as BOA, acts as the program administrator, placement agent, liquidity provider and/or credit support provider.

89. The Applicants represent that an ABCP Conduit is a special purpose vehicle that acquires assets from one or more originators and issues commercial paper to provide funding to the originator(s). Conduits are typically administered by a bank which provides liquidity support (standing ready to purchase the conduit's commercial paper if it cannot be rolled over) and/or credit support (committing to cover losses in the event of default). The program administrator also typically acts as placement agent for the commercial paper, sometimes together with one or more other placement agents.

90. The Applicants represent that commercial paper issued by a conduit may be purchased directly from the program administrator or other placement agent, or traded on the secondary market with another broker-dealer making a market in the Securities.

91. If an MPS acts as program administrator and placement agent in a conduit, the MPS is compensated as follows: (a) In the case of asset-backed commercial paper purchased directly from the MPS in its capacity as placement agent, the MPS receives a fee, typically five basis points; and (b) in the case of asset-backed commercial paper purchased from another broker-dealer, the MPS receives a fee (the amount of which is not made public) in connection with its services as program administrator, or as a provider of credit and/or liquidity support.

92. A BlackRock Manager might determine it is in the interest of Client Plans to purchase commercial paper in a primary offering directly from the placement agent(s) or trade in the secondary market with the placement agent(s) or another broker-dealer that makes a market in the Securities. In ABCP Conduits where an MPS is a program administrator, or is providing liquidity and/or credit support, the role(s) of the MPS might give rise to prohibited transactions on the part of BlackRock Managers, whether the BlackRock Manager purchases directly from the MPS or from another broker-dealer. In many cases there will not be three counterparties with which the BlackRock Manager can trade such Securities. In particular, in the case of purchases in the primary offering, the Securities frequently can only be purchased from the administrator (e.g., an MPS), acting as the placement agent. There may be only one placement agent (e.g., an MPS). If there is more than one placement agent, they will all offer the Securities in the primary offering at the same price. As a practical matter, there are many circumstances where there will not be competing prices for these Securities even in the secondary market. As in the case of repurchase agreements, a BlackRock Manager is able to determine the competitiveness of pricing of the ABCP Conduit commercial paper by reference to prevailing rates above Treasuries for comparable short-term money market instruments rated in the same category.

93. In order for relief under the proposed exemption to be available for this transaction, the following conditions are applicable:

(a)(i) The Client Plan must not be an MPS Plan of the MPS with whom the purchase or sale takes place, or an MPS Plan of another member of the same MPS Group as such MPS; and (ii) the Client Plan must not be an MPS Plan of an MPS which is acting in a continuing capacity, or an MPS Plan of another member of the same MPS Group as such MPS; and (iii) no MPS described in paragraphs 93(a)(i) or (ii), or another member of the same MPS Group as such MPS, has discretionary authority or control with respect to the Client Plan assets involved in the Covered Transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets; however, the 10% Rule applies;

(b) The commercial paper must have a stated maturity date of nine months or less from the date of issue, exclusive of days of grace, or must be a renewal of an issue of commercial paper the maturity of which is likewise limited;

(c) At the time it is acquired, the commercial paper must be ranked in the highest rating category by at least one of the Rating Organizations;

(d) If the seller or purchaser of the ABCP Conduit commercial paper is an MPS and/or an MPS performs a continuing role with respect to the Securities, secondary market purchases and sales must be pursuant to the Three Quote Process, provided that, for purposes of this transaction, firm quotes on comparable short-term money market instruments rated in the same category may be used as quotes for purposes of the Three Quote Process; and

(e) If an MPS performs a continuing role and there is a default, the taking of or refraining from taking of any action by the responsible BlackRock Manager which could have a material positive or negative effect upon the MPS must be decided upon by the IM.

94. The Applicants further request that the Department confirm that, for purposes of Section III.U. of the proposed exemption, no BlackRock Entity is to be regarded as an affiliate of any MPS. The Department concurs.

V. Purchase, Holding and Disposition by BlackRock Managers for Client Plans of Shares of Exchange-Traded Open-End Investment Companies Registered Under the 1940 Act (ETF) Managed by BlackRock Managers

95. The BlackRock Managers may serve as investment advisers to ETFs. For example, the BlackRock Managers serve as the investment adviser to the iShares® family of ETFs, one of the nation's largest ETF families. The Applicants represent that investment in ETFs is becoming increasingly more popular. If Client Plans were unable to invest in such ETFs, they would be unable to take advantage of both a beneficial investment opportunity and an important tool with which to manage liquidity.

96. The Applicants observe that BGI applied for and was granted an individual prohibited transaction exemption, PTE 2008–1, 73 FR 3274 (January 17, 2008), which, among other relief, permits BGI (now, BTC) and its investment advisory affiliates to acquire for ERISA and FERSA clients, shares of ETFs managed by BTC or an affiliate of BTC. PTE 2008–1 was patterned on PTE 77–4,[44] the prohibited transaction class exemption for certain transactions between investment companies and employee benefit plans. The Summary of Facts and Representations in the related proposal of PTE 2008–12 [45] describes in detail how trading in ETFs takes place, including the process by which Creation Shares are acquired.

97. The Applicants represent that should BlackRock Managers acquire or sell for Client Plans shares of ETFs managed by BTC or another BlackRock Manager, no material benefit accrues to the BlackRock Manager managing the ETF in question, as its assets under management are not thereby increased, with the possible exception of when the purchase of the ETF shares constitutes or results in new Creation Shares.

98. In order for relief under the proposed exemption to be available for this transaction,[46] the following conditions apply:

[44] 42 FR 18732 (April 8, 1977).

[45] See Proposed Exemption, Application No. D–11318, 72 FR 51668 (September 10, 2007).

[46] The grant of the exemptive relief provided in Section III.V. of the proposed exemption does not preclude compliance with and use of PTE 77–4 or PTE 2008–1 granted to Barclays Global Investors, N.A.

(a)(i) The BlackRock Manager must purchase such ETF shares from or through a person other than an MPS or a BlackRock Entity; and (ii) no purchase shall be exempt under the proposed exemption if the BlackRock Manager portfolio manager acting for the Client Plan knows (within the meaning of the proposed exemption) or should know that the shares to be acquired for Client Plans are Creation Shares, or that the purchase for Client Plans will result in new Creation Shares; and

(b) Notwithstanding paragraph 98(a)(i), the Existing Directed Brokerage and/or Wrap Fee Arrangement Exception applies. Additionally, the ECO Function periodically monitors purchases of Securities to ensure that the amount of BlackRock-managed ETF shares purchased for Client Plans under this paragraph 98(b) is not disproportionate to the amount of BlackRock-managed ETF shares purchased for Client Plans pursuant to paragraph 98(a) under the brokerage arrangement in place as of the date of the Acquisition.

W. Investment of Assets of MPS Plans in a BlackRock Bank-Maintained Common or Collective Trust as of the Date of the Acquisition—Fees Paid Outside the Trust

99. The Applicants represent that as of the Acquisition, one or more MPS Plans was invested in one or more BTC bank collective trust funds under an arrangement where the fees owed to BTC by these MPS Plans are paid directly to BTC by the MPS Plans, not out of the assets of the bank collective trust fund. These investments in the BTC funds, at the time they were made, were selected by fiduciaries of the MPS Plans as being in the interests of such Client Plans and their participants and beneficiaries when no relationship existed between BGI and the MPSs that might be viewed as affecting the best judgment of the fiduciaries of the MPS Plans. All such fees are paid at BTC's standard rates, or at negotiated rates discounted from BTC's standard rates. The proposed exemption would permit continuation of these investments, subject to certain conditions.

100. With respect to MPS Plans invested in Pooled Funds as of the date of the Acquisition, which Pooled Funds are common or collective trusts maintained by BTC, and in connection with which investments such MPS Plans pay management fees directly to BlackRock Managers, relief under the proposed exemption will be available until the earliest of (a) termination of the investment in the Pooled Fund, (b) transition of the fee arrangement to one under which the BlackRock Manager's fees are paid from assets of the Pooled Fund or by the MPS Plan sponsor, or (c) December 31, 2010 (Unwind Period 2) if the following conditions are met:

(a) The fees paid by such MPS Plans to the BlackRock Managers during Unwind Period 2 are neither more than reasonable compensation nor significantly more than fees paid to the BlackRock Managers by other, comparable Client Plans invested in such Pooled Funds which are not MPS Plans;

(b) The MPS Plans must not pay to BlackRock Managers during Unwind Period 2 any type of fee or other compensation that was not charged to or otherwise borne by MPS Client Plans investors in the Pooled Fund as of the date of the Acquisition; and

(c) During Unwind Period 2 the IM must review the investment by the MPS Plans in the Pooled Fund; all fees paid by the affected MPS Plans to BlackRock Managers must be disclosed to the IM; the IM must review the offering documents for the Pooled Funds and any advisory or management agreements with BlackRock Managers; and any material change in the terms and conditions of the investment by the affected MPS Plans in the Pooled Fund, including but not limited to changes to fees paid to BlackRock Managers or the terms of the advisory or management agreements with BlackRock Managers, must be promptly disclosed to the IM and be subject to the IM's written approval. Further, during Unwind Period 2, each such MPS Plan may terminate its investment in the Pooled Fund upon no more than thirty (30) days notice and without incurring a redemption fee paid to a BlackRock Manager.

X. Purchase, Holding and Disposition of BlackRock Equity Securities in the Secondary Market by BlackRock Managers for an Index Account or Fund, or a Model-Driven Account or Fund, Including Buy-Ups[47]

101. BlackRock is an issuer of equity Securities with a significant market capitalization. As a result, the Applicants represent that common or preferred Securities issued by BlackRock may be included as a component in an Index used by an Index Fund or a Model-Driven Fund managed by a BlackRock Manager. Thus, the purchase of Securities issued by BlackRock may be necessary for a portfolio to track the underlying benchmark. If Client Plans were unable to invest in such Securities, it could result in tracking error for applicable funds and accounts. It is not clear to the Applicants that an exemption is necessary to purchase or hold BlackRock Securities under such circumstances, but, given the breadth of the exemption, the Applicants believe requesting the certitude of exemptive relief on this point is appropriate.

102. In order for relief under the proposed exemption to be available for this transaction, the following conditions apply:

(a) The acquisition, holding and disposition of the BlackRock Securities must be for the sole purpose of maintaining quantitative conformity with the weight of such Securities prescribed by the relevant Index, for Index Accounts or Fund, or the weight of such Securities prescribed by the relevant Model, for Model-Driven Accounts or Funds, and such purchase may not exceed the purchase amount necessary for such Model or quantitative conformity;

(b) Any acquisition of BlackRock Securities must not involve any agreement, arrangement or understanding regarding the design or operation of the account or fund acquiring the BlackRock Securities which is intended to benefit BlackRock or any party in which BlackRock may have an interest; and

(c) With respect to an acquisition of BlackRock Securities by such an account or fund which constitutes a Buy-Up (*see* footnote 47):

(i) The acquisition must be made on a single trading day from or through one broker-dealer, which broker-dealer is not an MPS or a BlackRock Entity; provided, however, that if the volume condition in paragraph 102(c)(iv) below cannot be satisfied in a single trading day, the acquisition must be completed in as few trading days as possible in compliance with such volume

[47] "Buy-Up" means an initial acquisition of Securities issued by BlackRock by a BlackRock Manager, if such acquisition exceeds one percent (1%) of the aggregate daily trading volume for such Security, for an Index Account or Fund, or a Model-Driven Account or Fund which is necessary to bring the fund's or account's holdings of such Securities either to its capitalization-weighted or other specified composition in the relevant Index, as determined by the organization maintaining such Index, or to its correct weighting as determined by the Model. In non-Buy-up situations, the Applicants believe that a BlackRock Manager should be able to purchase, hold and dispose of BlackRock Securities in an Index/Model-Driven Account or Fund for the purpose of maintaining the proper benchmark weight without the need for additional exemptive relief. BlackRock requests relief for non-Buy-Up situations subject only to Sections III.X.1. and 2. of the proposed exemption for the avoidance of any issues about the necessity for such relief in particular circumstances. The Department is not opining on the need for such relief herein.

limitation and such trades must be reviewed by the ECO and reported to the IM;

(ii) Based upon the best available information, the acquisition must not be the opening transaction of a trading day and must not be made in the last half hour before the close of the trading day;

(iii) The price paid by the BlackRock Manager must not be higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from broker-dealers who are not MPSs or BlackRock Entities;

(iv) Aggregate daily purchases must not exceed fifteen percent (15%) of aggregate average daily trading volume for the Security, as determined by the greater of (A) the trading volume for the Security occurring on the applicable Recognized Securities Exchange and/or Automated Trading System on the date of the transactions, or (B) the aggregate average daily trading volume for the Security occurring on the applicable Recognized Securities Exchange and/or Automated Trading System for the previous ten (10) trading days, both based on the best information reasonably available at the time of the transaction. These volume limitations must be applied on a portfolio manager by portfolio manager basis unless purchases of BlackRock Securities are coordinated by the portfolio managers or trading desks, in which case the limitations are aggregated for the coordinating portfolio managers or trading desks. Provided further, if BlackRock, without Client Plan direction or consent, initiates a new Index Account or Fund, or Model-Driven Account or Fund on its own accord, with BlackRock Securities included therein, the volume restrictions for such new account or fund must be determined by aggregating all portfolio managers purchasing for such new account or fund. Cross trades of BlackRock Securities which comply with an applicable statutory or administrative prohibited transaction exemption are not included in the amount of aggregate daily purchases to which the limitations of this paragraph apply; [48]

(v) All purchases and sales of BlackRock Securities must occur either (A) on a Recognized Securities Exchange, (B) through an Automated Trading System operated by a broker-dealer that is not a BlackRock Entity and is either registered under the 1934 Act, and thereby subject to regulation by the Securities and Exchange Commission, or subject to regulation and supervision by the Securities and Futures Authority of the UK or another applicable regulatory authority, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (C) through an Automated Trading System that is operated by a Recognized Securities Exchange, pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(vi) The ECO must design acquisition procedures for BlackRock Managers to follow in Buy-Ups, which the IM approves in advance of the commencement of any Buy-Up, and the ECO Function must monitor BlackRock Manager's compliance with such procedures.

Y. Acquisition by BlackRock Managers of Financial Guarantees, Indemnities and Similar Protections for Client Plans From MPSs

103. The Applicants represent that BlackRock Managers in the past have provided and in some cases currently have in place for Client Plans financial guarantees, indemnification arrangements or similar instruments providing protection to the Client Plans against various possible losses or risks, such as an indemnification arrangement to protect against the consequences of a counterparty default. On occasion, these arrangements were and are provided to Client Plans by means of a contract or similar funding arrangement with a third party, and in some cases that third party can be an MPS. These guarantees, indemnification arrangements and similar instruments do not exist as a freestanding commitment constituting the sole relationship between BlackRock and the Client Plan; instead, they are features or additions to a more fundamental relationship, such as the retention of a BlackRock Manager as a discretionary asset manager, or in connection with a Client Plan investment in a commingled vehicle sponsored and/or managed by a BlackRock Manager. The terms of these arrangements benefit Client Plans, and independent Client Plan fiduciaries must agree to the terms of the arrangement, including, if provided through a third party, the identity of the third party.

104. In order for relief under the proposed exemption to be available for this transaction, the following conditions apply: (a) The terms of the arrangement (including the identity of the provider) must be approved by a fiduciary of the Client Plan which is independent of the MPS providing such protection or an MPS which is a member of the same MPS Group as such MPS and of BlackRock; (b) the compensation owed the MPS under the arrangement must be paid by a BlackRock Entity and not paid out of the assets of the Client Plan; (c) in the event a Client Plan or the ECO concludes an event has occurred which should trigger the obligations of the MPS under the arrangement, and the MPS disagrees to any material extent, the IM must determine the steps the BlackRock Manager must take to protect the interests of the Client Plan; and (d) the MPS providing the arrangement must be capable of being sued in United States courts, has contractually agreed to be subject to litigation in the United States with respect to any matter relating to Section III.Y. of the proposed exemption, and must have sufficient assets in the United States to honor its commitments under the arrangement.

Affiliated Underwritings and Affiliated Servicing

105. Several of the Covered Transactions set forth above include in their conditions requirements regarding affiliated underwriting and affiliated servicing. Because the conditions associated therewith apply to multiple Covered Transactions, the specific conditions for Affiliated Underwritings and Affiliated Servicing are set forth in this paragraph 105. In order for relief under the proposed exemption to be available, the following conditions must be met for an Affiliated Underwriting:

Affiliated Underwritings

(a) The Securities to be purchased must be either—

(i) Part of an issue registered under the 1933 Act. If the Securities to be purchased are part of an issue that is exempt from such registration requirement, such Securities must be:

(A) Issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States,

(B) Issued by a bank,

(C) Exempt from such registration requirement pursuant to a federal statute other than the 1933 Act, or

(D) The subject of a distribution and are of a class which is required to be registered under section 12 of the 1934 Act, and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act for a period of at least ninety (90)

[48] Such trades are priced by reference to market prices, and, thus, they generally do not affect market prices.

days immediately preceding the sale of such Securities and that has filed all reports required to be filed thereunder with the SEC during the preceding twelve (12) months;

(ii) Part of an issue that is an Eligible Rule 144A Offering. Where the Eligible Rule 144A Offering of the Securities is of equity securities, the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum; or

(iii) Municipal bonds taxable by the United States, including Build America Bonds created under section 54AA of the Code or successor thereto, under which the United States pays a subsidy to the state or local government issuer, but not including Building America Bonds which provide a tax credit to investors.

(b) The Securities to be purchased must be purchased prior to the end of the first day on which any sales are made, pursuant to that offering, at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities, except that—

(i) If such Securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such Securities are debt Securities, they may be purchased at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities and may be purchased on a day subsequent to the end of the first day on which any sales are made, pursuant to that offering, provided that the interest rates, as of the date of such purchase, on comparable debt Securities offered to the public subsequent to the end of the first day on which any sales are made and prior to the purchase date are less than the interest rate of the debt Securities being purchased;

(c) The Securities to be purchased must be offered pursuant to an underwriting or selling agreement under which the members of the syndicate are committed to purchase all of the Securities being offered, except if—

(i) Such Securities are purchased by others pursuant to a rights offering; or

(ii) Such Securities are offered pursuant to an over-allotment option;

(d) The issuer of the Securities to be purchased pursuant to the proposed exemption must have been in continuous operation for not less than three (3) years, including the operation of any predecessors, unless the Securities to be purchased—

(i) Are non-convertible debt Securities rated in one of the four highest rating categories by a Rating Organization; provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(ii)(A) Are debt Securities issued or fully guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(B) Are municipal bonds taxable by the United States, including Build America Bonds created under section 54AA of the Code or successor thereto, under which the United States pays a subsidy to the state or local government issuer, but not including Building America Bonds which provide a tax credit to investors; or

(iii) Are debt Securities which are fully guaranteed by a guarantor that has been in continuous operation for not less than three (3) years, including the operation of any predecessors, provided that such guarantor has issued other Securities registered under the 1933 Act; or if such guarantor has issued other Securities which are exempt from such registration requirement, such Guarantor has been in continuous operation for not less than three (3) years, including the operation of any predecessors, and such guarantor is:

(A) A bank;

(B) An issuer of Securities which are exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act; or

(C) An issuer of Securities that are the subject of a distribution and are of a class which is required to be registered under section 12 of the 1934 Act, and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act for a period of at least ninety (90) days immediately preceding the sale of such Securities and that has filed all reports required to be filed hereunder with the SEC during the preceding twelve (12) months.

(e) The aggregate amount of Securities of an issue purchased, pursuant to the proposed exemption, by the BlackRock Manager with: (i) the assets of all Client Plans; and (ii) the assets, calculated on a *pro rata* basis, of all Client Plans investing in Pooled Funds managed by the BlackRock Manager; and (iii) the assets of plans to which the BlackRock Asset Manager renders investment advice within the meaning of 29 CFR 2510.3–21(c) must not exceed:

(i) Ten percent (10%) of the total amount of the Securities being offered in an issue, if such Securities are equity securities;

(ii) Thirty five percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are Asset-Backed Securities rated in one of the three highest rating categories by at least one of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the third highest rating category;

(iii) Thirty five percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are debt Securities rated in one of the four highest rating categories by at least one of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(iv) Twenty five percent (25%) of the total amount of the Securities being offered in an issue, if such Securities are debt Securities rated in the fifth or sixth highest rating categories by at least one of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the sixth highest rating category; and

(v) The assets of any single Client Plan (and the assets of any Client Plans and any In-House Plans investing in Pooled Funds) must not be used to purchase any Securities being offered, if such Securities are debt Securities rated lower than the sixth highest rating category by any of the Rating Organizations;

(vi) Notwithstanding the percentage of Securities of an issue permitted to be acquired, as set forth in Sections IV.A.(5)(a)–(d) of the proposed exemption, the amount of Securities in any issue (whether equity or debt Securities or Asset-Backed Securities) purchased, pursuant to the proposed exemption, by the BlackRock Manager on behalf of any single Client Plan, either individually or through investment, calculated on a *pro rata* basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such Securities being offered in such issue, provided that a Sub-Advised Pooled Fund (as described in the proposed exemption) as a whole may purchase up to three percent (3%) of an issue; and

(vii) If purchased in an Eligible Rule 144A Offering, the total amount of the Securities being offered for purposes of determining the percentages, described in Sections IV.A.(5)(a)–(d) and (f) of the proposed exemption, is the total of:

(A) The principal amount of the offering of such class of Securities sold

by underwriters or members of the selling syndicate to QIBs; plus

(B) The principal amount of the offering of such class of Securities in any concurrent public offering.

(f) The aggregate amount to be paid by any single Client Plan in purchasing any Securities which are the subject of the proposed exemption, including any amounts paid by any Client Plan in purchasing such Securities through a Pooled Fund, calculated on a *pro rata* basis, must not exceed three percent (3%) of the fair market value of the net assets of such Client Plan, as of the last day of the most recent fiscal quarter of such Client Plan prior to such transaction, provided that a Sub-Advised Pooled Fund as a whole may pay up to one percent (1%) of fair market value of its net assets in purchasing such Securities.

(g) The covered transactions must not be part of an agreement, arrangement, or understanding designed to benefit any BlackRock Entity or MPS.

(h) Each Client Plan must have total net assets with a value of at least $50 million (the $50 Million Net Asset Requirement). For purposes of engaging in covered transactions involving an Eligible Rule 144A Offering, each Client Plan must have total net assets of at least $100 million in Securities of issuers that are not affiliated with such Client Plan (the $100 Million Net Asset Requirement).

For purposes of a Pooled Fund engaging in an Affiliated Underwriting, each Client Plan in such Pooled Fund other than a Sub-Advised Pooled Fund must have total net assets with a value of at least $50 million. Notwithstanding the foregoing, if each such Client Plan in a Pooled Fund other than a Sub-Advised Pooled Fund does not have total net assets with a value of at least $50 million, the $50 Million Net Asset Requirement will be met if fifty percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by investors, each of which has total net assets with a value of at least $50 million.

For purposes of a Pooled Fund engaging in an Affiliated Underwriting involving an Eligible Rule 144A Offering, each Client Plan in such Pooled Fund other than a Sub-Advised Pooled Fund must have total net assets of at least $100 million in Securities of issuers that are not affiliated with such Client Plan. Notwithstanding the foregoing, if each such Client Plan in such Pooled Fund other than a Sub-Advised Pooled Fund does not have total net assets of at least $100 million in Securities of issuers that are not affiliated with such Client Plan, the $100 Million Net Asset Requirement will be met if fifty percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by investors, each of which have total net assets of at least $100 million in Securities of issuers that are not affiliated with such investor, and the Pooled Fund itself qualifies as a QIB.

For purposes of the net asset requirements described above, where a group of Client Plans is maintained by a single employer or controlled group of employers, as defined in ERISA section 407(d)(7), the $50 Million Net Asset Requirement (or in the case of an Eligible Rule 144A Offering, the $100 Million Net Asset Requirement) may be met by aggregating the assets of such Client Plans, if the assets of such Client Plans are pooled for investment purposes in a single master trust.

(i) No more than twenty percent (20%) of the assets of a Pooled Fund, at the time of a covered transaction, may be comprised of assets of In-House Plans for which the BlackRock Manager, or a BlackRock Entity exercises investment discretion.

(j) The BlackRock Manager must be a QPAM, and, in addition to satisfying the requirements for a QPAM under section VI(a) of PTE 84–14, the BlackRock Manager must also have total client assets under its management and control in excess of $5 billion, as of the last day of its most recent fiscal year and shareholders' or partners' equity in excess of $1 million.

(k) The applicable recordkeeping requirements are set forth in Sections IV.A.11–12. of the proposed exemption.

Further, in order for relief under the proposed exemption to be available, the following conditions must be met for an Affiliated Servicing:

Affiliated Servicing

(a) The Securities must be CMBS that are rated in one of the three highest rating categories by Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the third highest rating category;

(b) The purchase of the CMBS must meet the conditions of an applicable Underwriter Exemption;

(c)(i) The aggregate amount of CMBS of an issue purchased, pursuant to the proposed exemption, by the BlackRock Manager with:

(A) The assets of all Client Plans;

(B) The assets, calculated on a pro rata basis, of all Client Plans and In-House Plans investing in Pooled Funds managed by the Asset Manager; and

(C) The assets of plans to which the Asset Manager renders investment advice within the meaning of 29 CFR 2510.3–21(c) must not exceed thirty five percent (35%) of the total amount of the CMBS being offered in an issue;

(ii) Notwithstanding the percentage of CMBS of an issue permitted to be acquired, as set forth in Section IV.B.3.(a) of the proposed exemption, the amount of CMBS in any issue purchased, pursuant to the proposed exemption, by the Asset Manager on behalf of any single Client Plan, either individually or through investment, calculated on a pro rata basis, in a Pooled Fund must not exceed three percent (3%) of the total amount of such CMBS being offered in such issue; and

(iii) If purchased in an Eligible Rule 144A Offering, the total amount of the CMBS being offered for purposes of determining the percentages, described in Section IV.B.3(a) of the proposed exemption, is the total of:

(A) The principal amount of the offering of such class of CMBS sold by underwriters or members of the selling syndicate to QIBs; plus

(B) The principal amount of the offering of such class of CMBS in any concurrent public offering;

(d) The aggregate amount to be paid by any single Client Plan in purchasing any CMBS which are the subject of the proposed exemption, including any amounts paid by any Client Plan in purchasing such CMBS through a Pooled Fund, calculated on a pro rata basis, must not exceed three percent (3%) of the fair market value of the net assets of such Client Plan, as of the last day of the most recent fiscal quarter of such Client Plan prior to such transaction;

(e) The Covered Transactions under Section IV.B. (Affiliated Servicing) of the proposed exemption must not be part of an agreement, arrangement, or understanding designed to benefit any MPS; and

(f) The requirements of Sections IV.A.8. through 12. of the proposed exemption must be met.

Correction Procedures

106. The Applicants requested that isolated violations of the EPPs, or isolated violations of the proposed exemption (the latter, Violations) should not cause the entire proposed exemption to be revoked (only a persistent pattern or practice of violations of the EPPs or of the conditions might cause the proposed exemption to be revoked). The Department concurs in this request.

107. The Department's concurrence is based in part on the unique nature of the proposed exemption. The BlackRock ownership structure outlined herein is

uniquely protective of BlackRock's independence from the MPSs, and the structure of the proposed transaction is unique in its use of both an extensive internal compliance regime and an extensive external compliance regime.

108. Further, the size and scale of the proposed exemption provides a unique ability to focus BlackRock on the financial implications of noncompliance with the proposed exemption. The proposed correction procedures give BlackRock only a single opportunity to report and correct failures, thus focusing BlackRock on identifying and correcting Violations within a specific window of opportunity and thereby increasing compliance. Due to the size and scale, if BlackRock does not identify Violations accurately, it risks the imposition of a significant excise tax.

109. In such context, the Applicants and the Department concur that compliance with the proposed exemption requires that all Violations must still be completely corrected. No non-exempt prohibited transaction will be deemed to occur, however, if the Violation is completely corrected (within the meaning set out below) no later than fourteen (14) business days following the date on which the ECO submits the quarterly report to the IM for the quarter in which the Covered Transaction first became a non-exempt prohibited transaction.

110. Under the proposed exemption, the following correction procedures would apply at all times that the exemption remains in effect:

(a)(i) The ECO shall monitor Covered Transactions and shall determine whether a particular Covered Transaction constitutes a Violation. The ECO shall notify the IM within five (5) business days following the discovery of any Violation;

(ii) The ECO shall make the initial determination in writing of how to correct a Violation, with such determination disclosed to the IM within five (5) business days of initial written determination. Following the initial written determination, the ECO must keep the IM apprised on a current basis of the process of correction and must consult with the IM regarding each Violation and the appropriate form of correction. The ECO shall report the correction of the Violation to the IM within five (5) business days following completion of the correction. For purposes of Section V.A.2. of the proposed exemption, "correction" must be consistent with ERISA section 502(i) and Code section 4975(f)(5);

(iii) The IM shall determine in writing whether it agrees that the correction of a Violation by the ECO is adequate, and, if the IM does not agree with the adequacy of the correction, the IM shall have the authority to require additional corrective actions by BlackRock; and

(iv) The summary of Violations and corrections of Violations will be in the IM's annual compliance report as described in Section II.E.12 of the proposed exemption; and

(b)(i) If a Covered Transaction which would otherwise constitute a Violation is corrected under the "Special Correction Procedure," such Covered Transaction shall continue to be exempt under Section I of the proposed exemption;

(ii)(A) The Special Correction Procedure mandates a complete correction of the Violation no later than fourteen (14) business days following the date on which the ECO submits the quarterly report to the IM for the quarter in which the Covered Transaction first would become a non-exempt prohibited transaction by reason of constituting a Violation if not for Section V.B. of the proposed exemption;

(B) Solely for purposes of the Special Correction Procedure, "correction" of a Covered Transaction which would otherwise by a Violation means either:

(a) Restoring the Client Plan to the position it would have been in had the conditions of the exemption been complied with;

(b) Correction consistent with section ERISA section 502(i) and Code section 4975(f)(5); or

(c) Correction consistent with the Voluntary Fiduciary Correction Program; [49] and

(C) Other than with respect to the definition of "correction," specified above, when utilizing the Special Correction Procedure the ECO and the IM must comply with Section V.A. of the proposed exemption.

111. In summary, the Applicants represent that the exemption proposed herein will satisfy the statutory criteria of ERISA section 408(a) and Code section 4975(c)(2) because:

(a) *Administratively feasible.* The Applicants believe that the proposed exemption is administratively feasible. Most of the Covered Transactions are the subject of existing statutory and/or administrative exemptions. The conditions for relief for the Covered Transaction have been modified to reflect, on the one hand, the possible negative implication of the equity investments of the MPSs in BlackRock, and on the other hand, the circumscribed ability of the MPSs to exercise rights normally associated with such equity investments. In addition, EPPs will have been developed with the cooperation and approval of the IM; an ECO will be appointed to report on compliance with the terms of the proposed exemption and the EPPs; and the IM will review compliance reports, pass upon corrections of Violations, and if necessary, contact the Department. Granting the proposed exemption requires no additional monitoring by the Department.

(b) *In the interest of plans and participants and beneficiaries.* The Applicants believe that the proposed exemption is in the interest of plans and participants and beneficiaries because the proposed exemption would allow BlackRock Managers to continue to engage in Covered Transactions with major participants in the financial markets which are necessary and beneficial to plans and their participants and beneficiaries. While many Covered Transactions (although perhaps not all) could be engaged in with parties other than an MPS, in numerous cases such transactions would be quantitatively or qualitatively inferior to the same transactions with an MPS.

(c) *Protective of the rights of participants and beneficiaries of such plans.* Each of the Covered Transactions is protective of the rights of participants and beneficiaries because specific conditions have been tailored to their respective natures. More broadly, the rights of participants and beneficiaries are protected by the general conditions, modeled on the QPAM Exemption, that are applicable to all Covered Transaction. The general protective conditions include compensation restrictions, development of EPPs, and implementation of EPPs with the cooperation and approval of the IM. Further, the ECO will report on compliance with the proposed exemption and the EPPs, and the IM will review compliance reports, pass upon corrections of Violations, and if necessary, contact the Department.

PROPOSED EXEMPTION

Based on the facts and representations set forth in the application, the Department is considering granting the following exemption under the authority of ERISA section 408(a), Code section 4975(c)(2) and FERSA section 8477(c)(3), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990), as follows:

SECTION I: COVERED TRANSACTIONS GENERALLY

If the proposed exemption is granted, for the period from December 1, 2009,

[49] 67 FR 15062 (March 28, 2002), as amended, 71 FR 20262 (April 19, 2006).

through the earlier of (i) the effective date of an individual exemption granting permanent relief for the following transactions, or (ii) May 31, 2011, the restrictions of ERISA sections 406(a)(1) and 406(b), FERSA sections 8477(c)(1) and (2), and the sanctions resulting from the application of Code section 4975, by reason of Code section 4975(c)(1),[50] shall not apply to the Covered Transactions set forth in Section III and entered into on behalf of or with the assets of a Client Plan; provided, that (x) the generally applicable conditions of Section II of this exemption are satisfied, and, as applicable, the transaction-specific conditions set forth below in Sections III and IV of this exemption are satisfied, or (y) the Special Correction Procedure set forth in Section V of this exemption is satisfied.

SECTION II: GENERALLY APPLICABLE CONDITIONS

A. *Compliance with the QPAM Exemption.* The following conditions of Part I of Prohibited Transaction Exemption 84–14, as amended (PTE 84–14 or the QPAM Exemption),[51] must be satisfied with respect to each Covered Transaction:

1. The BlackRock Manager engaging in the Covered Transaction is a Qualified Professional Asset Manager;

2. Except as set forth in Section III of this exemption, at the time of the Covered Transaction (as determined under Section VI(i) of the QPAM Exemption) with or involving an MPS, such MPS, or its affiliate (within the meaning of Section VI(c) of the QPAM Exemption),[52] does not have the authority to:

(a) Appoint or terminate the BlackRock Manager as a manager of the Client Plan assets involved in the Covered Transaction, or

(b) Negotiate on behalf of the Client Plan the terms of the management agreement with the BlackRock Manager (including renewals or modifications thereof) with respect to the Client Plan assets involved in the Covered Transaction;

3. (a) Notwithstanding the foregoing, in the case of an investment fund (as defined in Section VI(b) of the QPAM Exemption) in which two or more unrelated Client Plans have an interest, a Covered Transaction with an MPS will be deemed to satisfy the requirements of Section II.A.2. of this exemption if the assets of a Client Plan on behalf of which the MPS or its affiliate possesses the authority set forth in Subsections 2(a) and/or (b) above, and which are managed by the BlackRock Manager in the investment fund, when combined with the assets of other Client Plans established or maintained by the same employer (or an affiliate thereof described in section VI(c)(1) of the QPAM Exemption) or by the same employee organization, on behalf of which the same MPS possesses such authority and which are managed in the same investment fund, represent less than ten percent (10%) of the assets of the investment fund;

(b) For purposes of Section II.A.3.(a) of this exemption, and for purposes of Sections III.I.6, L.3(b), M.2.(b) and U.1. of this exemption, with respect to the assets of an MPS Plan invested in a Pooled Fund as of the date of the Acquisition, which Pooled Fund is a bank-maintained common or collective trust, such assets when aggregated with the assets of all other MPS Plans of the same MPS Group and invested in such Pooled Fund shall be deemed to constitute less than ten percent (10%) of the assets of such Pooled Fund from the date of the Acquisition through July 1, 2010 (the Unwind Period); provided, that:[53]

(i) The fees paid by such MPS Plans to BlackRock Managers during the Unwind Period are not more than reasonable compensation and are substantially the same as fees paid to the same BlackRock Managers by other, comparable Client Plans which are not MPS Plans, invested in such Pooled Fund as of the date of the Acquisition;

(ii) Such MPS Plans do not pay to the same BlackRock Managers during the Unwind Period any type of fee or other compensation that was not charged to or otherwise borne by Client Plan investors, which are not MPS Plans, in the Pooled Fund as of the date of the Acquisition;

(iii) During the Unwind Period, the IM reviews the investment by the MPS Plans in the Pooled Fund; all fees paid by the MPS Plans to BlackRock Managers are disclosed to the IM; the IM reviews the offering documents for the Pooled Funds and any advisory or management agreements with BlackRock Managers; and any material change in the terms and conditions of the investment by the MPS Plans in the Pooled Fund, including but not limited to fees paid to BlackRock Managers and the terms of the advisory or management agreements with BlackRock Managers, are promptly disclosed to the IM and are subject to the IM's approval; and

(iv) During the Unwind Period, each MPS Plan may terminate its investment in the Pooled Fund upon no more than thirty (30) days notice and without incurring a redemption fee paid to a BlackRock Manager;

4. The terms of the Covered Transaction are negotiated on behalf of the investment fund by, or under the authority and general direction of, the BlackRock Manager and either the BlackRock Manager or (so long as the BlackRock Manager retains full fiduciary responsibility with respect to the Covered Transaction) a property manager acting in accordance with written guidelines established and administered by the BlackRock Manager, makes the decision on behalf of the investment fund to enter into the Covered Transaction, provided that the Covered Transaction is not part of an agreement, arrangement or understanding designed to benefit the MPS;

5. The Covered Transaction is not entered into with an MPS which is a party in interest or disqualified person with respect to any Client Plan whose assets managed by the BlackRock Manager, when combined with the assets of other Client Plans established or maintained by the same employer (or affiliate thereof described in Section VI(c)(1) of the QPAM Exemption) or by the same employee organization, and managed by the BlackRock Manager, represent more than twenty percent (20%) of the total client assets managed by the BlackRock Manager at the time of the Covered Transaction;

6. At the time the Covered Transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the BlackRock Manager, the terms of the Covered Transaction are at least as favorable to the investment fund as the terms generally available in arm's length transactions between unrelated parties; and

7. Neither the BlackRock Manager nor any affiliate thereof (as defined in Section VI(d) of the QPAM

[50] For purposes of this proposed exemption, references to ERISA section 406 should be read to refer as well to the corresponding provisions of Code section 4975 and FERSA section 8477(c).

[51] 49 FR 9494 (Mar. 13, 1984), as amended, 70 FR 49305 (Aug. 23, 2005), and as amended, 75 FR 38837 (July 6, 2010).

[52] Solely for purposes of this Section II.A.2., no BlackRock Entity will be deemed to be an affiliate of an MPS. The Department is not making herein a determination as to whether any BlackRock Entity is an affiliate of an MPS under ERISA.

[53] For purposes of this Section II.A.3.(b), the MPS Plans of each of the MPS Groups (the PNC MPSs, the BOA MPSs, and the Barclays MPSs) are separately aggregated (e.g., all MPS Plans of BOA MPSs are aggregated together but are not aggregated with MPS Plans of Barclays MPSs or PNC MPSs).

Exemption),[54] nor any owner, direct or indirect, of a five percent (5%) or more interest in the BlackRock Manager[55] is a person who within the ten years immediately preceding the Covered Transaction has been either convicted or released from imprisonment, whichever is later, as a result of: Any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in ERISA section 411. For purposes of this section, a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

B. *Compensation.* None of the employees of a BlackRock Manager receive any compensation that is based on any Covered Transaction having taken place between Client Plans and any of the MPSs (as opposed to with another institution that is not an MPS). The fact that a specific Covered Transaction occurred with an MPS as opposed to a non-MPS counterparty is ignored by BlackRock and BlackRock Managers for compensation purposes. None of the employees of BlackRock or a BlackRock Manager receive any compensation from BlackRock or a BlackRock Manager which consists of equity Securities issued by an MPS, which fluctuates in value based on changes in the value of equity Securities issued by an MPS, or which is otherwise based on the financial performance of an MPS independent of BlackRock's performance, provided that this condition shall not fail to be met because the compensation of an employee of a BlackRock Manager fluctuates with the value of a broadly-based index which includes equity Securities issued by an MPS.

C. *Exemption Policies and Procedures.* BlackRock adopts and implements Exemption Policies and Procedures (EPPs) which address each of the types of Covered Transactions and which are designed to achieve the goals of: (1) Compliance with the terms of the exemption, (2) ensuring BlackRock's decision-making with respect to the Covered Transactions on behalf of Client Plans with MPSs or BlackRock Entities is done in the interests of the Client Plans and their participants and beneficiaries, and (3) to the extent possible, verifying that the terms of such Covered Transactions are at least as favorable to the Client Plans as the terms generally available in arm's length transactions with unrelated parties. The EPPs are developed with the cooperation of both the Exemption Compliance Officer (ECO) and the Independent Monitor (IM), and such EPPs are subject to the approval of the IM. The EPPs need not address transactions which are not within the definition of the term Covered Transactions.

Transgressions of the EPPs which do not result in Violations require correction only if the amount involved in the transgression and the extent of deviation from the EPPs is material, taking into account the amount of Client Plan assets affected by such transgressions (EPP Corrections). The ECO will make a written determination as to whether such transgressions require EPP Correction, and, if the ECO determines an EPP Correction is required, the ECO will provide written notice to the IM of the EPP Correction. The ECO will provide summaries for the IM of any such EPP Corrections as part of the quarterly report referenced in Section II.D.11.

D. *Exemption Compliance Officer.* BlackRock appoints an Exemption Compliance Officer (ECO) with respect to the Covered Transactions. If the ECO resigns or is removed, BlackRock shall appoint a successor ECO within a reasonable period of time, not to exceed thirty (30) days, which successor shall be subject to the affirmative written approval of the IM. With respect to the ECO, the following conditions shall be met:

1. The ECO is a legal professional with at least ten years of experience and extensive knowledge of the regulation of financial services and products, including under ERISA and FERSA;

2. A committee made up exclusively of members of the Board who are independent of BlackRock and the MPSs determines the ECO's compensation package, with input from the general counsel of BlackRock; the ECO's compensation is not set by BlackRock business unit heads, and there is no direct or indirect input regarding the identity or compensation of the ECO from any MPS;

3. The ECO's compensation is not based on performance of any BlackRock Entity or MPS, although a portion of the ECO's compensation may be provided in the form of BlackRock stock or stock equivalents;

4. The ECO can be terminated by BlackRock only with the approval of the IM;

5. The EPPs prohibit any officer, director or employee of BlackRock or any MPS or any person acting under such person's direction from directly or indirectly taking any action to coerce, manipulate, mislead, or fraudulently influence the ECO in the performance of his or her duties;

6. The ECO is responsible for monitoring Covered Transactions and shall determine whether Violations have occurred, and the appropriate correction thereof, consistent with the requirements of Section V of this exemption;

7. If the ECO determines a Violation has occurred, the ECO must determine why it occurred and what steps should be taken to avoid such a Violation in the future (e.g., additional training, additional procedures, additional monitoring, or additional and/or changed processes or systems);

8. The ECO is responsible for monitoring and overseeing the implementation of the EPPs. The ECO may delegate such responsibilities to the ECO Function, but the ECO will remain responsible for monitoring and overseeing the ECO Function's implementation of the EPPs. When appropriate, the ECO will recommend changes to the EPPs to BlackRock and the IM. The ECO will consult with the IM regarding the need for, timing, and form of EPP Corrections;

9. The ECO carries out the responsibilities required of the ECO described in: (a) The definition of "Index" in this exemption and (b) with respect to loans of Securities to an MPS in Section III.M. of this exemption, and carries out such other responsibilities stipulated or described in Section III of this exemption including supervision of the ECO Function;

10. The ECO, with the assistance of the ECO Function, monitors Covered Transactions and situations resulting from Covered Transactions with or involving an MPS with respect to which, because of the investment of the MPS in BlackRock, an action or inaction on the part of a BlackRock Manager might be thought to be motivated by an interest which may affect the exercise of such BlackRock Manager's best judgment as a fiduciary. If a situation is

[54] For the avoidance of doubt, all MPSs are excluded from the term "affiliate" for these purposes.

[55] For the avoidance of doubt, all MPSs are excluded from the term "owner" for these purposes.

identified by the ECO which poses the potential for a conflict, as specified in Section III, the ECO shall consult with the IM, or refer decision-making to the discretion of the IM;

11. The ECO provides a quarterly report [56] to the IM summarizing the material activities of the ECO for the preceding quarter and setting forth any Violations discovered during the quarter and actions taken to correct such Violations. With respect to Violations, the ECO report details changes to process put in place to guard against a substantially similar Violation occurring again, and recommendations for additional training, additional procedures, additional monitoring, or additional and/or changed processes or systems or training changes and BlackRock management's actions on such recommendations. In connection with providing the quarterly report for the second quarter and fourth quarter of each year, upon the request of the IM, the ECO and the IM shall meet in person to review the content of the report. Other members of the ECO Function may attend such meetings at the request of either the ECO or the IM;

12. In each quarterly report, the ECO certifies in writing to his or her knowledge that (a) the quarterly report is accurate; (b) BlackRock's compliance program is working in a manner which is reasonably designed to prevent Violations; (c) any Violations discovered during the quarter and the related corrections taken to date have been identified in the report; and (d) BlackRock has complied with the EPPs in all material respects;

13. No less frequently than annually, the ECO certifies to the IM as to whether BlackRock has provided the ECO with adequate resources, including, but not limited to, adequate staffing of the ECO Function, and, in connection with the quarterly report for the fourth quarter of each year, the ECO shall identify to the IM those BlackRock Managers that relied upon this exemption during the prior year and those that he reasonably anticipates relying on this exemption during the current year; and

14. The ECO provides any further information regarding Covered Transactions reasonably requested by the IM.

E. *Independent Monitor.* BlackRock retains an Independent Monitor (IM) with respect to the Covered Transactions. If the IM resigns or is removed, BlackRock shall appoint a successor IM within a reasonable period of time, not to exceed thirty (30) days. The IM:

1. Agrees in writing to serve as IM, and he or she is independent within meaning of Section VI (OO);

2. Approves the ECO selected by BlackRock, and as part of the approval process and annually thereafter approves in general terms the reasonableness of the ECO's compensation, taking into account such information as the IM may request of BlackRock and which BlackRock must supply, and approves any termination of the ECO by BlackRock;

3. Assists in the development of, and the granting of written approval of, the EPPs and any material alterations of the EPPs by determining that they are reasonably designed to achieve the goals of (a) compliance with the terms of the exemption, (b) ensuring BlackRock's decision-making with respect to Covered Transactions on behalf of Client Plans with MPSs or BlackRock Entities is done in the interests of the Client Plans and their respective participants and beneficiaries and, (c) requiring, to the extent possible, verification that the terms of such Covered Transactions are at least as favorable to the Client Plans as the terms generally available in comparable arm's length transactions with unrelated parties;

4. Consults with the ECO regarding the need for, timing and form of any EPP Corrections. The IM has the responsibilities with respect to corrections of Violations, as set forth in Section V of this Exemption. In response to EPP Corrections or Violations, the IM considers whether, and must have the authority, to require further sampling, testing or corrective action if necessary;

5. Exercises discretion for Client Plans in situations specified in Section III of this exemption where BlackRock Managers may be thought to have conflicts;

6. Performs certain monitoring functions described in Section III, and carries out the responsibilities required of the IM, as set forth in the definition of "Index" in this exemption, and with respect to loans of Securities to an MPS as set forth in Section III.M. of this exemption, and carries out such other responsibilities stipulated in Section III of this exemption;

7. Reviews the quarterly reports of the ECO, obtains and reviews representative samples of the data underlying the quarterly reports of the ECO, and, if the IM deems it appropriate, obtains additional factual information on either an ad hoc basis or on a systematic basis;

8. Reviews the certifications of the ECO as to whether (a) the quarterly report is accurate; (b) BlackRock's compliance program is working in a manner which is reasonably designed to prevent Violations; (c) any Violations discovered during the quarter and the related corrections taken to date have been identified in the report; (d) BlackRock has complied with the EPPs in all material respects; and (e) BlackRock has provided the ECO with adequate resources, including, but not limited to, adequate staffing of the ECO Function;

9. Determines, on the basis of the information supplied to the IM by BlackRock and the ECO, whether there has occurred a pattern or practice of insufficient diligence in adhering to the EPPs and/or the conditions of the exemption, and if such a determination is made, reports the same to the Department, and informs BlackRock and the ECO of any such report;

10. Determines whether the purchases of equity Securities issued by an MPS on behalf of Client Plans that are Other Accounts or Funds by a BlackRock Manager has had a positive material impact on the market price for such Securities, notwithstanding any volume limitations imposed by Section III.S. of the exemption and/or imposed by the IM with respect to such equity Securities. The IM makes this determination based upon its review of the relevant monthly reports required by the exemption with respect to such Covered Transactions provided by the ECO and publicly available information materially related to the trading of the Securities of an MPS on its primary listing exchange (or market);

11. Issues an annual compliance report,[57] to be timely delivered to (i) the Chairman of the Board, (ii) the Chief Executive Officer of BlackRock and (iii) the General Counsel of BlackRock. The annual compliance report shall be based on a review of the EPPs, the quarterly reports provided by the ECO, any transactions reviewed by the IM as well as any additional information the IM requests from BlackRock, and certifying to each of the following (or describing any exceptions thereto) that:

(a) The EPPs are reasonably designed to achieve the goals of (i) compliance with the terms of the exemption, (ii) ensuring BlackRock's decision-making with respect to Covered Transactions on behalf of Client Plans with MPSs or BlackRock Entities is done in the interests of the Client Plans and the respective participants and

[56] The first quarterly report will cover a 4-month period ending March 31, 2010.

[57] The first annual compliance report will cover the 13-month period ending December 31, 2010.

beneficiaries, and (iii) requiring to the extent possible, verification that the terms of any Covered Transaction are at least as favorable to Client Plans as the terms generally available in comparable arm's length transactions with unrelated parties;

(b) The EPPs and the other terms of the exemption were complied with, with any material exceptions duly noted;

(c) The IM has made the determination referred to in Section II.E.9. and the results of that determination;

(d) BlackRock has provided the ECO with adequate resources, including but not limited to adequate staffing of the ECO Function; and

(e) The compensation package for the ECO for the prior year is reasonable;

12. The annual compliance report of the IM, as described in Section II.E.11., shall contain a summary of Violations, any corrections of Violations required by the IM and/or the ECO at any time during the prior year. In addition, the IM further certifies that BlackRock correctly implemented the prescribed corrections, based in part on certification from the ECO; and

13. The annual compliance report of the IM shall also be timely delivered by the IM to the chief executive officer, the general counsel and the members of the boards of directors of each of the BlackRock Managers identified to the IM by the ECO as having relied upon this exemption during the prior year and those that the ECO reasonably anticipates will be relying on this exemption during the current year. The copies of the compliance report described in this Section II.E.13. shall be accompanied by a cover letter from the IM calling the attention of the recipients to any violations, material exceptions to compliance with the EPPs, or other shortfalls in compliance with the exemption to assist such officers and directors in carrying out their respective responsibilities.

F. *Special Notice Provisions.* A Special Notice containing (i) a notice of all of the conditions for relief under Sections III.C., E., F., G., Q., R., S. and V. and (ii) a copy of the Notice to Interested Parties must be provided to affected Client Plans in writing (which may be provided by U.S. mail or electronically, including by e-mail or use of a centralized electronic mailbox, so long as such electronic communication is reasonably calculated to result in the applicable Client Plan's receipt) as soon as practical, but no later than fifteen (15) days, following the date that the Notice to Interested Persons is provided to Client Plans generally, through publication in the Federal Register. As soon as practical following the Special Notice, a Client Plan fiduciary independent of any BlackRock Entity must be provided any additional material information regarding Covered Transactions described in Sections III.C., E., F., G., Q., R., S. and V. by the applicable BlackRock Manager on reasonable request; provided, that, solely for purposes of this subsection, the fiduciary of an In-House Plan is not required to be independent of any BlackRock Entity.

SECTION III: COVERED TRANSACTIONS

A. *Continuing Transactions.* Relief under Section I of this exemption is available for Type B Covered Transactions and Type C Covered Transactions and the unwind, settlement or other termination thereof provided that:

1. A list of all Type B Covered Transactions and all Type C Covered Transactions (the B and C List) as of the date of the Acquisition is prepared by BlackRock and provided to the ECO.

2. Any discretionary act by a BlackRock Manager with respect to a transaction on the B and C List is approved in advance in writing by the ECO. Such approval is required for, but not limited to, sales and other transfers to a third party, redemptions, the exercise of options, and the declaration of default or other credit impairment-driven decisions. The ECO must determine that the terms of such discretionary act are in the interests of the affected Client Plans.

3. The ECO Function periodically monitors outstanding transactions on the B and C List to inquire if an affirmative discretionary act, such as a credit driven action, would be appropriate. If the ECO makes such a determination, the ECO must direct the action be taken and must approve the terms thereof as being in the interests of the affected Client Plans.

4. The ECO Function sends to the IM an updated copy of the B and C List as of the end of each fiscal quarter summarizing the Type B Covered Transactions and Type C Covered Transactions remaining at the end of the quarter and any discretionary actions taken during the quarter by BlackRock Managers with respect to such transactions.

5. Upon the determination by the IM that an action taken with respect to a Type B Covered Transactions or Type C Covered Transaction was inappropriate or that the compensation the Client Plans received was inadequate, or that an action should have been taken but was not, the Client Plans are made whole by BlackRock.

B. *Purchases and Holdings by BlackRock Managers of Fixed Income Obligations Issued by an MPS in an Underwriting on Behalf of Client Plans Invested in an Index Account or Fund, or in a Model-Driven Account or Fund.* Relief under Section I of this exemption is available for a purchase and holding by BlackRock Managers of Fixed Income Obligations issued by an MPS in an underwriting on behalf of Client Plans for an Index Account or Fund, or a Model-Driven Account or Fund, provided that:

1. Such purchase is for the sole purpose of maintaining quantitative conformity with the weight of such Securities prescribed by the relevant Index, for Index Accounts or Funds, or the weight of such Securities prescribed by the relevant Model, for Model-Driven Accounts or Funds; and such purchase may not exceed the purchase amount necessary for such Model or quantitative conformity;

2. Such purchase is not made from any MPS;

3. No BlackRock Entity is in the selling syndicate;

4. After purchase, the responsible BlackRock Manager notifies the ECO if circumstances arise in which an action or inaction on the part of the BlackRock Manager regarding an MPS Fixed Income Obligation so acquired might be thought to be motivated by an interest which may affect the exercise of such BlackRock Manager's best judgment as a fiduciary, and complies with decisions of the ECO regarding the taking, or the refraining from taking, of actions in such circumstances; and

5. After purchase, any decision regarding conversion of an MPS Fixed Income Obligation into equity in the MPS is made by the IM.

C. *Purchase and Holding by BlackRock Managers of Fixed Income Obligations Issued by an MPS in an Underwriting on Behalf of Client Plans Invested in an Other Account or Fund.* Relief under Section I of this exemption is available for a purchase and holding by BlackRock Managers of Fixed Income Obligations issued by an MPS in an underwriting on behalf of Client Plans invested in an Other Account or Fund provided that:

1. The conditions of Section IV.A. of this exemption are satisfied, except that for purposes of Section IV.A.4.(a) and Section IV.A.5.(c), the MPS-issued Fixed Income Obligations at the time of purchase must be rated in one of the three highest rating categories by a Rating Organization and none of the Rating Organizations may rate the Fixed

Income Obligations lower than in the third highest rating category;

2. Such purchase is not made from an MPS;

3. No BlackRock Entity is in the selling syndicate;

4. After purchase, the responsible BlackRock Manager notifies the ECO if circumstances arise in which an action or inaction on the part of the BlackRock Manager regarding an MPS Fixed Income Obligation so acquired might be thought to be motivated by an interest which may affect the exercise of such BlackRock Manager's best judgment as a fiduciary, and complies with decisions of the ECO regarding the taking, or the refraining from taking, of actions in such circumstances;

5. After purchase, any decision regarding conversion of an MPS Fixed Income Obligation into equity in the MPS is made by the IM; and

6. Special Notice of all of the foregoing conditions for relief under this Section III.C. must be provided in accordance with the terms of Section II.F.

D. *Certain Transactions in the Secondary Market by BlackRock Managers of Fixed Income Obligations Including Fixed Income Obligations Issued by or Traded With an MPS.* Relief under Section I of this exemption is available for a purchase or sale in the secondary market or the holding by BlackRock Managers on behalf of Client Plans of (i) Fixed Income Obligations issued by an MPS or (ii) Fixed Income Obligations issued by a third party but purchased or sold to an MPS, provided that:

1. The Fixed Income Obligations are purchased from or sold to an MPS as a result of the Three Quote Process.

2. With respect to Fixed Income Obligations that are issued by an MPS and are purchased and held by a BlackRock Manager for a Client Plan—

(a) The purchase of the Fixed Income Obligation issued by an MPS is not made from the issuing MPS;

(b) After purchase, the responsible BlackRock Manager notifies the ECO if circumstances arise in which an action or inaction on the part of the BlackRock Manager regarding an MPS Fixed Income Obligation so acquired might be thought to be motivated by an interest which may affect the exercise of such BlackRock Manager's best judgment as a fiduciary, and complies with the decisions of the ECO regarding the taking, or the refraining from taking, of actions in such circumstances;

(c) After purchase, any decision regarding conversion of an MPS Fixed Income Obligation into equity in the MPS is made by the IM; and

(d) If purchased for an Index Account or Fund, or a Model-Driven Account or Fund, such purchase is for the sole purpose of maintaining quantitative conformity with the weight of such Securities prescribed by the relevant Index, for Index Accounts or Funds, or the weight of such Securities prescribed by the relevant Model, for Model-Driven Accounts or Funds and such purchase may not exceed the purchase amount necessary for such Model or quantitative conformity.

3. With respect to Fixed Income Obligations (whether or not issued by an MPS) held by a BlackRock Manager for a Client Plan under which an MPS has an ongoing function, such as servicing of collateral for asset-backed debt, or the potential for liability, such as under representations or warranties made by an MPS with respect to collateral for such asset-backed debt which the MPS originated, the taking of or refraining from taking any action by the responsible BlackRock Manager which could have a material positive or negative effect upon the MPS is decided upon by the ECO.

4. For purposes of this Section III.D., Asset-Backed Securities are not Fixed Income Obligations.

E. *Purchase in an Underwriting and Holding by BlackRock Managers of Fixed Income Obligations Issued by a Third Party when an MPS is Underwriter, in Either a Manager or a Member Capacity, or Debt Trustee.* Relief under Section I of this exemption is available for the purchase and holding by BlackRock Managers of Fixed Income Obligations issued by third parties in an underwriting when an MPS is an underwriter, in either a manager or a member capacity, or debt trustee under the Fixed Income Obligation, provided that:

1. The conditions of Section IV.A. are satisfied;

2. Such purchase is not made from an MPS;

3. No BlackRock Entity is in the selling syndicate; and

4. With respect to Fixed Income Obligations under which an MPS has either an ongoing function, such as debt trustee, servicer of collateral for asset–backed debt, or the potential for liability, such as under representations or warranties made by an MPS with respect to collateral for such asset-backed debt which the MPS originated, the taking of or refraining from taking any action by the responsible BlackRock Manager which could have a material positive or negative effect upon the MPS is decided upon by the ECO.

5. For purposes of this Section III.E., Asset-Backed Securities are not Fixed Income Obligations.

6. Special Notice of all of the foregoing conditions for relief under this Section III.E. must be provided in accordance with the terms of Section II.F.

F. *Purchase in an Underwriting and Holding by BlackRock Managers of Asset-Backed Securities, When an MPS is an Underwriter, in the Capacity as Either a Manager or a Member of the Selling Syndicate, Trustee, or, in the Case of Asset-Backed Securities Which Are CMBS, Servicer.* Relief under Section I of this exemption is available for the purchase and holding by BlackRock Managers of Asset-Backed Securities issued in an underwriting where an MPS is (i) an underwriter, in the capacity as either a manager or a member of the selling syndicate, (ii) trustee, or (iii), solely in the case of Asset-Backed Securities which are CMBS, servicer, when the MPS serves solely as servicer and not as an underwriter or trustee while being such servicer, of securitized obligations, provided that:

1. The conditions of Section IV.A. are satisfied, except that (a) for purposes of Section IV.A.4.(a), the Asset-Backed Securities at the time of purchase must be rated in one of the three highest rating categories by a Rating Organization and none of the Rating Organizations may rate the Asset-Backed Securities lower than the third highest rating category and (b) in the case of Asset-Backed Securities which are CMBS and for which the MPS is servicer, the conditions of Section IV.B. are satisfied instead of the conditions of Section IV.A.;

2. Such purchase is not made from an MPS;

3. No BlackRock Entity is in the selling syndicate;

4. In the case of Asset-Backed Securities with respect to which an MPS has either an ongoing function, such as trustee, servicer of collateral for CMBS, or the potential for liability, such as under representations or warranties made by an MPS with respect to collateral for CMBS which collateral the MPS originated, the taking of or refraining from taking of any action by a responsible BlackRock Manager which could have a material positive or negative effect upon the MPS is decided upon by the ECO;

5. The purchase meets the conditions of an applicable Underwriter Exemption; and

6. Special Notice of all of the foregoing conditions for relief under this Section III.F. must be provided in

accordance with the terms of Section II.F.

G. *Purchase and Holding by BlackRock Managers of Equity Securities Issued by an Entity Which is not an MPS and is Not a BlackRock Entity, in an Underwriting when an MPS is an Underwriter, in Either a Manager or a Member Capacity.* Relief under Section I of this exemption is available for the purchase and holding by BlackRock Managers of Equity Securities issued by an entity which is not an MPS and which is not a BlackRock Entity in an underwriting when an MPS is an underwriter, in either a manager or a member capacity, provided that:

1. The conditions of Section IV.A. are satisfied;

2. Such purchase is not made from an MPS;

3. No BlackRock Entity is in the selling syndicate;

4. The Securities are not Asset-Backed Securities; and

5. Special Notice of all of the foregoing conditions for relief under this Section III.G. must be provided in accordance with the terms of Section II.F.

H. *Purchase and Sale by BlackRock Managers of Asset-Backed Securities in the Secondary Market, from or to an MPS, and/or when an MPS is Sponsor, Servicer, Originator, Swap Counterparty, Liquidity Provider, Trustee or Insurer, and the Holding Thereof.* Relief under Section I of this exemption is available for a sale of Asset-Backed Securities by a BlackRock Manager to an MPS, or the purchase of Asset-Backed Securities by BlackRock Managers from an MPS and the holding thereof, and/or any such purchase or sale in the secondary market or holding when an MPS is a sponsor, a servicer, an originator, a swap counterparty, a liquidity provider, a trustee or an insurer, provided that:

1. If the Asset-Backed Securities are purchased from or sold to an MPS, the purchase or sale is as a result of the Three Quote Process.

2. Regardless of from whom the BlackRock Manager purchases the Asset-Backed Securities, the purchase and holding of the Asset-Backed Security otherwise meets the conditions of an applicable Underwriter Exemption.

3. Regardless of from whom the BlackRock Manager purchased the Asset-Backed Securities, if an MPS is, with respect to such Asset-Backed Securities, a sponsor, servicer, originator, swap counterparty, liquidity provider, insurer or trustee, as those terms are utilized or defined in the Underwriter Exemptions, and circumstances arise in which the taking of or refraining from taking of any action by the responsible BlackRock Manager could have a material positive or negative effect upon the MPS, the taking of or refraining from taking of any such action is decided upon by the ECO.

I. *Repurchase Agreements when MPS is the Seller.* Section I of this exemption applies to an investment by a BlackRock Manager of Client Plan assets which involves the purchase or other acquisition, holding, sale, exchange or redemption by or on behalf of a Client Plan of a repurchase agreement (or Securities or other instruments under cover of a repurchase agreement) in which the seller of the underlying Securities or other instruments is an MPS which is a bank supervised by the United States or a State, a broker-dealer registered under the 1934 Act, or a dealer who makes primary markets in Securities of the United States government or any agency thereof, or in banker's acceptances, and reports daily to the Federal Reserve Bank of New York its positions with respect to these obligations, provided that each of the following conditions are satisfied:

1. The repurchase agreement is embodied in, or is entered into pursuant to a written agreement. Such written agreement must be a standardized industry form; provided, that with the approval of the ECO on or about the date of the Acquisition, written agreements with an MPS that were in effect as of the date of the Acquisition may continue to be used until there is a material modification of the same, at which time standardized industry forms must be adopted;

2. The repurchase agreement has a term of one year or less;

3. The Client Plan receives interest no less than that which it would receive in a comparable arm's length transaction with an unrelated party;

4. The Client Plan receives Securities, banker's acceptances, commercial paper or certificates of deposit having a market value equal to not less than one hundred percent (100%) of the purchase price paid by the Client Plan;

5. Upon expiration of the repurchase agreement and return of the Securities or other instruments to the seller, the seller transfers to the Client Plan an amount equal to the purchase price plus the appropriate interest;

6. Neither the MPS seller nor any MPS which is a member of the same MPS Group has discretionary authority or control with respect to the investment of the Client Plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets. This Section III.I.6. shall be deemed satisfied notwithstanding the investment of assets of an MPS Plan of the MPS which is the seller under such repurchase agreement in a Pooled Fund as of the date of the Acquisition, which Pooled Fund is a bank-maintained common or collective trust, provided that such assets, when aggregated with the assets of all other MPS Plans of the same MPS Group as that of the MPS seller and invested in such Pooled Fund, at all times since the date of the Acquisition, constitute or are deemed pursuant to Section II.A.3.(b) to constitute less than ten percent (10%) of the assets of such Pooled Fund;

7. The Securities, banker's acceptances, commercial paper or certificates of deposit received by the Client Plan:

(a) Could be acquired directly by the Client Plan in a transaction not covered by this Section III.I. without violating ERISA sections 406(a)(1)(E), 406(a)(2) or 407(a); and

(b) If the Securities are subject to the provisions of the 1933 Act, they are obligations that are not "restricted securities" within the meaning of Rule 144 under the 1933 Act; provided, that, such restricted securities are permitted until July 31, 2010.

8. If the market value of the underlying Securities or other instruments falls below the purchase price at any time during the term of the agreement, the Client Plan may, under the written agreement required by Section III.I.1., require the MPS seller to deliver, by the close of business on the following business day (as such term is defined for purposes of the relevant written agreement), additional Securities or other instruments the market value of which, together with the market value of Securities or other instruments previously delivered or sold to the Client Plan under the repurchase agreement, equals at least one hundred percent (100%) of the purchase price paid by the Client Plan.

9. If the MPS seller does not deliver additional Securities or other instruments as required above, the Client Plan may terminate the agreement, and, if upon termination or expiration of the agreement, the amount owing is not paid to the Client Plan, the Client Plan may sell the Securities or other instruments and apply the proceeds against the obligations of the MPS seller under the agreement, and against any expenses associated with the sale.

10. The MPS seller agrees to furnish the Client Plan with the most recent available audited statement of its

financial condition as well as its most recent available unaudited statement, agrees to furnish additional audited and unaudited statements of its financial condition as they are issued and either: (a) Agrees that each repurchase agreement transaction pursuant to the agreement shall constitute a representation by the MPS seller that there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the Client Plan with whom such written agreement is made; or (b) prior to each repurchase agreement transaction, the MPS seller represents that, as of the time the transaction is negotiated, there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the Client Plan with whom such written agreement is made.

11. In the event of termination and sale as described in Section III.I.9., the MPS seller pays to the Client Plan the amount of any remaining obligations and expenses not covered by the sale of the Securities or other instruments, plus interest at a reasonable rate.

12. If an MPS seller involved in a repurchase agreement covered by this exemption fails to comply with any condition of this exemption in the course of engaging in the repurchase agreement, the BlackRock Manager who caused the plan to engage in such repurchase agreement shall not be deemed to have caused the plan to engage in a transaction prohibited by ERISA sections 406(a)(1)(A) through (D) or ERISA section 406(b), Code section 4975, or FERSA section 8477(c) solely by reason of the MPS seller's failure to comply with the conditions of the exemption.

13. In the event of any dispute between a BlackRock Manager and an MPS seller involving a Covered Transaction under this Section III.I., the IM has the responsibility to decide whether, and if so how, BlackRock is to pursue relief on behalf of the Client Plan(s) against the MPS Seller.

14. At time of entry into or renewal of each Covered Transaction under this Section III.I., including both term repurchase transactions and daily renewals for "open" or "overnight" transactions, either (a) each Covered Transaction under this Section III.I., is as a result of the Three Quote Process, or, (b) the BlackRock Manager determines that the yield on the proposed transaction, or the renewal thereof, is at least as favorable to the Client Plans as the yield of the Client Plan on two (2) other available transactions which are comparable in terms of size, collateral type, credit quality of the counterparty, term and rate. The methodology employed for purposes of the comparison in (b) above must (c) be approved in advance by the ECO Function and (d), to the extent possible, refer to objective external data points, such as the Eurodollar overnight time deposit bid rate, the rate for repurchase agreements with U.S. government Securities, or rates for commercial paper issuances or agency discount note issuances sourced from Bloomberg, or another third party pricing service or market data provider (which providers may use different terminology to refer to these same external data points). The applicable BlackRock Manager must record a description of the comparable transactions, if reliance is placed upon same, and such data must be periodically reviewed by the ECO Function. The procedures described in this Section III.I.14. must be designed to ensure that BlackRock Managers determine to only enter into Covered Transactions with MPS sellers which are in the interests of Plan Clients, and such procedures must be reviewed and may be commented on by the IM.

J. *Responding to Tender Offers and Exchange Offers Solicited by an MPS.* Relief under Section I of this exemption is available for participation by BlackRock Managers on behalf of Client Plans in tender offers or exchange offers or similar transactions where an MPS acts as agent for the entity (which entity may not be an MPS) making the offer, provided that:

1. The Client Plan pays no fees to the MPS in connection with this Covered Transaction;

2. The BlackRock Manager submits to the ECO in advance of participation a written explanation of the reasons for such participation; and

3. The ECO Function determines that the reasons for participation by the BlackRock Manager in the Covered Transaction are appropriate from the vantage point of the Client Plans. Effective as of October 1, 2010, the ECO Function must affirmatively make this determination in writing prior to the BlackRock Manager participating in the Covered Transactions under this Section III.J.

K. *Purchase in Underwritings of Securities Issued by an Entity Which is not an MPS when the Proceeds are Used to Repay a Debt to an MPS.* Relief under Section I of this exemption is available for the purchase by BlackRock Managers of Securities in underwritings issued by an entity which is not an MPS, but where the proceeds of the offering are used to repay a debt owed to an MPS, and the payment of such proceeds to the MPS, provided that the BlackRock Manager does not know that the proceeds will be applied to the repayment of debt owed to an MPS. If the BlackRock Manager does know that proceeds of the offering will be applied to the repayment of debt owed to an MPS, the purchase of the Securities and the payment of the proceeds to the MPS are exempt under Section I of this exemption provided that no more than twenty percent (20%) of the offering is purchased by BlackRock Managers for Client Plans, and no more than fifty percent (50%) of the offering in the aggregate is purchased by BlackRock, BlackRock Managers and other BlackRock Entities for Client Plans, other clients of BlackRock Managers, or as proprietary investments.

L. *Bank Deposits and Commercial Paper.* Relief under Section I of this exemption is available for an investment by a BlackRock Manager of Client Plan assets which involves the purchase or other acquisition, holding, sale, exchange or redemption by or on behalf of a Client Plan of certificates of deposit, time deposits or other bank deposits at an MPS, or in commercial paper issued by an MPS, provided that:

1. With respect to bank deposits, either:

(a)(i) The bank is supervised by the United States or a State, and at the outset of the Covered Transaction or renewal thereof of, such bank has a credit rating in one of the top two (2) categories by at least one of the Rating Organizations; (ii) neither the bank nor an affiliate of the bank has discretionary authority or control with respect to the investment of Client Plan assets involved in the Covered Transaction or renders investment advice (within the meaning of 29 CFR § 2510.3–21(c)) with respect to those assets; and (iii) such deposit bears a reasonable interest rate, or—

(b) The BlackRock Manager and the MPS comply with ERISA section 408(b)(4).

2. With respect to commercial paper:

(a) The Client Plan is not an MPS Plan of the MPS issuing the commercial paper;

(b) The commercial paper has a stated maturity date of nine (9) months or less from the date of issue, exclusive of days of grace, or is a renewal of an issue of commercial paper the maturity of which is likewise limited;

(c) Neither the MPS issuer of the commercial paper, any MPS guarantor of the commercial paper, nor any member of the same MPS Group as such MPS issuer or guarantor has discretionary authority or control with

respect to the investment of the Client Plan assets involved in the Covered Transaction or renders investment advice (within the meaning of 29 CFR § 2510.3–21(c)) with respect to those assets; and

(d) At the time it is acquired, the commercial paper is ranked in one of the two (2) highest rating categories by at least one of the Rating Organizations.

3. For purposes of the Covered Transactions set forth in this Section III.L.:

(a) No BlackRock Entity shall be regarded as an affiliate of an MPS bank at which a deposit is made of Client Plan assets, nor of an MPS issuer of commercial paper in which a BlackRock Manager invests Client Plan assets, and

(b) Section III.L.1.(a)(ii) and Sections III.L.2.(a) and (c) shall be deemed satisfied notwithstanding the investment of assets of an MPS Plan of the MPS which is the depository bank or issuer of commercial paper in a Pooled Fund as of the date of the Acquisition, which Pooled Fund is a bank-maintained common or collective trust, provided that such assets when aggregated with the assets of all other MPS Plans of the same MPS Group as the issuer of such asset and invested in such Pooled Fund, at all times since the date of the Acquisition, constitute or are deemed pursuant to Section II.A.3.(b) to constitute less than ten percent (10%) of such Pooled Fund.

M. *Securities Lending to an MPS.*

1. Relief under Section I of this exemption is available for:

(a) The lending of Securities by a BlackRock Manager that are assets of a Client Plan to an MPS which is a U.S. Broker-Dealer or a U.S. Bank provided that the conditions set forth in Section III.M.2. are met;

(b) The lending of Securities by a BlackRock Manager that are assets of a Client Plan to an MPS which is a Foreign Broker-Dealer or Foreign Bank; provided that, the conditions set forth in Section III.M.2. and Section III.M.3. below are met; and

(c) The payment to a BlackRock Manager of compensation for services rendered in connection with loans of Client Plan assets that are Securities to an MPS; provided that, the conditions set forth in Section III.M.4. below are met.

2. General Conditions for Transactions Described in Sections III.M.1.(a) and (b).

(a) The length of a Securities loan to an MPS does not exceed one year in term.

(b) Neither the MPS borrower nor any MPS which is a member of the same MPS Group as the MPS borrower has or exercises discretionary authority or control with respect to the investment of the Client Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets. This Section III.M.2.(b) shall be deemed satisfied notwithstanding the investment of the assets of an MPS Plan of the MPS which is the borrower under such Securities lending transaction in a Pooled Fund as of the date of the Acquisition, which Pooled Fund is a bank-maintained common or collective trust, provided that such assets when aggregated with the assets of all other MPS Plans of the same MPS Group as that of the MPS borrower and invested in such Pooled Fund, at all times since the date of the Acquisition, constitute or are deemed pursuant to Section II.A.3.(b) to constitute less than ten percent (10%) of the assets of such Pooled Fund.

(c) The Client Plan receives from the MPS borrower by the close of the BlackRock Manager's business on the day in which the Securities lent are delivered to the MPS,

(i) U.S. Collateral having, as of the close of business on the preceding business day, a market value, or, in the case of bank letters of credit, a stated amount, equal to not less than one hundred percent (100%) of the then market value of the Securities lent; or

(ii) Foreign Collateral having as of the close of business on the preceding business day, a market value, or, in the case of bank letters of credit, a stated amount, equal to not less than:

(x) One hundred two percent (102%) of the then market value of the Securities lent as valued on a Recognized Securities Exchange or an Automated Trading System on which the Securities are primarily traded if the collateral posted is denominated in the same currency as the Securities lent, or

(y) One hundred five percent (105%) of the then market value of the Securities lent as valued on a Recognized Securities Exchange or an Automated Trading System on which the Securities are primarily traded if the collateral posted is denominated in a different currency than the Securities lent.

(d) Notwithstanding the foregoing, if the BlackRock Manager is a U.S. Bank or U.S. Broker-Dealer, and such BlackRock Manager indemnifies the Client Plan with respect to the difference, if any, between the replacement cost of the borrowed Securities and the market value of the collateral on the date of a borrower default, the Client Plan receives from the MPS borrower by the close of the BlackRock Manager's business on the day in which the Securities lent are delivered to the borrower, Foreign Collateral having as of the close of business on the preceding business day, a market value, or, in the case of bank letters of credit, a stated amount, equal to not less than:

(i) One hundred percent (100%) of the then market value of the Securities lent as valued on a Recognized Securities Exchange or an Automated Trading System on which the Securities are primarily traded if the collateral posted is denominated in the same currency as the Securities lent; or

(ii) One hundred one percent (101%) of the then market value of the Securities lent as valued on a Recognized Securities Exchange or an Automated Trading System on which the Securities are primarily traded if the collateral posted is denominated in a different currency than the Securities lent and such currency is denominated in Euros, British pounds, Japanese yen, Swiss francs or Canadian dollars; or

(iii) One hundred five percent (105%) of the then market value of the Securities lent as valued on a Recognized Securities Exchange or an Automated Trading System if the collateral posted is denominated in a different currency than the Securities lent and such currency is other than those specified above.

(e)(i) If the MPS borrower is a U.S. Bank or U.S. Broker-Dealer, the Client Plan receives such U.S. Collateral or Foreign Collateral from the MPS borrower by the close of the BlackRock Manager's business on the day in which the Securities are delivered to the MPS borrower. Such collateral is received by the Client Plan either by physical delivery, wire transfer or by book entry in a Securities depository located in the United States, or,

(ii) If the MPS borrower is a Foreign Bank or Foreign Broker-Dealer, the Client Plan receives U.S. Collateral or Foreign Collateral from the MPS borrower by the close of the BlackRock Manager's business on the day in which the Securities are delivered to the borrower. Such collateral is received by the Client Plan either by physical delivery, wire transfer or by book entry in a Securities depository located in the United States or held on behalf of the Client Plan at an Eligible Securities Depository. The indicia of ownership of such collateral shall be maintained in accordance with section 404(b) of ERISA and 29 CFR 2550.404b–1.

(f) Prior to making of any such loan, the MPS borrower shall have furnished the BlackRock Manager with:

(i) The most recent available audited statement of the MPS borrower's financial condition, as audited by a United States certified public accounting firm or in the case of an MPS borrower that is a Foreign Broker-Dealer or Foreign Bank, a firm which is eligible or authorized to issue audited financial statements in conformity with accounting principles generally accepted in the primary jurisdiction that governs the borrowing MPS Foreign Broker-Dealer or Foreign Bank;

(ii) The most recent available unaudited statement of its financial condition (if the unaudited statement is more recent than such audited financial statement); and

(iii) A representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition since the date of the most recent financial statement furnished to the BlackRock Manager that has not been disclosed to the BlackRock Manager. Such representations may be made by the MPS borrower's agreement that each loan shall constitute a representation by the MPS borrower that there has been no such material adverse change.

(g) The loan is made pursuant to a written loan agreement, the terms of which are at least as favorable to the Client Plan as an arm's-length transaction with an unrelated party would be. Such loan agreement states that the Client Plan has a continuing security interest in, title to, or the rights of secured creditor with respect to the collateral. Such agreement may be in the form of a master agreement covering a series of Securities lending transactions.

(h) The written loan agreement must be a standardized industry form; provided, that, with the approval of the ECO on or about the date of the Acquisition, written loan agreements with an MPS borrower that were in effect as of the date of the Acquisition may continue to be used until there is a material modification of the same, at which time standardized industry forms must be adopted.

(i) In return for lending Securities, the Client Plan:

(i) Receives a reasonable fee (in connection with the Securities lending transaction), and/or

(ii) Has the opportunity to derive compensation through the investment of the currency collateral. Where the Client Plan has that opportunity, the Client Plan may pay a loan rebate or similar fee to the MPS borrower, if such fee is not greater than the Client Plan would pay in a comparable transaction with an unrelated party.

(j) All fees and other consideration received by the Client Plan in connection with the loan of Securities are reasonable. The identity of the currency in which the payment of fees and rebates will be made is set forth either in the written loan agreement or the loan confirmation as agreed to by the MPS borrower and the BlackRock Manager prior to the making of the loan.

(i) Pricing of a loan to an MPS borrower is based on (i) rates for comparable loans of the same Security to non-MPS borrowers and (ii) third-party market data:

(x) For loans of liquid Securities (sometimes referred to as general collateral loans), an automatic system may be used to price loans so long as the resulting rate the Client Plan receives from the MPS borrower is at least as favorable to the Client Plan as the rate the BlackRock Managers are receiving for Client Plans or other clients from non-MPS borrowers of the same Security;

(y) For purposes of pricing loans of less liquid Securities (sometimes referred to as "special loans"), and for purposes of determining whether to terminate or continue a loan which does not have a set term, pricing may also be based on a BlackRock trader determination that continuing the loan is in the interest of the Client Plan based on all relevant factors, including price (provided that price is within the range of prices of other loans of the same Security to comparable non-MPS borrowers by BlackRock Managers for Client Plans or other clients) and potential adverse consequences to the Client Plan of terminating the loan, provided that the pricing data used in making these decisions is retained and made available for possible review by the ECO.

(ii) Automatic pricing mechanisms and pricing decisions by traders are subject to ongoing periodic review by the ECO Function, and the results of such review are included in reports by the ECO to the IM. Specifically, the quarterly reports by the ECO to the IM must address the lending patterns of:

(x) Illiquid Securities to the MPS borrowers from all Client Plans, including the percentage that loans of such Securities to the MPSs represent of all loans of such Securities from all Client Plans; and

(y) Illiquid Securities to the MPS borrowers from all Other Accounts or Funds, including the percentage that loans of such Securities to the MPSs represent of all loans of such Securities from all Other Accounts or Funds.

(k) The Client Plan receives the equivalent of all distributions made to holders of the borrowed Securities during the term of the loan including, but not limited to, dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional Securities;

(l) If the market value of the collateral at the close of trading on a business day is less than the applicable percentage of the market value of the borrowed Securities at the close of trading on that day (as described in this Section III.M.2.(c) of this exemption), then the MPS borrower shall deliver, by the close of business on the following business day, an additional amount of U.S. Collateral or Foreign Collateral the market value of which, together with the market value of all previously delivered collateral, equals at least the applicable percentage of the market value of all the borrowed Securities as of such preceding day.

Notwithstanding the foregoing, part of the U.S. Collateral or Foreign Collateral may be returned to the MPS borrower if the market value of the collateral exceeds the applicable percentage (described in this Section III.M.2.(c) of this exemption) of the market value of the borrowed Securities, as long as the market value of the remaining U.S. Collateral or Foreign Collateral equals at least the applicable percentage of the market value of the borrowed Securities.

(m) The loan may be terminated by the Client Plan at any time, whereupon the MPS borrower shall deliver certificates for Securities identical to the borrowed Securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed Securities) to the Client Plan within the lesser of:

(i) The customary delivery period for such Securities,

(ii) Five business days, or

(iii) The time negotiated for such delivery by the BlackRock Manager for the Client Plan, and the borrower.

(n) In the event that the loan is terminated, and the MPS borrower fails to return the borrowed Securities or the equivalent thereof within the applicable time described in Section III.M.2(m), the BlackRock Manager for the Client Plan may, under the terms of the loan agreement:

(i) Purchase Securities identical to the borrowed Securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the borrower under the agreement, and any expenses associated with the sale and/or purchase, and

(ii) The MPS borrower is obligated, under the terms of the loan agreement, to pay, and does pay to the Client Plan

the amount of any remaining obligations and expenses not covered by the collateral, including reasonable attorney's fees incurred by the Client Plan for legal action arising out of default on the loans, plus interest at a reasonable rate.

Notwithstanding the foregoing, the MPS borrower may, in the event the MPS borrower fails to return borrowed Securities as described above, replace collateral, other than U.S. currency, with an amount of U.S. currency that is not less than the then current market value of the collateral, provided such replacement is approved by the BlackRock Manager.

(o) If the MPS borrower fails to comply with any provision of a loan agreement which requires compliance with this exemption, the BlackRock Manager who caused the Client Plan to engage in such transaction shall not be deemed to have caused the Client Plan to engage in a transaction prohibited by ERISA sections 406(a)(1)(A) through (D) or ERISA section 406(b) or FERSA section 8477(c) solely by reason of the borrower's failure to comply with the conditions of the exemption.

(p) If the Securities being loaned to an MPS borrower are managed in an Index Account or Fund, or a Model-Driven Account or Fund where the Index or the Model are created or maintained by the MPS borrower, the ECO Function periodically performs a review, no less than quarterly, of the use of such MPS-sponsored Index or Model, and the Securities loaned from such an account or fund to the MPS, which review is designed to enable a reasonable judgment as to whether the use of such Index or Model, or any changes thereto, were for the purpose of benefitting BlackRock or the MPS through the Securities lending activity described in this Section III.M. If the ECO forms a reasonable judgment that the use of such Index or Model, or any changes thereto, were for the purpose of benefitting BlackRock or the MPS, the ECO shall promptly inform the IM.

(q) In the event of any dispute between the BlackRock Manager on behalf of a Client Plan and an MPS borrower involving a Covered Transaction under this Section III.M., the IM shall decide whether, and if so, how the BlackRock Manager is to pursue relief on behalf of the Client Plan(s) against the MPS borrower.

(r) If the Securities being loaned to an MPS borrower are managed in an Other Account or Fund, the employees of the BlackRock Manager who exercise discretionary authority or control over the Other Account or Fund shall not have access to the information regarding whether the particular Securities are on loan to an MPS, with such access limitations imposed on or about September 30, 2010 and implemented through the EPPs on or about September 30, 2010.

3. Specific Conditions for Transactions Described in Section III.M.1.(b).

(a) The BlackRock Manager maintains the written documentation for the loan agreement at a site within the jurisdiction of the courts of the United States.

(b) Prior to entering into a transaction involving an MPS Foreign Broker-Dealer or an MPS Foreign Bank either:

(i) The MPS Foreign Broker-Dealer or Foreign Bank agrees to submit to the jurisdiction of the United States; agrees to appoint an agent for service of process in the United States, which may be an affiliate; consents to service of process on such agent; and agrees that any enforcement by a Client Plan of its rights under the Securities lending agreement will, as the option of the Client Plan, occur exclusively in the United States courts; or

(ii) The BlackRock Manager, if a U.S. Bank or U.S. Broker-Dealer, agrees to indemnify the Client Plan with respect to the difference, if any, between the replacement cost of the borrowed Securities and the market value of the collateral on the date of an MPS borrower default plus interest and any transaction costs incurred (including attorney's fees of such Client Plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the Client Plan may incur or suffer directly arising out of a borrower default by the MPS Foreign Broker-Dealer or Foreign Bank.

(c) In the case of a Securities lending transaction involving an MPS Foreign Broker-Dealer or an MPS Foreign Bank, the BlackRock Manager must be a U.S. Bank or U.S. Broker-Dealer, and prior to entering into the loan transaction, such BlackRock Manager must agree to indemnity the Client Plan with respect to the difference, if any, between the replacement cost of the borrowed Securities and the market value of the collateral on the date of an MPS borrower default plus interest and any transaction costs incurred (including attorney's fees of such plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the Client Plan may incur or suffer directly arising out of a borrower default by the MPS Foreign Broker-Dealer or Foreign Bank.

4. Specific Conditions for Transactions Described in Section III.M.1.(c):

(a) The loan of Securities is not prohibited by section 406(a) of ERISA or otherwise satisfies the conditions of this exemption.

(b) The BlackRock Manager is authorized to engage in Securities lending transactions on behalf of the Client Plan.

(c) The compensation, the terms of which are at least as favorable to the Client Plan as an arm's length transaction with an unrelated party, is reasonable and is paid in accordance with the terms of a written instrument, which may be in the form of a master agreement covering a series of Securities lending transactions.

(d) Except as otherwise provided in Section III.M.4.(f), the arrangement under which the compensation is paid:

(i) Is subject to the prior written authorization of a fiduciary of a Client Plan (the authorizing fiduciary), who is (other than in the case of an In-House Plan) independent of the BlackRock Manager, provided that for purposes of this Section III.M.4.(d) a fiduciary of an MPS Plan acting as the authorizing fiduciary shall be deemed independent of the BlackRock Manager so long as such fiduciary, as of the date of the authorization, is not a BlackRock Entity, and

(ii) May be terminated by the authorizing fiduciary within:

(x) The time negotiated for such notice of termination by the Client Plan and the BlackRock Manager, or

(y) Five business days, whichever is less, in either case without penalty to the Client Plan.

(e) No such authorization is made or renewed unless the BlackRock Manager shall have furnished the authorizing fiduciary with any reasonably available information which the BlackRock Manager reasonably believes to be necessary to determine whether such authorization should be made or renewed, and any other reasonably available information regarding the matter that the authorizing fiduciary may reasonably request.

(f) Special Rule for Commingled Investment Funds. In the case of a pooled separate account maintained by an insurance company qualified to do business in a State or a common or collective trust fund maintained by a bank or trust company supervised by a State or Federal agency, the requirements of Section III.M.4.(d) of this exemption shall not apply, provided that:

(i) The information described in Section III.M.4.(e) (including information with respect to any material change in the arrangement) shall be furnished by the BlackRock Manager to

the authorizing fiduciary described in Section III.M.4.(d) with respect to each Client Plan whose assets are invested in the account or fund, not less than 30 days prior to implementation of the arrangement or material change thereto, and, where requested, upon the reasonable request of the authorizing fiduciary;

(ii) In the event any such authorizing fiduciary submits a notice in writing to the BlackRock Manager objecting to the implementation of, material change in, or continuation of the arrangement, the Client Plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the account or fund, without penalty to the Client Plan, within such time as may be necessary to effect such withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a Client Plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a Client Plan electing to withdraw; and

(iii) In the case of a Client Plan whose assets are proposed to be invested in the account or fund subsequent to the implementation of the compensation arrangement and which has not authorized the arrangement in the manner described in Sections III.M.4.(f)(i) and (ii), the Client Plan's investment in the account or fund shall be authorized in the manner described in Section III.M.4.(d)(i).

N. *To-Be-Announced Trades (TBAs) of GNMA, FHLMC or FNMA Mortgage-Backed Securities with an MPS Counterparty.* Relief under Section I of this exemption is available for trades (purchases and sales) on a principal basis of mortgage-backed Securities issued by FHLMC, FNMA or guaranteed by GNMA and meeting the definition of "guaranteed governmental mortgage pool certificate" in 29 CFR 2510.3–101(i) with an MPS on a TBA basis, including, when applicable, delivery of the underlying Securities to a Client Plan, provided that:

1. The Covered Transactions under this Section III.N. are a result of the Three Quote Process; provided that, solely for purposes of this Section III.N.1., firm quotes under the Three Quote Process may also include firm quotes obtained on comparable Securities, as described below, when firm quotes with respect to the applicable TBA transactions are not reasonably attainable.

2. With regard to purchases of FHLMC and FNMA mortgage-backed Securities on a TBA basis, (i) the BlackRock Manager makes a determination that such Securities are of substantially similar credit quality as GNMA guaranteed governmental mortgage pool certificates, (ii) the ECO (in regular consultation with and under the supervision of the IM) monitors the credit spread between GNMA and FHLMC/FNMA mortgage-backed Securities, and (iii) each of the ECO and the IM (independently) has the authority and responsibility to determine whether purchases of FHLMC and/or FNMA mortgage-backed Securities on a TBA basis should not be permitted due to such credit spread, and such authority and responsibility is reflected in the EPPs.

3. With regard to possible delivery of underlying Securities to Client Plans, as opposed to cash settlement, the ECO Function approves any such delivery in advance.

For purposes of Section III.N.1., "comparable Securities" are Securities that: (a) Are issued and/or guaranteed by the same agency, (b) have the same coupon, (c) have a principal amount at least equal to but no more than two percent (2%) greater than the Security purchased or sold, (d) are of the same program or class, and (e) either (i) have an aggregate weighted average monthly maturity within a 12-month variance of the Security purchased or sold, but in no case can the variance be more than ten percent (10%) of such aggregate weighted average maturity of the Securities purchased or sold, or (ii) meet some other comparable objective standard containing a range of variance that is no greater than that described in (i) above and that assures that the aging of the Securities is properly taken into account.

O. *Foreign Exchange Transactions With an MPS Counterparty.* Relief under Section I of this exemption is available for a Foreign Exchange Transaction by a BlackRock Manager on behalf of Client Plans with an MPS as counterparty provided that:

1. (a) The Foreign Exchange Transaction is as a result of the Three Quote Process; or (b) the total net amount of the Foreign Exchange Transaction on behalf of Client Plans by BlackRock Managers is greater than $1 million and the exchange rate is within 0.5% above or below the Interbank Rate as represented to the BlackRock Managers by the MPS;

2. Foreign Exchange Transactions with an MPS counterparty only involve currencies of countries that are classified as "developed" or "emerging" markets by a third party Index provider that divides national economies into "developed," "emerging" and "frontier" markets. The Index provider shall be selected by BlackRock, provided, however, the IM shall have the right to reject the Index provider in its sole discretion at any time; and

3. Each Foreign Exchange Transaction complying with Section III.O.1.(b) must be set forth in the applicable quarterly reports of the ECO to the IM.

P. *Agency Execution of Equity and Fixed Income Securities Trades and Related Clearing as Described in PTE 86–128, Including Agency Cross Trades, When the Broker is an MPS.* Relief under Section I of this exemption is available for transactions in Securities described in Section II of PTE 86–128, as from time to time amended,[58] as if BlackRock Managers and MPS broker-dealers were "affiliates" as defined in Section I.(b) of PTE 86–128, provided the following conditions are satisfied:

1. The MPS is selected to perform Securities brokerage services for Client Plans pursuant to the normal brokerage placement practices, policies and procedures of the BlackRock Manager designed to ensure best execution.

2. The conditions of PTE 86–128 set forth in the following sections of that exemption must be complied with: Section III(e); Section III(f); Section III(g)(2); and Section III(h); provided, however, that the first sentence of section III(h) of PTE 86–128 is amended for purposes of this Section III.P.2. to provide as follows: "A trustee [other than a nondiscretionary trustee] may only engage in a covered transaction with a plan that has total net assets with a value of at least $50 million and in the case of a pooled fund, the $50 million requirement will be met if fifty percent (50%) or more of the units of beneficial interest in such pooled fund are held by investors having total net assets with a value of at least $50 million."

3. The ECO Function receives the information required to be provided to the "authorizing fiduciary" under Section III(e), Section III(f) and Section III(g)(2) of PTE 86–128, and the ECO has the authority to terminate the use of the MPS as broker-dealer without penalty to Client Plans at any time.

4. With respect to agency cross transactions described in Section III(g) of PTE 86–128 that are being effected or executed by an MPS broker, (i) neither the MPS broker effecting or executing the agency cross transaction nor any member of the same MPS Group as the MPS broker effecting or executing the

[58] 51 FR 41686 (Nov. 18, 1986), as amended, 67 FR 64137 (Oct. 17, 2002).

agency cross transaction may have discretionary authority to act on behalf of, and/or provide investment advice to another party to the agency cross transaction which is a seller when the Client Plan is a buyer, or which is a buyer, when the Client Plan is a seller (Another Party), and (ii), the BlackRock Manager instituting the transaction for the Client Plan must not have knowledge that a BlackRock Entity has discretionary authority and/or provides investment advice to Another Party to the agency cross transaction.

5. The exceptions in Sections IV(a), (b), and (c) of PTE 86–128 are applicable to this exemption.

6. Notwithstanding the other conditions of this Section III.P., with respect to Client Plans which as of the date of the Acquisition had in place with BlackRock Managers either directed brokerage and/or wrap fee arrangements which required the BlackRock Managers to use an MPS as a Securities broker, BlackRock Managers may continue to use that MPS as the Securities broker for such Client Plans under the brokerage procedures in place as of the date of the Acquisition; provided that a list of all of such arrangements has been provided to the ECO and no material changes are made to such arrangements.

Q. *Use by BlackRock Managers of Exchanges and Automated Trading Systems on Behalf of Client Plans.* Relief under Section I of this exemption is available for the direct or indirect use by, or directing of trades to, U.S. and non-U.S. exchanges or U.S. Automated Trading Systems (ATS) in which one or more MPSs have an ownership interest by BlackRock Managers for Client Plans, provided that:

1. Prior to January 1, 2011,

(a) No single MPS (together with other members of the same MPS Group) has a greater than twenty percent (20%) ownership interest in the exchange or the ATS; and

(b) The ECO does not make a determination, summarized in the ECO quarterly report, that a BlackRock Manager or all BlackRock Managers must discontinue such direct or indirect use of or the directing of trades to any such exchange or ATS on the basis that either the amount of use or the volume of trades is unwarranted or not in the interests of the Client Plans and their participants and beneficiaries.

2. Effective on and after January 1, 2011, either

(a) No one MPS (together with other members of the same MPS Group) has (i) a greater than ten percent (10%) ownership interest in the exchange or ATS or (ii) the BlackRock Managers do not know the level of such ownership interest; or

(b) If a BlackRock Manager knows that an MPS (together with other members of the same MPS Group) has an ownership interest that is greater that ten percent (10%) but not greater than twenty percent (20%) in the exchange or ATS,

(i) The ECO makes a determination, summarized in the ECO quarterly report, that there is no reason for a BlackRock Manager or all BlackRock Managers to discontinue such direct or indirect use of or the directing of trades to any such exchange or ATS on the basis that the amount of use or the volume of trades is unwarranted or not in the interests of the Client Plans and their participants and beneficiaries, and does not make a determination that a BlackRock Manager or all BlackRock Managers must discontinue such direct or indirect use of or the directing of trades to any such exchange or ATS on the basis that the amount of use or the volume of trades is unwarranted or not in the interests of the Client Plans and their participants and beneficiaries. The IM may request any additional information relating to any such determination summarized in the ECO quarterly report and may, after consultation with the ECO, make a determination that a BlackRock Manager or all BlackRock Managers must discontinue such direct or indirect use of or the directing of trades to any such exchange or ATS on the basis that the amount of use or the volume of trades is unwarranted or not in the interests of the Client Plans and their participants and beneficiaries;

(ii) The price and compensation associated with any purchases or sales utilizing such exchange or ATS are not greater than the price and compensation associated with an arm's length transaction with an unrelated party;

(iii) All such exchanges and ATSs shall be situated within the jurisdiction of the U.S. District Courts and regulated by a U.S. federal regulatory body or a U.S. federally approved self-regulatory body, provided that this condition shall not apply to the direct or indirect use of or the directing of trades to an exchange in a country other than the United States which is regulated by a government regulator or a government approved self-regulatory body in such country and which involves trading in Securities (including the lending of Securities) or futures contracts; and

(iv) Special Notice of all of the foregoing conditions for relief under this Section II.Q.2.(b) must be provided in accordance with the terms of Section II.F.

R. *Purchases in the Secondary Market of Common and Preferred Stock Issued by an MPS by BlackRock Managers for Client Plans Invested in an Index Account or Fund, or a Model-Driven Account or Fund.* Relief under Section I of this exemption is available for the purchase in the secondary market of common or preferred stock issued by an MPS by BlackRock Managers for Client Plans invested in an Index Account or Fund, or a Model-Driven Account or Fund provided that:

1. Such purchase is for the sole purpose of maintaining quantitative conformity with the weight of such Securities prescribed by the relevant Index, for Index Accounts or Funds, or the weight of such Securities prescribed by the relevant Model, for Model-Driven Accounts or Funds, and such purchase may not exceed the purchase amount necessary for such Model or quantitative conformity.

2. Such purchase is not made from the issuing MPS.

3. Notwithstanding Section III.R.2.,

(a) With respect to Client Plans which as of the date of the Acquisition had in place with a BlackRock Manager either a directed brokerage and/or wrap fee arrangement which required the BlackRock Manager to use a certain MPS as a Securities broker, the BlackRock Manager may purchase MPS common or preferred stock through such MPS, including, if applicable, the issuing MPS, acting as agent under the brokerage arrangement in place as of the date of the Acquisition; provided that, a list of all of such arrangements has been provided to the ECO and no material changes are made to such arrangements. Special Notice of all of the foregoing conditions for relief under this Section III.R. must be provided in accordance with the terms of Section II.F.

(b) BlackRock Managers may rely on other exemptive relief when acquiring stock of an MPS for Client Plans through an MPS broker, including the issuing MPS.

S. *Purchase in the Secondary Market of Common and Preferred Stock Issued by an MPS by BlackRock Managers for Client Plans Invested in an Other Account or Fund.* Relief under Section I of this exemption is available for the purchase in the secondary market of common or preferred stock issued by an MPS by BlackRock Managers for Client Plans invested in an Other Account or Fund provided that:

1. Such purchase is not made from the issuing MPS.

2. Notwithstanding Section III.S.1.,

(a) With respect to Client Plans which as of the date of the Acquisition had in place with a BlackRock Manager either

a directed brokerage and/or wrap fee arrangement which required the BlackRock Manager to use a certain MPS as a Securities broker, the BlackRock Manager may purchase MPS common or preferred stock through such MPS, including if applicable, the issuing MPS, acting as agent under the brokerage arrangements in place as of the date of the Acquisition; provided that, a list of all of such arrangements has been provided to the ECO and no material changes are made to such arrangements. Special Notice of all of the foregoing conditions for relief under this Section III.S. must be provided in accordance with the terms of Section II.F.

(b) BlackRock Managers may rely on other exemptive relief when acquiring stock of an MPS for Client Plans under this Section III.S. through an MPS broker, including the issuing MPS.

3. With respect to Client Plans described in Section III.S.2.(a), the ECO Function periodically monitors purchases of MPS stock for such Client Plans to ensure that the amount of stock of an MPS purchased for such Client Plans is not disproportionate to the amount of such stock of the same MPS purchased for Client Plans invested in Other Accounts or Funds not subject to directed brokerage and/or wrap fee arrangements and described in Section III.S.2.(a).

4. As a consequence of a purchase of MPS stock, the class of stock purchased does not constitute more than five (5) percent of the Other Account or Fund. In the case of a Pooled Fund, the class of stock purchased and attributed to each Client Plan does not exceed five percent (5%) of such Client Plan's proportionate interest in the Pooled Fund.

5. Aggregate daily purchases of a class of MPS stock for Client Plans do not exceed the greater of (i) fifteen percent (15%) of the aggregate average daily trading volume (ADTV) for the previous ten (10) trading days, or (ii) fifteen percent (15%) of trading volume on the date of the purchase. These volume limitations must be met on a portfolio manager by portfolio manager basis unless purchases are coordinated among portfolio managers, in which case the limitations are applied to the coordinated purchase.[59] Any coordinated purchases of the same class of MPS stock in the secondary market for Index Accounts or Funds or for Model-Driven Accounts or Funds must be taken into account when applying these ADTV limitations on purchases for an Other Account or Fund; provided, however, if coordinated purchases for Index Accounts or Funds, or for Model-Driven Accounts or Funds, would cause the fifteen percent (15%) limitation to be exceeded, BlackRock Managers can nonetheless acquire for Other Accounts or Funds up to the greater of five percent (5%) of ADTV for the previous ten (10) trading days or five percent (5%) of trading volume on the day of the Covered Transaction. For purposes of this Section III.S.5., cross trades of MPS equity Securities which comply with an applicable statutory or administrative prohibited transaction exemption are not taken into account.

6. The ECO Function monitors the volume limits on purchases of MPS stock described in Section III.S.5. and provides a monthly report to the IM with respect to such purchases and limits. The IM shall impose lower volume limitations and take other appropriate action with respect to such purchases if the IM determines on the basis of these reports by the ECO and publicly available information materially related to the trading of the Securities of an MPS on its primary listing exchange (or market) that the purchases described have a material positive impact on the market price for such Securities.

T. *The Provision of Custodial, Administrative and Similar Ministerial Services by an MPS for a Client Plan as a Consequence of a BlackRock Manager Exercising Investment Discretion on Behalf of the Client Plan or Rendering Investment Advice to the Client Plan.* Relief under Section I of this exemption is available for the provision of custodial, administrative and similar ministerial services by an MPS for a Client Plan as a consequence of a BlackRock Manager exercising investment discretion or rendering investment advice (in each case, within the meaning of ERISA section 3(21)(A)) for or to such Client Plan, provided that (1) the terms of such service are comparable to those a Client Plan would receive in an arm's length transaction with an unrelated party and (2) the ECO approves in advance and in writing (which may include electronic communication if retrievable by the ECO) the choice or recommendation of the MPS by the BlackRock Manager and the terms of the services, including but not limited to, the associated fees.

U. *Purchases, Sales and Holdings by BlackRock Managers for Client Plans of Commercial Paper Issued by ABCP Conduits, When an MPS Has One or More Roles.* Relief under Section I of this exemption is available for the purchase, holding and sale by BlackRock Managers acting on behalf of Client Plans of commercial paper issued by an ABCP Conduit with respect to which an MPS acts as placement agent, and/or in some continuing capacity such as program administrator, provider of liquidity, or provider of credit support, provided that:

1. (a)(i) The Client Plan is not an MPS Plan of the MPS with whom the purchase or sale takes place, or an MPS Plan of another member of the same MPS Group as such MPS, and (ii) the Client Plan is not an MPS Plan of an MPS which is acting in a continuing capacity, or an MPS Plan of another member of the same MPS Group as such MPS, and (iii) no MPS described in Sections III.U.1.(a)(i) or (ii), or another member of the same MPS Group as such MPS, has discretionary authority or control with respect to the Client Plan assets involved in the Covered Transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets;

(b) This Section III.U.1 shall be deemed satisfied notwithstanding the investment of assets of an MPS Plan of the MPS, which is placement agent or otherwise is acting in a continuing capacity, in a Pooled Fund as of the date of the Acquisition, which Pooled Fund is a bank-maintained common or collective trust, provided that such assets when aggregated with the assets of all other MPS Plans of the same MPS Group as the MPS which is the placement agent or otherwise is acting in a continuing capacity and invested in such Pooled Fund, at all times since the date of the Acquisition, constitute or are deemed pursuant to Section II.A.3.(b) to constitute less than ten percent (10%) of such Pooled Fund.

2. The commercial paper has a stated maturity date of nine months or less from the date of issue, exclusive of days of grace, or is a renewal of an issue of commercial paper the maturity of which is likewise limited;

3. At the time it is acquired, the commercial paper is ranked in the highest rating category by at least one of the Rating Organizations;

4. If the seller or purchaser of the ABCP Conduit commercial paper is an MPS and/or an MPS performs a continuing role with respect to the Securities, secondary market purchases and sales are pursuant to the Three

[59] For example, if two or more portfolio managers send their purchase orders to the same trading desk and the traders on that trading desk coordinate the purchases of the same MPS equity Securities, the limitations apply to the trading desk; if two or more portfolio managers or two or more trading desks are coordinating purchases of MPS equity Securities, the limitations are applied across the group of portfolio managers or traders who are coordinating the purchase orders.

Quote Process, provided that, for purposes of this Section III.U.4., firm quotes on comparable short-term money market instruments rated in the same category may be used as quotes for purposes of the Three Quote Process;

5. If an MPS performs a continuing role and there is a default, the taking of or refraining from taking of any action by the responsible BlackRock Manager which could have a material positive or negative effect upon the MPS is decided upon by the IM;

No BlackRock Entity is to be regarded as an affiliate of any MPS for purposes of the Covered Transactions set forth in this Section III.U.

V. *Purchase, Holding and Disposition by BlackRock Managers for Client Plans of Shares of Exchange-Traded Open-End Investment Companies Registered Under the 1940 Act (ETF) Managed by BlackRock Managers.* Relief under Section I of this exemption is available for the purchase, holding and disposition by BlackRock Managers for Client Plans of shares of an ETF managed by a BlackRock Manager provided that:

1. (a) The BlackRock Manager purchases such ETF shares from or through a person other than an MPS or a BlackRock Entity, and

(b) No purchase is exempt under Section I of this exemption if the BlackRock Manager portfolio manager acting for the Client Plan knows or should know that the shares to be acquired for Client Plans are Creation Shares, or that the purchase for Client Plans will result in new Creation Shares.

2. Notwithstanding Section III.V.1.(a), BlackRock Managers may purchase shares of ETFs managed by a BlackRock Manager through an MPS acting as agent for Client Plans which, as of the date of the Acquisition, had in place with a BlackRock Manager either a directed brokerage and/or wrap fee arrangement which required the BlackRock Manager to use such MPS as a Securities broker; provided that, (i) a list of all of such arrangements has been provided to the ECO and no material changes are made to such arrangements and (ii) the ECO Function periodically monitors purchases of Securities to ensure that the amount of BlackRock-managed ETF shares purchased for Client Plans under Section III.V.2. is not disproportionate to the amount of BlackRock-managed ETF shares purchased for Client Plans pursuant to Section III.V.1. Special Notice of all of the foregoing conditions for relief under this Section III.V.2. must be provided in accordance with the terms of Section II.F.

W. *Investment of Assets of MPS Plans in a BlackRock Bank-Maintained Common or Collective Trust as of the Date of the Acquisition—Fees Paid Outside the Trust.* Relief under Section I of this exemption is available with respect to MPS Plans invested in Pooled Funds as of the date of the Acquisition, which Pooled Funds are common or collective trusts maintained by BlackRock Institutional Trust Company, N.A., and in connection with which investments such MPS Plans pay management fees directly to BlackRock Managers until the earliest of (i) termination of the investment in the Pooled Fund, (ii) transition of the fee arrangement to one under which the BlackRock Manager's fees are paid from assets of the Pooled Fund or by the MPS Plan sponsor, or (iii) December 31, 2010 (Unwind Period 2) provided that:

1. The fees paid by such MPS Plans to the BlackRock Managers during Unwind Period 2 are neither more than reasonable compensation nor significantly more than fees paid to the BlackRock Managers by other, comparable Client Plans invested in such Pooled Funds which are not MPS Plans; and

2. The MPS Plans do not pay to BlackRock Managers during Unwind Period 2 any type of fee or other compensation that was not charged to or otherwise borne by MPS Client Plan investors in the Pooled Fund as of the date of the Acquisition.

During Unwind Period 2, the IM must review the investment by the MPS Plans in the Pooled Fund; all fees paid by the affected MPS Plans to BlackRock Managers must be disclosed to the IM; the IM must review the offering documents for the Pooled Funds and any advisory or management agreements with BlackRock Managers; and any material change in the terms and conditions of the investment by the affected MPS Plans in the Pooled Fund, including but not limited to changes to fees paid to BlackRock Managers or the terms of the advisory or management agreements with BlackRock Managers, must be promptly disclosed to the IM and be subject to the IM's written approval. Further, during Unwind Period 2, each such MPS Plan may terminate its investment in the Pooled Fund upon no more than thirty (30) days notice and without incurring a redemption fee paid to a BlackRock Manager.

X. *Purchase, Holding and Disposition of BlackRock Equity Securities in the Secondary Market by BlackRock Managers for an Index Account or Fund, or a Model-Driven Account or Fund, Including Buy-Ups.*[60] Relief under Section I of this exemption is available for the purchase, holding and disposition of common or preferred stock issued by BlackRock in the secondary market by BlackRock Managers for Client Plans in an Index Account or Fund, or in a Model-Driven Account or Fund provided that:

1. The acquisition, holding and disposition of the BlackRock Securities is for the sole purpose of maintaining quantitative conformity with the weight of such Securities prescribed by the relevant Index, for Index Accounts or Funds, or the weight of such Securities prescribed by the relevant Model, for Model-Driven Accounts or Funds, and such purchase may not exceed the purchase amount necessary for such Model or quantitative conformity.

2. Any acquisition of BlackRock Securities does not involve any agreement, arrangement or understanding regarding the design or operation of the account or fund acquiring the BlackRock Securities which is intended to benefit BlackRock or any party in which BlackRock may have an interest.

3. With respect to an acquisition of BlackRock Securities by such an account or fund which constitutes a Buy-Up,

(a) The acquisition is made on a single trading day from or through one broker-dealer, which broker-dealer is not an MPS or a BlackRock Entity; provided, however, that if the volume limitation in Section III.X.3.(d) below cannot be satisfied in a single trading day, the acquisition will be completed in as few trading days as possible in compliance with such volume limitation and such trades will be reviewed by the ECO and reported to the IM;

(b) Based upon the best available information, the acquisition is not the opening transaction of a trading day and is not made in the last half hour before the close of the trading day;

(c) The price paid by the BlackRock Manager is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from broker-dealers who are not MPSs or BlackRock Entities;

(d) Aggregate daily purchases do not exceed fifteen percent (15%) of aggregate average daily trading volume for the Security, as determined by the greater of (i) the trading volume for the Security occurring on the applicable Recognized Securities Exchange and/or

[60] BlackRock requested such relief for the avoidance of any issue about the necessity for such relief in particular circumstances; the Department is not opining on the need for such relief herein.

Automated Trading System on the date of the transactions, or (ii) the aggregate average daily trading volume for the Security occurring on the applicable Recognized Securities Exchange and/or Automated Trading System for the previous ten (10) trading days, both based on the best information reasonably available at the time of the transaction. These volume limitations are applied on a portfolio manager by portfolio manager basis unless purchases of BlackRock Securities are coordinated by the portfolio managers or trading desks, in which case the limitations are aggregated for the coordinating portfolio managers or trading desks. Provided further, if BlackRock, without Client Plan direction or consent, initiates a new Index Account or Fund or Model-Driven Account or Fund on its own accord, with BlackRock Securities included therein, the volume restrictions for such new account or fund shall be determined by aggregating all portfolio managers purchasing for such new account of fund. Cross trades of BlackRock Securities which comply with an applicable statutory or administrative prohibited transaction exemption are not included in the amount of aggregate daily purchases to which the limitations of this Section III.X. apply;

(e) All purchases and sales of BlackRock Securities occur either (i) on a Recognized Securities Exchange, (ii) through an Automated Trading System operated by a broker-dealer that is not a BlackRock Entity and is either registered under the 1934 Act, and thereby subject to regulation by the Securities and Exchange Commission, or subject to regulation and supervision by the Securities and Futures Authority of the UK or another applicable regulatory authority, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an Automated Trading System that is operated by a Recognized Securities Exchange, pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(f) The ECO designs acquisition procedures for BlackRock Managers to follow in Buy-Ups, which the IM approves in advance of the commencement of any Buy-Up, and the ECO Function monitors BlackRock Manager's compliance with such procedures.

Y. *Acquisition by BlackRock Managers of Financial Guarantees, Indemnities and Similar Protections for Client Plans from MPSs.* Relief under Section I of this exemption is available for the provision by an MPS of a financial guarantee, indemnification arrangement or similar instrument or arrangement providing protection to a Client Plan against possible losses or risks provided that:

1. The terms of the arrangement (including the identity of the provider) are approved by a fiduciary of the Client Plan which is independent of the MPS providing such protection and of BlackRock;

2. The compensation owed the MPS under the arrangement is paid by a BlackRock Entity and not paid out of the assets of the Client Plan;

3. In the event a Client Plan or the ECO concludes an event has occurred which should trigger the obligations of the MPS under the arrangement, and the MPS disagrees to any material extent, the IM determines the steps the BlackRock Manager must take to protect the interests of the Client Plan; and

4. The MPS providing the arrangement is capable of being sued in United States courts, has contractually agreed to be subject to litigation in the United States with respect to any matter relating to this Section III.Y., and has sufficient assets in the United States to honor its commitments under the arrangement.

SECTION IV: AFFILIATED UNDERWRITINGS AND AFFILIATED SERVICING

A. Affiliated Underwritings

1. The Securities to be purchased are either:

(a) Part of an issue registered under the 1933 Act, or, if Securities to be purchased are part of an issue that is exempt from such registration requirement, such Securities:

(i) Are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States,

(ii) Are issued by a bank,

(iii) Are exempt from such registration requirement pursuant to a federal statute other than the 1933 Act, or

(iv) Are the subject of a distribution and are of a class which is required to be registered under section 12 of the 1934 Act, and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act for a period of at least ninety (90) days immediately preceding the sale of such Securities and that has filed all reports required to be filed thereunder with the SEC during the preceding twelve (12) months; or

(b) Part of an issue that is an Eligible Rule 144A Offering. Where the Eligible Rule 144A Offering of the Securities is of equity securities, the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum; or

(c) Municipal bonds taxable by the United States, including Build America Bonds created under section 54AA of the Code or successor thereto, under which the United States pays a subsidy to the state or local government issuer, but not including Building America Bonds which provide a tax credit to investors.

2. The Securities to be purchased are purchased prior to the end of the first day on which any sales are made, pursuant to that offering, at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities, except that:

(a) If such Securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(b) If such Securities are debt Securities, they may be purchased at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities and may be purchased on a day subsequent to the end of the first day on which any sales are made, pursuant to that offering, provided that the interest rates, as of the date of such purchase, on comparable debt Securities offered to the public subsequent to the end of the first day on which any sales are made and prior to the purchase date are less than the interest rate of the debt Securities being purchased; and

3. The Securities to be purchased are offered pursuant to an underwriting or selling agreement under which the members of the syndicate are committed to purchase all of the Securities being offered, except if:

(a) Such Securities are purchased by others pursuant to a rights offering; or

(b) Such Securities are offered pursuant to an over-allotment option.

4. The issuer of the Securities to be purchased pursuant to this exemption must have been in continuous operation for not less than three (3) years, including the operation of any predecessors, unless the Securities to be purchased:

(a) Are non-convertible debt Securities rated in one of the four highest rating categories by a Rating Organization; provided that none of the

Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(b)(i) are debt Securities issued or fully guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(ii) Are municipal bonds taxable by the United States, including Build America Bonds created under section 54AA of the Code or successor thereto, under which the United States pays a subsidy to the state or local government issuer, but not including Building America Bonds which provide a tax credit to investors; or

(c) Are debt Securities which are fully guaranteed by a guarantor that has been in continuous operation for not less than three (3) years, including the operation of any predecessors, provided that such guarantor has issued other Securities registered under the 1933 Act; or if such guarantor has issued other Securities which are exempt from such registration requirement, such guarantor has been in continuous operation for not less than three (3) years, including the operation of any predecessors, and such guarantor is:

(i) A bank;

(ii) An issuer of Securities which are exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act; or

(iii) An issuer of Securities that are the subject of a distribution and are of a class which is required to be registered under section 12 of the 1934 Act, and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act for a period of at least ninety (90) days immediately preceding the sale of such Securities and that has filed all reports required to be filed hereunder with the SEC during the preceding twelve (12) months.

5. The aggregate amount of Securities of an issue purchased, pursuant to this exemption, by the BlackRock Manager with: (i) The assets of all Client Plans; and (ii) the assets, calculated on a *pro rata* basis, of all Client Plans investing in Pooled Funds managed by the BlackRock Manager; and (iii) the assets of plans to which the BlackRock Manager renders investment advice within the meaning of 29 CFR 2510.3 21(c) does not exceed:

(a) Ten percent (10%) of the total amount of the Securities being offered in an issue, if such Securities are equity securities;

(b) Thirty five percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are Asset-Backed Securities rated in one of the three highest rating categories by at least one of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the third highest rating category;

(c) Thirty five percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are debt Securities rated in one of the four highest rating categories by at least one of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(d) Twenty five percent (25%) of the total amount of the Securities being offered in an issue, if such Securities are debt Securities rated in the fifth or sixth highest rating categories by at least one of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the sixth highest rating category; and

(e) The assets of any single Client Plan (and the assets of any Client Plans and any In-House Plans investing in Pooled Funds) may not be used to purchase any Securities being offered, if such Securities are debt Securities rated lower than the sixth highest rating category by any of the Rating Organizations;

(f) Notwithstanding the percentage of Securities of an issue permitted to be acquired, as set forth in Subsections A.(5)(a)–(d) of this Section IV., the amount of Securities in any issue (whether equity or debt Securities or Asset-Backed Securities) purchased, pursuant to this exemption, by the BlackRock Manager on behalf of any single Client Plan, either individually or through investment, calculated on a *pro rata* basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such Securities being offered in such issue, provided that a Sub-Advised Pooled Fund described in Section VI.(AAA) as a whole may purchase up to three percent (3%) of an issue; and

(g) If purchased in an Eligible Rule 144A Offering, the total amount of the Securities being offered for purposes of determining the percentages, described, above, in Section IV.A.5.(a)–(d) and (f), is the total of:

(i) The principal amount of the offering of such class of Securities sold by underwriters or members of the selling syndicate to QIBs; plus

(ii) The principal amount of the offering of such class of Securities in any concurrent public offering.

6. The aggregate amount to be paid by any single Client Plan in purchasing any Securities which are the subject of this exemption, including any amounts paid by any Client Plan in purchasing such Securities through a Pooled Fund, calculated on a *pro rata* basis, does not exceed three percent (3%) of the fair market value of the net assets of such Client Plan, as of the last day of the most recent fiscal quarter of such Client Plan prior to such transaction, provided that a Sub-Advised Pooled Fund as a whole may pay up to one percent (1%) of fair market value of its net assets in purchasing such Securities.

7. The covered transactions are not part of an agreement, arrangement, or understanding designed to benefit any BlackRock Entity or MPS.

8. Each Client Plan shall have total net assets with a value of at least $50 million (the $50 Million Net Asset Requirement). For purposes of engaging in covered transactions involving an Eligible Rule 144A Offering, each Client Plan shall have total net assets of at least $100 million in Securities of issuers that are not affiliated with such Client Plan (the $100 Million Net Asset Requirement).

For purposes of a Pooled Fund engaging in an Affiliated Underwriting, each Client Plan in such Pooled Fund other than a Sub-Advised Pooled Fund shall have total net assets with a value of at least $50 million. Notwithstanding the foregoing, if each such Client Plan in a Pooled Fund other than a Sub-Advised Pooled Fund does not have total net assets with a value of at least $50 million, the $50 Million Net Asset Requirement will be met, if fifty percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by investors, each of which has total net assets with a value of at least $50 million.

For purposes of a Pooled Fund engaging in an Affiliated Underwriting involving an Eligible Rule 144A Offering, each Client Plan in such Pooled Fund other than a Sub-Advised Pooled Fund shall have total net assets of at least $100 million in Securities of issuers that are not affiliated with such Client Plan. Notwithstanding the foregoing, if each such Client Plan in such Pooled Fund other than a Sub-Advised Pooled Fund does not have total net assets of at least $100 million in Securities of issuers that are not affiliated with such Client Plan, the $100 Million Net Asset Requirement will be met if fifty percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by investors, each of which have total net assets of at least $100 million in

Securities of issuers that are not affiliated with such investor, and the Pooled Fund itself qualifies as a QIB.

For purposes of the net asset requirements described, above in Section IV.A.8., where a group of Client Plans is maintained by a single employer or controlled group of employers, as defined in ERISA section 407(d)(7), the $50 Million Net Asset Requirement (or in the case of an Eligible Rule 144A Offering, the $100 Million Net Asset Requirement) may be met by aggregating the assets of such Client Plans, if the assets of such Client Plans are pooled for investment purposes in a single master trust.

9. No more than twenty percent (20%) of the assets of a Pooled Fund, at the time of a covered transaction, are comprised of assets of In-House Plans for which the BlackRock Manager, or a BlackRock Entity exercises investment discretion.

10. The BlackRock Manager must be a QPAM, and, in addition to satisfying the requirements for a QPAM under section VI(a) of PTE 84–14, the BlackRock Manager must also have total client assets under its management and control in excess of $5 billion, as of the last day of its most recent fiscal year and shareholders' or partners' equity in excess of $1 million.

11. The BlackRock Manager maintains, or causes to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the persons described below in Section IV.A.12.(a) to determine whether the conditions of this exemption have been met, except that:

(a) No party in interest with respect to a plan which engages in the covered transactions, other than the BlackRock Manager, shall be subject to a civil penalty under ERISA section 502(i) or the taxes imposed by Code sections 4975(a) and (b), if such records are not maintained, or not available for examination as required below by Section IV.A.12.(a); and

(b) A separate prohibited transaction shall not be considered to have occurred if, due to circumstances beyond the control of the BlackRock Manager, such records are lost or destroyed prior to the end of the six-year period.

12. (a) Except as provided below, in Section IV.A.12.(b), and notwithstanding the provisions of subsections (a)(2) and (b) of ERISA section 504, the records referred to, above, in Section IV.A.11. are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the SEC;

(ii) Any fiduciary of any plan that engages in the covered transactions, or any duly authorized employee or representative of such fiduciary;

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by a plan that engages in the covered transactions, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of a plan that engages in the covered transactions, or duly authorized employee or representative of such participant or beneficiary;

(b) None of the persons described in Sections IV.A.12.(a)(ii) through (iv) shall be authorized to examine trade secrets of the BlackRock Manager, or commercial or financial information which is privileged or confidential; and

(c) Should the BlackRock Manager refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to Section IV.A.12.(b), the BlackRock Manager shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

B. Affiliated Servicing

1. The Securities are CMBS that are rated in one of the three highest rating categories by a Rating Organization; provided that none of the Rating Organizations rates such Securities in a category lower than the third highest rating category.

2. The purchase of the CMBS meets the conditions of an applicable Underwriter Exemption.

3. (a) The aggregate amount of CMBS of an issue purchased, pursuant to this exemption, by the BlackRock Manager with:

(i) The assets of all Client Plans; and

(ii) The assets, calculated on a pro rata basis, of all Client Plans and In-House Plans investing in Pooled Funds managed by the Asset Manager; and

(iii) The assets of plans to which the Asset Manager renders investment advice, within the meaning of 29 CFR Sec. 2510.3–21(c), does not exceed thirty five percent (35%) of the total amount of the CMBS being offered in an issue.

(b) Notwithstanding the percentage of CMBS of an issue permitted to be acquired, as set forth in Section IV.B.3.(a) of this exemption, the amount of CMBS in any issue purchased, pursuant to this exemption, by the Asset Manager on behalf of any single Client Plan, either individually or through investment, calculated on a pro rata basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such CMBS being offered in such issue, and;

(c) If purchased in an Eligible Rule 144A Offering, the total amount of the CMBS being offered for purposes of determining the percentages described in Section IV.B.3(a), is the total of:

(i) The principal amount of the offering of such class of CMBS sold by underwriters or members of the selling syndicate to QIBs; plus

(ii) The principal amount of the offering of such class of CMBS in any concurrent public offering.

4. The aggregate amount to be paid by any single Client Plan in purchasing any CMBS which are the subject of this exemption, including any amounts paid by any Client Plan in purchasing such CMBS through a Pooled Fund, calculated on a pro rata basis, does not exceed three percent (3%) of the fair market value of the net assets of such Client Plan, as of the last day of the most recent fiscal quarter of such Client Plan prior to such transaction.

5. The Covered Transactions under this Section IV.B. are not part of an agreement, arrangement, or understanding designed to benefit any MPS.

6. The requirements of Sections IV.A.8. through 12. are met.

SECTION V: CORRECTION PROCEDURES

A. 1. The ECO shall monitor Covered Transactions and shall determine whether a particular Covered Transaction constitutes a Violation. The ECO shall notify the IM within five (5) business days following the discovery of any Violation.

2. The ECO shall make an initial determination as to how to correct a Violation and place the conclusion of such determination in writing, with such conclusion disclosed to the IM within five (5) business days of the placing of the conclusion of such determination in writing. Following the initial determination, the ECO must keep the IM apprised on a current basis of the process of correction and must consult with the IM regarding each Violation and the appropriate form of correction. The ECO shall report the correction of the Violation to the IM within five (5) business days following completion of the correction. For purposes of this Section V.A.2., "correction" must be consistent with

ERISA section 502(i) and Code section 4975(f)(5).

3. The IM shall determinate whether it agrees that the correction of a Violation by the ECO is adequate and shall place the conclusion of such determination in writing, and, if the IM does not agree with the adequacy of the correction, the IM shall have the authority to require additional corrective actions by BlackRock.

4. A summary of Violations and corrections of Violations will be in the IM's annual compliance report as described in Section II.E.12.

B. Special Correction Procedure

1. If a Covered Transaction which would otherwise constitute a Violation is corrected under this "Special Correction Procedure," such Covered Transaction shall continue to be exempt under Section I of this exemption.

2. (a) The Special Correction Procedure is a complete correction of the Violation no later than fourteen (14) business days following the date on which the ECO submits the quarterly report to the IM for the quarter in which the Covered Transaction first would become a non-exempt prohibited transaction by reason of constituting a Violation if not for this Section V.B.

(b) Solely for purposes of the Special Correction Procedure, "correction" of a Covered Transaction which would otherwise be a Violation means either:

(i) Restoring the Client Plan to the position it would have been in had the conditions of the exemption been complied with;

(ii) Correction consistent with ERISA section 502(i) and Code section 4975(f)(5); or

(iii) Correction consistent with the Voluntary Fiduciary Correction Program.[61]

(c) Other than with respect to the definition of "correction" specified above, when utilizing the Special Correction Procedure the ECO and the IM shall comply with Section V.A.

SECTION VI: DEFINITIONS[62]

A. "1933 Act" means the Securities Act of 1933, as amended.

B. "1934 Act" or "Exchange Act" means the Securities Exchange Act of 1934, as amended.

C. "1940 Act" means the Investment Company Act of 1940, as amended.

D. "$50 Million Net Asset Requirement" shall have the meaning set forth in Section IV.A.8. of this exemption.

E. "$100 Million Net Asset Requirement" shall have the meaning set forth in Section IV.A.8. of this exemption.

F. "ABCP Conduit" means a special purpose vehicle that acquires assets from one or more originators and issues commercial paper to provide funding to the originator(s). Such vehicles are typically administered by a bank, but is not required to be administered by a bank, which provides liquidity support (standing ready to purchase the conduit's commercial paper if it cannot be rolled over) and/or credit support (committing to cover losses in the event of default). The program administrator also typically acts as placement agent for the commercial paper, sometimes together with one or more other placement agents. Commercial paper issued by such a conduit may be purchased directly from the program administrator or other placement agent, or traded on the secondary market with another broker-dealer making a market in the Securities.

G. "Acquisition" means the acquisition by BlackRock of Barclays Global Investors UK Holdings, Ltd. and its subsidiaries on December 1, 2009.

H. "Affiliate" of another person means:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person;

(2) Any officer, director, partner, employee, or relative (as defined in section 3(15) of ERISA) of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director, partner or employee.

I. "Asset-Backed Securities" means Securities which are pass-through certificates or trust certificates characterized as equity pursuant to 29 CFR 2510.3–101 that represent a beneficial ownership interest in the assets of an issuer which is a trust, with any such trust limited to (1) a single or multi-family residential or commercial mortgage investment trust, (2) a motor vehicle receivable investment trust, or (3) a guaranteed governmental mortgage pool certificate investment trust, and which entitles the holder to payments of principal, interest and/or other payments made with respect to the assets of the trust, the corpus or assets of which consist solely or primarily of secured obligations that bear interest or are purchased at a discount. For purposes of Section IV.A. of this exemption, Asset-Backed Securities are treated as debt Securities.

J. "Authorizing fiduciary'' has the meaning set forth in Section III.M.4.(d)(i) of this exemption.

K. "Automated Trading System" or "ATS" means an electronic trading system, ECN or electronic clearing network or similar venue that functions in a manner intended to simulate a Securities exchange by electronically matching orders from multiple buyers and sellers, such as an "alternative trading system" within the meaning of the SEC's Reg. ATS (17 CFR part 242.300), as such definition may be amended from time to time, or an "automated quotation system" as described in Section 3(a)(51)(A)(ii) of the 1934 Act.

L. "B and C List" has the meaning set forth in Section III.A.1. of this exemption.

M. "BlackRock" means BlackRock, Inc. and any successors thereof.

N. "BlackRock Entity" means BlackRock and any entity directly or indirectly, through one or more intermediaries, under the control of BlackRock, and any other entity which subsequently becomes directly or indirectly, through one or more intermediaries, under the Control of BlackRock, and successors of the foregoing.

O. "BlackRock Manager" means any bank, investment advisor, investment manager directly or indirectly, through one or more intermediaries, under the control of BlackRock, and any other bank, investment advisor, or investment manager which subsequently becomes directly or indirectly, through one or more intermediaries, under the control of BlackRock, and successors of the foregoing, including but not limited to BlackRock Advisors, LLC, BlackRock Financial Management, Inc., BlackRock Capital Management, Inc., BlackRock Institutional Management Corporation, BlackRock International, Ltd., State Street Research and Management Company, BlackRock Realty Advisors, Inc., BlackRock Investment Management, LLC, BlackRock Fund Advisors, and BlackRock Institutional Trust Company, N.A. and any of the investment advisors and investment manager it controls.

P. "Buy-Up" means an initial acquisition of Securities issued by BlackRock by a BlackRock Manager, if such acquisition exceeds one percent (1%) of the aggregate daily trading volume for such Security, for an Index Account or Fund, or a Model-Driven Account or Fund which is necessary to bring the fund's or account's holdings of such Securities either to its capitalization-weighted or other specified composition in the relevant

[61] PTE 2002–51, 67 FR 70623 (November 25, 2002), as amended, 71 FR 20135 (April 19, 2006).

[62] The definition of terms herein shall apply equally to the singular and plural forms of the terms defined. Section headings are for convenience only.

Index, as determined by the organization maintaining such Index, or to its correct weighting as determined by the Model.

Q. "Client Plan" means any plan subject to ERISA section 406, Code section 4975 or FERSA section 8477(c) for which a BlackRock Manager is a fiduciary as described in ERISA section 3(21), including, but not limited to, any Pooled Fund, MPS Plan, Index Account or Fund, Model-Driven Account or Fund, Other Account or Fund, or In-House Plan, except where specified to the contrary.

R. "CMBS" means an Asset-Backed Security with respect to which the assets or corpus of the issuer consist solely or primarily of obligations secured by commercial real property (including obligations secured by leasehold interests on commercial real property).

S. "Code" means the Internal Revenue Code of 1986, as amended.

T. "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

U. "Covered Transaction" means each transaction set forth in Section III by a BlackRock Manager for a Client Plan with, affecting or involving, directly or indirectly, an MPS and/or a BlackRock Entity.

V. "Creation Shares" means new shares in an ETF created by an exchange of a specified basket of Securities and/or cash to the ETF for such new shares of the ETF.

W. "ECO Function" means the ECO and such other BlackRock Entity employees in legal and compliance roles working under the supervision of the ECO in connection with the Covered Transactions. The list of BlackRock Entity employees shall be shared with the IM from time to time, not less than quarterly, and such employees will be made available to discuss the relevant Covered Transactions with the IM to the extent the IM or the ECO deem it reasonably prudent.

X. "Electronic Communications Network" or "ECN" means an electronic system described in Rule 600(b)(23) of Regulation NMS under the 1934 Act.

Y. "Eligible Rule 144A Offering" shall have the same meaning as defined in SEC Rule 10f-3(a)(4) (17 CFR 270.10f-3(a)(4)) under the 1940 Act.

Z. "Eligible Securities Depository" means an eligible securities depository as that term is defined under Rule 17f-7 of the 1940 Act, as such definition may be amended from time to time.

AA. "EPP Correction" has the meaning set forth in Section II.C. of this exemption.

BB. "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

CC. "Exemption Compliance Officer" or "ECO" means an officer of BlackRock or of a BlackRock Entity appointed by BlackRock or such BlackRock Entity, subject to the approval of the IM, who is responsible for compliance with the exemption. The ECO, unless otherwise stated in this exemption, will be responsible for: Monitoring all Covered Transactions and reviewing compliance with all of the conditions of the exemption applicable thereto; approving certain Covered Transactions in advance as required by the terms of the exemption; reviewing reports of Covered Transactions and the results of sampling of Covered Transactions; and determining when Covered Transactions transgress the EPPs and/or constitute a Violation.

DD. "ETF" means an exchange-traded open-end investment company registered under the 1940 Act.

EE. "Exemption Policies and Procedures" or "EPPs" means the written policy adopted and implemented by BlackRock for BlackRock Entities that is reasonably designed to ensure compliance with the terms of the exemption. The EPPs must reflect the specific requirements of the exemption, but must also be designed to ensure that the decisions to enter into Covered Transactions on behalf of Client Plans with the MPSs is in the interests of Client Plans and their participants and beneficiaries, including by ensuring to the extent possible that the terms of each Covered Transaction are at least as favorable to the Client Plan as the terms generally available in comparable arm's length transactions with unrelated parties.

FF. "FERSA" means the Federal Employees' Retirement System Act of 1986, as amended.

GG. "FHLMC" means the Federal Home Loan Mortgage Corporation.

HH. "Fixed Income Obligations" means fixed income obligations including structured debt or other instruments characterized as debt pursuant to 29 CFR 2510.3–101, including, but not limited to, debt convertible into equity, certificates of deposit and loans (other than loans with respect to which an MPS is the entity which acts as lead lender). Asset-Backed Securities are not Fixed Income Obligations for purposes of this exemption.

II. "FNMA" means the Federal National Mortgage Association.

JJ. "Foreign Bank" means an institution that has substantially similar powers to a bank as defined in section 202(a)(2) of the Investment Advisers Act, as amended, has as of the last day of its most recent fiscal year, equity capital which is the equivalent of no less than $200 million, and is subject to:

(1)(a) Registered and regulated under the laws of the Financial Services Authority in the United Kingdom, or (b)(i) registered and regulated by a securities commission of a Province of Canada that is a member of the Canadian Securities Administration, and (ii) is subject to the oversight of a Canadian self-regulatory authority; or

(2) Regulation by the relevant governmental banking agency(ies) of a country other than the United States and the regulation and oversight of these banking agencies were applicable to a bank that received: (i) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a bank or (ii) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96–62, as amended, involving the loan of securities by a plan to a bank. On the date this exemption becomes effective, the following countries shall qualify for purposes of this clause (ii): United Kingdom, Canada, Germany, Japan, Australia, Switzerland, France, the Netherlands and Sweden.

KK. "Foreign Broker-Dealer" means a broker-dealer that has, as of the last day of its most recent fiscal year, equity capital that is the equivalent of no less than $200 million and is:

(1) Registered and regulated under the laws of the Financial Services Authority in the United Kingdom;

(2) Registered and regulated by a securities commission of a Province of Canada that is a member of the Canadian Securities Administration, and is subject to the oversight of a Canadian self-regulatory authority; or

(3) Registered and regulated under the relevant securities laws of a governmental entity of a country other than the United States and such securities laws and regulation were applicable to a broker-dealer that received: (a) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a broker-dealer or (b) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96–62, as amended, involving the loan of securities by a plan to a broker-dealer. On the date this exemption becomes effective, the following countries shall qualify for purposes of this clause (2): United Kingdom, Canada, Germany,

Japan, Australia, Switzerland, France, the Netherlands and Sweden.

LL. "Foreign Collateral" means:

(1) Securities issued by or guaranteed as to principal and interest by the following Multilateral Development Banks, the obligations of which are backed by the participating countries, including the United States: The International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the International Finance Corporation;

(2) Foreign sovereign debt securities provided that at least one nationally recognized statistical rating organization has rated in one of its two highest categories either the issue, the issuer or guarantor;

(3) The British pound, the Canadian dollar, the Swiss franc, the Japanese yen or the Euro;

(4) Irrevocable letters of credit issued by a Foreign Bank, other than the borrower or an affiliate thereof, which has a counterparty rating of investment grade or better as determined by a nationally recognized statistical rating organization; or

(5) Any type of collateral described in Rule 15c3–3 of the 1934 Act as amended from time to time provided that the lending fiduciary is a U.S. Bank or U.S. Broker-Dealer and such fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed Securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs which a plan may incur or suffer directly arising out of a borrower default. Notwithstanding the foregoing, collateral described in any of the categories enumerated in section V(e) of PTE 2006–16 will be considered U.S. Collateral for purposes of the exemption.

MM. "Foreign Exchange Transaction" means the exchange of the currency of one nation for the currency of another nation, or a contract for such an exchange. The term Foreign Exchange Transaction includes option contracts on foreign exchange transactions. Foreign Exchange Transactions may be either "spot", "forward" or "split" depending on the settlement date of the transaction.

NN. "GNMA" means the Government National Mortgage Association.

OO. "Independent Monitor" or "IM" means an individual or entity appointed by BlackRock to carry out certain functions set forth in Sections II, III and V of the exemption and who (or which), given the number of types of Covered Transactions and the number of actual individual Covered Transactions potentially covered by the exemption, must be knowledgeable and experienced with respect to each Covered Transaction and able to demonstrate sophistication in relevant markets, instruments and trading techniques relative thereto, and, in addition, must understand and accept in writing its duties and responsibilities under ERISA and the exemption with respect to the Client Plans. The IM must be independent of and unrelated to BlackRock and any MPS. For purposes of this exemption, such individual or entity will not be deemed to be independent of and unrelated to BlackRock and the MPSs if:

(1) Such individual or entity directly or indirectly controls, is controlled by, or is under common control with BlackRock or an MPS;

(2) Such individual or entity, or any employee thereof performing services in connection with this exemption, or an officer, director, partner, or highly compensated employee (as defined in Code section 4975(e)(2)(H)) thereof, is an officer, director, partner or highly compensated employee (as defined in Code section 4975(e)(2)(H)) of BlackRock or an MPS; or any member of the business segment performing services in connection with this exemption is a relative of an officer, director, partner or highly compensated employee (as defined in Code section 4975(e)(2)(H)) of BlackRock or an MPS.

However, if an individual is a director of the IM and an officer, director, partner or highly compensated employee (as defined in Code section 4975(e)(2)(H)) of BlackRock or an MPS, and if he or she abstains from participation in any of the services performed by the IM under this exemption, then this Section VI.OO.(2) shall not apply.

For purposes of this Subsection, the term officer means a president, any senior vice president in charge of a principal business unit, division or function (such as sales, administration, or finance), or any other officer who performs a policy-making function for the IM, BlackRock, or an MPS.

(3) The IM directly or indirectly receives any compensation or other consideration for the IM's personal account in connection with any Covered Transaction, except that the IM may receive compensation from BlackRock for acting as IM as contemplated herein if the amount or payment of such compensation is reasonable and not contingent upon or in any way affected by any decision made by the IM while acting as IM; or

(4) The annual gross revenue received by the IM, during any year of its engagement, from the MPSs and BlackRock Entities for all services exceeds the greater of (a) five percent (5%) of the IM's annual gross revenue from all sources for its prior tax year, or, (b) one percent (1%) of the annual gross revenue of the IM and its majority shareholder from all sources for their prior tax year.

PP. "Index" means an equity or debt Securities or commodities index that represents the investment performance of a specific segment of the market for equity or debt Securities or commodities in the United States and/or an individual foreign country or any collection of foreign countries, but only if—

(1) The organization creating and maintaining the index is:

(a) Engaged in the business of providing financial information, evaluation, advice or Securities brokerage services to institutional clients,

(b) A publisher of financial news or information, or

(c) A public Securities exchange or association of Securities dealers; and

(2) The index is created and maintained by an organization independent of all BlackRock Entities. For purposes of this definition of "Index," every BlackRock Entity is deemed to be independent of every MPS.

(3) The index is a generally accepted standardized index of Securities or commodities which is not specifically tailored for the use of a BlackRock Manager(s).

(4) If the organization creating, providing or maintaining the Index is an MPS:

(a) Such Index must be widely-used in the market by independent institutional investors other than pursuant to an investment management or advisory relationship with a BlackRock Manager, and must be prepared or applied by such MPS in the same manner as for customers other than a BlackRock Manager(s);

(b) BlackRock must certify to the ECO whether, in its reasonable judgment, such Index is widely-used in the market. In making this determination, BlackRock shall take into consideration factors such as (i) publication of summary Index information by the MPS providing the Index, Bloomberg, Reuters, or a similar institution involved in the dissemination of financial information, and (ii) delivery of Index information including but not limited to

Index component information by such MPS to clients or other subscribers including by electronic means including via the internet;

(c) BlackRock must notify the ECO if it becomes aware that: (i) Such Index is operated other than in accordance with objective rules, in the ordinary course of business, (ii) manipulation of any such Index has occurred for the purpose of benefiting BlackRock, or (iii) in the event that any rule change occurred in connection with the rules underlying such Index, such rule change was made by the MPS for the purpose of benefiting BlackRock; provided, however, this Subsection (c)(iii) expressly excludes instances where the rule changes were made in response to requests from clients/prospective clients of BlackRock even if BlackRock is ultimately hired to manage such a portfolio (e.g., if plan sponsor X requests a "Global ex-Sudan Fixed Income Index", an MPS decides to sponsor such index and plan sponsor X approaches BlackRock or otherwise issues a "Request for Proposal" for investment managers who could manage an index portfolio benchmarked to the Global ex-Sudan Fixed Income Index).

(d) BlackRock must certify to the ECO annually that it is not aware of the occurrence of any of the events described in Section VI.PP.(4)(c), and if BlackRock cannot so certify, or if BlackRock provides the ECO with the notice described Section VI.PP.(4)(c), the ECO shall notify the IM, and the IM must take appropriate remedial action which may include, but need not be limited to, instructions for relevant BlackRock Managers to cease using such Index.

QQ. "Index Account or Fund" means any investment fund, account or portfolio sponsored, maintained, trusteed, or managed by a BlackRock Manager or a BlackRock Entity, in which one or more Client Plans invest, and—

(1) Which is designed to track the rate of return, risk profile and other characteristics of an Index by either (i) replicating the same combination of Securities or commodities which compose such Index or (ii) sampling the Securities or commodities which compose such Index based on objective criteria and data;

(2) For which the BlackRock Manager does not use its discretion, or data within its control, to affect the identity or amount of Securities or commodities to be purchased or sold;

(3) That contains "plan assets" subject to either ERISA section 406, Code section 4975 or FERSA section 8477(c); and,

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Index Account or Fund which is intended to benefit a BlackRock Entity or an MPS, or any party in which a BlackRock Entity or an MPS may have an interest.

For purposes of this definition of "Index Account or Fund", every BlackRock Entity is deemed to be independent of each MPS.

RR. "In-House Plan" means an employee benefit plan that is subject to ERISA section 406 and/or Code section 4975, and that is sponsored by a BlackRock Entity for its employees.

SS. "Interbank Rate" means the interbank bid and asked rate for foreign exchange transactions of comparable size and maturity at the time of the transaction as quoted on a nationally recognized service for facilitating foreign currency trades between large commercial banks and Securities dealers.

TT. "Know" means to have actual knowledge. BlackRock Managers will be deemed to have actual knowledge of information set forth in a written agreement or offering document as of the date the BlackRock Manager receives such agreement or document.

UU. "Model" means a computer model that is based on prescribed objective criteria using independent data not within the control of a BlackRock Entity to transform an Index.

VV. "Model-Driven Account or Fund" means any investment fund, account or portfolio sponsored, maintained, trusteed, or managed by a BlackRock Manager or a BlackRock Entity in which one or more Client Plans invest, and—

(1) Which is composed of Securities or commodities the identity of which and the amount of which are selected by a Model;

(2) That contains "plan assets" subject to either ERISA section 406, Code section 4975 or FERSA section 8477(c); and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Model-Driven Account or Fund or the utilization of any specific objective criteria which is intended to benefit a BlackRock Entity or an MPS, or any party in which a BlackRock Entity or an MPS may have an interest.

For purposes of this definition of "Model-Driven Account or Fund," every BlackRock Entity is deemed to be independent of each MPS.

WW. "MPS" or "Minority Passive Shareholder" means (1) Barclays PLC, (2) Bank of America Corporation, (3) The PNC Financial Services Group, Inc., or (4) each entity directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with one or more of Barclays PLC (Barclays MPSs), Bank of America Corporation (BOA MPSs) or The PNC Financial Services Group, Inc., (PNC MPSs) (each of the PNC MPSs, Barclays MPSs, and the BOA MPSs, an MPS Group) but excluding any and all BlackRock Entities. Bank of America Corporation and any entity directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with Bank of America Corporation (collectively, the BOA Group) shall cease to be an MPS on the day after the number of representatives of the BOA Group on the BlackRock Board of Directors is reduced to one (1).

XX. "MPS Group" shall have the meaning set forth in the definition of MPS.

YY. "MPS Plans" means an employee benefit plan(s) that is subject to ERISA section 406 and/or Code section 4975, and that is sponsored by an MPS for its employees.

ZZ. "Other Account or Fund" means any investment fund, account or portfolio sponsored, maintained, trusteed, or managed by a BlackRock Manager or a BlackRock Entity in which one or more Client Plans invest, and—

(1) Which is not an Index Account or Fund or a Model-Driven Account or Fund; and

(2) That contains "plan assets" subject to either ERISA section 406, Code section 4975 or FERSA section 8477(c).

AAA. "Pooled Fund" means a common or collective trust fund or other pooled investment fund:

(1) In which Client Plan(s) invest;

(2) For which a BlackRock Manager exercises discretionary authority or discretionary control respecting the management or disposition of the assets of such fund(s); and

(3) That contains "plan assets" subject to either ERISA section 406, Code section 4975 or FERSA section 8477(c).

Solely for purposes of Section IV of this exemption, "Pooled Fund(s)" shall only include funds or trusts which otherwise meet this definition but which also are either (i) maintained by a BlackRock Entity or (ii) maintained by a person which is not a BlackRock Entity but is sub-advised by a BlackRock Manager, provided that with respect to a Pooled Fund described in (ii), (A) the fund or trust is either a bank-maintained common or collective trust fund or an insurance company pooled separate account that holds assets of at least $250 million, (B) the bank or insurance company sponsoring the pooled fund

has total client assets under its management or control in excess of $5 billion as of the last day of its most recent fiscal year, and shareholders' or partners' equity in excess of $1 million, and (C) the decision to invest the Client Plan into the bank-maintained common or collective trust or insurance company pooled separate account and to maintain such investment is made by a Client Plan fiduciary which is not a BlackRock Entity. Such sub-advised Pooled Funds are sometimes referred to herein as "Sub-Advised Pooled Funds".

BBB. "QPAM Exemption" or "PTE 84–14" means Prohibited Transaction Exemption 84–14, as amended.

CCC. "Qualified Professional Asset Manager" or "QPAM" shall have the meaning set forth in Section VI(a) of the QPAM Exemption.

DDD. "Qualified Institutional Buyer" or "QIB" shall have the same meaning as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)) under the 1933 Act.

EEE. "Rating Organizations" means Standard & Poor's Rating Services, Moody's Investors Service, Inc., Fitch Ratings Inc., DBRS Limited, DBRS, Inc., or any successors thereto.

FFF. "Recognized Securities Exchange" means a U.S. securities exchange that is registered as a "national securities exchange" under section 6 of the 1934 Act, or a designated offshore securities market, as defined in Regulation S of the SEC (17 CFR 230.902(b)), as such definition may be amended from time to time, which performs with respect to Securities the functions commonly performed by a stock exchange within the meaning of definitions under the applicable Securities laws (e.g., 17 CFR 240.3b-16).

GGG. "SEC" means the United States Securities and Exchange Commission.

HHH. "Securities" shall have the same meaning as defined in section 2(36) of the 1940 Act. For purposes of Section IV of this exemption, except as where specifically identified, Asset-Backed Securities are treated as debt Securities.

III. "Special Notice" shall have the meaning set forth in Section II.F. of this exemption.

JJJ. "Three Quote Process" means three bids or offers (either of which being sometimes referred to as quotes) are received by a trader for a BlackRock Manager each of which such quotes such trader reasonably believes is an indication that the dealer presenting the bid or offer is willing to transact the trade at the stipulated volume under discussion, and all material terms (including volume) under discussion are materially similar with respect to each other such quote. In selecting the best of three such quotes, a BlackRock Manager shall maintain books and records for the three firm bids/offers in a convention that it reasonably believes is customary for the specific asset class (such as "price" quotes, "yield" quotes or "spread" quotes). For example, corporate bonds are often quoted on a spread basis and dealers customarily quote the spread above a certain benchmark bond's yield (e.g., for a given size and direction such as a BlackRock trader may ask for quotes to sell $1 million of a particular bond, dealer 1 may quote 50 bps above the yield of the 10 year treasury bond, dealer 2 might quote 52 bps above the yield of the 10 year treasury bond and dealer 3 might quote 53 bps above the yield of the 10 year treasury bond). If only two firm bids/offers can be obtained, the trade requires prior approval by the ECO and the ECO must inquire as to why three firm bids/offers could not be obtained. If in the case of a sale or purchase a trader for a BlackRock Manager reasonably believes it would be injurious to the Client Plan to specify the size of the intended trade to certain bidders, a bid on a portion of the intended trade may be treated as a firm bid if the trader documents (i) why the bid price is a realistic indication of the economic terms for the actual amount being traded despite the difference in the size of the actual trade and (ii) why it would be harmful to the Client Plan to solicit multiple bids on the actual amount of the trade. If a trader for a BlackRock Manager solicits bids from three or more dealers on a sale or purchase of a certain volume of Securities, and receives back three or more bids, but at least one bid is not for the full amount of the intended sale, if the price offered by the partial bidder(s) is less than the price offered by the full bidder(s), the trader may assume a full bid by the partial bidder(s) would not be the best bid, and the trader can consummate the trade, in the case of at least two full bids, with the dealer making the better of the full bids, or in the case of only one full bid, with the dealer making that full bid.

KKK. "Type A Transactions" means transactions between BlackRock Managers on behalf of Client Plans with MPSs which (i) are or were continuing transactions within the meaning of section VI(i) of PTE 84–14 and/or section IV(h) of PTE 91–38 in existence on the date of the Acquisition, and (ii) pursuant to which there is no discretion on the part of either party, other than the ability of the BlackRock Manager to sell or otherwise transfer the Client Plan's position to a third party, or the ability of the MPS to sell or otherwise transfer its position to a third party, or the ability of the MPS to otherwise terminate the transaction on previously specified terms.

LLL. "Type B Covered Transactions" means transactions which meet the criteria to be Type A Transactions but which possess the additional feature that the BlackRock Manager, on behalf of a Client Plan, has the option to terminate the transaction with the MPS on previously specified terms.

MMM. "Type C Covered Transactions" means transactions which meet the criteria to be Type B Covered Transactions but which possess the additional feature that the BlackRock Manager may terminate or modify the transaction on behalf of a Client Plan under certain circumstances, but only with negotiation and/or payment of consideration to the MPS or to the Client Plan which was not predetermined.

NNN. "Underwriter Exemption(s)" means a group of individual exemptions granted by the Department to provide relief for the origination and operation of certain asset pool investment trusts and the acquisition, holding and disposition by plans of Asset-Backed Securities representing undivided interests in those trusts. Such group of individual exemptions was collectively amended by PTE 2009–31, 74 FR 59001 (Nov. 16, 2009).

OOO. "Unwind Period" shall have the meaning set forth in Section II.A.3.(b) of this exemption.

PPP. "Unwind Period 2" shall have the meaning set forth in Section III.W. of this exemption.

QQQ. "U.S. Bank" means a bank as defined in section 202(a)(2) of the Investment Advisers Act, as amended.

RRR. "U.S. Broker-Dealer" means a broker-dealer registered under the 1934 Act or exempted from registration under section 15(a)(1) of the 1934 Act as a dealer in exempted government Securities (as defined in section 3(a)(12) of the 1934 Act).

SSS. "U.S. Collateral" means:

(1) U.S. currency;

(2) "Government securities" as defined in section 3(a)(42)(A) and (B) of the 1934 Act;

(3) "Government securities" as defined in section 3(a)(42)(C) of the 1934 Act issued or guaranteed as to principal or interest by the following corporations: The Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Student Loan Marketing Association and the Financing Corporation;

(4) Mortgage-backed Securities meeting the definition of a "mortgage related security" set forth in section 3(a)(41) of the 1934 Act;

(5) Negotiable certificates of deposit and bankers acceptances issued by a "bank" as that term is defined in section 3(a)(6) of the 1934 Act, and which are payable in the United States and deemed to have a "ready market" as that term is defined in 17 CFR 240.15c3–1; or

(6) Irrevocable letters of credit issued by a U.S. Bank other than the borrower or an affiliate thereof, or any combination, thereof.

TTT. "Violation" means a Covered Transaction which is a prohibited transaction under section 406 or 407 of ERISA, Code section 4975, or FERSA section 8477(c) and which is not exempt by reason of a failure to comply with this exemption or another administrative or statutory exemption. To the extent that the non-exempt prohibited transaction relates to an act or omission that is separate and distinct from a prior otherwise exempt transaction that may relate to the same asset (e.g., a conversion of a debt instrument into an equity instrument or a creditor's committee for a debt instrument), the Violation occurs only at the current point in time and no Violation shall be deemed to occur for the earlier transaction relating to the same asset (e.g., the initial purchase of the asset) that was otherwise in compliance with ERISA, the Code or FERSA.

Effective Date: This exemption is effective as of December 1, 2009; notwithstanding the foregoing, this exemption ceases to be available with respect to the BOA Group on the day after the number of representatives of the BOA Group on the BlackRock Board of Directors is reduced to one (1).

Signed at Washington, DC, this 9th day of March____, 2011.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2011–6044 Filed 3–17–11; 8:45 am]

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Part III

Department of Health and Human Services

Centers for Medicare and Medicaid Services

42 CFR Part 488
Medicare and Medicaid Programs; Civil Money Penalties for Nursing Homes; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

42 CFR Part 488

[CMS–2435–F]

Medicare and Medicaid Programs; Civil Money Penalties for Nursing Homes

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule will revise and expand current Medicare and Medicaid regulations regarding the imposition and collection of civil money penalties by CMS when nursing homes are not in compliance with Federal participation requirements in accordance with section 6111 of the Affordable Care Act of 2010.

DATES: These regulations are effective on January 1, 2012.

FOR FURTHER INFORMATION CONTACT: Lori Chapman, (410) 786–9254.

SUPPLEMENTARY INFORMATION:

I. Background

To participate in the Medicare program or the Medicaid program, or both, long-term care facilities must be certified as meeting Federal participation requirements. Section 1864(a) of the Social Security Act (the Act) authorizes the Secretary to enter into agreements with State survey agencies to determine whether facilities meet the Federal participation requirements for Medicare. Section 1902(a)(33)(B) of the Act provides for State survey agencies to perform the same survey tasks for facilities participating or seeking to participate in the Medicaid program. The results of Medicare and Medicaid related surveys are used by CMS and the State Medicaid agency, respectively, as the basis for a decision to enter into or deny a provider agreement, recertify facility participation in one or both programs, or terminate the facility from the program. They are also used to determine whether one or more enforcement remedies should be imposed where noncompliance with Federal requirements is identified.

To assess compliance with Federal participation requirements, surveyors conduct onsite inspections (surveys) of facilities. In the survey process, surveyors directly observe the actual provision of care and services to residents and the effect or possible effects of that care to assess whether the care provided meets the assessed needs of individual residents.

Among the statutory enforcement remedies available to the Secretary and the States to address facility noncompliance are civil money penalties. Authorized by sections 1819(h) and 1919(h) of the Act, civil money penalties may be imposed for each day or each instance of facility noncompliance, as well as for past instances of noncompliance even if a facility is in compliance at the time of the current survey. The regulations that govern the imposition of civil money penalties, as well as other enforcement remedies authorized by the statute, were published in the **Federal Register** on November 10, 1994 (59 FR 56116), and on March 18, 1999 (64 FR 13354). These rules are set forth at Part 488, Subpart F, and the provisions directly affecting civil money penalties are set forth at § 488.430 through § 488.444. In the proposed rule, published on July 12, 2010, preceding this final regulation, we discussed in more detail civil money penalties for facility's noncompliance, a facility's option to dispute cited deficiencies and the facility's right to waive a hearing within specified timeframes and procedures (75 FR 39641).

As specified in section 1128A(f) of the Act, which is incorporated in sections 1819(h) and 1919(h) of the Act, and consistent with the way other civil money penalties are recovered, monies collected by CMS are returned to the State in proportion commensurate with the relative proportion of Medicare and Medicaid beds at the facility in use by residents of the respective programs on the date the civil money penalty begins to accrue, and remaining funds are deposited as miscellaneous receipts of the United States Department of the Treasury. Section 1919(h)(2)(A)(ii) of the Act specifies that civil money penalties collected by the State must be applied to the protection of the health or property of residents of any nursing facility that the State or CMS finds deficient, including payment for the cost of relocating residents to other facilities, maintenance of operation of a facility pending correction of deficiencies or closure, and reimbursement of residents for personal funds lost.

II. Summary of the Proposed Provisions and Responses to Comments on the Proposed Rule

A. Overview

In the July 12, 2010 **Federal Register** (75 FR 39641), we published a proposed rule to revise and expand current Medicare and Medicaid regulations regarding the imposition and collection of civil money penalties by CMS when nursing homes are not in compliance with Federal participation requirements. In response to the proposed rule, we received approximately 213 public comments. We received comments from various States, health care associations, nursing homes, individuals, provider advocacy organizations and consumer advocacy organizations. The comments for this proposal ranged from general support of or general opposition to the proposal to more specific comments regarding the proposed rule.

In this final rule we provide a summary of each proposed provision, a summary of the public comments received, our responses to them, and any changes we are implementing in this final rule as a result of comments received.

Section 6111 of the Patient Protection and Affordable Care Act (the Affordable Care Act) (Pub. L. 111–148), enacted on March 23, 2010, amended sections 1819(h) and 1919(h) of the Social Security Act (the Act) to incorporate specific provisions pertaining to the imposition and collection of civil money penalties when facilities do not meet Medicare and Medicaid participation requirements.

We believe that through these new statutory provisions, Congress has expressed its intent to improve efficiency and effectiveness of the nursing home enforcement process, particularly as it relates to civil money penalties imposed by CMS.

These provisions in section 6111 of the Affordable Care Act seek to reduce the delay which results between the identification of problems with noncompliance and the effect of certain penalties that are intended to motivate a nursing home to maintain continuous compliance with basic expectations regarding the provision of quality care. They also seek to eliminate a facility's ability to significantly defer the direct financial effect of an applicable civil monetary penalty until after an often long litigation process.

To implement these new statutory provisions, we proposed to revise Part 488 by adding new § 488.431 and § 488.433. We also proposed revisions to existing regulations throughout Part 488 to further incorporate the new statutory provisions. The proposed changes would be consistent with section 6111 of the Affordable Care Act. We noted that the proposed rule would provide for the establishment of an escrow account where civil money penalties may be placed until any applicable administrative appeal processes have been completed; allow for civil money penalty reductions when facilities self-

report and promptly correct their noncompliance; in cases where civil money penalties are imposed, offer an independent informal dispute resolution process where the interests of both facilities and residents are represented and balanced; and, improve the extent to which civil money penalties collected from Medicare facilities can benefit nursing home residents. Through the proposed revisions, we intended to directly promote and improve the health, safety, and overall well-being of residents.

B. Analysis of and Response to Public Comments

1. Establishment of an Escrow Account for Civil Money Penalties

Under the existing process, facilities are able to avoid paying a civil money penalty for years because it can often take a long time for administrative appeals to be completed. Concerns about the delays in payment of a civil money penalty have been raised in independent reports issued by both the United States Government Accountability Office (GAO) and the Office of the Inspector General of the Department of Health and Human Services (OIG).

Sections 6111(a) and (b) of the Affordable Care Act expand sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act by adding a new subsection (IV)(bb) which states that, in the case of civil money penalties imposed for each day of noncompliance, the penalty will not be collected until after the independent informal dispute resolution process under new section (IV)(aa) is completed, by which the facility may informally challenge the noncompliance on which the penalty was based. (The added provisions regarding the new independent informal dispute resolution process are discussed later in section II.B.3. of this preamble.)

In the proposed rule, we interpreted the language of this new section (IV)(bb) to mean that any per day civil money penalty would be effective and continue to accrue but would not be collected during the time that the determination of noncompliance which led to the imposition of a civil money penalty is subject to the independent informal dispute resolution process. This is consistent with other provisions of section 6111 of the Affordable Care Act and when viewed in the context of the purpose of the enforcement process of the Social Security Act. First, new subsection (IV)(cc) of sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii), as amended by section 6111 of the Affordable Care Act, permits the collection of the civil money penalty upon completion of an independent informal dispute resolution process. If the per day civil money penalty did not apply and accrue during the period of an independent informal dispute resolution process, there would not be any civil money penalty funds to collect upon completion of the process in those cases where the independent informal dispute resolution does not result in any change to the findings. In those cases where this independent informal dispute resolution process does result in a change to the findings that would lower the civil money penalty amounts, then the accrual would be immaterial because the civil money penalties would be appropriately adjusted (*i.e.* were reduced or rescinded) back to the effective date of the civil money penalty. Second, it has been CMS's longstanding position that sections 1819(h) and 1919(h) of the Act provide that a per day civil money penalty can begin to accrue as early as the date that a facility was first determined to be out of compliance and continues to accrue, without interruption, until a facility has achieved substantial compliance or is terminated from the program. Additionally, the Act provides that the effective date of a civil money penalty can be retroactive to the date of an adverse event that was documented through the survey process to have occurred prior to the issuance of a formal written notice informing the facility that a per day civil money penalty has been applied. Section 6111 of the Affordable Care Act does not change the existing nursing home enforcement process; rather it adds an additional process to be available to facilities as a result of the Secretary's new authority to collect a civil money penalty before exhaustion of administrative remedies. Third, since a facility may continue to be out of substantial compliance for a period of time until it is terminated from the program, an interruption in the civil money penalty accrual would be contrary to the intended effect of creating financial incentives for facilities to maintain compliance and promptly correct any noncompliance. Since we believe Congress intended to speed and strengthen the motivational and deterrent effects of civil money penalties, we believe that suspending the accrual of a civil money penalty while the underlying noncompliance was being informally challenged would undermine such motivational effects. We therefore proposed that CMS will not collect applicable civil money penalty funds until either an independent informal dispute resolution process is completed or 90 days has passed since the notice of civil money penalty imposition has been issued, whichever is earlier. The 90 day period is the maximum combined time period permitted from the date of the notice of civil money penalty imposition (when a facility has the opportunity to request an independent informal dispute resolution) to the date for completion of the independent informal dispute resolution process itself. This combined maximum time period is consistent with the provisions of new sections 1819(h)(2)(B)(ii)(IV)(cc) and 1919(h)(3)(C)(ii)(IV)(cc) of the Act, as amended by section 6111 of the Affordable Care Act (which is discussed in more detail below).

i. Collection and Placement in Escrow Account

Sections 6111(a) and (b) of the Affordable Care Act add new sections 1819(h)(2)(B)(ii)(IV)(cc) and 1919(h)(3)(C)(ii)(IV)(cc) of the Act which provide the authority for CMS to collect and place civil money penalties into escrow accounts pending the resolution of an appeal. This may be done on the earlier of (1) the date when a requested independent informal dispute resolution process is completed, or (2) 90 days after imposition of the civil money penalty. We have proposed implementing these requirements at § 488.431(b)(1)(i) and § 488.431(b)(1)(ii). While the amended statutory language contemplates that a facility will be either wholly successful or unsuccessful in challenging its determination of noncompliance during the independent informal dispute resolution process, the proposed regulation reflects an understanding that there are times when a facility is partly successful. In such instances, the facility may be able to argue successfully for change to only some of its cited noncompliance.

If such change as a result of the independent informal dispute resolution were to affect the civil money penalty amounts owed, (for example, through deletion of a germane deficiency), then the amount initially imposed would need to be adjusted accordingly before being collected and placed in the escrow account.

ii. When a Facility Is Successful in a Formal Administrative Appeal

Sections 6111(a) and (b) of the Affordable Care Act amend sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act by adding new section (IV)(dd) which provides that collected civil money penalties may be kept in an escrow account pending the resolution

of any subsequent appeals. Sections 6111(a) and (b) of the Affordable Care Act also adds new section (IV)(ee) to revise sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act, to require that when a final administrative decision results in the successful appeal of a facility's cited determination of noncompliance that led to the imposition of the civil money penalty, that civil money penalty amount being held in escrow will then be returned to the facility, with interest. We have proposed at § 488.431(d)(2) that if the administrative law judge (ALJ) reverses the civil money penalty amount in whole or in part, the escrowed amount continues to be held pending expiration of the time for CMS to appeal the ALJ decision or, where CMS does appeal, a Departmental Appeals Board decision affirming the ALJ's reversal of the civil money penalty. We believe these new statutory provisions contemplate not only a situation where the facility is either wholly successful or unsuccessful in its administrative appeal of a determination which led to a civil money penalty imposition, but that they also include situations in which a facility is partially successful in its appeal. Thus, the proposed regulation recognizes this possibility and provides that CMS will return collected civil money penalty amounts commensurate with the final administrative appeal results. We do not plan to include specifics in this regulation about how these requirements would be operationalized because we believe that such guidance is more appropriately suited for inclusion in our *State Operations Manual* after dialogue with interested stakeholders. However, we do expect that the collection of a per day civil money penalty under this final rule may be a two-step process. In proposed § 488.431(b)(2), we expect that in instances when a facility has not achieved substantial compliance at the time a per day civil money penalty can be collected and placed in an escrow account, that collection would consist of the penalty amount that has accrued from the effective date of the penalty through the date of collection. Another collection would need to occur later in the process for any final balance determined to be due and payable once the facility achieves substantial compliance or is terminated from the program.

The comments we received and our responses are set forth below.

Comment: A few commenters wanted to know who will be responsible for the collected amounts and how will it be processed and tracked.

Response: CMS will be responsible through its accounting component to oversee the collection process and the maintenance of the escrow account, while a CMS data component will maintain the system that will record and track any possible administrative appeals associated with the collected civil money penalty.

Comment: Several commenters expressed concern that the early collections and escrowing of civil money penalty amounts has the potential for disrupting the cash flow that nursing homes need to successfully operate especially in smaller facilities. Other commenters felt CMS may impose significant civil money penalties on a SNF that may not have the available resources to put the total civil money penalty amount into escrow and to pay the costs associated with a formal appeal. If the resources are unavailable and there are no alternatives to posting the full amount of the civil money penalties, the commenters argued that CMS will have effectively denied participating SNFs any meaningful opportunity to contest survey findings. Such a result would operate to deprive SNFs of their due process rights under the 5th Amendment to the U.S Constitution based upon their recognized property and liberty interest. CMS should therefore permit SNFs to enter into payment plans, to post bonds or to use other alternative approaches to secure payment and allow SNFs to freely access these options.

Response: We understand that there may be rare cases where a particular provider could have limited funds due to the financial viability of their entity. In fact, our existing regulations at § 488.438 provide that a facility's financial condition is one factor that is considered in determining the amount of the civil money penalty to be imposed. However, the commenter raises the prospect that the problem for the facility may not be so much the eventual sum total amount of civil monetary payments due, but rather the more immediate timetable for the placement of funds in escrow. Therefore, in response to the comments received, we have revised § 488.431(b) by adding a new subsection (3) that states "CMS may provide for an escrow payment schedule that differs from the collection times of paragraph (1) of this subsection in any case in which CMS determines that more time is necessary for deposit of the total civil money penalty into an escrow account, not to exceed 12 months if CMS finds that immediate payment would create substantial and undue financial hardship on the facility."

In addition, at § 488.431(b)(4), we state that "If the full civil money penalty is not placed in an escrow account within 30 calendar days from the date the provider receives notice of collection, or within 30 calendar days of any due date established pursuant to a hardship finding under paragraph (b)(3), CMS may deduct the amount of the civil money penalty from any sum then or later owed by CMS or the State to the facility in accordance with § 488.442(c)."

While we appreciate the practical financial challenges for some nursing homes in rare circumstances, we do not agree that under this rule facilities would be denied any due process. The new independent informal dispute resolution process is an option available for facilities to contest survey findings prior to the collection of civil money penalties to be placed in escrow and should reduce the chances of erroneous deprivation. This is followed by post-collection full formal hearing before the Departmental Appeals Board that has always been available for contesting the findings that led to the imposition of a civil money penalty. We believe that these two processes address any due process concerns. Furthermore, we believe that there are additional safeguards and protections available to facilities to challenge the accuracy of survey findings at various points during the survey, including interviews during the survey and the exit conference.

Comment: One commenter recommended changing "may" to "shall" in proposed § 488.431(b)(1) so that the civil money penalty is always placed in escrow when a facility requests independent informal dispute resolution. Conversely, we received several comments indicating that the statutory language appeared to be discretionary and allowed the Secretary to require that not all civil money penalties be placed in escrow.

Response: Section 6111 of the Affordable Care Act amends sections 1819(h) and 1919(h) of the Act that provide the Secretary with the broad discretion to collect and place civil money penalties into an escrow account pending resolution of any subsequent appeal. The opportunity to participate in an independent informal dispute resolution is triggered when a civil money penalty imposed against the facility is subject to being collected and placed in an escrow account prior to the resolution of an appeal. In order to phase in the new collection and escrow provisions, CMS intends to initially focus only on civil money penalties imposed as a result of the most serious deficiencies. These would be the civil

money penalties that would be subject to being placed into escrow and, subsequently, an independent informal dispute resolution process. Thus, we are revising proposed § 488.431(a) to clarify that the opportunity for independent informal dispute resolution will be offered within 30 days of the notice of the imposition of a civil money penalty that will be collected and placed into escrow. We are also revising § 488.431(b) and § 488.442 to clarify that the collection process and due date for less serious civil money penalties will be the same for civil money penalties imposed by the state; in other words, CMS will use the process that is used by the states for collecting those penalties that are not placed into escrow until CMS completely phases in the new collection process. CMS will issue further guidance at a later date regarding the collection and escrow provision as well as the companion independent informal dispute resolution process.

Comment: One commenter wanted clarification on CMS's proposed establishment of an escrow account for civil money penalties. One commenter pointed out that in the case of per day penalty, subsection (a)(1)(B)(IV)(bb) of section 6111 is explicit that "a penalty may not be imposed for any day during the period beginning on the initial day of imposition of the penalty and ending on the day on which the informal dispute process under item (aa) is completed." The NPRM states that CMS interprets this to mean that "any per day civil money penalty would be effective and continue to accrue but not be collected." A commenter asked if this means the civil money penalty is not formally imposed in the first notice to the facility. Another commenter argued that CMS ignores the quoted language, interpreting the legislation to mean that a per day penalty cannot be collected during the period between imposition of the penalty and the conclusion of the dispute resolution process, but it can continue to accrue and be collected thereafter. The commenter argued that none of the reasons CMS offers for its interpretation are compelling or supported in law, and that the goal of the survey and certification process is to verify or secure substantial compliance with federal requirements, not generate revenue. Secondly, the commenter stated that long standing positions must yield to changes in the law, that CMS has no authority to render this minimal incentive smaller still, and that if anything, the interruption in penalty accrual is incentive for CMS to provide for speedy independent review processes.

Response: The notice of the opportunity for the independent informal dispute resolution process is included in the notice of the imposition of civil money penalties, as specified in proposed § 488.431. The Affordable Care Act specifies that the right to participate in an independent informal dispute resolution process applies when a civil money penalty is imposed and collected to be placed into an escrow account pending the resolution of any subsequent appeals. To consider the civil money penalty as not being imposed until after the independent informal dispute resolution occurs would result in circular logic that could result in a facility not being able to choose to participate in the independent informal dispute resolution since it could not contend that a civil money penalty had been imposed. Consequently, we believe that the statute intends that the penalty will not be collected until after a facility has had an opportunity for an independent informal dispute resolution process by which the facility may informally challenge the noncompliance on which the penalty was based.

In addition, if a per day civil money penalty did not apply and accrue during the period of an independent informal dispute resolution process, there would not be any civil money penalty funds to collect upon completion of the process in those cases where the dispute resolution does not result in any change to the findings. This would create incentives to request an independent informal dispute resolution in every case, even when the facts or findings were not truly in dispute, simply to reduce the immediate and intended financial impact of a civil monetary penalty, a result we view as inconsistent with the purpose of strengthening the deterrent effect of such a penalty. In those cases where this independent informal dispute resolution process does result in a change to the findings that would lower the civil money penalty amounts, then the accrual would be immaterial because the civil money penalties will be reduced or rescinded back to the effective date of the civil money penalty. Furthermore, Section 6111 of the Affordable Care Act does not change the existing nursing home enforcement process; rather, it adds an additional process to protect facilities from early collection of a civil money penalty based on possibly erroneous deficiency findings before exhaustion of administrative remedies. Finally, since a facility could continue to be out of substantial compliance for a period of time until it is terminated from the program, an interruption in the civil money penalty accrual would be contrary to the intended remedial effect of creating financial incentives for facilities to promptly correct and maintain compliance with program requirements. Since Congress intended to enhance and strengthen the motivational and deterrent effects of civil money penalties, we believe that suspending the accrual of a civil money penalty while the underlying noncompliance was being informally challenged would undermine such motivational effects.

Comment: Several commenters questioned the meaning of "applicable interest" in the proposed rule at § 488.431(d)(2). One commenter suggested that the rate should be defined as the current rate of judgment interest. Other commenters noted that a successful appeal will lead to a refund of the escrowed amount with interest, but the way such interest is to be calculated is not described and the disposition of interest in a failed appeal is not addressed.

Response: We propose to use the same rate of interest for escrowed civil money penalty funds as the rate the Medicare statute applies in civil actions over reimbursement disputes. Section 1878(f)(2) of the Act governs the payment of interest for providers who seek judicial review of Medicare reimbursement cases and win. This section specifies that the interest rate is equal to the rate of interest on obligations issued for purchase by the Federal Hospital Insurance Trust Fund for the month in which the civil action is filed. We propose to use the same interest rate formula here, and to use the rate in effect for the month that the civil money penalty is required to be placed in escrow. The rates for particular months are published at: *http://www.cms.gov/MedicareProgramRatesStats/,* (click "Trust Fund Interest Rates"). A Departmental Appeals Board decision affirming an administrative law judge's (ALJ's) reduction or reversal of a civil money penalty amount will result in a return of appropriate funds already placed in escrow, plus applicable interest. The disposition of interest in an unsuccessful appeal is addressed at proposed § 488.431(d)(2). If the ALJ reverses a civil money penalty in whole or in part, the escrowed amounts for civil money penalties levied on the basis of those deficiencies will continue to be held pending expiration of the time for CMS to appeal the decision. Where CMS does appeal and a Departmental Appeals Board decision affirms the reversal of the applicable

deficiency, any collected civil money penalty amount owed to the facility based on a final administrative decision will be returned to the facility with applicable interest.

Comment: One commenter wanted to know what the time frame is for returning collected amounts to the facility, when applicable.

Response: Any collected civil money penalty amount later determined as being owed to the facility will be returned to the facility with applicable interest after a final administrative decision. The final administrative decision is either a decision of the ALJ or the Departmental Appeal Boards (DAB) Appellate Division, or when the time to appeal has passed. We expect that funds will be returned within 90 days of any final administrative decision, which is the same timeframe given to facilities to pay a civil money penalty into an escrow account.

Comment: One commenter pointed out that the proposed regulatory text at § 488.431(c) refers to § 488.431(e) which does not exist.

Response: We appreciate this technical comment and are revising the regulatory text in this final rule at § 488.431(c) to refer to the appropriate section, which is § 488.431(d)(2).

2. Reduction of a Civil Money Penalty by 50 percent for Self-Reporting and Prompt Correction of Noncompliance.

Sections 6111(a) and (b) of the Affordable Care Act add new sections 1819(h)(2)(B)(ii)(II) and (III) and 1919(h)(3)(C)(ii)(II) and (III) of the Act. These sections establish new authorities for CMS to reduce a civil money penalty it imposes by up to 50 percent when CMS determines that a facility has self-reported and promptly corrected its noncompliance. This new provision explicitly provides that such reduction is not applicable for noncompliance that constitutes immediate jeopardy to resident health and safety as defined at § 489.3, or that constitutes either a pattern of harm or widespread harm to facility residents, or that resulted in a resident's death. Additionally, the new provisions clearly specify that this reduction does not apply to a civil money penalty that was imposed for a repeated deficiency that resulted in a civil money penalty reduction under this section in the previous year.

The proposed rule would permit CMS to reduce a civil money penalty if a facility self-reports and promptly corrects quality problems. The new reduction authority works in harmony with section 6102 of the Affordable Care Act that requires nursing homes to implement an effective ethics and compliance program as well as an internal quality assurance and performance improvement program. The requirements in both sections 6111 and 6102 of the Affordable Care Act emphasize the value of systems within a nursing home that can continuously stream performance information back to its facility management with the expectation that problems with the provision of quality care would be identified and promptly remedied, and that system improvements would be put in place to prevent recurrence. New sections 1819(h)(2)(B)(ii)(II) and (III) and 1919(h)(3)(C)(ii)(II) and (III) of the Act, as amended by sections 6111(a) and (b) of the Affordable Care Act, support section 6102 of the Affordable Care Act, promoting quality assurance and improvement by adding a financial incentive through the 50 percent reduction of a civil money penalty following self-reporting and prompt correction of such problems. We have proposed implementing these new requirements at § 488.438(c).

The language of the new statutory provision permissively states that the Secretary may reduce an imposed civil money penalty by up to 50 percent "where a facility self-reports and promptly corrects a deficiency for which a penalty was imposed under this clause not later than 10 calendar days after the date of such imposition." We proposed that the 50 percent reduction would be applied only where a number of conditions are met. First, the facility must have self-reported the noncompliance to CMS or the State before it was identified by CMS or the State and before it was reported to CMS or the State by means of a complaint lodged by a person other than an official representative of the nursing home. Second, correction of the noncompliance must have occurred within ten calendar days of the date that the facility identified the deficient practice. For a number of reasons stated below, we proposed not to permit a 50 percent reduction when the self-reporting or the correction occurred at any later point in time. To credit a facility with "self-reporting" only after a facility has been surveyed and noncompliance has been discovered by CMS would not meet the common sense meaning of "self-reporting." We therefore proposed to give meaning to this provision in a manner that can best encourage facilities to self-report their noncompliance so that they can take the necessary corrective action as quickly as possible, without waiting for the State or CMS to identify or to cite the noncompliance, and thus be rewarded for their efforts. Therefore, under the discretion provided to us in this provision, we have declined to reduce a civil money penalty by 50 percent when a facility attempts to self-report noncompliance after it has already been identified by CMS. Rather, we proposed at § 488.438(c)(2)(i) and (ii) that, among other criteria, in order for a facility to receive this 50 percent reduction, CMS must determine that the facility self-reported and corrected the noncompliance within 10 days of identifying it, and before it was identified by CMS or the State. In addition we specified that any attempted self-reporting of noncompliance by a facility that occurs after it was already identified by CMS will not be considered for any reduction under this proposed provision.

In accordance with sections 6111(a) and (b) of the Affordable Care Act, which adds new subsections (III)(bb) to sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act, noncompliance constituting immediate jeopardy, a pattern of harm, widespread harm, or resulting in a resident's death is not eligible for the civil money penalty reduction that might otherwise be available in the case of self-reporting and prompt correction. Therefore, we proposed adding this limitation at § 488.438(c)(2)(iv). Noncompliance at these scope and severity levels indicates a significant breakdown in facility performance and systems to the extent that, even if self-reported, warrants an equally significant consequence without the benefit of a considerable reduction. Furthermore, new sections 1819(h)(2)(B)(ii)(III)(aa) and 1919(h)(3)(C)(ii)(III)(aa) of the Act, as amended by sections 6111(a) and (b) of the Affordable Care Act, also specify that the reduction under these provisions would not apply for facilities that have repeated noncompliance for which a penalty reduction under this provision was received during the previous year. We proposed to add this limitation at § 488.438(c)(2)(v). We believe, and Congress clearly indicated, that facilities unwilling or unable to maintain and sustain compliance with the same participation requirements over this period of time should not be rewarded with a reduced civil money penalty. This is consistent with current regulations at § 488.438(d)(2) which require that the State and CMS must increase the civil money penalty amount for any repeated deficiencies for which a lower level penalty amount was previously imposed. Current regulations at § 488.438(d)(3) define repeated deficiencies as "deficiencies in the same regulatory grouping of requirements

found at the last survey, subsequently corrected, and found again at the next survey."

We also proposed at § 488.438(c)(2)(iii) to specify that a facility must waive its right to a hearing in order to receive this 50 percent reduction. This is because, by the facility's own admission through its self-reporting and correction, it has acknowledged its noncompliance, thereby substantially eliminating the basis for any formal appeal. Should a facility elect to expend its resources on an administrative appeal, we believe it should choose between the 50 percent reduction otherwise available or pursuing the appeal. We also reinforced the incentive of a facility to invest in its program improvement by making it clear that the civil money penalty reduction for self-reporting and prompt correction will be at the maximum 50 percent level rather than any other permissible lower percentage amount. The Secretary's authority for such a civil money penalty reduction under Section 6111 of the Affordable Care Act is discretionary and states that the reduction may be "up to 50 percent." To maximize the incentives for quality improvement, and to remove uncertainty for nursing homes, we proposed to set the percentage reduction at the highest permissible level of 50 percent in these circumstances.

In proposed § 488.436(b)(1) and § 488.438(c)(3), we proposed to amend these sections to specify that a facility may receive only one and not both of the available civil money penalty reductions. Under existing regulations at § 488.436(b), a facility may receive a 35 percent reduction in its civil money penalty liability if it timely waives its right to appeal the determination of noncompliance that led to the imposition of the penalty. No other criterion needs to be met in order for a facility to get this 35 percent reduction. However, in order to receive the higher 50 percent reduction in penalty, a facility must not only waive its right to a hearing, but it must also meet the specific criteria at proposed § 488.438(c)(2). A qualifying facility may receive either the 35 percent reduction for waiving its right to a hearing or the 50 percent reduction for self-reporting and promptly correcting, but in no case will the facility receive both reductions at the same time.

The comments we received and our responses are set forth below.

Comment: Several commenters were concerned with CMS's interpretation of the provisions governing the ability of CMS to reduce civil money penalties up to 50 percent when SNFs and certain NFs self-report and timely correct deficiencies. A main concern was that ten days from the facility's identification of its noncompliance may not be an adequate amount of time to correct a deficiency and that CMS should instead conform to the timeframe that commenters believe was mandated by Congress, i.e. ten days from the date of imposition of a civil money penalty. In addition, many commenters felt that CMS had exceeded its authority when interpreting the statutory language.

Response: The new statutory language at 1819(h)(2)(b)(ii)(II) provides the Secretary with the discretion that she "may" reduce a civil money penalty by up to 50 percent in the case where a facility self-reports and promptly corrects a deficiency for which a penalty was imposed "not later than ten calendar days after the date of such imposition". We agree that the statutory language provides the Secretary with the discretion to permit a longer time frame for correction than the period in our proposed regulation. We also agree that correction of self-identified problems may often require more than the proposed ten days, particularly in order to effectuate systemic changes that can prevent recurrence of the problem(s). We have therefore revised § 488.438(c)(2)(ii) to reflect that we have adjusted the timeframe for correcting a self-reported deficiency or deficiencies to be the earlier of: (a) 15 calendar days from the date of the self-reported circumstance or incident that later resulted in a finding of noncompliance, or (b) ten calendar days from the date a civil money penalty was imposed. Current regulation at 42 CFR 483.13 requires a facility to thoroughly investigate certain alleged violations and report the findings of its investigation within five working days of the incident. Using this requirement as a guideline, we believe that the 15 calendar day timeframe will provide a facility with about 7–10 calendar days to make necessary corrections after the five working day period in which facility must have completed its investigation of certain alleged violations currently specified in the regulations.

To the extent that systemic changes are required to prevent reoccurrence, the 15 day timeframe will permit more time for facilities to design and implement such systemic reform. To the extent that a facility has an effectively functioning quality assurance and performance improvement system, then 15 days is more likely to be a feasible timeframe within which to take remedial action. At this time we have elected not to use the discretion afforded in the statute to permit an even longer time period for correction because we believe that prompt action should always be taken to resolve deficiencies. For the same reason we chose to apply the maximum reduction permitted under the statute for a civil money penalty reduction when prompt action is indeed taken, so that the final rule provides that CMS will reduce a civil money penalty (if one were imposed) by the full 50 percent, as long as the requirements specified in § 488.438(c)(2) are met.

Comment: Several commenters expressed concern that offering a 50 percent reduction for self-reporting and prompt correction would result in an increase of facilities over-reporting to "head off" civil money penalties. This would result in an increase to an already overburdened State workload.

Response: We note that the regulations at § 483.13 already require a facility to report specific actions and violations involving mistreatment, neglect or abuse, and misappropriation of resident property. While we acknowledge that offering a 50 percent reduction for self-reporting and prompt correction may result in an increase of facilities over-reporting, we expect that as facilities gain experience and knowledge regarding self-reporting any increase to the State workload will be mitigated. We also hope that any other increased reporting may be balanced by more timely and assertive corrective action by facilities, as well as improved care for residents.

Comment: Several commenters asked that we define "previous year" in the requirement that a 50 percent reduction is not allowable if the civil money penalty is being imposed for a repeated deficiency that received a civil money penalty reduction in the previous year. Another suggestion was made to eliminate "previous year" altogether and apply CMS's current definition of "repeat deficiency."

Response: We accept the comment to eliminate "previous year" and to apply CMS's definition of "repeated deficiencies" and have revised § 488.438(c)(2)(v) accordingly. Current regulations at § 488.438(d)(3) define repeated deficiencies as "deficiencies in the same regulatory grouping of requirements found at the last survey, subsequently corrected, and again found at the next survey." The State Operations Manual (SOM) at section 7516.3 provides further clarification that repeated deficiencies are those deficiencies in the same regulatory grouping that are found at the last standard or abbreviated standard

survey, corrected, and then found again at the next standard or abbreviated standard survey. Using this definition is consistent with both existing regulation and the Affordable Care Act time frame.

Comment: One commenter asked what role the State would have outside of its existing functions with regards to the self-reported deficiencies.

Response: The State's role with regards to receiving and processing self-reported incidents will not change. However, CMS does intend to implement system changes to CMS's Automated Survey Processing Environment (ASPEN) that will allow States to indicate when a survey is the result of self-reporting. The planned ASPEN changes will also allow a notation to be included about whether or not a 50 percent reduction was applied to a civil money penalty.

Comment: A commenter asked that when multiple per instance civil money penalties result from self-reporting, does the 50 percent reduction apply to the total, cumulative civil money penalty amount or to each individual civil money penalty instance?

Response: The 50 percent reduction will apply only to civil money penalties that meet the requirements as defined by § 488.438(c). Sections 488.438(c)(2)(iv) and (v) specify that the noncompliance that was self-reported and corrected did not constitute a pattern of harm, widespread harm, immediate jeopardy, or result in the death of a resident; and, the civil money penalty was not imposed for a repeated deficiency that previously received a civil money penalty reduction under this section. Each per instance civil money penalty would be evaluated individually based on the above criteria. All civil money penalties meeting all the requirements, whether one or multiple per instance civil money penalties, would receive the 50 percent reduction.

Comment: Several commenters expressed the opinion that the 50 percent reduction would never go into effect as the corrected noncompliance at scope and severity levels of D, E and G would be considered past noncompliance which are rarely, if ever, subject to civil money penalty imposition.

Response: We agree that civil money penalties would rarely be imposed for deficiencies cited as past noncompliance at the scope and severity levels of D, E and G. In the case of deficiencies cited at the "E" level, this is considered to be a "pattern" of harm and would not be eligible for the reduction in any case. If the noncompliance is serious, although a scope and severity level has not been determined, we want to reinforce the need for timely correction, hence the 15 day timeframe for correction of the noncompliance.

Comment: One commenter suggested that we add language indicating that, in order to be eligible for a 50 percent reduction, an additional requirement should be that "the facility must have met mandatory reporting requirements as set forth by Federal law or regulation and any pertinent State law."

Response: We concur with the commenter. We believe that a facility must have met mandatory reporting requirements as set forth by Federal and State law in order to be eligible for a 50 percent reduction and therefore, we have revised § 488.438(c)(2) by adding the following new subsection:

(vi) The facility has met mandatory reporting requirements for the incident or circumstance upon which the civil money penalty is based as required by Federal law and State laws.

Comment: One commenter expressed concern about the imposition of any civil money penalty when a facility has self-reported noncompliance. They further stated that the proper incentive to self-report should be that no punitive action will be taken (i.e., no deficiency should be cited and no civil money penalty imposed) so that the facility can openly review systems, policies and procedures, and educational needs with the goal of improving care and quality of life for and with residents.

Response: We do not agree with the commenter. To participate in the Medicare and Medicaid programs, long term care facilities must be certified as meeting Federal participation requirements. There is an expectation that providers remain in compliance with all participation requirements. The regulations emphasize the need for continual, rather than cyclical, compliance and the enforcement process mandates that policies and procedures be established to promptly remedy deficient practices and to ensure that correction is lasting. Specifically, facilities must take the initiative and responsibility for continually monitoring their own performance to sustain compliance. When, through a survey, it is determined that a facility is not meeting these minimum requirements for participation in one or both programs, enforcement remedies may be imposed in order to encourage prompt compliance with participation requirements as well as to promote the continued rendering of quality health care in a safe environment. This is regardless of whether noncompliance is self-reported or not. It is important to note that the participation requirements are the minimum health and safety standards that providers are required to meet and failure to meet these requirements may lead to the imposition of an enforcement remedy, such as a civil money penalty. CMS and the States have a statutory responsibility to identify all noncompliance, regardless of whether or not the noncompliance was self-reported. Additionally, it is important to note that imposition of a civil money penalty for current or past noncompliance, whether or not self-reported, is not a new remedy option, but rather was established by the nursing home reform changes of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) (Pub. L. 100–203) and is a less severe alternative to termination from participation in Medicare, Medicaid or both programs.

Comment: One commenter expressed concern that the new self-reporting provision would require States to inspect a facility twice within a ten day period; once to determine noncompliance and again to determine correction. This would increase pressure on State time and resources, significantly affecting the State's survey and certification operations.

Response: In very limited circumstances, some complaints or reported incidents of noncompliance would not warrant an on-site survey, especially if an alternative method of determining the facility's compliance will suffice. For example, a facility providing verifiable, written evidence of facility repairs being completed could possibly be considered by a surveyor to be sufficient to determine that a facility indeed made the required repairs. In the proposed rule we specified that correction of a deficiency must occur within ten days of identification of the noncompliance. However, as we noted above, in this final rule we have extended this timeframe for facilities to correct self-reported noncompliance at § 488.438(c)(2)(ii) but we do not always require the State to verify correction within this same timeframe.

Comment: A few commenters argue that many States require self-reporting of events well before a facility has the opportunity to self-investigate and determine, if in fact, noncompliance has occurred.

Response: A State's own self-reporting requirements are enforced by the State and fall outside the scope of this regulation.

Comment: One commenter questioned whether the 50 percent reduction applied to State-operated facilities. They further requested that CMS consider the

possibility of adding a provision that allows for a similar reduction for facilities where the civil money penalty is State-imposed.

Response: The proposed regulation states that "When CMS determines that a SNF, SNF/NF or NF-only facility subject to a civil money penalty imposed by CMS * * *" State operated facilities are eligible for this reduction only when they are subject to a civil money penalty imposed by CMS. While we appreciate the suggestion that this provision also apply when the civil money penalty is State-imposed, there is currently no statutory authority for such application.

Comment: One commenter asked for CMS to clarify whether facilities must self-report to the State survey agency or to CMS. They also asked how the Regional Offices would be notified of the self-report.

Response: As currently provided in § 483.13(c)(2), the facility would self-report to the State survey agency. The State survey agency would be responsible for notifying the appropriate CMS regional office of this self-report using currently existing procedures.

Comment: We received a few comments asking for examples of specific self-reporting case scenarios.

Response: Any specific scenarios would be fact-driven and dealt with on a case by case basis. However, additional guidance regarding self-reporting will be provided in the State Operations Manual.

Comment: A few commenters ask that we define "promptly".

Response: As noted above, the revised proposed regulation at § 488.438(c)(2)(ii) specifies that correction of the self-reported noncompliance is considered to be prompt if it is corrected either within 15 calendar days from the date that the circumstance or incident occurred or ten calendar days from the date that the civil money penalty was imposed, whichever occurs first.

Comment: One commenter asked what safeguards would be in place to prevent facilities from misrepresenting their prompt compliance.

Response: The State survey agency will follow existing procedures and guidance for determining that a facility meets all federal participation requirements. Surveyors are trained and qualified to determine a facility's compliance with the participation requirements and they will continue to do so. The surveyors will survey/verify whether or not a provider that self-reported a deficient practice was able to correct the practice within the specified timeframe and the State agency will inform the CMS regional office of its findings, who will then make the decision as to whether or not an imposed civil money penalty should be reduced by 50 percent.

Comment: One commenter asked if "promptly corrected" include immediate jeopardy deficiencies that have been removed during the survey.

Response: No. If the civil money penalty is imposed for deficiencies which meet the criteria established in proposed § 488.438(c)(2), the civil money penalty will be eligible for a 50 percent reduction. If the civil money penalty was imposed for a deficiency cited at the scope and severity level of immediate jeopardy, section 6111 of the Affordable Care Act will not permit that penalty amount to be reduced by 50 percent. Section 488.438(c)(2)(iv) specifies that the noncompliance that was self-reported and corrected cannot constitute a scope and severity level of immediate jeopardy.

Comment: One commenter suggested that CMS clarify when the requirements for self-reporting trigger an investigation, that facility culpability is not automatically presumed, and that all self-reported occurrences do not result in a deficiency and imposition of a remedy.

Response: As we noted in a response above, in limited circumstances some self-reporting may not trigger a survey and/or the imposition of a remedy. Determinations about whether or not a deficiency exists will continue to be made as they are now, on a case-by-case basis.

Comment: One commenter suggested that the proposed rule did not give facilities a meaningful incentive to self-report and that it gives CMS a road map to impose penalties that CMS does not presently have.

Response: The purpose of the regulation is to give nursing homes an incentive to self-report and promptly correct suspected deficient practices. While it is true that when a nursing home self-reports there is a greater likelihood that CMS will be on notice of the possibility of deficient practices, however the determination of noncompliance and the citation of deficiencies relies on evidence and documentation. CMS must maintain the balance between its resources to address noncompliance resulting from self-reported circumstances and the ability to manage the statutorily mandated survey, certification and enforcement process.

Comment: Several commenters disagreed with the proposed rule's assertion that a facility could not receive both a 50 percent reduction for self-reporting and prompt correction and a 35 percent reduction for waiving the right to appeal an enforcement action. They note that there is nothing in the statute that would preclude a facility from receiving both.

Response: The current 35 percent reduction for waiving the right to a hearing found at § 488.436(b) was implemented under CMS's general rulemaking authority under § 1102 of the Act, and not as a result of a specific statutory directive. There is no evidence that Congress intended these new provisions under the Affordable Care Act to be cumulative such that a facility could possibly receive up to an 85 percent total reduction of an imposed penalty (i.e., 35 percent for waiving an appeal and 50 percent for self-reporting and prompt correction). Indeed, Congress established a specific ceiling on the penalty amount that can be reduced by the Secretary, which is "not more than 50 percent." To interpret this provision as the commenters suggested would render the enforcement remedy of imposing a civil money penalty meaningless. The purpose of a civil money penalty, indeed of all available enforcement remedies, is to protect residents from inadequate care and to motivate providers to promptly comply with the participation requirements and provide quality services.

The new authority established under section 6111 of the Affordable Care Act provides that the reduction for self-reporting and prompt correction of noncompliance could be less than 50 percent. However, rather than utilize a lower percentage, we have exercised the full discretion permitted under the law to specify that a civil money penalty reduction will be at the full 50 percent, rather than a lesser amount, so as to provide the maximum incentive to a facility to promptly correct problems it has identified. By allowing the full 50 percent reduction, we are reinforcing the incentive for a facility to continually invest in its program evaluation and improvement. While providers are still able to choose to receive the 35 percent reduction for waiving their hearing rights under the specified procedures, this can only be done if they have not already received the 50 percent reduction provided under this rule.

Therefore, at proposed § 488.436(b)(1) we specify that in order to receive the 35 percent reduction under § 488.436, a provider shall not have received the 50 percent reduction specified by § 488.438.

Comment: One commenter suggested that CMS define "self-report" to mean a voluntary written report to the State survey agency that the facility has identified and corrected potential

noncompliance with a requirement for participation.

Response: While we appreciate the comment, the State survey agency will use its discretion to determine if and/or when information self-reported by a facility should trigger an on-site survey for determining if noncompliance exists. There may be limited circumstances where a written report may be sufficient for the State survey agency, but this does not apply to all. Self-reported incidents would be processed similar to complaints received by the State survey agency. For complaints that are not at a level of immediate jeopardy or actual harm, the state survey agency decides, based on information received about the complaint, whether to investigate the complaint on-site (i.e., conduct a survey), perform a desk review of the complaint, or refer it to a more appropriate agency.

Comment: One commenter requested that we define "repeat deficiency" to mean a repeated instance of the violation of the same regulation which formed the basis of the civil money penalty.

Response: Repeated deficiencies are defined in the regulations at § 488.438(d)(3) as "deficiencies in the same regulatory grouping of requirements found at the last survey, subsequently corrected, and found again at the next survey." We have concluded that applying this definition to the 50 percent reduction provision would maintain maximum consistency with current Federal regulations. Facilities unwilling or unable to maintain and sustain compliance with the same participation requirements over this period of time should not be benefited by a reduced civil money penalty amount.

Comment: One commenter suggested that any civil money penalty reduction be conditioned on the facility fully cooperating with any survey and other follow-up to the self-reporting. In other words, for a facility to receive a reduction in a civil money penalty, the facility would have to promptly provide any related documentation, access to staff, and the facility staff could not misrepresent to surveyors any issue raised by the self-reporting.

Response: While we appreciate the comment, we would expect that participating facilities would be fully cooperative with the survey process whether it was triggered by self-reported information or for any other reason. Absence of evidence that prompt correction occurred and that the facility is in compliance with the applicable requirements upon which the civil monetary penalty was based would, in and of itself, preclude CMS from granting the penalty reduction. The lack of facility cooperation in the survey process would rebound to the disadvantage of the facility itself to the extent that it impaired a positive finding of prompt self-correction and present compliance.

3. Opportunity for an Independent Informal Dispute Resolution Process.

Sections 6111(a) and (b) of the Affordable Care Act add new section (IV)(aa) to sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act, which provides a facility with the opportunity to participate in an independent informal dispute resolution process if civil money penalties have been imposed against the facility, subject to (IV)(cc). When an independent informal dispute resolution is offered, such offer will be provided to a facility not later than 30 days after the imposition of the civil money penalty and must generate a written record prior to the collection of the penalty. Additionally, the independent informal dispute resolution process is not automatic. It is available only upon the facility's request.

Language included in the House Ways and Means Committee Report H.R. 3200, while not enacted, is similar to the language used in the Affordable Care Act and offers some insight into what prompted the inclusion of this new independent review process and what was envisioned as "independent." The language in H.R. 3200 provided that any such process "shall allow independent informal dispute resolution to be conducted by an independent State agency (including an umbrella agency, such as the Health and Human Services Commission), a Quality Improvement Organization, or the State survey agency, so long as the participants in independent informal dispute resolution are not involved in the initial decision to cite the deficiency(ies) and impose the remedy(ies). Whoever is authorized to conduct independent informal dispute resolution must not have any conflicts of interest * * *." We also note that during debate on the House floor on March 21, 2010, U.S. House of Representatives Energy and Commerce Committee Chairman Henry Waxman stated that over 40 percent of nursing home surveyors in four States told the Government Accountability Office (GAO) that their existing States' processes for informal dispute resolution favored nursing home operators over resident welfare. Representative Waxman further stated that the independent informal dispute resolution process "should be conducted by an independent State agency or entity with healthcare experience, or by the State survey agency, so long as no entity or individual who conducts independent informal dispute resolution has a conflict of interest," and that anyone should have the right to participate in the process.

While operational details of this independent review process are more appropriate for inclusion as guidance in our *State Operations Manual,* we have proposed that specific core elements be included so that we can ensure the fairness and efficiency of the independent informal dispute resolution process. (CMS will notify the facility of the opportunity for this process as specified in proposed § 488.431.)

We proposed at § 488.431(a) that CMS continues to retain ultimate authority for the survey findings and imposition of civil money penalties, and also provide that an independent informal dispute resolution must be requested by the facility within 30 days of notice of imposition of a civil money penalty. In an effort to ensure that the independent informal dispute resolution process is completed timely, we proposed at § 488.431(a)(1) that it be completed within 60 days of the imposition of a civil money penalty if it is timely requested by the facility. We proposed at § 488.431(a)(2) that an independent informal dispute resolution will generate a written record prior to collection. At proposed § 488.431(a)(3), we are requiring that the independent informal dispute resolution process include notification to an involved resident or a resident representative, as well as the State ombudsman.

We proposed that the new independent informal dispute resolution process be an additional option for nursing homes, and that nursing homes would retain the option to use the existing informal dispute resolution process under § 488.331. We believe that the current informal dispute resolution process can be expeditious and that it addresses a greater range of noncompliance issues that would affect other enforcement remedies than the new independent informal dispute resolution process is required to cover. The Affordable Care Act requires that the independent process be available only in cases of noncompliance for which a civil money penalty was imposed when civil money penalty funds are to be placed in an escrow account. Although States may elect to make the independent process applicable to a wider array of situations, continued maintenance of the existing informal dispute resolution process will ensure the availability of a system to

address facility challenges of cited deficiencies regardless of whether other non-civil money penalty remedies are imposed. We also proposed at § 488.431(a)(4) that the new independent informal dispute resolution process be conducted at the requesting facility's expense, and expect that a system of user fees designed to cover expenses of this process will be put in place in each State. We asked for comments on alternative user fee systems. We believed this arrangement was advisable for a number of reasons. First, the current informal dispute resolution process will continue to be available to nursing homes at no charge. Second, without a user fee, the costs of the new process would be borne by the Medicare Trust Fund or other public sources that are already subject to serious fiduciary challenge. Third, in electing to use the new independent process, a nursing home must believe that there is added value to the new process as compared with either using the current (and still available) process that does not involve a user fee or requesting a formal appeal under § 498.40.

We invited comments on the user fee and whether there should be distinctions made in the user fees depending on certain factors, such as whether CMS or the State changed the scope, severity, or quantity of deficiency citations as a result of information obtained through the independent informal dispute resolution process. We also solicited comments on whether the fee should be returned to the facility in the event that the applicable civil money penalty is completely eliminated as proposed in § 488.431(a)(4). We proposed that the system of fees must be approved by CMS, be based on expected average costs, and must be uniformly applied within the State.

Finally, in view of the insights and underlying intent of this new process, as provided by the House language that is similar to the language passed in the Affordable Care Act and statements expressed by Chairman Waxman noted above, we proposed at § 488.431(a)(5) that independent informal dispute resolution be conducted by the State under section 1864 of the Act, or an entity approved by the State and CMS, or by CMS in the case of surveys conducted only by Federal surveyors, with no conflicts of interest, such as: (i) A component of an umbrella State agency provided that the component is organizationally separate from the State survey agency; (ii) an independent entity with healthcare experience selected by the State and approved by CMS; or (iii) a distinct part of the State survey agency, so long as the entity or individual(s) conducting the independent informal dispute resolution has no conflict of interest and has not had any part in the survey findings under dispute.

The comments we received and our responses are set forth below.

Comment: We received comments which reiterated that all States are currently required to provide Medicare and/or Medicaid-certified nursing homes an opportunity to participate in an informal dispute resolution process and that the criteria for this process are described in Chapter 7 of the *State Operations Manual* (CMS Pub. 100–07). One commenter maintains that the regulations regarding independent informal dispute resolution should generally mirror those of informal dispute resolution. Another commenter urged CMS to provide in the final regulations a requirement that facilities must elect either the existing informal dispute resolution process or the proposed independent informal dispute resolution process. Facilities should have only one opportunity for dispute resolution as this is already an alternative to the formal appeal procedure. The commenter suggested that the regulations should clarify that only evidence that would be permissible in a traditional informal dispute resolution may be utilized in an independent informal dispute resolution. Some commenters wrote that a facility should have one chance to elect which informal dispute resolution process it wishes to pursue and should not be allowed to switch from one to the other. Other commenters wrote that nursing homes should be allowed to choose to participate in both processes.

Response: The new independent informal dispute resolution process is an additional option available to nursing homes. This final rule does not remove or alter the existing informal process at § 488.331(a) which remains as an option for nursing homes to use to dispute cited deficiencies. We believe that the existing informal dispute resolution process is expeditious and it addresses all noncompliance issues that would affect the imposition of other enforcement remedies. Section 6111 of the Affordable Care Act requires that a new independent process be available in cases of noncompliance for which a civil money penalty was imposed and the penalty is collected and deposited in an escrow account.

Although States may elect to make the independent process applicable to a wider array of situations, continued maintenance of the existing informal dispute resolution process will ensure the availability of a system to address facility challenges of cited deficiencies regardless of whether other non-civil money penalty remedies are imposed. The current informal dispute resolution process will continue to be available to nursing homes.

To assure efficiency and effectiveness in the current nursing home survey and certification process, we expect that the general procedures outlined in the *State Operations Manual* for the current informal dispute resolution process would be applicable to the new independent informal dispute resolution process. Thus, we agree that nursing homes may request dispute resolution for each survey that cites deficiencies (*State Operations Manual,* Ch. 7, section 7212). We agree with the commenter that facilities should have only one opportunity for dispute resolution for the same set of survey findings, as both the current informal process and the new independent informal processes are both intended to be an additional process to the formal appeal procedure. If the government were to allow nursing homes to request both informal dispute resolution and independent informal dispute resolution on the same set of survey findings, this would serve no meaningful purpose worthy of the added expense. We have therefore clarified the nature of this choice by revising § 488.331(a)(3) and adding new § 488.431(a)(5) to make clear that facilities may not have two opportunities at an informal dispute resolution process, except in cases where the informal dispute resolution has already been completed before a facility has received notice of a civil money imposition that will be collected and placed in an escrow account.

Analogous to the current informal dispute resolution process, the new independent informal dispute resolution process would provide the nursing home the opportunity to dispute the deficiencies that led to the imposition of a civil money penalty and not challenge any other aspect of the survey process, including severity and scope classification (with the exception of a finding of substandard quality of care or immediate jeopardy), remedies imposed by the enforcing agency, alleged failure of the survey team to comply with a requirement of the survey process, alleged inconsistency of the survey team in citing deficiencies among facilities, or alleged inadequacy or inaccuracy of the process.

Comment: We received several comments regarding the time frames for requesting and completion of the independent informal dispute

resolution process. One commenter wrote that the 60-day time period from the notice of imposition of the civil money penalty to completion of the independent informal dispute resolution process may be too restrictive because the facility has up to 30 days to request the independent dispute resolution process, leaving little time for the process to be completed. The commenter asked if CMS will consider the 60-day completion window to begin from of the date that the independent informal dispute resolution was requested by the facility. Another commenter asked if the 30 days included the 10-day time frame in which the facility has to request an informal dispute resolution under the current process. One commenter wrote that the independent informal dispute resolution should be completed within the same 60-day time frame that the provider has to request a hearing. Finally, another commenter wrote that the independent informal dispute resolution should be requested within the same 10-day time frame that the provider has to submit a plan of correction.

Response: Sections 6111(a) and (b) of the Affordable Care Act adds new section (IV)(aa) to sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act, which provides a facility with the opportunity to participate in an independent informal dispute resolution process if civil money penalties have been imposed against the facility and, consistent with new section (IV)(cc), the civil money penalties are subject to being placed in an escrow account. This new independent process must be offered to a facility not later than 30 days after the imposition of the civil money penalty that will be collected and placed in an escrow account. We understand the commenters' confusion with these new provisions as providers have been using the current informal dispute resolution process since its implementation in 1995. In order to reduce confusion between the two processes, and to promote consistency and efficiency within the enforcement system, we will require that the nursing home has the same 10-day time frame to request independent informal dispute resolution as that which exists for the current informal dispute resolution process. In addition, we have revised § 488.431(a)(1) to clarify that the independent informal dispute resolution process will be completed within 60 days of a facility request so long as the request is made timely by the facility.

Nursing homes will be notified of the availability of the independent informal dispute resolution in either the CMS letter transmitting the Form CMS–2567 if this letter communicates the CMS notice of imposition of a civil money penalty, or in the CMS formal notice of imposition of the civil money penalty that may occur after a subsequent revisit. If a nursing home elects independent informal dispute resolution at the first opportunity to request independent informal dispute resolution, the requirement to provide independent informal dispute resolution would be met even if a civil money penalty based on the same set of survey findings were imposed at a later point in time on the nursing home.

Comment: One commenter stated that there is nothing in the independent informal dispute resolution regulation specifying that the facility must make a choice between informal dispute resolution and independent informal dispute resolution and the timing of the two processes seems to allow for facilities to use both of them. Absent a provision requiring facilities to make a choice, the incentive would be to always request an informal dispute resolution in the hope the deficiency is removed or reduced in severity prior to having to request independent informal dispute resolution. Several commenters were confused and asked how would the process work if an independent informal dispute resolution upholds a deficiency but that same deficiency is removed during the informal dispute resolution process while the independent informal dispute resolution process is ongoing, or even after it is completed. One commenter suggested that the final regulation provide that a nursing home that requests an informal dispute resolution on a specific deficiency waives its right to subsequently request an independent informal dispute resolution on that same deficiency.

Response: We agree that facilities should have only one opportunity for dispute resolution for the same set of survey findings, as both the current informal process and the new independent informal processes are both intended to be in addition to the formal appeal procedure. If the government were to allow nursing homes to request both informal dispute resolution and independent informal dispute resolution on the same set of survey findings, this would serve no meaningful purpose worthy of the added expense. As we noted above, we have revised proposed § 488.331(a)(3) and added a new section at § 488.431(a)(5). In the development of our operational procedures, we will also provide guidance to clarify the interplay between the two distinct processes.

Comment: One commenter asked that the regulation be separated into two parts: Independent informal dispute resolution conducted by State surveyors and independent informal dispute resolution conducted by Federal surveyors.

Response: We do not concur that the regulation regarding independent informal dispute resolution be divided into two parts based on which surveyors, State survey agency surveyors or CMS regional office surveyors, conducted the survey. To require that two separate independent informal dispute resolution processes be available would be an inefficient use of limited resources. If a nursing home is provided an opportunity to request independent informal dispute resolution as a result of a survey conducted only by federal surveyors, the independent informal dispute resolution would be conducted by an entity approved by the State and CMS, or by CMS or its agent if the State's independent dispute resolution process is not used.

Comment: One comment noted that it is unclear whether the rule requires that States offer independent informal dispute resolution services or if it only encourages States to do so. Without a requirement, many nursing facilities will likely not be afforded the opportunity for independent informal dispute resolution services.

Response: The rule at § 488.331(a)(3) establishes a requirement for independent informal dispute resolution for nursing homes that have civil money penalties imposed by CMS where such a penalty is subject to being placed in an escrow account. Section 488.431(a)(5) in the proposed rule clearly establishes that States must conduct or arrange for independent informal dispute resolution to be conducted.

Comment: One commenter asked if this rule is exempting nursing homes from the right to a free hearing.

Response: We assume that by "free hearing" the commenter is referring to the existing informal dispute resolution provided at § 488.331. The existing informal dispute resolution process provided at § 488.331 is not altered by the new regulations to provide a nursing home an opportunity for independent informal dispute resolution when a civil money penalty that will be collected and escrowed is imposed.

Comment: We received many comments noting that proposed § 488.431(a) establishes CMS's intent to

retain ultimate authority for survey and findings and imposition of civil money penalties, but that the rule does not address or specify the criteria or standards for penalty assessment that will be applied by CMS when it decides to accept or reject the dispute resolution results. One commenter recommended that CMS amend proposed § 488.431 and/or provide guidance to specify the criteria and/or standards that will be applied to the review and compliance determination resulting from the independent informal dispute resolution process. The commenter recommended that proposed § 488.431 should require notification to the provider that includes a full explanation of CMS's final determination in cases where CMS disagrees with and/or overturns dispute resolution outcomes where the provider has prevailed. Another commenter asked that CMS clarify the contents of the written record, i.e., would it be a minimal statement of the final outcome or a full narrative record including key issues of the citation, primary rebuttal of the facility, rationale and supporting references for the outcome. Another commenter asked if a letter from CMS to the facility is intended to be the written record.

Response: We appreciate the commenters' concerns regarding operational aspects of the independent informal dispute resolution process that were not included in the proposed rule. In order to give States sufficient time to develop and operationalize the provisions in this rule, we will be phasing in the provision implementing the availability of an independent informal dispute resolution process. In addition, we understand that States and CMS will need time to develop protocol and training not only for the new independent informal dispute resolution process but for all the provisions in this final rule.

Therefore, the effective date for this rule is January 1, 2012. To support consistency and efficiency within the nursing home enforcement process, CMS will strengthen this final rule by including a requirement that States submit their plan for conducting independent informal dispute resolution to CMS for approval by CMS. By doing this, CMS will be able to assure consistency among the States regarding elements of the independent informal dispute resolution process that are better suited for inclusion in the *State Operations Manual* than in regulations. To support States in developing an independent informal dispute resolution process that is responsive to the comments requesting clarification, CMS will engage a workgroup of State survey agency and CMS regional office representatives to develop a template of key elements that an independent informal dispute resolution process would include. Key elements would include a process to assure timely completion of independent informal dispute resolution, methodology for notification, and components of the independent informal dispute resolution written record. We believe that this approach recognizes that States vary in their organizational structure, their size, their resources, and their ability to comply with the regulations through a variety of operations and procedures. Therefore, we have revised proposed § 488.431(a)(5) and renumbered it in this final rule at § 488.431(a)(4) to require that all State independent informal dispute resolution processes be approved by CMS.

CMS reviews the results of the dispute resolution processes and retains the right to be the final arbiter of accuracy and appropriateness. The exact operational procedures for doing so will be provided in the *State Operations Manual* and other CMS public communications.

Comment: One commenter described a current state informal dispute resolution process which is conducted by an umbrella State agency that is organizationally separate from the State survey agency and meets all major criteria in the proposed rules for independent informal dispute resolution. The commenter continues to note that this existing state process would require minor and few procedural changes to meet every criterion of the proposed rule. The commenter suggested adding a provision to the rule that, if a State already has an independent informal dispute resolution process that meets the requirements, the State is not required to implement a new or second informal dispute resolution process or to charge providers for the State's existing independent informal dispute resolution process.

Response: As discussed previously, we are adding a requirement to this rule that CMS will approve each State's independent informal dispute resolution process. States that already have a process in place which meets the requirements of this rule will be able to submit its process to CMS for approval. It is not our intention to require new processes if a State has an existing process in place that meets the requirements of this final rule.

Comment: One commenter wrote that during an independent review, a recommendation is based strictly on the material provided by the facility. When a State survey agency disagrees with the recommendation, it is usually due to additional information found in the surveyor notes or copies of facility forms made at the time of the survey. An independent reviewer would not have access to these documents.

Response: We do not agree with the comment that the entity conducting the independent informal dispute resolution would not have access to the documentation necessary to make an informed decision regarding the survey findings being disputed by a nursing home. Any information relevant to the survey findings being disputed, including surveyor's notes and/or copies of facility forms, is typically discussed within the CMS Form–2567 Statement of Deficiencies. Specifics regarding the operational aspects of the independent informal dispute resolution process will be provided in the *State Operations Manual.*

Comment: The proposed rule at § 488.431(a)(3) includes notification to an involved resident or resident representative, as well as State ombudsman, to provide written comment. Some commenters noted that this provision of the proposed rule is not related to Section 6111 and appears to be outside the focus of the process, which is to determine whether a deficiency is valid. One comment recommended that CMS limit access to the new process to only the nursing homes and the applicable reviewers to ensure that nursing homes are provided with a minimum level of due process.

Response: We do not accept the comments that would exclude a resident, resident representative and/or State ombudsman from the independent informal dispute resolution process because we believe this provision is consistent with ensuring independence and accountability. In addition, the fundamental purpose of the survey and certification process is to protect beneficiaries of the program. Residents, resident representatives, and State ombudsman (who represent them) add value to the process and provide input regarding the survey findings under review during the independent informal dispute resolution process. Finally, as discussed in the Preamble of the proposed rule, during debate on the House floor on March 21, 2010, U.S. House of Representatives Energy and Commerce Committee Chairman Henry Waxman stated that over 40 percent of nursing home surveyors in four States told the Government Accountability Office (GAO) that their existing States' processes for informal dispute

resolution favored nursing home operators over resident welfare. Representative Waxman further stated that the independent informal dispute resolution process "should be conducted by an independent State agency or entity with healthcare experience, or by the State survey agency, so long as no entity or individual who conducts independent informal dispute resolution has a conflict of interest," and that anyone should have the right to participate in the process. We consider the nursing home resident to be especially important to the process, particularly since the resident may have initiated a complaint that gave rise to a complaint investigation that resulted in the finding of a deficiency. Furthermore, nothing in section 6111 or the existing regulations expressly limits such participation by affected parties. We therefore conclude that this provision of the rule is consistent with congressional intent.

Comment: Commenters asked for specific clarification regarding the provision at § 488.431(a)(3) including providing a definition of "resident representative" as someone who has legal representation; providing anonymity for residents who may fear retaliation; and defining the written process, and the notification process. Some commenters suggested that the notification process be done by the facility, the governing body of the nursing home, or the State survey agency since that is the agency having knowledge of and contact with the involved resident. One commenter wrote that all individuals, who are impacted or could potentially be impacted, should have the opportunity to provide written comment, as should the resident and family councils of the facility. A commenter suggested that the regulations should specify that residents, families and advocates should have the right to attend and actively participate in the independent informal dispute resolution process. A commenter suggested that a face to face opportunity be provided. Other commenters offered suggestions, such as requiring nursing homes to post the independent informal dispute resolution decisions in a public place without identification of a specific resident so that all facility residents can familiarize themselves with the outcome without sacrificing anonymity; or, have the State ombudsman provide the results of the dispute resolution to residents.

Response: We appreciate the variety of comments and suggestions. We will give these comments thoughtful consideration as we develop the operational procedures to implement the independent informal dispute resolution process and publish the process in our *State Operations Manual.* In the final rule itself, we seek to strike a balance between affording opportunities to nursing home residents that are consistent with the new law and the feasibility of a process that remains informal and can reasonably be completed in a timely manner.

Comment: One commenter noted that some States have more than one State ombudsman and that it would be helpful to have a definition of the roles and responsibilities CMS intended for "the State ombudsman" who will have the opportunity for written comment in the independent informal dispute resolution process. In line with this comment, another commenter suggested that we revise the wording of the rule to state the "State Long-Term Care Ombudsman." One comment suggested that the regulations be amended to require that resident's and State ombudsman's comments be given equal consideration as the facility's comments in independent informal dispute resolution. One commenter noted that there were not enough safeguards to ensure that the process is fair and impartial. One commenter asked if lawyers of family members and facilities could be included in the process.

Response: We believe that the provisions of this rule ensure that the independent informal dispute resolution process is fair and impartial and takes into account evidence provided not only by the facility, but by residents and/or their representatives. Both the current informal dispute resolution and the new independent informal dispute resolution processes are "informal." Although we would not expect that lawyers of either residents or their family members would have a role in providing written comments, the regulation does not prohibit this. For more inclusive participation, including representation by lawyers, there are the formal appeal processes that remain undiminished by this new and added opportunity for timely independent informal processes. We concur with the recommendation and have revised the final rule at § 488.431(a)(3) by changing "state ombudsman" to "State's long-term care ombudsman" so that it is consistent with § 488.325 *Disclosure of results of surveys and activities.*

Comment: In response to our request for comments on alternative user fee systems in the proposed rule, we received many varied comments regarding the provision at proposed § 488.431(a)(4) that the independent informal dispute resolution be conducted at the facility's expense. Commenters noted that charging a nursing home for the costs of independent informal dispute resolution, but not the current informal dispute resolution, discourages independent review in favor of the usual informal dispute resolution and a fee arrangement that requires a nursing home to pay for any part of the State survey agency's error is simply unfair. Some commenters maintain that CMS exceeded its authority, as a user fee is not included in the statutory language, while others considered a user fee to be appropriate and desirable. Some commenters questioned how the fees would be structured, as there are many variables that come into play in the review process. Commenters asked for clarification regarding what is considered actual expenses of the process. Some commenters offered very detailed suggestions based on their experience. These suggestions include that each State survey agency contract with an independent review entity and develop a fee system based on the State-specific requirements. One commenter suggested that the fee structure and amounts should be negotiated between the State agency and the independent informal dispute resolution entity. The commenter further suggested that the individual State base fee per deficiency would be consistent in all reviews, while the actual cost per hours of review and/or type of review would reflect the severity, volume of material for review, and complexity of the case file which can vary widely. Reasonable fees should take into consideration the State-specific requirements in the independent informal dispute resolution process, including costs of: management and administrative staff, database development and utilization, State-specific report development, consistency and reliability monitoring, and training and continuing education of staff. Some commenters strongly recommend leaving the billing and receipt of payment to the independent informal dispute resolution entity. Some commenters agreed that facilities should pay while others maintained that the costs should be restored to facility operations. Commenters questioned the provision that a "Fee shall be returned in the event that the applicable civil money penalty is completely eliminated" and asked that CMS clarify how an entity that conducts independent informal dispute resolution would be paid and by whom, in the event that any fee charged to the nursing home, is returned to the nursing home. A commenter recommended a

consistent user fee system to control costs. Other commenters suggested that involving the State agency in the fees would add unnecessary costs to the State agency and could be an incentive to not cite deficiencies. One comment stated that the user fee is for the service of dispute resolution, and should in no way be based on the result or finding of the resolution process.

Response: We received many valuable comments and we appreciate the commenters' suggestions and concerns. While we do not concur with all of the comments regarding a user fee, we have determined that we must research this issue further and take into consideration all the comments we received. Therefore, we will not be requiring a mandatory user fee system at this time.

After due consideration of the comments, we have removed references to the user fee that was originally proposed as § 488.431(a)(4). Some States currently offer an independent process and charge a user fee; such processes and such user fees are not affected by this rule unless an imposed civil money penalty is subject to being placed in escrow. Upon the effective date of this rule, States may no longer charge a user fee for an independent informal dispute resolution process which is initiated under this rule due to CMS's imposition of a civil money penalty that is subject to collection and being placed in escrow pursuant to § 488.431(b).

Comment: One commenter stated that paying for the costs of this new independent informal dispute resolution process would place a burden on the Medicare Trust Fund or other public sources and that currently no funds are expended from the Federal Medicare Trust funds that directly or indirectly relate to enforcement processes or otherwise for nursing homes. The commenter stated that much inefficiency currently exists within and among the State's overall survey processes well beyond the informal dispute resolution processes that might be better controlled through enhanced oversight of the States by CMS Central and regional offices. The commenter continued that while they understand the political nature of this effort, more oversight of the current practices and processes at the State and regional CMS office level might help to alleviate financial burdens and inconsistent practices on the program overall. The commenter recommends that CMS review the average length of time and the number of surveyors involved in conducting surveys based on the purpose of the survey and outcome of the survey findings, i.e., standard health survey versus complaint survey as data analysis of this type might help to identify efficient activities and best practices between States.

Response: We appreciate the commenters concerns regarding the need for oversight of the survey and certification process. CMS acknowledges the potential impact on the Medicare Trust Fund or other public sources. However, by taking steps to improve the quality of care, the benefits to the residents outweigh the financial burden. In addition, we will take the commenters suggestions into consideration as we anticipate future revisions to the *State Operations Manual.*

Comment: We received several comments related to proposed § 488.431(a)(5). Commenters wrote that in order for the proposed independent informal dispute resolution process to be independent and objective and to provide a minimum level of due process, it must be managed and conducted by qualified individuals wholly outside of the State survey agency. The commenters stated that two of the examples of entities appropriate for conducting an independent informal dispute resolution proposed in §§ 488.431(a)(5)(i) (a component of the umbrella State agency) and (a)(5)(iii) (a distinct part of the State survey agency) do not meet the definition of "independent", since both are parts of and/or are directly connected to the State agency that cited the noncompliance. They further noted that the unique aspects involved in examining and evaluating outcomes in nursing home residents and a specific understanding and/or healthcare experience in the field of long term care would be particularly helpful in reviewing the evidence surrounding determinations of noncompliance. Commenters suggested that the final rule elaborate further on the qualifications of the independent third party and suggested that the final regulations establish the specific training and skill set necessary for the entity to ensure that the individual conducting the process is in fact "independent" and has no conflicts of interest, yet fully understands the survey process and the permissible parameters of the independent informal dispute resolution process. One commenter urged CMS to add an Administrative Law Judge to the list of entities that could conduct independent informal dispute resolution. If CMS decides to provide additional guidance through the *State Operations Manual,* the commenter urges CMS to seek stakeholder input, including input from consumers. One commenter wrote that having this process run by an organization that is subject to approval by the State agency or that is a distinct part of State government does not lend itself to the development of a truly independent review process. The commenter urges CMS to look at models of dispute resolution that are in use in other venues and to consider whether the Quality Improvement Organizations are equipped or could be equipped to serve in this capacity. Commenters recommended that CMS establish a process to monitor the independent informal dispute resolution entities and conduct an assessment of the impact.

Response: We have considered the commenters recommendations and suggestions and conclude that many of the comments will assist us in preparing guidance to States through the *State Operations Manual.* We disagree with the commenters that the entity described at proposed § 488.421(a)(5)(i) is not "independent" and maintain that a component of an umbrella State agency that is organizationally separate from the State survey agency would thus meet the requirement to be independent. For example, if the survey agency is located in the Department of Health and Mental Hygiene (DHMH) within a State agency and the Department of Labor, Licensing and Regulation (DLLR) is located in another part of the same State agency, we would agree that qualified persons from DLLR could be part of an independent informal dispute resolution entity. We concur with the comment that a distinct part of the State survey agency would not meet the new level of independence that we find desirable. We have therefore revised proposed § 488.431(a)(5) by renumbering it as (a)(4), by adding "Be approved by CMS and conducted by the State under section 1864 of the Act * * *," by removing subsection (iii), and by revising subsection (ii) to state:

"(ii) an independent entity with a specific understanding of Medicare and Medicaid program requirements selected by the State and approved by CMS."

Comment: We received a comment suggesting that rather than focus on a costly and time consuming "independent" appeal process, facilities should be required to go directly to the existing formal appeal process on all matters they wish to contest. The commenter notes that under the existing process, facilities are able to proceed with informal dispute resolution, spend State survey agency (and sometimes CMS) time and resources on this informal appeal, and then take advantage of the automatic 35 percent

Federal penalty reduction if they waive their right to formally appeal the determination. The commenter notes that, instead, facilities should be afforded due process through a formal appeal, or be permitted to choose the benefit of the 35 percent penalty reduction by not appealing. Since "independent" informal dispute resolutions still leaves CMS in control of the final appeal determination, the commenter believes that there is great benefit and little lost by eliminating informal dispute resolution entirely.

Response: We appreciate the comment. However, a nursing home is not required to participate in either informal dispute resolution or independent informal dispute resolution to dispute survey findings. The regulations at § 488.331 provide that a state must offer a facility the opportunity to dispute the survey findings upon receipt of the official statement of deficiencies, but that a facility must request to partake in this opportunity. Similarly, the Secretary must provide a participating nursing home with the opportunity of an independent informal dispute resolution process when a civil money penalty is imposed and collected in advance of exhausting formal appeals. The nursing home must make a choice about whether or not to participate in these processes and if it does choose to participate, it must request these processes. Further, the nursing home enforcement regulations at § 488.408 provide that a facility may appeal the certification of noncompliance leading to an enforcement remedy. Here again, the facility may choose to forego a formal appeal and accept the findings and determinations from a survey. We will monitor results of the informal dispute resolution process and examine whether the process serves as a cost-effective alternative to the more expensive formal appeals process.

Comment: One commenter questioned the statement in the preamble to the proposed rule on page 39646 that the "* * * Affordable Care Act requires that the independent process be available only in cases of noncompliance for which a civil money penalty was imposed." Sections 6111 (a) and (b) of the Affordable Care Act provide the opportunity for facilities to participate in an independent informal dispute resolution process if civil money penalties have been imposed. However, nothing in statements quoting Representative Waxman indicate or confirm the intent or necessity of an additional independent informal dispute resolution process specific to the imposition of civil money penalties. The commenter notes that the informal dispute resolution process already required at § 488.331 and the new process triggered by the imposition of civil money penalties are equally discretionary. Both afford the opportunity for providers and surveyors to debate and resolve citations that may be questionable prior to the expenditure of time and costs associated with a formal appeal. The rationale for two distinct entities that share the same objective, but retain separate criteria and procedures, appears paradoxical. The commenter concludes that the potential result is an unfairly weighted two-tiered system that is both cumbersome and administratively over-burdensome.

Response: We understand the concern of the commenter. We intend to work very closely with a workgroup of State survey agency personnel and CMS regional office representatives to assure to the degree possible that the informal dispute resolution and the independent informal dispute resolution provisions are in harmony with one another. The commenter's concern about the potential for duplicate processes also reinforces our understanding and interpretation of the law. Section 6111 adds new subsection (IV)(aa) to sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act which provides for an independent informal dispute resolution process and makes the provision "subject to (cc)." New subsection "(cc)" provides for the placement of the penalty in escrow. As a result, the law requires that the independent process is offered to facilities whenever civil money penalty funds are collected and placed in an escrow account. For penalty amounts collected under the existing process (*i.e.,* after a final administrative decision), the new independent informal dispute resolution process is not required.

Comment: One commenter inquired whether States will receive additional funding to implement the independent informal dispute resolution process?

Response: State implementation of the independent informal dispute resolution process will be addressed through the routine survey and certification budget process.

4. Acceptable Uses of Civil Money Penalties Collected by CMS

Section 6111 of the Affordable Care Act establishes new acceptable uses of civil money penalties collected by CMS. Some of these collected civil money penalty funds must be applied directly to promote quality care and the well-being of nursing home residents. Additionally, the Affordable Care Act makes it clear that the specified use of such funds, collected from SNFs, SNF/NFs and NF-only facilities as a result of civil money penalties imposed by CMS, must be approved by CMS.

The Affordable Care Act provides flexibility about how civil money penalty funds collected by CMS can be used. These new provisions are also consistent with section 1919(h)(2)(A)(ii) of the Act regarding how civil money penalties may be used when collected by the State. Section 1919(h)(2)(A)(ii) of the Act provides that civil money penalties that are imposed by the State shall be applied to the protection of the health or property of nursing facility residents. We solicited comments on whether an acceptable use of collected fees would be to offset a portion of the cost of independent reviews.

The provisions of section 1128A of the Act continue to be applied to civil money penalties under sections 1819(h) and 1919(h) of the Act and specify that funds collected from Medicare facilities attributable to Title XVIII be deposited into the United States Treasury. However, the specific authorities provided by sections 6111(a) and (b) of the Affordable Care Act, which adds new subsections (IV)(ff) to sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act, expressly provide that now "a portion" of these collected funds may be used to benefit residents. Giving weight and meaning to both provisions, we proposed that while some portion of the collected civil money penalty funds from Medicare facilities will continue to be deposited with the Treasury, another portion of those funds may be directed back into the program to be invested in activities that benefit residents. Specifically, we proposed at § 488.433 that 50 percent of the Title XVIII portion of collected civil money penalty amounts would be used for activities that would benefit nursing home residents and that the remaining 50 percent of collected funds applicable to Title XVIII would continue to be deposited to the Department of the Treasury. This proposed division of funds reflects the focus and importance the Affordable Care Act provisions give to improving and promoting the health and well-being of nursing home residents. Furthermore, to protect against any actual or potential conflicts of interest, we specified at § 488.433 that collected civil money penalty funds cannot be used for survey and certification operations and functions performed under section 1864 of the Act, but must entirely be used for activities that benefit nursing home

residents, and that any such activity must be approved by CMS.

With regard to distinguishing between Medicare and Medicaid proportions of civil money penalty collections for dually-participating facilities, we retained current regulations at § 488.442(f) (but proposed to amend them to include reference to § 488.433) that specify the formula for determining the proportion of collected civil money penalty funds that are to be returned to the State in dually participating facilities, that is, "in proportion commensurate with the relative proportions of Medicare and Medicaid beds at the facility actually in use by residents covered by the respective programs on the date the civil money begins to accrue." These funds attributable to Title XIX are returned to the State in which the noncompliant facility that paid the civil money penalty is located, and this arrangement is continued in our proposed rule.

The Affordable Care Act provides examples of those types of activities that would be considered appropriate uses for civil money penalty monies, including—

- Assistance to support and protect residents of a facility that closes (voluntarily or involuntarily) or is decertified (including offsetting costs of relocating residents to home and community-based settings or another facility), which is found at proposed § 488.433(a) and (b);
- Projects that support resident and family councils and other consumer involvement in assuring quality care in facilities, which is found at proposed § 488.433(c);
- Facility improvement initiatives approved by CMS (including joint training of facility staff and surveyors, technical assistance for facilities implementing quality assurance programs, the appointment of temporary management firms, and other activities approved by CMS), which is found at proposed § 488.433(d).

At § 488.433(e) we proposed the appointment of a temporary management firm as one possible use of collected civil money penalties, as noted in the new subsections added by section 6111 of the Affordable Care Act. Currently existing regulations at § 488.415(c) require that the temporary manager's salary is paid directly by the facility. Using civil money penalty funds to appoint a temporary management firm significantly reduces the deterrent effect of the temporary manager enforcement sanction since the costs associated with it would be paid for by collected civil money penalty funds instead of by the facility. We believe this was not the intent of Section 6111 of the Affordable Care Act. Therefore, while the proposed rule does not contemplate using civil money penalty funds for payment of the temporary manager's salary, it does contemplate using the funds for other expenses related to development and maintenance of temporary management or receivership capability (for example, recruiting, vetting, or retaining of temporary managers, or other related system infrastructure expenses). Use of funds in this manner should secure the readiness and availability of temporary manager candidates, and therefore, encourage the use of this sanction. When considering the types of initiatives or projects that would make good use of civil money penalty funds collected from Medicare facilities and that would best benefit nursing home residents, CMS may conclude that the State is in the best position to provide that judgment. In this instance, CMS is free to use its share of the collected funds to pay the State to perform those activities that CMS determines would best benefit nursing home residents. This payment to a State to secure the State's assistance for a CMS-approved resident benefit activity does not constitute an increase in the State's proportion of any civil money penalty funds collected from a dually participating facility. Rather, these are funds that CMS collected from a Title XVIII facility and which CMS subsequently determines can be used in the most beneficial way through the State.

We wish to reiterate that use of funds collected from a SNF, SNF/NF, or NF-only facility as a result of a CMS-imposed civil money penalty must be approved by CMS. We expect that CMS will issue guidance that will permit specific categories of civil money penalty use without waiting for per-request approval, while other uses not listed in the guidance would require case-by-case advance approval.

The comments we received and our responses are set forth below.

Comment: Several commenters suggested using civil money penalty funds to support the frontline direct care workforce enhancement projects such as facilitating the education and credentials, tracking of the State's direct care workforce, creating a direct care worker registry, and providing improvements in the competency, education, and training standards for direct care workers, as these front line workers are responsible for the care of our elders. One commenter suggested that workforce enhancement should not require pre-approval. One commenter supports initiatives pertaining to workplace culture change, dependent adult abuse prevention and intervention, and ombudsman and other resident advocate functions.

Response: CMS concurs with the importance of the frontline direct care workforce, such as certified nurse assistants (CNAs), in the care of our vulnerable beneficiaries and the value that workforce enhancements could contribute in improving care of the nursing home residents. We appreciate the thoughtful and detailed suggestions provided. At this time we will not be able to provide an exhaustive list or address each suggested or potential use in its entirety. We will use workgroups to develop and publish *State Operations Manual* guidance, so that CMS can provide further clarification on acceptable uses of civil money penalty funds.

Comment: Many commenters representing multiple disability groups and independent living centers support using civil money penalty funds to transition residents from nursing homes to community living and asked for civil money penalty funding to be directed to Nursing Home Transition to Community programs.

Response: Nursing home residents are those individuals who receive facility-based care. When such residents wish to relocate to another nursing home or to a community setting, it may be appropriate for civil monetary penalty funds to be used in the process of relocation, such as helping residents visit prospective care settings (including a prospective apartment of their own), and even short-term trial visits to assess the suitability of a community arrangement in advance of a final decision. However, we do not consider it appropriate for such funds to be used beyond the transition process itself or to pay for expenses for which Congress has established separate funding sources, such as section 1915(c) of the Social Security Act. Appropriate transition funds for nursing home residents will need to be evaluated on a case by case basis. The offsetting of costs for nursing home residents in the event of closure or decertification is already permitted as a time-limited allowable cost for transition to the community. We caution that civil money penalty funds are variable and collected strictly as necessary in order to ensure a facility's prompt compliance with participation requirements and conditions and are not used as a source to generate revenue. Therefore these funds should not be relied upon as a steady funding source or to sustain a particular program over an extended time period.

Comment: Several commenters asked for clarification of the proportion/division of civil money penalty funds and about the requirement for CMS approval of fund usage. Commenters expressed a concern that existing civil money penalty funds are not being used appropriately. A question was posed for clarification of the Medicaid (State) portion of civil money penalties. One commenter requests that language be revised to clarify whether State-operated facilities are included or excluded. One commenter requests that language be revised to clarify whether the "remaining collected funds" is limited to the other 50 percent of applicable Title XVII funds or whether it includes those funds applicable to Title XIX. If the intent is to include Title XIX funds, the commenter disputes the appropriateness of requiring CMS approval for use of those funds beyond existing limitations on allowable uses.

Response: We proposed at § 488.433 that 50 percent of the Title XVIII portion of collected civil money penalty amounts be used for activities that would benefit nursing home residents and that the remaining 50 percent of collected funds applicable to Title XVIII continue to be deposited to the United States Department of the Treasury (Treasury). With regard to distinguishing between the portion of civil money penalty collections for dually-participating facilities that would go to the State and the portion to be conveyed to the Treasury, the current regulations at § 488.442(f) remain intact except that we are amending the section to include reference to proposed § 488.433. Proposed section 488.442(f) specifies the formula for determining the proportion of collected civil money penalty funds that are to be returned to the State in dually participating facilities, which is, "in proportion commensurate with the relative proportions of Medicare and Medicaid beds at the facility actually in use by residents covered by the respective programs on the date the civil money penalty begins to accrue." Civil money penalty amounts collected from dually-participating facilities will continue to be returned to the State (in which the facility that paid the civil money penalty is located) in the same proportion under this rule.

Civil money penalty funds returned to a State under proposed section 488.442(f) may be used by the State for any project that directly benefits facility residents, in accordance with section 1919(h)(2)(A)(ii) of the Act. CMS will have the approval authority for the use of all civil money penalty funds effective March 23, 2011. If there is reason to believe that a State is not spending collected civil money penalties in accordance with the law or not at all, this matter should be referred to the appropriate CMS Regional Office account representative so that he or she may review this matter with the State. CMS is not accepting the comment to specify whether State-operated facilities are excluded. The use of funds from any civil money penalty imposed by CMS would be subject to § 488.433.

Comment: A few commenters expressed a strong concern about the potential for the inappropriate use of civil money penalty funds being directed back to the deficient facility. Several commenters expressed concern that civil money penalties will be used under state programs to address areas or issues that should be addressed by the nursing home under its administrative responsibility to maintain adequate standards of care, and that some provisions of care are often short cuts implemented to improve facility profitability. One commenter noted that facilities are not providing safety equipment or sufficient staffing to support basic care requirements, such as feeding, turning and repositioning, and dealing with high risk populations. One commenter stated "the permitted use of civil money penalty funds should also assure that these funds cannot be used, directly or indirectly, to increase the industry's bottom line". A few commenters mentioned that funds should be used for recruitment and retention efforts.

Response: CMS intends that civil money penalty funds will be used to implement programs and services that go beyond meeting minimum statutory requirements at the facility level. It is not appropriate for States to return civil money penalty funds directly to a deficient facility, since a civil money penalty used by the facility to correct the noncompliance that led to its imposition would generally not represent a sanction as it would not have any remedial effect. Further, the statute provides that the funds must benefit facility residents and not the nursing home. Hiring practices including salary, turnover, recruitment and retention are within the responsibility of the facility and are the cost of doing business. While we anticipate establishing a typology of set approved uses that will not require States to wait for CMS approval before initiating a program or enterprise, we anticipate that there will be many other proposals which will need to be evaluated on a case by case basis and will require CMS advance approval.

Comment: A few commenters felt strongly that providing "joint trainings" between provider and regulator would blur the line of distinction between the two and would not be conducive to promote correct identification of deficiencies and imposition of remedies. Another organization felt strongly that it would be beneficial for the joint training to be "standardized" for both, and yet another commenter felt that this effort should be open to a variety of stakeholders. One commenter also thought that including the Long Term Care Ombudsmen in the training would be beneficial.

Response: We believe that there are benefits for joint training between State survey agencies and nursing home providers to improve understanding of Federal requirements and to communicate specific policies and procedures. In fact, CMS has sponsored such joint trainings on a national basis dating back to the implementation of OBRA '87 to train both States and providers in the new health and safety requirements and enforcement rules. We appreciate the required distinction between a State surveyor and a facility and expect that joint trainings are designed so the line between provider and regulator would not be blurred. To give the optimum flexibility of such training, we do not propose standardizing the joint trainings nor do we propose to limit or to require other stakeholders in joint trainings.

Comment: More than half of the commenters propose that 90 percent of the civil money penalty funds be used to benefit facility residents with 10 percent being returned to Treasury. A couple of commenters thought that a 75/25 split would be more appropriate while several supported the 50/50 split as described. One commenter felt all 100 percent of the funds should be directed to the nursing home residents. This was one of the most frequently-raised topics, and all of the commenters who raised this issue suggested that a much higher percentage of the collected funds should be reinvested back into projects designed to directly benefit residents.

Response: The Affordable Care Act created a new permissive authority that allows the Secretary to use a portion of collected civil money penalties to benefit facility residents. This authority applies only to funds that CMS requires to be placed in escrow, and that remain after all administrative appeals have been exhausted and where the facility is unsuccessful in its appeals. In response to the overwhelming amount of comments received supporting a 90/10 split and given the new opportunity to

use Medicare civil money penalty funds to benefit and protect nursing home residents, we have revised § 488.433 to specify that for funds subject to being placed in escrow, pursuant to § 488.431, after all administrative appeals have been exhausted and where the facility is unsuccessful in its appeals, 90 percent of the collected civil money will be used for activities that benefit nursing home residents and meet the requirements as specified at § 488.433. The remaining 10 percent of the collected civil money penalty for funds subject to being placed in escrow, after all administrative appeals have been exhausted and where the facility is unsuccessful in its appeals, will be deposited with the Department of Treasury in accordance with § 488.442(f). This new provision does not apply to civil monetary penalties that are not subject to being placed in escrow in accordance with § 488.431.

Comment: Most individuals that submitted comments offered the following suggested uses for collected civil money penalties:

- Supplement the state Ombudsman program funding;
- Fund recruitment of more specialized nursing home evaluators;
- Support initiatives pertaining to workplace culture change, dependent adult abuse prevention and intervention, and ombudsman and other resident advocate functions;
- Support person centered care and culture change similar to Eden Grants;
- Transportation funding for all residents when a facility closes;
- Consider the full array of quality improvement initiatives;
- Use of palliative/end of life care; and
- Resident Advocate Functions and Resident and Family Councils.

Response: At this time CMS will not be able to provide an exhaustive list or to address each suggested or potential use in its entirety, but rather we will issue subsequent guidance and publish it in the *State Operations Manual.* This guidance will provide further clarification on specific types of uses that are pre-approved and those uses that will be evaluated on a case by case basis as well as the criteria for such evaluation. Part of the evaluation criteria will include an examination of the degree to which the intended use protects residents or pertains to other uses of civil money penalty funds provided by section 6111 of the Affordable Care Act. We will also evaluate whether the potential use of civil money penalty funds is already funded under the current Survey and Certification program or whether the potential use of a civil money penalty requires a sustainable funding source. Promising programs and state practices have already been identified in several States under the existing requirements for use of civil money penalty funds, as described in CMS Survey & Certification (S&C) Memo 09–44 (June 19, 2009). However, we do not plan to approve uses that lock in civil monetary penalty funding to very long term programs that would create the reality or the appearance of an on-going revenue demand so strong that it could affect the judgment of the State or CMS in imposing civil monetary penalties, or to fund programs for which Congress has provided another on-going funding source.

Comment: While § 488.433(e) addresses the appropriate use of civil money penalties for the infrastructure of the temporary management remedy, one commenter does not feel this provision will help as facilities cannot afford the temporary manager salary.

Response: Although it may be true that not every nursing home provider may be able to afford to hire and institute a temporary manager, we continue to believe that the ability of a State to develop the capacity to recruit potential temporary managers can advance the overall effectiveness of the nursing home enforcement process. Thus, a State can request the use of civil money penalties to build this infrastructure.

Comment: One commenter suggested that funds be used for the State Long Term Care Ombudsmen program.

Response: Enhancement to the Long Term Care Ombudsmen program to support Resident Advocate Functions and Resident and Family Councils could be discussed in the planning stages for *State Operations Manual* guidance. However, we reiterate that we do not intend to approve civil money penalty uses that may create the reality or the appearance of an on-going revenue demand so strong that it could affect the judgment of the State or CMS in imposing civil money penalties, or to fund activities for which a nursing home is already responsible under State or Federal regulations or laws, or to fund program responsibilities for which Congress has specifically provided another on-going funding source. This is not to say that CMS would necessarily deny approval of a State's use of civil monetary penalties by its Long Term Care Ombudsman program for activities that are designed to benefit nursing home residents. We intend to develop further guidance to assist States in determining the kinds of activities that would be approved by CMS.

Comment: A commenter asked about whether or not CMS intends to publicly report the amount of civil money penalties collected and asked that it be included in the final regulation.

Response: Public reporting of particular information related to enforcement actions is addressed specifically in Section 6103 of the Affordable Care Act and directs CMS to publish relevant enforcement information.

Comment: One commenter proposed that a structured and streamlined process be created to disburse civil money penalty funds in a timely manner, to be used within 3 years, and suggested that CMS convene a workgroup to address this topic.

Response: Stakeholder input into CMS's *State Operations Manual* updates will be invaluable as we tackle implementation of the final rule, and we will seek such input.

Comment: One commenter suggested that CMS examine deficiency citation data to determine pockets of deficient practice when allocating civil money penalty funds.

Response: As part of program oversight, CMS already does examine the national and State enforcement data, including civil money penalties.

5. Additional Comments on Policy Issues

CMS received several comments that did not fall into the specific areas addressed above. The comments we received and our responses are set forth below.

Comment: One commenter suggested that no further intervention is needed for nursing homes and that insurance companies, pharmaceuticals, HMOs and CEOs be examined.

Response: OBRA '87 (Pub. L. 100–203) established requirements of Medicare and Medicaid survey and certification of nursing homes as well as the enforcement process. This law established a menu of mandatory and discretionary enforcement responses when nursing homes fail to meet participation requirements. The provisions regarding civil money penalties in the affordable Care Act augments and further enhances the existing enforcement processes and does not provide authority for the examination of other industries and areas raised by the commenter. Therefore we cannot accept this comment.

Comment: We received two comments with respect to enforcing Quality Assurance and Performance Improvement Programs in SNFs and NFs.

Response: While these comments fall outside the scope of this rule, we note that Quality Assurance and Performance Improvement Programs are specifically addressed in Section 6102 of the Affordable Care Act. Under Section 6102, the Centers for Medicare & Medicaid Services are required to promulgate regulations to carry out the provisions of section 6102. We will do so separately from this current regulation.

Comment: One commenter recommended that § 488.431(a) be revised to include the State Survey Agency and the State Medicaid Agency as entities that retain the ultimate authority to determine a facility's compliance or noncompliance with the federal nursing home requirements. Further the commenter suggested that we specifically provide that an independent informal dispute resolution (or a non-independent informal dispute resolution) does not ultimately determine compliance or noncompliance.

Response: CMS disagrees with the commenter's suggested changes, as CMS retains the ultimate authority on determining compliance and/or noncompliance with program conditions and requirements.

Comment: Regarding proposed § 488.431(a)(1), one commenter asked whether it is correct to assume and interpret that the notice of imposition of a civil money penalty will come directly from CMS, since CMS retains the ultimate authority for determining compliance and imposing enforcement remedies, and not the State agency, which only recommends a civil money penalty to CMS?

Response: As we noted in our responses to the comments above, the opportunity for independent informal dispute resolution is only available when CMS imposes the civil money penalty remedy and collects the penalty amount to be placed in an escrow account. The notice of imposition of a civil money penalty will come directly from CMS.

Comment: One commenter expressed concern that the proposed rule will complicate enforcement for States which have their own statutory fining authority.

Response: The proposed rule does not change any current remedy imposition provisions. The proposed independent informal dispute resolution process provides an opportunity for providers to dispute survey findings which lead to the imposition of a civil money penalty by CMS that may be collected and placed in an escrow account.

Comment: One commenter cited inconsistencies between CMS's Regional Offices when offering guidance to State Survey Agencies and indicated that guidance provided by one Regional Office can be contrary to the advice provided by a different Regional Office. The commenter exhorted CMS Central Office to provide greater oversight of the Regional Offices to ensure consistency among the State Survey Agencies, especially the circumstances under which civil money penalties may be imposed, or reduced. One example of inconsistency among Regional Offices is evidenced by the imposition of daily versus per instance civil money penalties. The commenter stated that their State has been the subject of misinformation promulgated by industry associations asserting that their State Survey Agency's penalties are harsher than those imposed by Survey Agencies in surrounding States. Additionally, there is no assurance that the Regional Office will impose sanctions based upon the State Survey Agency's recommendations. Fragmented authority of the State Survey Agencies and CMS can be a persistent challenge to be addressed.

Response: We appreciate the comment that greater oversight of the CMS Regional Offices by the Central Office will help ensure consistency among State survey agencies. We also agree that there should be consistency among CMS Regional Offices when offering guidance to State survey agencies. In an effort to ensure consistency, operational details of the independent informal dispute resolution process will be included as guidance in the *State Operations Manual,* and we will convene a CMS workgroup to explore additional actions that may improve consistency.

Comment: One commenter asked if there is a standard timeframe that CMS has to appeal an ALJ decision.

Response: This comment falls outside the scope of this rule which deals with informal dispute resolution and not the formal hearing process which involves an administrative law judge. However, requirements regarding the appeals and hearing procedures are located at 42 CFR Part 498.

Comment: Some commenters asked whether new model letters would be prepared, standardized and revised, and be consistent nationwide.

Response: While we are proposing that core elements for the independent informal dispute resolution process be included in the new regulations, the specific operational details including model letters are more appropriate for inclusion in the *State Operations Manual.*

III. Provisions of the Final Regulations

In this final rule we are adopting the provisions as set forth in the July 12, 2010 proposed rule with the following revisions based on the comments received—

1. Informal Dispute Resolution

- Revised § 488.331(a)(3) to clarify a facility's choice in electing either the current informal dispute resolution process or the new independent informal dispute resolution process.

2. Civil Money Penalties Imposed by CMS and Independent Informal Dispute Resolution: for SNFS, SNF/NFs, and NF-only Facilities (§ 488.431)

- Revised § 488.431(a) by making technical changes to make language more consistent, inserting clarification of when the independent informal dispute resolution would be offered, and revising the language at § 488.431(a)(1).
- Revised § 488.431(a)(3) so that it is consistent with the requirements at § 488.325 "Disclosure of results of surveys and activities".
- Removed proposed § 488.431(4), eliminating language regarding a user fee system.
- Revised § 488.431(a)(5) and renumbered it as new (a)(4) to strengthen the requirements of States for an independent informal dispute resolution. Also, based on comments received, revised subparagraph (ii) to specify necessity for understanding Medicare/Medicaid program requirements and removed subparagraph (iii).
- Added new § 488.431(a)(5).
- Revised § 488.431(b) by adding paragraph (3) that provides the ability for CMS, at its discretion, to adjust the timing of civil money penalty payments in limited circumstances to account for cases of financial hardship.
- Revised § 488.431(b) by adding new paragraphs (3) regarding an escrow payment schedule, (4) that provides CMS recourse when a facility does not pay applicable civil money penalty funds to be placed into an escrow account within 30 calendar days from notice of assessment, and (5) which clarifies that for any civil money penalties that are not collected and placed into escrow, the collection process to be used will be the same process for state-imposed civil money penalties under § 488.432.
- Revised § 488.431(c) to provide additional minor clarification and to make a technical edit to reference the

appropriate section which is § 488.431(d)(2).

• Revised § 488.431(d)(2) to provide additional minor clarification and to define applicable interest by referencing section 1878(f)(2) of the Act.

3. Civil Money Penalties Imposed by the State: NF-Only (§ 488.432)

• Amend § 488.432 by revising the section heading.

4. Civil Money Penalties: Uses and Approval of Civil Money Penalties Imposed by CMS (§ 488.433)

• Revised introductory phrase to reflect the change in division of civil money penalty funds based on public comments and to clarify when funds will be deposited.

• Revised 488.433(d) to clarify circumstances for this use of civil money penalty funds.

5. Civil Money Penalties: Amount of Penalty (§ 488.438)

• Revised § 488.438(c)(2)(ii) and adding subparagraphs (A) and (B) to clarify the self reporting and correction timeframe.

• Revised § 488.438(c)(2)(v) by adding the cross-reference for the definition of "repeated deficiency".

• Revised § 488.438(c)(2) by adding new paragraph (vi) to further clarify eligibility for a 50 percent reduction.

6. Civil Money Penalties: Effective Date and Duration of Penalty (§ 488.440)

• Revised § 488.440(b) to include appropriate cross reference to § 488.442 and include language that clarifies the effective date and duration of civil money penalties imposed by the state for NFs-only.

• Modified § 488.440(c) for clarity by adding reference to civil money penalties imposed by CMS that may not be collected and placed into an escrow account.

7. Civil Money Penalties: Due Date for Payment of Penalty (§ 488.442)

• Revised § 488.442(a)(2) to include reference to § 488.431 and to add language that clarifies the process to follow when no hearing was requested, which was inadvertently omitted in the proposed rule.

IV. Collection of Information Requirements

Sections 4204(b) and 4214(d) of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), Public Law 100–203, enacted on December 21, 1987, provide waivers of Office of Management and Budget review of information collection requirements for the purpose of implementing the nursing home reform amendments. The provisions of OBRA '87 that exempt agency actions to collect information from States or facilities relevant to survey and enforcement activities from the Paperwork Reduction Act are not time-limited.

V. Regulatory Impact Statement

We have examined the impact of this rule as required by Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), Executive Order 12866 on Regulatory Planning and Review (September 1993), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We estimate that this provision will cost between $6 and $15 million dollars per year to implement. Of this total cost, we estimate that this provision will result in $5.4 million in fixed costs per year and between $1.6 million and $10 million in variable costs per year. This estimate assumes, based on historical data, that there will be about 2,600 civil money penalties imposed each year. Historically, nursing homes request informal dispute resolutions for about 15% of civil money penalties. Each IDR reviews 2.5 deficiencies on average. The upper bound of this cost estimate assumes that 100% of all civil money penalty impositions will result in an independent informal dispute resolution request. This rule has been designated a "significant regulatory action" although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. This rule does not reach the $100 million economic threshold and thus is not considered a major rule under the Congressional Review Act.

The RFA requires agencies to analyze options for regulatory relief of small business, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7 million to $34.5 million in any one year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because the Secretary has determined that this final rule will not have a significant impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Core-Based Statistical Area (for Medicaid) and outside of a Metropolitan Statistical Area (for Medicare) and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2010, that threshold level is currently approximately $135 million and will have no consequential effect on State, local, or tribal governments, in the aggregate, or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation would not impose costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

List of Subjects in 42 CFR Part 488

Administrative practice and procedure, Health facilities, Medicare,

Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR part 488 as set forth below:

PART 488—SURVEY, CERTIFICATION, AND ENFORCEMENT PROCEDURES

■ 1. The authority citation for part 488 is revised to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act, unless otherwise noted (42 U.S.C. 1302 and 1395(hh)); Section 6111 of the Patient Protection and Affordable Care Act (Pub. L. 111–148)

Subpart E—Survey and Certification of Long-Term Care Facilities

■ 2. Revise § 488.330(e)(2)(ii) to read as follows:

§ 488.330 Certification of compliance or noncompliance.

* * * * *

(e) * * *

(2) * * *

(ii) Except for civil money penalties imposed on NFs-only by the State, during any pending hearing that may be requested by the provider of services.

* * * * *

■ 3. Amend § 488.331 by adding a new paragraph (a)(3) to read as follows:

§ 488.331 Informal dispute resolution.

(a) * * *

(3) For SNFs, dually-participating SNF/NFs, and NF-only facilities that have civil money penalties imposed by CMS that will be placed in a CMS escrow account, CMS also offers the facility an opportunity for independent informal dispute resolution, subject to the terms of paragraphs (b), (c), and (d) of this section and of § 488.431. The facility must request independent informal dispute resolution in writing within 10 days of receipt of CMS's offer. However, a facility may not use the dispute resolution processes at both § 488.331 and § 488.431 for the same deficiency citation arising from the same survey unless the informal dispute resolution process at § 488.331 was completed prior to the imposition of the civil money penalty.

* * * * *

Subpart F—Enforcement of Compliance for Long-Term Care Facilities With Deficiencies

■ 4. Section 488.400 is revised to read as follows:

§ 488.400 Statutory basis.

Sections 1819(h) and 1919(h) of the Act specify remedies that may be used by the Secretary or the State respectively when a SNF or a NF is not in substantial compliance with the requirements for participation in the Medicare and Medicaid programs. These sections also provide for ensuring prompt compliance and specify that these remedies are in addition to any other available under State or Federal law, and, except, for civil money penalties imposed on NFs-only by the State, are imposed prior to the conduct of a hearing.

■ 5. Add a new § 488.431 to read as follows:

§ 488.431 Civil money penalties imposed by CMS and independent informal dispute resolution: for SNFS, dually-participating SNF/NFs, and NF-only facilities.

(a) *Opportunity for independent review.* CMS retains ultimate authority for the survey findings and imposition of civil money penalties, but provides an opportunity for independent informal dispute resolution within 30 days of notice of imposition of a civil money penalty that will be placed in escrow in accordance with paragraph (b) of this section. An independent informal dispute resolution will—

(1) Be completed within 60 days of facility's request if an independent informal dispute resolution is timely requested by the facility.

(2) Generate a written record prior to the collection of the penalty.

(3) Include notification to an involved resident or resident representative, as well as the State's long term care ombudsman, to provide opportunity for written comment.

(4) Be approved by CMS and conducted by the State under section 1864 of the Act, or by an entity approved by the State and CMS, or by CMS or its agent in the case of surveys conducted only by federal surveyors where the State independent dispute resolution process is not used, and which has no conflict of interest, such as:

(i) A component of an umbrella State agency provided that the component is organizationally separate from the State survey agency.

(ii) An independent entity with a specific understanding of Medicare and Medicaid program requirements selected by the State and approved by CMS.

(5) Not include the survey findings that have already been the subject of an informal dispute resolution under § 488.331 for the particular deficiency citations at issue in the independent process under § 488.431, unless the informal dispute resolution under § 488.331 was completed prior to the imposition of the civil money penalty.

(b) *Collection and placement in escrow account.*

(1) For both per day and per instance civil money penalties, CMS may collect and place the imposed civil money penalties in an escrow account on whichever of the following occurs first:

(i) The date on which the independent informal dispute resolution process is completed under paragraph (a) of this section.

(ii) The date that is 90 days after the date of the notice of imposition of the penalty.

(2) For collection and placement in escrow accounts of per day civil money penalties, CMS may collect the portion of the per day civil money penalty that has accrued up to the time of collection as specified in paragraph (b)(1) of this section. CMS may make additional collections periodically until the full amount is collected, except that the full balance must be collected once the facility achieves substantial compliance or is terminated from the program and CMS determines the final amount of the civil money penalty imposed.

(3) CMS may provide for an escrow payment schedule that differs from the collection times of paragraph (1) of this subsection in any case in which CMS determines that more time is necessary for deposit of the total civil money penalty into an escrow account, not to exceed 12 months, if CMS finds that immediate payment would create substantial and undue financial hardship on the facility.

(4) If the full civil money penalty is not placed in an escrow account within 30 calendar days from the date the provider receives notice of collection, or within 30 calendar days of any due date established pursuant to a hardship finding under paragraph (b)(3), CMS may deduct the amount of the civil money penalty from any sum then or later owed by CMS or the State to the facility in accordance with § 488.442(c).

(5) For any civil money penalties that are not collected and placed into an escrow account under this section, CMS will collect such civil money penalties in the same manner as the State in accordance with § 488.432.

(c) *Maintenance of escrowed funds.* CMS will maintain collected civil money penalties in an escrow account pending the resolution of any administrative appeal of the deficiency findings that comprise the basis for the civil monetary penalty imposition. CMS will retain the escrowed funds on an on-going basis and, upon a final

administrative decision, will either return applicable funds in accordance with paragraph (d)(2) of this section or, in the case of an unsuccessful administrative appeal, will periodically disburse the funds to States or other entities in accordance with § 488.433.

(d) *When a facility requests a hearing.* (1) A facility must request a hearing on the determination of the noncompliance that is the basis for imposition of the civil money penalty as specified in § 498.40 of this chapter.

(2) If the administrative law judge reverses deficiency findings that comprise the basis of a civil money penalty in whole or in part, the escrowed amounts continue to be held pending expiration of the time for CMS to appeal the decision or, where CMS does appeal, a Departmental Appeals Board decision affirming the reversal of the pertinent deficiency findings. Any collected civil money penalty amount owed to the facility based on a final administrative decision will be returned to the facility with applicable interest as specified in section 1878(f)(2) of the Act.

■ 6. Amend § 488.432 by revising the section heading and revising paragraphs (a), (b)(1) introductory text, (b)(2), (c)(1) introductory text, and (c)(2); and removing paragraph (e) to read as follows:

§ 488.432 Civil money penalties imposed by the State: NF-only.

(a) *When a facility requests a hearing.* (1) When the State imposes a civil money penalty against a non-State operated NF that is not subject to imposition of remedies by CMS, the facility must request a hearing on the determination of noncompliance that is the basis for imposition of the civil money penalty within the time specified in § 431.153 of this chapter.

(2)(i) If a facility requests a hearing within the time frame specified in paragraph (a)(1) of this section, for a civil money penalty imposed per day, the State initiates collection of the penalty when there is a final administrative decision that upholds the State's determination of noncompliance after the facility achieves substantial compliance or is terminated.

(ii) If a facility requests a hearing for a civil money penalty imposed per instance of noncompliance within the time specified in paragraph (a)(1) of this section, the State initiates collection of the penalty when there is a final administrative decision that upholds the State's determination of noncompliance.

(b) * * *

(1) If a facility does not request a hearing in accordance with paragraph (a) of this section, the State initiates collection of the penalty when the facility—

* * * * *

(2) *When a facility does not request a hearing for a civil money penalty imposed per instance of noncompliance.* If a facility does not request a hearing in accordance with paragraph (a) of this section, the State initiates collection of the penalty when the time frame for requesting a hearing expires.

(c) * * *

(1) If a facility waives, in writing, its right to a hearing as specified in § 488.436, for a civil money penalty imposed per day, the State initiates collection of the penalty when the facility—

* * * * *

(2) If a facility waives, in writing, its right to a hearing as specified in § 488.436, the State initiates collection of civil money penalty imposed per instance of noncompliance upon receipt of the facility's notification.

* * * * *

■ 7. Add a new § 488.433 to read as follows:

§ 488.433 Civil money penalties: Uses and approval of civil money penalties imposed by CMS.

Ten percent of the collected civil money penalty funds that are required to be held in escrow pursuant to § 488.431 and that remain after a final administrative decision will be deposited with the Department of the Treasury in accordance with § 488.442(f). The remaining ninety percent of the collected civil money penalty funds that are required to be held in escrow and that remain after a final administrative decision may not be used for survey and certification operations but must be used entirely for activities that protect or improve the quality of care for residents. These activities must be approved by CMS and may include, but are not limited to:

(a) Support and protection of residents of a facility that closes (voluntarily or involuntarily).

(b) Time-limited expenses incurred in the process of relocating residents to home and community-based settings or another facility when a facility is closed (voluntarily or involuntarily) or downsized pursuant to an agreement with the State Medicaid agency.

(c) Projects that support resident and family councils and other consumer involvement in assuring quality care in facilities.

(d) Facility improvement initiatives approved by CMS, such as joint training of facility staff and surveyors or technical assistance for facilities implementing quality assurance and performance improvement program, when such facilities have been cited by CMS for deficiencies in the applicable requirements.

(e) Development and maintenance of temporary management or receivership capability such as but not limited to, recruitment, training, retention or other system infrastructure expenses. However, as specified in § 488.415(c), a temporary manager's salary must be paid by the facility.

■ 8. Section 488.436 is amended by revising paragraph (b)(1) to read as follows:

§ 488.436 Civil money penalties: Waiver of hearing, reduction of penalty amount.

* * * * *

(b) * * *

(1) If the facility waives its right to a hearing in accordance with the procedures specified in paragraph (a) of this section, CMS or the State reduces the civil money penalty by 35 percent, as long as the civil money penalty has not also been reduced by 50 percent under § 488.438.

* * * * *

■ 9. Section 488.438 is amended by revising paragraphs (c) and (d)(1) to read as follows:

§ 488.438 Civil money penalties: Amount of penalty.

* * * * *

(c) *Decreased penalty amounts.* (1) Except as specified in paragraph (d)(2) of this section, if immediate jeopardy is removed, but the noncompliance continues, CMS or the State will shift the penalty amount imposed per day to the lower range.

(2) When CMS determines that a SNF, dually-participating SNF/NF, or NF-only facility subject to a civil money penalty imposed by CMS self-reports and promptly corrects the noncompliance for which the civil money penalty was imposed, CMS will reduce the amount of the penalty by 50 percent, provided that all of the following apply —

(i) The facility self-reported the noncompliance to CMS or the State before it was identified by CMS or the State and before it was reported to CMS or the State by means of a complaint lodged by a person other than an official representative of the nursing home;

(ii) Correction of the self-reported noncompliance occurred on whichever of the following occurs first:

(A) 15 calendar days from the date of the circumstance or incident that later

resulted in a finding of noncompliance; or

(B) 10 calendar days from the date the civil money penalty was imposed;

(iii) The facility waives its right to a hearing under § 488.436;

(iv) The noncompliance that was self-reported and corrected did not constitute a pattern of harm, widespread harm, immediate jeopardy, or result in the death of a resident;

(v) The civil money penalty was not imposed for a repeated deficiency, as defined in paragraph (d)(3) of this section, that was the basis of a civil money penalty that previously received a reduction under this section; and

(vi) The facility has met mandatory reporting requirements for the incident or circumstance upon which the civil money penalty is based, as required by Federal and State law.

(3) Under no circumstances will a facility receive both the 50 percent civil money penalty reduction for self-reporting and correcting under this section and the 35 percent civil money penalty reduction for waiving its right to a hearing under § 488.436.

(d) * * *

(1) Before a hearing requested in accordance with § 488.431(d) or § 488.432(a), CMS or the State may propose to increase the per day penalty amount for facility noncompliance which, after imposition of a lower level penalty amount, becomes sufficiently serious to pose immediate jeopardy.

* * * * *

■ 10. Section 488.440 is amended by revising paragraphs (b) and (c) to read as follows:

§ 488.440 Civil money penalties: Effective date and duration of penalty.

* * * * *

(b) The per day civil money penalty is computed and collectible, as specified in § 488.431, § 488.432, and § 488.442 for the number of days of noncompliance until the date the facility achieves substantial compliance, or, if applicable, the date of termination when —

(1) The determination of noncompliance is upheld after a final administrative decision for NFs-only subject to civil money penalties imposed by the state or for civil money penalties imposed by CMS that are not collected and placed into an escrow account;

(2) The facility waives its right to a hearing in accordance with § 488.436; or

(3) The time for requesting a hearing has expired and CMS or the State has not received a hearing request from the facility.

(c)(1) For NFs-only subject to civil money penalties imposed by the State and for civil money penalties imposed by CMS that may not be placed in an escrow account, the entire penalty, whether imposed on a per day or per instance basis, is due and collectible as specified in the notice sent to the provider under paragraphs (d) and (e) of this section.

(2) For SNFs, dually-participating SNF/NFs, or NFs subject to civil money penalties imposed by CMS, collection is made in accordance with § 488.431.

* * * * *

■ 11. Section 488.442 is amended to remove and reserve paragraph (b) and revise paragraphs (a), (e)(1), and (f) to read as follows:

§ 488.442 Civil money penalties: Due date for payment of penalty.

(a) *When payments are due for a civil money penalty.* (1) Payment for a civil money penalty is due in accordance with § 488.431 of this chapter for CMS-imposed penalties and 15 days after the State initiates collection pursuant to § 488.432 of this chapter for State-imposed penalties, except as provided in paragraphs (a)(2) and (3) of this section.

(2) *After a request to waive a hearing or when a hearing was not requested.* Except as provided for in § 488.431, a civil money penalty is due 15 days after receipt of a written request to waive a hearing in accordance with § 488.436 or 15 days after the time period for requesting a hearing has expired and a hearing request was not received when:

(i) The facility achieved substantial compliance before the hearing request was due; or

(ii) The effective date of termination occurs before the hearing request was due.

(3) *After the effective date of termination.* A civil money penalty payment is due 15 days after the effective date of termination, if that date is earlier than the date specified in paragraph (a)(1)of this section.

(b) [Reserved]

* * * * *

(e) * * *

(1) Medicare-participating facilities are deposited and disbursed in accordance with § 488.433; and

* * * * *

(f) *Collection from dually participating facilities.* Civil money penalties collected from dually participating facilities are deposited and disbursed in accordance with § 488.433 and returned to the State in proportion commensurate with the relative proportions of Medicare and Medicaid beds at the facility actually in use by residents covered by the respective programs on the date the civil money penalty begins to accrue.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare Supplementary Medical Insurance Program)

Dated: December 22, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: February 17, 2011.

Kathleen Sebelius,

Secretary.

[FR Doc. 2011–6144 Filed 3–17–11; 8:45 am]

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Part IV

Department of Labor

Employment and Training Administration
20 CFR Part 655

Wage and Hour Division
29 CFR Part 503

Temporary Non-Agricultural Employment of H–2B Aliens in the United States; Proposed Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 503

RIN 1205–AB58

Temporary Non-Agricultural Employment of H–2B Aliens in the United States

AGENCY: Employment and Training Administration, and Wage and Hour Division, Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The Department of Labor (the Department or DOL) proposes to amend its regulations governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. This Notice of Proposed Rulemaking (NPRM or proposed rule) proposes to revise and solicits comments on the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2B status. The Department also proposes to create new regulations to provide for increased worker protections for both U.S. and foreign workers and enhanced enforcement under the H–2B program.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before May 17, 2011. Interested persons are invited to submit comments on the proposed H–2B registration form mentioned herein; comments must be received on or before May 17, 2011.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB58, by any one of the following methods:

- *Federal e-Rulemaking Portal www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *Mail or Hand Delivery/Courier:* Please submit all written comments (including disk and CD–ROM submissions) to Michael Jones, Acting Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–5641, Washington, DC 20210.

Please submit your comments by only one method. Comments received by means other than those listed above or that are received after the comment period has closed will not be reviewed. The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public on the *http://www.regulations.gov* Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments through the *http://www.regulations.gov* Web site.

Docket: For access to the docket to read background documents or comments received, go the Federal eRulemaking portal at *http://www.regulations.gov.* The Department will also make all the comments it receives available for public inspection during normal business hours at the Employment and Training Administration (ETA) Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as an electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693–3700 (VOICE) (this is not a toll-free number) or 1–877–889–5627 (TTY/TDD).

FOR FURTHER INFORMATION CONTACT: For further information on 20 CFR part 655, subpart A, contact William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

For further information on 29 CFR part 503, contact Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3510, Washington, DC 20210; Telephone (202) 693–0406 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR Part 655 Subpart A

A. Statutory Standard and Current Department of Labor Regulations

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H–2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary non-agricultural labor or services for which "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b). Section 214(c)(1) of the INA requires DHS to consult with appropriate agencies before approving an H–2B visa petition. 8 U.S.C. 1184(c)(1). The regulations for the U.S. Citizenship and Immigration Services (USCIS), the agency within DHS which adjudicates requests for H–2B status, require that an intending employer first apply for a temporary labor certification from the Secretary of Labor (the Secretary). That certification informs USCIS that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6). A certification from the Secretary currently is not required for H–2B employment on Guam, for which certification from the Governor of Guam is required. 8 CFR 214.2(h)(6)(iii).

The Department's regulations at 20 CFR part 655, Subpart A, "Labor Certification Process for Temporary Employment in Occupations other than

Agriculture or Registered Nursing in the United States (H–2B Workers),'' govern the H–2B labor certification process, as well as the enforcement process to ensure U.S and H–2B workers are employed in compliance with H–2B labor certification requirements. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in ETA, the agency to which the Secretary of Labor has delegated her responsibilities described in the USCIS H–2B regulations. Enforcement of the attestations made by employers in the course of submission of H–2B applications for labor certification is conducted by the Wage and Hour Division (WHD) within the Department of Labor, to which DHS on January 16, 2009 delegated enforcement authority granted to it by the INA. 8 U.S.C. 1184(c)(14)(B).

Under the current regulations, an employer seeking to fill job opportunities through the H–2B program must demonstrate that it has a temporary need for the services or labor, as defined by one of four regulatory standards: (1) A one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). Generally, that period of time will be limited to 1 year or less but, in the case of a one-time occurrence, could last up to 3 years, consistent with the standard under DHS regulations at 8 CFR 214.2(h)(6) as well as current Department regulations. *See* 20 CFR 655.6(b).

Before 2008, the Department's regulatory scheme was minimal; the process was governed primarily through program guidance issued by ETA, with enforcement by WHD only of independently applicable laws such as the Fair Labor Standards Act (FLSA). Before 2007, ETA processing was governed primarily by General Administration Letter No. 1–95, 60 FR 7216, Feb. 7, 1995, which laid out the processing of applications, first at the State Workforce Agency (SWA), then at the Federal level. Applications were filed first with the SWA, allowing them to review the applications, oversee the conduct of recruitment of potential U.S. workers, review the results, and then forward the application to OFLC with a recommendation of whether to approve or deny the application. ETA issued Training and Employment Guidance Letter (TEGL) No. 21–06, 72 FR 19961, Apr. 20, 2007, to replace the previous guidance for the processing of H–2B applications.

In January 2005, DHS and the Department issued companion NPRMs to significantly revise each agency's H–2B processing procedures. 70 FR 3984, Jan. 27, 2005; 70 FR 3993, Jan. 27, 2005. This set of proposed rules suggested an attestation-based approach to adjudication, sending applications directly to USCIS with enhanced enforcement by the Department. The two agencies received significant opposition to these proposals. The Department withdrew its proposed rule as a result of these comments. See *http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117.*

In 2008, the Department again proposed regulations employing an attestation-based filing model. See 73 FR 29942, May 22, 2008. In this proposed model, SWAs no longer oversaw recruitment, instead allowing the employer to conduct its recruitment with no direct Federal or state oversight. This attestation-based model meant that OFLC could only review certain aspects of compliance with the regulations through post-certification audits rather than through the recruitment process, although the recruitment process itself was not dissimilar and the employers were performing the same activities as they would be with a SWA's assistance and oversight. The proposed regulation also provided for enforcement by WHD through investigation and findings, leading to the imposition of civil money penalties and other actions. These regulations were proposed in light of (1) considerable workload increases for both the Department and the SWAs (an approximate 30 percent increase in applications in Fiscal Year (FY) 2007 over those received in FY 2006, and a similar increase during the first half of FY 2008); (2) limited appropriations funding for program-related operations, both at the Federal and SWA levels; and (3) frequent and increasing comments from the user community that the process was cumbersome, complicated, time-consuming, and inefficient. These proposed regulations were a substantial shift from the administration of the program which provided for greater SWA involvement in the application and recruitment process. The Department received substantial comment on the proposed rule, and issued a Final Rule on December 19, 2008 (the 2008 Final Rule), which became effective January 18, 2009. See 73 FR 78020, Dec. 19, 2008.

Under the current attestation-based processing model, before filing an application to seek H–2B workers, an employer must first recruit U.S. workers to ensure an adequate test of the labor market for the position. In addition, the employer must offer and subsequently pay throughout the period of employment a wage that is equal to or higher than the prevailing wage for the occupation in the area of intended employment; provide terms and conditions of employment that are not less favorable than those offered to the foreign worker(s); and contact any previously laid-off workers.

One important change in the 2008 Final Rule was its inclusion of enforcement authority for the Department. Before 2008, the Department had no H–2B specific enforcement authority or process to ensure employer compliance with H–2B labor certifications. Congress vested DHS with that enforcement authority in 2005. See 8 U.S.C. 1184, as amended by the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Public Law 109–13, 119 Stat. 231. That legislation authorized DHS to delegate this enforcement authority to the Department and DHS subsequently made that delegation. The 2008 Final Rule instituted an H–2B regulatory enforcement regime based upon DHS's delegation.

On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania in *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), invalidated various provisions of the Department's 2008 Final Rule and remanded the case to the Department to correct its errors. The court ruled that the Department had violated the Administrative Procedure Act when it did not adequately explain its reasoning for using skill levels as part of the H–2B prevailing wage determination process, and that it failed to consider comments relating to the choice of appropriate data sets in deciding to rely on Occupational Employment Statistics survey data rather than Davis Bacon Act and Service Contract Act wage data in setting the prevailing wage rates. The court ordered the Department to "promulgate new rules concerning the calculation of the prevailing wage rate in the H–2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order." *CATA* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010). The Department began a separate rulemaking process to address the prevailing wage calculation and, on January 19, 2011, finalized its new prevailing wage calculation methodology in Wage Methodology for the Temporary Non-agricultural Employment H–2B Program Final Rule, 76 FR 3452 (Jan. 19, 2011). This NPRM does not address the matters in the Prevailing Wage Final Rule, and

commenters should not address those matters in this proceeding. However, commenters may wish to consider the content of that rule in fashioning their comments to the NPRM since the prevailing wage determination system set forth in the Prevailing Wage Final Rule will be applied to the final rule that results from this NPRM.

Additionally, the court invalidated and vacated 20 CFR 655.22(k) insofar as that provision permits the clients of job contractors to hire H–2B workers without submitting an application to the Department. As a result, the Department no longer accepts H–2B labor certification applications filed solely by job contractors.

Lastly, the court invalidated the following provisions on the ground that the Department did not provide a rational explanation of its policy choices: (1) 20 CFR 655.15(g) concerning the situations in which H–2B employers must contact unions as a potential source of labor; (2) the portion of 20 CFR 655.4 defining "full time"; and (3) the portion of 20 CFR 655.4 defining "job contractor" to mean an entity that "will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers." In this NPRM, the Department is proposing a new provision at section 655.44 specifying when H–2B employers must contact unions as a potential source of labor and a new definition of "full time" at section 655.5 and 29 CFR 503.4 and is thereby proposing to abandon the particular union contact and full time provisions that were invalidated by the court. The Department is also proposing a slightly modified definition of job contractor based on the invalidated definition; however, the Department has provided an explanation in section 655.5 of the preamble which clarifies the rationale for the underlying definition and its modification.

B. The Need for Rulemaking

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H–2B program. The Department believes that the policy underpinnings of the 2008 Final Rule, *e.g.* streamlining the H–2B process to defer many determinations of program compliance until after an application has been adjudicated, do not provide an adequate level of protection for either U.S. or foreign workers. These protections are essential to meet the regulatory mandate to prevent adverse effect on wages and working conditions for U.S. workers and to ensure access to jobs for U.S. workers in order to satisfy the statutory requirement that certifications be granted only if no U.S. workers are available.

First, there are insufficient worker protections in the current attestation-based model in which employers merely assert, and do not demonstrate, that they have performed an adequate test of the U.S. labor market and one which is in accordance with the regulations. Further, in the first year of the operation of the attestation-based system our experience indicates that employers are attesting to compliance with program obligations with which they have not complied, and that employers do not appear to be recruiting, hiring and paying U.S. workers, and in some cases the H–2B workers themselves, in accordance with established program requirements. Cases audited after certification by the OFLC in the 2 years since the adoption of an attestation-based program demonstrate a pattern of non-compliance or avoidance of demonstrating compliance. In the first round of audits conducted, which was primarily a random sample of cases, the Department found that 52 percent of employers that had attested to compliance with regulatory obligations were in fact not in compliance with those obligations. A second round demonstrated a higher level of compliance, but in total, the audited cases demonstrate a level of compliance of only 55 percent. The violations included evidence of both H–2B and U.S. workers being offered less than full-time work; misrepresentations as to the work time that was actually offered or the number of workers actually needed; workers being paid less than the prevailing wages; and U.S. workers being rejected for other than lawful, job-related reasons, such as not having a commercial driver's license when one is not required to perform the job. The identified violations come from different geographical sectors and relate to both new and experienced filers. The most disturbing evidence of non-compliance is, however, a lack of response from many of those audited—indicating anything from a company that does not exist (evidenced by returned mail) to an employer seeking to avoid liability by simply not informing the Department of its errors.

There has also been increasing evidence in the H–2B program of violations rising to the criminal level. The Department has seen increasing evidence of employers and agents filing fraudulent applications—involving hundreds or thousands of requested employees—for non-existent job opportunities. *U.S.* v. *Broyles,* 2:09-cr-00003–MSD–TEM–23 (E.D. Va. 2010) (conspiracy to conspiracy to fraudulently obtain H–2B visas), *U.S.* v. *Barbugli,* 6:10-cr-00177–MSS–DAB, 6:10-mj-01089–KRS, 6:10-cr-00180–MSS–GJK (C.D. Fl. 2010) (three family members guilty for operations involving a labor staffing company obtaining fraudulent H–2B visas through more than 11 subsidiary companies), and *U.S.* v. *Manuel*, 9:10-cr-80057–KAM (S.D. FL. 2010) (false statements and conspiring to hold approximately 39 Filipino nationals in forced service to work in H–2B status in country clubs and hotels in Southeast Florida) represent the most recent criminal actions involving H–2B applications filed for fraudulent job opportunities or containing false information at odds with the treatment actually received by the workers. Moreover, the General Accountability Office (GAO) released a report in September 2010 summarizing a review of ten concluded criminal and civil cases covering the previous 5 years involving H–2B employers and recruiters. These cases demonstrated violations of various labor laws or the settlement of alleged violations such as wage and/or overtime violations; charging of fees by employers; and the submission of fraudulent documentation to obtain visas and other government benefits. The Department cannot ignore this rise in successful criminal and civil prosecutions which demonstrate the abuse of the H–2 program; while the attestation-based model may not be a direct cause of the types of action resulting in these criminal charges, the model provides more of an opportunity for such actions to occur and remain undetected.

The steps offered in this proposed rule cannot entirely eliminate the concerns the Department has with an attestation-based application model. The evidence of non-compliance under such a model is, however, sufficient in the Department's view to warrant steps to ensure that employers who comply in good faith can do so while those who have no intent to uphold their obligations have a decreased opportunity to defraud the program. In eliminating the attestation-based application model, the Department also increases the efficiency of the program, by ensuring applications with potential violations can be addressed before recruitment or certification, rather than requiring the more drastic potential for debarment after audit.

In light of such non-compliance the Department has chosen to revisit the use of attestations, notwithstanding the use of post-certification program integrity measures. Increased enforcement such as that proposed in this NPRM, although

essential to a viable H–2B program, is not sufficient to ensure protection of workers in H–2B occupations who constitute a particularly vulnerable subgroup of the workforce. Rather, the most reliable method by which the Department can ensure compliance with the regulatory requirements is through the review of compliance through documentation provided to the Department in advance of the certification determination, rather than during the audit process. In addition to communicating to all the parties to the process the need to comply with those obligations, this review deters bad actors in the program from making false statements and also reinforces program requirements for those who are new to the program or unable to adequately discern their program obligations. To the extent that employers have incorrectly attested to compliance with program requirements through ignorance or misunderstanding of those requirements, the compliance-based model will identify those problems in the review of the application and offer the employer an opportunity to correct its error without penalty or delay in meeting its date of need.

Although the Department still seeks to maintain an efficient system, it has in this new rule struck a balance between reducing processing times and protecting U.S. worker access to these job opportunities. The structured time frames for the processing of applications set forth in the proposed rule help the agency to strike that vital balance. We would emphasize that the return to the certification model which was used in the program for its entire history until January 2009, and which was recently reintroduced into the H–2A program, creates no significant additional burdens on employers. It does not change the nature of the obligations with which employers must comply, or the documentation that employers must maintain, but merely adjusts the timing and circumstances under which that documentation, the evidence of compliance with those obligations, must be produced for review. While this change produces no additional burden on employers, it will substantially enhance overall program integrity by allowing the Department to identify potential problematic applications at the earliest possible time. It is also much less onerous on employers to be required to amend a deficient or incomplete application before it is certified, than to subject the employer to the potential for back pay, civil money penalties or debarment if the deficiencies in the application are not identified until the job opportunity is gone.

The Department, however, is aware that in certain instances, employers would prefer a continuation of an attestation-based application process. Using an attestation-based application, applications would be streamlined and employers may be able to obtain some cost savings from not being required to duplicate and send documentation demonstrating compliance along with the application. Many employers have indicated to the Department the preference for a streamlined application system, with more of an emphasis on enforcement for compliance on the back end. This is the model that was put into place in the 2008 Final Rule and has support of many employers.

The Department remains concerned, however, whether its goals of ensuring compliance (both up-front compliance by those unfamiliar with program requirements and for those engaged in deliberate disregard for program obligations) can be met through increased program compliance assistance and post-certification enforcement. This is particularly true in a temporary worker program, where non-compliance would likely be identified through enforcement efforts well after the impacted H–2B workers have returned to their home country or the U.S. workers were already denied employment.

While a compliance demonstration model remains the Department's preferred alternative and as such is reflected in the proposed regulatory text, the Department proposes dual consideration of an alternative retaining the current attestation-based application system. The Department is interested in receiving comments on the alternative of maintaining the current or some modification of the current attestation-based program design. Specifically, the Department is seeking comments on whether it should develop certain attestations which can be required of all employers (such as an attestation for certain kinds of recruitment), or for only certain program compliance requirements. In order to provide information to address the Department's concerns, comments on any attestation alternative should focus on the following:

1. What kind of specific guidance could the Department provide that would benefit a first-time (or sporadic) employer in the H–2B program to avoid mistakes in making attestations of compliance with program obligations?

2. What kind of guidance would benefit frequent users of the program with respect to repetitive errors in recruitment? What kind of guidance would be beneficial in avoiding errors in unique situations for these users?

3. Could pre-certification audits augment a post-certification audit in an attestation-based program model? If not, how would you propose the Department obtain information in the absence of supervised activity in order to arrive at certification while ensuring compliance with program obligations?

4. What additional sanctions could be taken against employers to ensure compliance with program requirements, given the potential for fraud in the H–2B program?

5. What other kinds of actions could the Department take to prevent an H–2B employer from filing attestations that do not meet program requirements?

Accordingly, in order to adequately protect U.S. and H–2B workers, the Department proposes the changes discussed below, including the proposal of a new 29 CFR part 503 to set forth WHD's investigative and enforcement roles. The Department is engaging in this new rulemaking to provide the public with notice and opportunity to comment on the H–2B program.

The NPRM seeks to help employers meet legitimate short-term temporary labor needs where and when there are no available U.S. workers. Over the years as the program has evolved, stakeholders in diverse industries throughout the country repeatedly have expressed concerns that some employers were inappropriately using H–2B workers for job opportunities that were permanent, thereby denying U.S. workers the opportunity for long-term employment. These employers' actions are at the detriment of other employers with a legitimate temporary need that are ultimately denied access to the program due to the statutory limitation on available visas. By preventing employers with a long-term permanent need from participating in the H–2B program, the Department would provide employers with genuine unmet temporary needs with a greater opportunity to participate in the program. Similarly, the proposed requirement that employers provide a single date of need or start date for the workers ensures that employers with legitimate temporary needs will have a better chance of receiving available visas in years in which the demand exceeds the supply.

The Department's proposal to bifurcate the current application process into a registration phase which addresses the employer's temporary need and an application phase which addresses the labor market test will enable the Department to prevent

employers without a legitimate temporary need from even filing an application. The current process where the adjudication of temporary need is concurrent with the evaluation of the labor market test often results in delays in processing employer applications for H–2B labor certifications. The Department believes that bifurcating this process will facilitate the timely processing of applications. This bifurcation allows the employers to conduct the labor market test closer to the date of need without the simultaneous adjudication of temporary need. Because the registration may be valid for up to 3 years, employers will be able to commence the process at the second phase without having to re-establish temporary need for the second and third years of registration, absent significant change in conditions, saving employer and public resources from re-adjudication of an obvious legitimate need. Additionally, removing employers without demonstrable temporary need from the application process further enables the Department and the SWAs to focus their limited resources on administering in a timely manner the labor market test. A registration process enables the Department to better serve the employers with legitimate temporary need, as well as the public by being able to focus on ensuring that U.S. workers are afforded full access to these job opportunities.

As part of the Department's commitment to openness and public input, DOL reached out to stakeholders, including employers, labor unions, advocates and other Federal agencies to learn more about their experiences with the H–2B program and hear their views on how the program can be improved to meet temporary labor needs, while ensuring U.S. worker access to the job opportunities and providing sufficient worker protections to both U.S. and H–2B workers. These listening sessions included targeted immigration sessions at the full-day Stakeholder Forum convened by WHD in Washington, DC and attended by hundreds of representatives from business, labor and other stakeholders, as part of its annual strategic planning process. These meetings provided the Department with a wealth and diversity of experience and views that helped better inform the drafting process. The Department hopes that the interested parties review this proposal and continue to engage and provide feedback and comments that are essential to ensuring an effective and workable final rule.

II. Discussion of 20 CFR Part 655, Subpart A

A. Introductory Sections

1. Section 655.1 Scope and Purpose of Subpart A

This proposed provision informs program users of the statutory basis and regulatory authority for the H–2B labor certification process. This provision describes the Department's role in receiving, reviewing, adjudicating, and upholding the integrity of an *Application for Temporary Employment Certification.*

2. Section 655.2 Authority of Agencies, Offices and Divisions in the Department of Labor

The Department proposes in this provision to describe the authority of and division of activities related to the H–2B program among the Department's agencies. It discusses the authority of OFLC, the office within ETA that exercises the Secretary's responsibility for determining the availability of U.S. workers and whether the employment of H–2B nonimmigrant workers will adversely affect the wages and working conditions of similarly employed workers. It also discusses the authority of WHD, the agency responsible for investigation and enforcement of the terms and conditions of H–2B labor certifications, as delegated by the DHS.

3. Section 655.3 Territory of Guam

As in the 2008 Final Rule, under the proposed rule, the granting of H–2B labor certifications and the enforcement of the H–2B visa program in Guam will continue to reside with the Governor of Guam, pursuant to DHS regulations. However, this regulation proposes that the determination of all prevailing wages should be housed in the Department, including those for Guam. The function determining a prevailing wage for construction workers on Guam has most recently been housed with USCIS, which consults with the Governor of Guam as to the admission of H–2B construction workers on Guam. 8 CFR 214.2(h)(6)(iii). DHS and the Department are in agreement that issuing prevailing wages for all workers, including construction workers, would more appropriately be performed by the Department, specifically by the OFLC, because OFLC already provides prevailing wage determinations for all other U.S. jurisdictions. The Department, therefore, is proposing that the process for obtaining a prevailing wage in proposed section 655.12 also apply to H–2B job opportunities in Guam. Employment opportunities in Guam would, under the proposed rule, be subject to the same process and methodology for calculating prevailing wages as any other jurisdiction within the Department's purview.

4. Section 655.4 Special Procedures

The proposed rule continues the Department's authority to establish, continue, revise, or revoke special procedures that establish variations for processing certain H–2B *Applications for Temporary Employment Certification.* These are situations where the Department recognizes that variations from the normal H–2B labor certification processes are necessary to permit access to the program for specific industries or occupations. These variations permit access to the program for those who would otherwise be unable to readily comply with the program's established processes, such as by allowing itinerary employment for reforestation employers and certain employers in the entertainment industry. Under the proposed rule, as with the 2008 Final Rule, special procedures already in place on the effective date of the regulations will remain in force until otherwise modified or withdrawn by the Department.

5. Section 655.5 Definition of Terms

Although the Department proposes a number of changes to the definitions section from the definitions contained in the 2008 Final Rule, many of the changes are to clarify meanings in minor ways that do not substantively change the meaning of the term. However, some substantive changes to definitions are also proposed.

The Department proposes to add a reference to the definition of "agricultural labor or services" from its own regulations governing H–2A temporary agricultural employment in order to assist in clarifying what non-agricultural employment is, by defining what it is not. The distinction between agricultural and non-agricultural employment is defined in part by the H–2A temporary agricultural regulations, drawn from the express authorization of the Department to define what constitutes agricultural labor or services. The Department is also offering a definition of "non-agricultural labor or services" as any type of employment that is not agricultural in nature.

The Department proposes to add the definition of "area of substantial unemployment" to the H–2B program. As will be discussed more fully below, employers seeking H–2B workers in areas of substantial unemployment may

be subject to enhanced recruitment based on the Certifying Officer's (CO) discretion. Further discussions of how the Department has derived the definition of "area of substantial unemployment" can be found in ETA's Training and Employment Guidance Letter No. 1–08, Aug. 20, 2008.

The Department proposes to amend the definition of an "attorney" to reflect the scope of activities attorneys can perform under the program.

The Department proposes to amend the definition of "Certifying Officer" to clarify that the Administrator, OFLC is the National CO.

The Department proposes to include the definition of "corresponding employment" under these H–2B regulations to more accurately reflect the DHS regulatory requirement that, as a condition for approval of H–2B petitions the Secretary certify that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6). To ensure that U.S. workers are not adversely affected by the employment of H–2B workers, the Department proposes to require that employers provide to workers engaged in corresponding employment at least the same protections and benefits as those provided to H–2B workers (except for border crossing and visa fees which would not be applicable). Like the definition of corresponding employment in the H–2A program, "corresponding employment" is defined as the employment of workers who are not H–2B workers by an employer whose H–2B Application was approved by OFLC in any work included in the job order, or any work performed by the H–2B workers during the validity period of the job order. Workers in "corresponding employment" may be either workers hired during the recruitment process on an H–2B job order or workers who already work for an employer who perform the same work as H–2B workers.

Historically, there has been a recognition that U.S. workers should not be treated less favorably than temporary foreign workers. For example, a 1980 Senate Judiciary Report on Temporary Worker Programs stated that U.S. employers were required to offer domestic workers wages equal to foreign workers as a prerequisite for labor certification. See Congressional Research Service: "Report to the Senate Committee on the Judiciary: Temporary Worker Programs: Background and Issues, 53 (1980)." Current § 655.22(a) reflects this principle, requiring that the terms and conditions of offered employment cannot be less favorable than those offered to H–2B workers. This provides for equal treatment of workers hired during the H–2B recruitment process. However, the current regulation does not encompass all workers who may be engaged in work performed by H–2B workers during the validity of the job order.

Courts have consistently upheld the Department's interpretation that the wages and benefits offered or provided to H–2A agricultural workers must also be provided to domestic workers. See *Farmer* v. *Employment Security Comm'n of N.C., 4 F.3d 1274, 1276, nn. 2, 3, 4 (4th Cir. 1993)* (H–2A employers must make certain benefits available to all temporary agricultural laborers); see also *Williams* v. *Usery, 531 F.2d 305, 306 (5th Cir. 1976)* (the Secretary's authority is limited to making an economic determination of what rate must be paid all workers to neutralize any adverse effect resulting from the influx of temporary foreign workers). Similarly, in the H–2B non-agricultural context, paying the prevailing wage rate to all workers protects against possible wage depression from the introduction of foreign workers.

Further, under the current H–2B regulations, since employees hired during the current ten-day recruitment period in § 655.15(e) are entitled to the same offered terms and conditions of employment as the foreign workers hired for those positions, a longtime employee earning less than the advertised wage would be entitled to quit his current employment and re-apply for the same job with the same employer to obtain the higher wage rate offered to H–2B workers and U.S. workers hired during that recruitment period. This would be disruptive for the employer and could create an additional administrative burden for the SWAs for any workers being referred through them. It also puts too high a premium on longtime employees understanding their rights under the regulations, and feeling secure enough—rare in low-wage employment—to quit a job with the expectation of being immediately rehired. Under this NPRM, longtime U.S. workers would be entitled to the wage rates paid to H–2B employees without having to quit their jobs and be rehired.

The H–2B program must ensure that U.S. workers are not adversely affected by the presence of H–2B workers in the labor market. A primary means of providing this protection is to ensure that the jobs are available to U.S. workers under the same wages, benefits, and terms and conditions of employment provided to temporary foreign workers. The problem we seek to address with this aspect of corresponding employment are H–2B employers who place H–2B workers in occupations and/or at job sites outside the scope of the labor certification and in violation of the regulations, thereby bypassing many of the protections U.S. workers otherwise enjoy under the program, such as domestic recruitment requirements, wage protections, and the right to be employed if available and qualified. We invite comments that propose alternatives to including in the definition of corresponding employment U.S. workers employed in occupations which are beyond the scope of the labor certification but at job sites where H–2B workers are placed and that will still ensure that U.S. worker protections are not undermined.

An employer employing H–2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the conditions in this section. The Department also invites members of the public to provide comments on whether and how each new proposed condition, including the application of transportation benefits, the three-quarter guarantee and the definition of full-time employment, should apply to H–2B workers and U.S. workers in corresponding employment.

The Department proposes to retain the definition of "employee" from the 2008 Final Rule, with minor clarifying edits. This definition is based on the common law, as set forth in the Supreme Court's holding in *Nationwide Mutual Insurance* v. *Darden,* 503 U.S. 318, 322–324 (1992). The proposed clarifying edits would conform the definition to one used in most other Department-administered temporary foreign worker programs. To provide clarity, the Department proposes a definition of the term "H–2B worker" as an individual authorized to be in the United States to perform H–2B non-agricultural services or labor.

The Department proposes to amend the definition of "full time" in the H–2B program to mean 35 or more hours per week. The proposed increase in the number of hours from 30 to 35 to constitute full-time employment conforms more closely to the available data on full-time employment. This will also provide greater clarity for employers than the current regulation, which defines full time to mean 30 hours or more per week with a vague exception for unidentified local or

industry standards. The proposal also restores the pre-2008 level of 35 hours.

The District Court in *CATA* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), invalidated the definition in the 2008 H–2B Final Rule of full time as 30 hours a week, which was a change from the proposed definition of full time as 35 hours a week primarily because, in the court's view, the Department did not "consider[ ] the relevant factors and articulate[ ] a rational connection between the facts found and the choice made." CATA, 2010 WL 3431761 at * 14 (quotation and citation omitted).

In accord with the CATA decision, the Department believes that the regulatory definition of full-time work should be supported by empirical data. In response to these data, the Department's position regarding the definition of full time has evolved. Though the 2008 Final Rule established a 30-hour work week as the standard for full time employment, the CATA court correctly pointed out that the 2008 Final Rule contained no meaningful rationale for that determination. After reviewing available information, the Department now believes that a 35-hour work week is more representative of the actual needs of employers and expectations of workers. First, the most recent statistics available from BLS indicate that the average hours worked during a week, including both full and part time employment was 34.3 hours during December 2010, [1] and that the average weekly hours worked of workers who usually work full time is 42.4 hours. [2] These statistics make clear that full time U.S. workers are employed for at least 35 hours per week. The last two years of experience under the current rule are consistent with the direction of BLS data. Though an exhaustive statistical analysis of hours requested is not feasible, it is clear that a substantial majority of H–2B employers recruit workers for 35 or more hours of work each week. All of the approximately 30 investigations undertaken by the WHD since enforcement authority was transferred from DHS have identified work weeks of at least 35 hours (with some even indicating possible overtime). In addition, as noted in the preamble to the current H–2B regulations, landscapers—one of the largest groups of H–2B workers—typically work 35-hour weeks. *See* 73 FR 78038 (Dec. 19, 2008). Defining a workweek as at least 35 hours is consistent with existing H–2A regulations, and it is closer to the 40 hours per week standard used in the H–1B program. Furthermore, the use of the 35-hour week may increase the possibility of recruiting U.S. workers who may find the additional hours of work more attractive.

The Department anticipates that this change will not impose substantial cost on most employers. Since the data and experience referenced above indicated that a substantial majority of H–2B employers already employ workers for 35 hours or longer each week, the proposed rule will have no impact on a large proportion of the employer population. Furthermore, 66 percent of employers in FY2010 requested at least ten employees to work in the same occupation in the same area of intended employment, suggesting that some employers can avoid any adverse impact by requesting fewer workers and scheduling each to work several more hours per week. The Department seeks comments on costs to employers and other stakeholders of an increase from 30 to 35 hours per week.

Alternatively, the Department considered proposing a 40-hour threshold. This level is more in line with what the U.S. labor market generally considers as full time. Forty hours is also reflective of data actually captured by the December 2010 BLS Current Population Survey (CPS) concluding that the average workweek of non-agricultural workers who usually work full time is 42.4 hours long.[3] The Department is currently proposing 35 hours instead of 40 because 35 hours is more consistent with the Department's historical practice for the H–2B program, and should therefore not pose difficulty for the regulated community. However, the Department welcomes comments regarding whether extending the definition of a full-time workweek to at least 40 hours is more protective of U.S. workers and whether it conforms better to employer standards and needs.

The Department proposes to amend the definition of an "H–2B petition" to clarify that the petition includes the certified *Application for Temporary Employment Certification* and its attachments. This more closely reflects the Department of Homeland Security's current H–2B regulations, in which a certified *Application for Temporary Employment Certification* is required.

In this NPRM, the Department proposes to amend the definition of a "job contractor." The U.S. District Court for the Eastern District of Pennsylvania in *CATA* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) invalidated the definition of "job contractor" under the 2008 Final Rule, concluding that the Department did not provide a rational explanation for its adoption of the language in the final rule that the job contractor "will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers." The court found the Department's explanation deficient because the Department stated that this language was to "make clear that the job contractor, rather than the contractor's client, must control the work of the individual employee." However, as the court stated, this language "did precisely the opposite—it clarified that it is the contractor's client who 'must control the work of the individual employee.' The explanation is therefore not rationally connected to the change, which will accordingly be invalidated as arbitrary."

Accordingly, the Department would like to resolve any confusion and clarify that the phrase "the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying and firing the workers" was intended to clarify that an employer meets the definition of job contractor where the job contractor's client, rather than the job contractor, exercises primary supervision or control over the work of the individual employee.

The Department is proposing to amend the definition of job contractor to include the phrase "substantial, direct day-to-day" before "supervision or control" to clarify that an entity exercising some limited degree of supervision or control over the H–2B workers would still be considered a job contractor, while an entity exercising substantial, direct day-to-day supervision or control over the H–2B workers would not be considered a job contractor. This revised definition better reflects the activities of job contractors in the H–2B program.

The Department is not of the view that employers engaged in reforestation activities that have historically used the program will be impacted by this proposed action because their activities generally should not fall under the definition of a job contractor. Reforestation employers provide on site,

[1] Bureau of Labor Statistics, *Employment Situation,* Table B–2: Average weekly hours and overtime of all employees on private nonfarm payrolls by industry sector, seasonally adjusted, Dec. 2010. *http://www.bls.gov/news.release/empsit.t18.htm.*

[2] Bureau of Labor Statistics, *Employment Situation,* Table A–24: Persons at work in agriculture and related and in nonagriculture industries by hours of work, Dec. 2010. *http://www.bls.gov/web/empsit/spseea24.pdf.*

[3] Bureau of Labor Statistics, *Employment Situation,* Table A–24: Persons at work in agriculture and related and in nonagriculture industries by hours of work, Dec. 2010. *http://www.bls.gov/web/empsit/spseea24.pdf.*

day-to-day supervision and direction of workers and are therefore not job contractors for the purposes of this proposed rule.

The Department also proposes an amended definition of the "offered wage." The amended definition makes clear the employer's obligation to pay all affected workers at least the highest of the prevailing wage, or the Federal, State, or local minimum wage.

The Department proposes to revise the definition of "strike." The term is used in the same way as in the Department's 2010 H–2A regulations. The proposed definition is broader than the current definition and includes any concerted work stoppage as a result of a labor dispute or any concerted interruption or slowdown of operation.

The Department also proposes to define several terms not previously defined in the 2008 Final Rule. The Department intends by these new definitions to provide interested parties with an understanding of terms that are either new or are commonly used in the H–2B program. As discussed more fully later in this preamble, the Department is including a definition of "H–2B Registration." See discussion of § 655.11. Other terms have been proposed to provide program users with insight to better achieve program compliance, including "job offer" and "job order." The Department proposes these definitions to ensure that employers understand the difference between the offer that is made to workers, which must contain all the material terms and conditions of the job, and the order that is the published document used by SWAs in the dissemination of the job opportunity.

The Department is including a proposed definition of a "Federal holiday" to provide clarity for employers about which holidays are included for purposes of tracking timelines that are used in this regulation. The Department proposes to move several definitions to the definition section, such as the "Administrator, OFLC," that have appeared in different sections in previous regulations to provide one place for the definition of those terms.

The Department also proposes the removal of certain definitions that are obsolete in or inapplicable to the H–2B program. The terms "representative" and "eligible worker" for example, are proposed to be eliminated, as they are no longer used.

6. Section 655.6 Temporary Need

The Department proposes an interpretation of temporary need that is directly reflective of the DHS definition of that term and of the Department's experience in the H–2B program. The DHS regulations define temporary need as a need for a limited period of time, where the employer must "establish that the need for the employee will end in the near, definable future." 8 CFR 214.2(h)(6)(ii)(B). The proposed interpretation is consistent with this approach.

The Department proposes to exclude job contractors from being considered for participation in the H–2B program. Job contractors are defined in this regulation as entities that employ workers they supply to other entities and that are generally only engaged in the hiring, firing and payment of the workers they supply; they do not control the day-to-day performance of or directly supervise the services or labor of those workers. Furthermore, they have an ongoing business of supplying workers to other entities, even if that entity's need for the services is temporary. It is the Department's view that a job contractor's ongoing need is by its very nature permanent rather than temporary and therefore the job contractor does not qualify to participate in the program. The contractor may have many clients, each of whom has a temporary need, but the contractor's need for the employees it seeks to fulfill its contracts is ongoing and therefore of a potentially permanent duration. Accordingly, the contractor's need would not be temporary.

This conclusion is consistent with the Board of Immigration Appeals' seminal decision in *Matter of Artee,* 18 I. & N. Dec 366, Interim Decision 2934, 1982 WL 190706 (BIA 1982). *Matter of Artee* established that a determination of temporary need rests on the nature of the underlying need for the duties of the position. The Board of Alien Labor Certification Appeals (BALCA) has recently further clarified the definition of temporary need in *Matter of Caballero Contracting & Consulting LLC* 2009–TLN–00015 (April 9, 2009), finding that "the main point of *Artee* * * * is that a job contractor cannot use [solely] its client's needs to define the temporary nature of the job where focusing solely on the client's needs would misrepresent the reality of the application." BALCA, in *Matter of Cajun Constructors, Inc.* 2009–TLN–00096 (October 9, 2009), also decided that an employer that by the nature of its business works on a project until completion and then moves on to another, has a permanent rather than a temporary need. The Department concurs that a job contractor that provides workers to an employer on a temporary basis, but has an ongoing need for such workers, is an entity with a permanent and not a temporary need.

As a result of the order issued by the U.S. District Court for the Eastern District of Pennsylvania in *CATA* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), the Department has stopped accepting labor certification applications submitted by job contractors. In the CATA decision, the court interpreted DHS' regulations to require every employer client of a "job contractor" as defined in the regulations at 20 CFR 655.4, to file a visa petition (and thus the underlying labor certification as well); therefore, requiring only job contractors to file a labor certification application would be contrary to DHS regulations. The proposal to eliminate job contractors altogether from the H–2B program, based on the determination that job contractors have a permanent need, effectively achieves the same result as the court's ruling in CATA since the Department has yet to receive a labor certification application from a job contractor that meets both the requirements of the CATA decision and the existing H–2B regulations.[4]

The Department's proposal regarding job contractors is based on our determination that job contractors, by their nature, have a permanent need for workers and therefore are not statutorily permitted to seek to employ H–2B workers. As stated above, the Department understands that in some circumstances the use of a job contractor may be advantageous to employers; job contractors presumably save some employers from the administrative functions of direct employment and provide their clients with useful, perhaps even cost-saving, service. However, the advantages provided to employers by using these services are not a legitimate basis for use of the H–2B program. Based on the Department's determination that job contractors have

[4] While the CATA decision did not impose an outright prohibition on the participation of job contractors in the H–2B program, the Court left open the possibility that the Department may accept a labor certification application from a job contractor if its employer-client(s) also filed applications. However, the regulation at 20 CFR 655.20(e) only allows for one H–2B labor certification application to be filed for worksite(s) within one area of intended employment for each job opportunity with an employer. The H–2B regulations though recognize joint employment and do not prohibit the filing of a single labor certification by joint employers. Therefore, under the current regulations, a job contractor and its employer-client(s) could very well file a single application as joint employers and thus be in compliance with both the CATA decision (which prohibits allowing only the job contractor to file the application) and § 655.20(e) (which prohibits the filing of multiple applications for a single job opportunity).

a permanent need for workers, it cannot transgress the temporary parameters of the program to permit employers with permanent job opportunities to apply for temporary workers. The Department recognizes that by taking this position, the result may be that some employers who have been clients of such job contractors, and who have not previously participated in the program, may now seek to do so. We encourage those employers to submit information to us about their changed circumstances as a result of this proposal, including the potential costs or savings that may result.

DHS categorizes and defines temporary need into four classifications: Seasonal need; peakload need; intermittent need; and one-time occurrence. A one-time occurrence may be for a period of up to 3 years. The other categories are limited to 1 year or less in duration.

The Department proposes to define temporary need as less than 9 months, except in the case of a one-time occurrence. The definition is in keeping with the DHS definition of temporary need, in which the "period of time will be one year or less, but in the case of a one-time event could last up to 3 years." 8 CFR 214.2(h)(6)(ii)(B). The Department believes its proposed time period is an appropriate interpretation of the "or less" limitation contained in the DHS regulations, a limitation it has always previously applied in this program. This interpretation is necessary to ensure that the program is available only for employers with truly temporary or seasonal needs. The current approach that permits temporary certifications for periods up to 10 months encompasses job opportunities that the Department believes are permanent in nature and not consistent with Congressional intent to limit H–2B visas to employers with temporary or seasonal needs. If work is performed during all four seasons of the year, either it is not temporary or seasonal, consistent with statutory intent, or it is not the same work (for example, landscape workers who also perform snow removal duties) and thus would require separate applications. Employers that have recurring needs that are longer than 9 months should not have access to the H–2B temporary worker program for those job opportunities.

In addition, the Department's experience in administering the H–2B program indicates that some employers are not appropriately characterizing the nature of their peakload need, specifically where this need is based on a short-term, as opposed to seasonal, demand. Peakload need is based on "seasonal or short-term demand" for which the employer needs to supplement its normal workforce. 8 CFR 214.2(h)(6)(ii)(A)(3). The Department is concerned that employers who cannot demonstrate a seasonal need mischaracterize a permanent need as a short-term temporary need, relying on a perceived short-term demand. Employers such as landscaping or construction companies frequently conduct year-round activities at a sustained level for the maximum allowable period of time for certification that would otherwise constitute a permanent need but for the two months when the H–2B workers return to their home countries. The slowdown in work is attributed more to the absence of H–2B workers, as opposed to an actual decrease in the demand for labor or services.

The Department is seeking comments and ideas from the public on factors or criteria that the Department should consider in determining whether the employer has a genuine peakload need based on short-term demand. In particular, the Department seeks comments on whether the Department should restrict the definition of short-term demand to one that is the direct result of climatic, environmental or other natural conditions. The Department would also appreciate comments on other alternatives limiting short-term demand to a specific time period, such as 6 months.

7. Section 655.8 Requirements for Agents

The Department has long accepted applications from agents acting on behalf of employers in the H–2B program. However, in administering the H–2B program, the Department has become concerned about the role of agents in the program, especially as to whether their presence and participation have contributed to problems with program compliance, such as the passing on of prohibited costs to employees. The Department invites the public to provide ideas and suggestions on the appropriate role of agents in the H–2B program. In particular, the Department seeks comments on whether the Department should continue to permit the representation of employers by agents in the H–2B program.

Alternatively, if the Department were to continue to accept applications from agents, the Department seeks comments on any additional requirements that should be applied to agents to strengthen program integrity. At a minimum, the Department proposes to require agents to provide copies of current agreements defining the scope of their relationships with employers to demonstrate that a bona fide relationship exists between an agent and employer. Where the agent is required under MSPA to have a Certificate of Registration, the agent must also provide a current copy which identifies the specific farm labor contracting activities that the agent is authorized to perform.

8. Section 655.9 Disclosure of Foreign Worker Recruitment

The Department proposes to require the employer and its attorney and/or agents to provide a copy of any agreements with a foreign labor contractor or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers under an *Application for Temporary Employment Certification.* The disclosure of the terms and conditions of the agreement will assist the Department in determining whether the underlying transaction raises any program compliance concerns, including whether prohibited fees are being paid or passed on by the foreign labor contractor or recruiter. Additionally, information about the identity of the international recruiters will assist the Department in more appropriately directing its audits and investigations. By disclosing to the public the names of the foreign labor contractors and recruiters used by employers and their attorneys and/or agents participating in the H–2B program, the Department seeks to provide greater transparency regarding the H–2B worker recruitment process. In particular, the Department intends to use this list of foreign labor contractors and recruiters to facilitate information sharing between the Department and public, so that where the Department believes it is appropriate, it can more closely examine applications or certifications involving a particular labor contractor or recruiter identified by members of the public to have engaged in improper behavior.

B. Prefiling Procedures

1. Section 655.11 Registration of H–2B Employers

The Department proposes requiring all employers to participate in a registration process that will allow the Department to assess the employer's claim of temporary need for non-agricultural temporary foreign workers before the employer is permitted to file an *Application for Temporary Employment Certification* to employ H–

2B workers. As discussed more fully below, the Department intends to use this process to ensure, in a manner that will facilitate the adjudication of applications, that each employer that seeks to employ temporary foreign workers in the H–2B category has a real and justifiable temporary need.

The Department proposes this registration step for a number of reasons. First, a registration process will streamline the adjudication of applications by ensuring an up-front determination of the employer's temporary need. The classification of an employer's need is a key issue in the current adjudicatory model, with significant resources employed in, and substantial frustration resulting from, the determination of whether an employer's need can be classified as temporary, and within that definition, whether it can be classified as a one-time, seasonal, intermittent, or peakload need. By requiring advance determination of the temporary need question, employers and workers seeking jobs can be assured of an application process that is closer in time to the dates of need and more focused on determining the availability of U.S. workers.

Second, the registration process will ensure a more efficient process to repeat users of the program. A registration approval that may be issued for a period of up to 3 years will allow employers to concentrate on their recruitment efforts in later years, while allowing the Department to focus on first-time or infrequent users whose program knowledge may be lacking. Slight variances in employers' underlying need will also be tolerated while significant variances (for example, an increase in the number of requested H–2B positions of more than 20 percent; a change of more than 14 days in the beginning or ending date of need; or a change in the nature of the job classification) will result in having to redetermine temporary need in accordance with § 655.11.

Under the proposed rule, an employer must file an *H–2B Registration* no fewer than 120 and no more than 150 calendar days before the date of initial need for H–2B workers. The *H–2B Registration* must be accompanied by supporting documentation showing the number of positions the employer desires to fill in the first year of registration; the period of time for which the employer needs the workers; and that the employer's need for the services or labor is non-agricultural, temporary and justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by DHS in 8 CFR 214.2(h)(6)(ii)(B) and interpreted in § 655.6. The employer is also required to sign the *H–2B Registration,* as is the employer's attorney or agent, if applicable.

Under the proposed rule, upon receiving a non-transferrable *H–2B Registration* and the accompanying documentation, the CO will, at a minimum, review the request for completeness and makes a determination based on whether the job classification and duties are non-agricultural; whether the employer's need for the services or labor to be performed is temporary in nature; whether the number of worker positions is justified; and whether the request represents a bona fide job opportunity.

The Department's proposal requires the CO to send any notice or request related to an *H–2B Registration* that requires a response from the employer by means assuring next day delivery, and that the employer's response be sent by similar means by the due date specified by the CO. The Department acknowledges that in many cases electronic mail may be the fastest way to relay correspondence and other information, and it may elect to use that method of transmission in order to ensure the fastest delivery. The proposal also allows employers to elect to use that method of delivery in their responses.

The proposed rule authorizes the CO to issue a Request for Further Information (RFI) if the CO determines the *H–2B Registration* cannot be approved as submitted. The CO may issue the RFI for a number of reasons, including but not limited to an incomplete or inaccurate ETA Form 9155; a job classification and duties that do not qualify as non-agricultural; the failure to demonstrate temporary need; and/or positions that do not constitute bona fide job opportunities. The RFI will inform the employer why the *H–2B Registration* is not sufficient for the CO to grant the registration; direct the employer to submit supplemental information or documentation in response to the RFI within 7 business days from the date of the RFI, and inform the employer that the CO will issue a Notice of Decision after reviewing the information submitted in response to the RFI. The RFI further informs the employer that a failure to comply with the RFI, including not providing all requested documentation within the specified timeframe, will result in a denial of the *H–2B Registration.* The proposed rule authorizes the CO to issue one or more additional RFIs before issuing a Notice of Decision on the employer's *H–2B Registration,* if needed.

If the CO approves the *H–2B Registration,* the CO will send the decision to the employer, and a copy to the employer's attorney or agent, if applicable, notifying the employer that it is eligible to file an *Application for Temporary Employment Certification* to employ H–2B workers in the occupational classification for the anticipated number of positions and period of need stated on the approved *H–2B Registration.* Under the Department's proposal, the CO is authorized to approve an *H–2B Registration* for a period of up to 3 consecutive years for that occupation and area of intended employment. If the CO denies the request, the decision informs the employer why the request was denied, offers the employer an opportunity to request administrative review under § 655.61, and informs the employer that if it does not request administrative review within 10 business days, the denial of the *H–2B Registration* will be final.

The Department proposes requiring all employers that file an *H–2B Registration* to retain any documents and records not otherwise submitted proving compliance with this subpart. An employer whose *H–2B Registration* is approved is required to retain all records for a period of 3 years from the final date of applicability of the *H–2B Registration.* An employer whose *H–2B Registration* is denied or withdrawn is also required to retain all records for 3 years, to be measured from the date of the final registration decision or withdrawal by the employer. The Department's regulatory mandate to ensure that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed U.S. workers serves as the basis for the Department's authority to require employers to retain records relating to their *H–2B Registration,* even if the employer's *H–2B Registration* is ultimately withdrawn or denied. While it is extremely unlikely that the Department would audit any employer who initiated activity but did not actually file an application, these records would be potentially invaluable to the Department in evaluating future *H–2B Registrations* filed by the employer as to whether the employer has a temporary need that meets the requirements of the H–2B program.

For instance, in the first year, an employer files an *H–2B Registration* in which the employer claims it has a seasonal need with dates of need from

February to November. The Department grants the *H–2B Registration,* but the employer subsequently withdraws its *H–2B Registration.* In the second year, the same employer files an *H–2B Registration* for the identical job opportunity, except that its dates of need are now from April to December. Due to the changes in dates of need, the Department may have some concerns as to the legitimacy of the employer's temporary need and thus may request the employer to provide documentation of temporary need in support of both its previous and current year's *H–2B Registration.* Especially given that any burden that would be placed on an employer would be minimal [5]— *i.e.,* the employer merely would be required to retain documents for 3 years—making these records available to the Department clearly is worthwhile to uphold the integrity of the H–2B labor certification program and to ensure optimal employment opportunities for U.S. workers and no adverse effect on the wages and working conditions of U.S. workers.

2. Section 655.12 Use of Registration of H–2B Employers

The Department proposes to permit an employer to file an *Application for Temporary Employment Certification* upon approval of its *H–2B Registration,* and for the duration of the registration's validity period, which may be up to 3 consecutive years from the date of issuance. The employer, however, may not use the same approved *H–2B Registration* to file an *Application for Temporary Employment Certification* if the employer's need for workers has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers); if the beginning or ending date of need for the job opportunity has changed by more than 14 calendar days; if the nature of the job classification and/or duties has changed; and/or if the temporary nature of the employer's need for services or labor is no longer temporary. If these changes occur, the proposed rule requires the employer to file a new *H–2B Registration.* Limiting the use of the employer's approved *H–2B Registration* in this way ensures the integrity of the registration process by requiring employers to submit a new *H–2B Registration* when the employer's circumstances change significantly.

[5] The EO 12866 analysis estimates the cost per employer to comply with document retention requirements to be not in excess of $21.99.

3. Section 655.10 Prevailing Wage

The Department proposes a modified process for obtaining a prevailing wage. In order to provide clarity, the proposed rule simplifies how an employer requests prevailing wage determinations (PWD). Under the proposed rule employers must request PWDs from the NPWC before posting their job orders with the SWA and the PWD must be valid on the day the job orders are posted. Employers should continue to request a PWD in the H–2B program at least 60 days before the date on which the determination is needed.

As discussed above, the determination of a prevailing wage has been the subject of another rulemaking, necessitated by the court's decision in *CATA* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), which culminated in the publication of the Wage Methodology for the Temporary Non-agricultural Employment H–2B Program Final Rule, 76 FR 3452, Jan. 19, 2011. This NPRM does not address or seek to amend the prevailing wage methodology established under that final rule.

4. Section 655.13 Review of PWDs

The Department proposes changes to the process for the review of PWDs for purposes of clarity and consistency. The proposed rule reduces the number of days within which the employer must request review of a PWD by the NPWC Director from 10 calendar days to 7 business days from the date of the PWD. The proposed rule revises the language of the 2008 Final Rule to reflect that the NPWC Director will review determinations. For similar reasons, the proposed rule specifies that the employer has 10 business days from the date of the NPWC Director's final determination within which to request review by BALCA. No other substantive changes were made to this section.

C. Application for Temporary Employment Certification Filing Procedures

1. Section 655.15 Application Filing Requirements

This provision sets out the basic requirements with which employers need to comply in order to file an *Application for Temporary Employment Certification* once they have an approved *H–2B Registration.* Under the proposed rule, the Department has returned to a post-filing recruitment model in order to ensure better and more thorough compliance by H–2B employers with program requirements. The Department's experience in administering the H–2B program since the implementation of the 2008 Final Rule suggests that the lack of oversight by the Department and the SWAs during the pre-filing recruitment process has resulted in failures to comply with program requirements. The recruitment model described below will enhance coordination between OFLC and the SWAs, better serve the public by providing U.S. workers more access to available job opportunities, and assist the employer in obtaining the qualified personnel that it requires in a timelier manner. The proposed rule allows the Department to work more closely with the SWAs by requiring the employer to file the *Application for Temporary Employment Certification* and a copy of the job order with the Chicago NPC at the same time it files the job order with the SWA. The employer must submit this filing no more than 90 days and no fewer than 75 days before its date of need. The proposed process continues to employ the SWAs' significant knowledge of the local labor market, job requirements, and local prevailing practices by authorizing the SWA to review the contents of the job order for compliance and submit to the CO any deficiencies pursuant to § 655.16. The Department continues to require employers to file separate applications when there are different dates of need for the same job opportunity within an area of intended employment. This prohibition against staggered entries based on a single date of need is intended to ensure that employers provide U.S. workers the maximum opportunity to consider the job opportunity and is consistent with USCIS policies. The Department recognizes that there may be industries whose participation in the H–2B program may be constrained as a result of this revised timeframe in years in which the statutory cap of 33,000 visas for the six-month intervals beginning October 1 and April 1 is at issue. However, this is largely a function of the statutory cap on the available visas over which the Department has no control.

While the Department has begun efforts to establish an online format for the submission of an *Application for Temporary Employment Certification,* as such a system depends upon the resolution of issues in this rulemaking, it cannot be immediately implemented when a final rule becomes effective. Thus there will have to be a period during which paper submissions remain the means by which applications must be filed. Therefore, the Department proposes to continue to require filing of an *Application for Temporary Employment Certification* in a paper

format until such time as an electronic system can be fully implemented. The Department proposes to continue to use Form ETA 9142 to collect the necessary information; however, the form's appendices will be slightly modified to reflect changes from the 2008 Final Rule (such as a change of tense to note pre-recruitment filing). As in the 2008 Final Rule, the proposed rule requires the *Application for Temporary Employment Certification* to contain original signatures.

2. Section 655.16 Filing of the Job Order at the SWA

The proposed rule requires the employer to submit the job order directly to the SWA at the same time as it files the *Application for Temporary Employment Certification* and a copy of the job order with the NPC, no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need. Ensuring that the recruitment of U.S. workers occurs closer in time to the actual job availability makes the recruitment more realistic and more likely to result in greater opportunities for U.S. workers. The proposed rule continues to use the SWAs' experience with the local labor market, job requirements, and prevailing practices by requiring the SWA to review the contents of the job order for compliance with § 655.18 and notify the CO of any deficiencies within 4 business days of its receipt of the job order. The proposed rule differs from the 2008 Final Rule in that it prohibits the SWA from posting the job order before receiving a Notice of Acceptance from the CO directing it to do so. It is the Department's belief that the cooperative relationship between the CO and the SWA continues to ensure program integrity. Additionally, by requiring such concurrent filing and review, the CO can simultaneously address job order deficiencies identified by the NPC and the SWA in a single Notice of Deficiency before the employer conducts its recruitment. This coordination will ensure greater program integrity and efficiency.

Upon placement of the job order in intra and interstate clearance, the SWA must keep the job order on its active file and continue to refer U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until 3 days before the date of need, when it is assumed that the last H–2B worker has departed for the place of employment, unless informed otherwise by the employer, as provided in proposed § 655.40. This ensures the job order is afforded maximum visibility for the most relevant period of time—the time during which workers are most likely to apply for an imminent job opening, and when employers are most in need of workers. This is a substantial change from the current practice of keeping the job order open only for a short time, but the Department believes the change will ensure that U.S. workers are apprised of the job opening and provided a meaningful opportunity to apply when they are most likely to do so and most likely to accept the offered employment.

3. Section 655.17 Emergency Situations

Under the proposed rule, an employer may file an *H–2B Registration* and/or an *Application for Temporary Employment Certification* fewer than 75 days before the start date where an employer has good and substantial cause and there is sufficient time for the employer to undertake an adequate test of the labor market. This is a change from the current regulations which do not allow for emergency filings. This affords employers flexibility while maintaining the integrity of the application and recruitment processes. To meet the good and substantial cause test, the employer must provide to the CO detailed information describing the reason(s) which led to the emergency request. Such cause may include the substantial loss of U.S. workers due to Acts of God or pandemic health issues, damage to facilities resulting from weather or other conditions, or new contracts that require earlier start dates. However, the CO's denial of an *H–2B Registration* in accordance with the procedures under § 655.11 does not constitute good and substantial cause necessitating a waiver request.

4. Section 655.18 Content of the Job Order

The job order is essential for providing U.S. workers sufficient information to make informed employment decisions. The Department proposes to require employers to inform applicants in the job order not only of the typical information provided in advertisements, but also of several key assurances and obligations to which the employer is committing to by filing an *Application for Temporary Employment Certification* for H–2B workers. The job order must also be provided to H–2B workers with its pertinent terms in a language the worker understands.

a. *Prohibition Against Preferential Treatment (§ 655.18(a)).* Under the proposed rule, the employer is responsible for providing to U.S. workers at least the same level of benefits, wages, and working conditions that are being or will be offered or paid to H–2B workers, similar to the requirements under current § 655.22(a). The additional requirement is that this guarantee must be set forth in the job order to be sure that all workers are aware of their rights.

b. *Bona Fide Job Requirements (§ 655.18(b)).* The Department proposes to require that the job qualifications and requirements listed in the job order be bona fide and consistent with those required by employers that do not use H–2B workers for the same or comparable occupations in the same area of intended employment, consistent with the requirements in current § 655.22(a). The intent of this provision is to prevent employers from artificially making the job opportunity unattractive to U.S. workers, thereby increasing the need for H–2B workers.

c. *Benefits, Wages, and Working Conditions Covered Under (§ 655.18(c)–(g)).* The Department proposes to require the employer to list all of the following benefits, wages, and working conditions in the job order: the rate of pay, frequency of pay, deductions that will be made, and that the job opportunity is full-time. These requirements are generally consistent with those required in current § 655.17 and § 655.22; where changes were made, they are discussed in the preamble to § 655.20. These disclosures are critical to a potential applicant's decision whether to accept the opportunity.

d. *Three-Fourths Guarantee (§ 655.18(h)).* The Department proposes to require that H–2B employers guarantee payment of wages for at least three-fourths of the contract period and proposes to require the employer to list this guarantee in the job order. Currently, there is no minimum number of hours that employers are required to provide to H–2B workers. The NPRM proposes to require that employers guarantee the worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual date of need, whichever is later, and which ends on the expiration date specified in the job order or in any extensions. Again, awareness of this guarantee would be critical to a U.S. worker's ability to evaluate the job opportunity and thus influence the decision to accept the employer's job offer. These proposed requirements are similar to the three-fourths guarantee in the H–2A program; however, that program assesses the guarantee based upon the entire contract period rather than based upon 4-week

periods. Recent experience enforcing the H–2B regulations demonstrates that workers are often provided much less work than that promised in the job order and this occurrence has convinced the Department that this protection is necessary.

e. *Transportation and Visa Fees (§ 655.18(i)).* The proposed rule requires the job order to disclose that the employer will provide, pay for, or fully reimburse the worker for inbound and outbound transportation and daily subsistence costs. This requirement applies to both U.S. workers who are not reasonably able to return to their residence within the same workday and H–2B workers when traveling to and from the employer's place of employment. Additionally, if applicable, the job order must disclose that the employer will provide daily transportation to the workers to the worksite. The job order also must disclose that the employer will reimburse the H–2B workers for visa and related fees.

f. *Employer-Provided Items (§ 655.18(j)).* The proposed rule requires the job order to indicate that the employer will provide workers with all tools, supplies, and equipment needed to perform the job at no cost to the employee. This requirement, which is consistent with current § 655.22(g) which requires all deductions to be reasonable, gives the workers additional protection against improper deductions from wages, and assures them that they will not be required to pay for items necessary to perform the job.

g. *Board, Lodging, or Facilities (§ 655.18(k)).* While not required to offer such benefits, if the employer intends to provide H–2B workers with room and board or other such facilities or offer assistance in securing such lodging, it must be disclosed in the job order and offered to all U.S. worker-applicants who cannot reasonably return to their residence within the same workday. This requirement is intended to ensure that the employer offers, to the extent practicable, the U.S. workers the same benefits, wages, and working conditions as those offered to the H–2B workers. If the employer intends to make a deduction from cash wages for the reasonable costs of board, lodging or other facilities, it must disclose that in the job order.

Some employers qualify under existing special procedures to use a single *Application for Temporary Employment Certification* to recruit and employ itinerant workers in multiple areas of intended employment on the same job order. Consistent with case law interpreting the primary benefit principle under the Fair Labor Standards Act, in the situation where employees must move from one temporary work location to another, the employee's temporary housing while at a particular work location is primarily for the benefit of the employer. See *Masters* v. *Maryland Management Co.,* 439 F.2d 1329 (4th Cir. 1974); *Marshall* v. *DeBord,* 1978 WL 1705 (E.D. Okla. 1978); *Bailey* v. *Pilots' Association for the Bay and River Delaware,* 406 F. Supp. 1302 (E.D. Pa. 1976). Similarly, the transportation required to move the employees from one work location to the next work location, as well as the daily transportation between the temporary housing and the worksite, is primarily for the employer's benefit. *See* 29 CFR 531.32(c); 29 CFR 778.217(b)(3). Therefore, employers operating under the special procedures mechanism to employ itinerant workers will be required to pay for housing and transportation expenses that are primarily for the benefit of the employer, and the employer's job order will have to advise potential employees of this obligation.

D. Assurances and Obligations

1. Section 655.20 Assurances and Obligations of H–2B Employers

Proposed § 655.20 would replace current § 655.22 and contains the employer obligations that WHD will enforce. The Department proposes to modify, expand, and clarify current requirements to ensure that an employer's need for H–2B workers is genuine because no qualified U.S. workers are available, and that the employment of H–2B workers will not adversely affect the wages and working conditions of U.S. workers. Requiring compliance with the following enhanced conditions of employment is the most effective way to meet these goals. As discussed in the preamble to § 655.5, workers engaged in corresponding employment are entitled to the same protections and benefits provided to H–2B workers.

a. *Rate of Pay (§ 655.20(a)).* Proposed § 655.20(a) draws from several different provisions of existing § 655.22. For example, the Department proposes to modify the current § 655.22(e) on the employer's responsibility to pay the offered wage throughout the worker's authorized period of employment to include the requirement that the payment must be made "free and clear." Further discussion of "free and clear" appears below.

The proposed section also adds a requirement that productivity standards that are a condition of job retention must be specified in the job order and must be no more than normally required by non-H–2B employers for the occupation in the area of intended employment. The Department maintains that imposition of productivity standards should be evaluated by the SWA prior to acceptance of the *Application for Temporary Employment Certification* in order to ensure that there is no adverse effect on the working conditions of similarly employed U.S. workers.

The Department recognizes that some occupations for which H–2B workers are sought have traditionally been piece-rate jobs and the *Application for Temporary Employment Certification* allows an employer to compute pay on a piece-rate basis. The proposed section allows piece rates to serve as the basis for computing wages only if the piece rate paid is at least equal to the piece rate normally paid to workers performing the same activity in the area of intended employment. Consistent with current § 655.22(g)(1), in every workweek the piece rate must result in wages at least equal to what the weekly earnings would have been had the worker's pay been computed based upon the offered hourly wage. If the piece rate earnings do not equal at least the required amount, this proposed paragraph requires that the employer supplement the worker's wages on a workweek basis to meet the offered wage. Finally, the proposal eliminates the current option of paying wages on a monthly basis.

b. *Wages Free and Clear and Deductions (§§ 655.20(b) and 655.20(c)).* The Department's experience demonstrates that some employers may seek to reduce their wage liability by imposing unauthorized deductions on gross wages. The proposed obligations in paragraphs (b) and (c) of this section seek to ensure payment of the offered wage by requiring that wage payments be final, unconditional, and "free and clear" and by limiting deductions which reduce wages to below the required rate. Specifically, authorized deductions are limited to those: required by law; made under a court order; that are for the reasonable cost or fair value of board, lodging, or facilities furnished (only if disclosed in the job order); or that are amounts paid to third parties authorized by the employee or a collective bargaining agreement. Deductions for costs that are primarily for the benefit of the employer are never reasonable. Unauthorized or impermissible deductions include those not specified in the job order; "kick backs" paid to the employer or employer representative; and amounts paid to third parties which

are unauthorized, unlawful, or from which the employer or its foreign labor contractor, recruiter, agent worker, or affiliated person benefits to the extent such deductions reduce the actual wage to below the required wage. The FLSA and 29 CFR part 531 provide appropriate guidance in determining the permissibility of deductions, as indicated in the proposed paragraph.

c. *Job Opportunity is Full-Time (§ 655.20(d)).* In proposed § 655.20(d), the Department redefines full-time employment as at least 35 hours per week, an increase from the current level of 30 hours. A 35-hour workweek more accurately reflects the nature of full-time work and strikes an appropriate balance between the employer's needs and the employment and income needs of both U.S. and foreign workers. Additionally, consistent with the FLSA, this NPRM adds the requirement that the workweek will be a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods which may start on any day or hour of the day. Accordingly, wages would be computed based on this workweek. This requirement establishes a clear period for determining whether the employer has paid the required wages, which will aid in enforcement.

d. *Job Qualifications and Requirements (§ 655.20(e)).* Proposed § 655.20(e) clarifies the existing § 655.22(h) by stating that each job qualification and requirement listed in the job order must be consistent with normal and accepted qualifications required by non-H–2B employers for similar occupations in the same area of intended employment. OFLC will determine what is normal and accepted during the pre-certification process. The proposed paragraph also allows the CO to require the employer to substantiate any job qualifications specified in the job order.

e. *Three-Fourths Guarantee (§ 655.20(f)).* The Department has determined that the three-fourths guarantee required in the H–2A program provides protection that is necessary in the H–2B program as well. The guarantee has been required under the H–2A program since its inception in 1987; in the 2008 Final Rule, the Department defended the requirement: "The Department believes the rule provides essential protection for both U.S. and H–2A workers, in that it ensures their commitment to a particular employer will result in real jobs that meet their reasonable expectations." 73 FR 77152 (Dec. 18, 2008).

Recent experience in enforcing the H–2B regulations demonstrates that workers are often provided much less work than that promised in the job order, which has convinced the Department that this protection is necessary. For example, the Department's enforcement experience has revealed employers that stated on their H–2B applications that they would provide 40 hours of work per week when, in fact, their workers averaged far fewer hours of work. Indeed, in some weeks the workers did not work at all.

In addition to the Department's recent experience enforcing the H–2B regulations, the Department is aware of testimony involving cases in which unscrupulous employers which have obtained H–2B labor certification have overstated the period of need and/or the number of hours for which the workers are needed. For example, H–2B workers testified at a hearing before the Domestic Policy Subcommittee, House Committee on Oversight and Government Reform, on April 23, 2009 that there were several weeks in which they were offered no work; others testified that their actual weekly hours—and hence their weekly earnings—were less than half of the amount they had been promised in the job order. Daniel Angel Castellanos Contreras, a Peruvian engineer, was promised 60 hours per week at $10–$15 per hour. According to Mr. Contreras, "The guarantee of 60 hours per week became an average of only 20 to 30 hours per week—sometimes less. With so little work at such low pay [$6.02 to $7. 79 per hour] it was impossible to even cover our expenses in New Orleans, let alone pay off the debt we incurred to come to work and save money to send home." [6] Miguel Angel Jovel Lopez, a plumber and farmer from El Salvador, was recruited to do demolition work in Louisiana with a guaranteed minimum of 40 hours of work per week. Mr. Lopez testified, "Instead of starting work, however, I was dropped off at an apartment and left for two weeks. Then I was told to attend a two week training course. I waited three more weeks before working for one day on a private home and then sitting for three more weeks.[7] Testimony at the same hearing by three attorneys who represent H–2B workers stated that these witnesses' experiences were not aberrations but were typical. Hearing on The H–2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers, 111th Cong. (Apr. 23, 2009).

Furthermore, a 2010 report by the American University Washington College of Law International Human Rights Law Clinic and the Centro de los Derechos del Migrante, Inc. documented the prevalence of work shortages for women working on H–2B visas in the Maryland crab industry. The researchers found that "[s]everal women interviewed spent days and weeks without work when crabs were scarce. During this time most continued to make rent payments, and struggled to send money to family back in Mexico." [8]

WHD enforcement experience from the H–2A program provides further evidence supporting the need to extend guaranteed minimum work protections to H–2B workers who in many ways are similarly situated to their H–2A counterparts. Though the three-fourths guarantee is already in place in the H–2A program, WHD has found employers substantially violating its provisions. For instance, as recently as January 2011, WHD assessed $1/3 million in back wages from a vegetable farm employer which failed to provide to 244 workers—148 of whom were U.S. workers—at least 75 percent of the work hours promised. This case is currently in litigation.

Few legal options exist for H–2B workers who feel their work contracts have been violated. An initial barrier to legal recourse is purely practical: H–2B workers are not eligible for services from federally-funded legal aid programs. As a result, most H–2B workers have no access to lawyers or information about their legal rights. Furthermore, the H–2B job order, which specifies the terms and conditions of employment, including work hours, may not be enforceable through private litigation. *See Garcia* v. *Frog Island Seafood, Inc.,* 644 F.Supp.2d 696, 716–18 (E.D.N.C. 2009) (holding H–2B job orders would not be treated as enforceable contracts). A guaranteed number of hours, enforceable by WHD, may well be the only protection H–2B workers have if employers misrepresent the amount of work the worker will actually be provided.

[6] Testimony of Daniel Angel Castellanos Contreras before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee, 2, (2009, Apr. 23) *http://oversight.house.gov/images/stories/documents/20090423085101.pdf.*

[7] Testimony of Miguel Angel Jovel Lopez before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee, 2. (2009, Apr. 23) *http://oversight.house.gov/images/stories/documents/20090423085606.pdf.*

[8] American University Washington College of Law International Human Rights Law Clinic and Centro de los Derechos del Migrante, Inc. *Picked Apart: The Hidden Struggles of Migrant Worker Women In the Maryland Crab Industry.*2, July 2010. *http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrlc_picked_apart.pdf?rd=1.*

In an effort to combat such abuses, § 655.20(f) proposes to require a guaranteed offer of employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period. The Department proposes to use successive 4-week periods to measure the three-fourths guarantee instead of measuring the three-fourths guarantee over the course of the entire time period of need (as in the H–2A three-quarters guarantee), in order to ensure that work is offered during the entire time period certified by the Department. Four-week increments will aid the Department in enforcing the statutory and regulatory temporary need requirement. When employers file applications for H–2B certifications, they represent that they have a need for full-time temporary work during the entire time period for which they request certification from the Department. Using a 4-week period will prevent employers from requesting workers for nine months, for example, if they really only have a need for their services for seven months. Thus, a 4-week period will help to ensure that employers do not assert that they need workers throughout the winter months if the work cannot be conducted in such weather and there is little or no work for the workers to perform until spring. Using a 4-week period also prevents an employer from inappropriately stating, for example, that it needs workers until October 31st, if its season is over and there generally is little or no work after September 30th, in the hopes that the employees will simply leave the job before the end of the period so the employer will be relieved of its obligation to pay for their return transportation. When a worker accepts a job offer that promises full-time work for a set period of time and foregoes other opportunities to make that commitment, the worker has a right to be provided with the promised amount of work for the entire period for which work was promised. The hours are not fungible, and should not be provided primarily in the middle of the period of need in order to meet the three-fourths guarantee.

These 4-week periods would begin the first workday after the worker's arrival at the place of employment or the advertised contractual first date of need, whichever is later, and would end on the expiration date specified in the job order or in any extensions. The Department believes that this guarantee will impose no burden on employers that have accurately stated their need for workers, even if the employer's calculation of the amount of available work is off by as much as 25 percent. Therefore, the three-fourths guarantee offers the appropriate level of protection for workers who are employed by unscrupulous employers, without any penalty or burden to compliant employers.

The proposed system provides for a workday to be based on the workday hours stated in the employer's job order and require the guarantee in each 4-week period. The 4-week period would be based on the employer's workweek. If a worker arrives and starts work after the first day of the employer's workweek, resulting in a partial workweek, then the initial 4-week guarantee period could result in a period of as long as 4 weeks and 6 days. Similarly, the worker might cease employment before the end of a final 4-week period, resulting in a guarantee period as short as one workday. In such cases, the guarantee is increased for the initial period and decreased for the last period on a pro rata basis.

Under the proposed guarantee, the employer would be required to pay the worker three-fourths of the wages the worker would have earned in any 4-week period if the employer had offered the worker the number of hours specified in the job offer. In contrast to the guarantee provided under the H–2A program, this proposal does not exclude hours offered on the worker's Sabbath and Federal holidays from the three-fourths guarantee requirement in recognition of the fact that many H–2B workers are employed in the hospitality industry that need those workers available during those times.

The Department recognizes that workers may fail or refuse to work hours which have been offered by the employer. Consequently, the proposed section allows the employer to count any hours offered consistent with the job order that a worker freely and without coercion chooses not to work, up to the maximum number of daily hours on the job order, in the calculation of guaranteed hours. The proposed section also allows the employer to offer the worker more than the specified daily work hours, but the employer may not require the employee to work such hours or count them as offered if the employee chooses not to work the extra hours. However, the employer may include all hours actually worked when determining whether the guarantee has been met. Furthermore, as detailed in § 503.16(g), the CO can terminate the employer's obligations under the guarantee in the event of fire, weather, or another Act of God that makes the fulfillment of the job order impossible.

As indicated above, the purpose of the guarantee is to ensure that employers do not misuse the program by overstating their need for full-time, temporary workers, such as by carelessly calculating the starting and ending dates of their temporary need, the hours of work needed per week, or the total number of workers required to do the work available. The Department believes that the guarantee will motivate employers to carefully consider the extent of their workforce needs before applying for certification, thus discouraging employers from applying for unnecessary workers or from promising work which may not exist. To the extent that employers more accurately describe the amount of work available and the periods during which work may be more or less available, it gives both U.S. and foreign workers a better chance to realistically evaluate the desirability of the offered job. Not only will this result in workers working most of the hours promised in the job order but it may also make the capped H–2B visas available to other employers whose businesses need to use H–2B workers. The three-fourths guarantee is a reasonable deterrent to such potential carelessness and a necessary protection for workers, while still providing employers with flexibility relating to the required hours, given that many common H–2B occupations involve work that can be affected by weather conditions.

An hour guarantee is necessary to protect the integrity of the H–2B program and to protect the interests of both workers and employers in the H–2B program. At the same time, the Department invites the public to suggest alternative guarantee systems that may better serve those goals. In particular, the Department seeks comments on whether a 4-week increment is the best period of time for measuring the three-fourths guarantee or whether a shorter or longer time period would be more appropriate.

f. *Impossibility of Fulfillment (§ 655.20(g)).* In proposed § 655.20(g), the Department acknowledges that circumstances beyond the control of the employer or the worker, such as a natural disaster or a fire, might result in the need to terminate a worker's employment before the expiration date of a job order. Therefore, the new language in this paragraph allows employers to terminate a job order in certain circumstances when approved by the CO. In such an event, the employer would be required to meet the three-fourths guarantee discussed in paragraph (f) of this section based on the starting date listed in the job offer or

first workday after the arrival of the worker, whichever is later, and ending on the work termination date. The employer would also be required to attempt to transfer the H–2B worker (if permitted under the INA) or worker in corresponding employment to another comparable job. Absent such transfer, the employer would have to comply with the proposed transportation requirements in paragraph (j) of this section.

g. *Frequency of Pay (§ 655.20(h)).* The proposed § 655.20(h) adds the requirements that the employer indicate the frequency of pay in the job order and that workers be paid every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Further, wages must be paid when due. Allowing the employer to pay less frequently than every 2 weeks and to not make timely payment of wages imposes an undue burden on workers who traditionally are paid low wages and live paycheck to paycheck.

h. *Earnings Statements (§ 655.20(i)).* Proposed § 655.20(i) adds requirements for the employer to maintain accurate records of worker earnings and provide the worker on or before each payday an appropriate earnings statement. This proposed paragraph also lists the information that the employer must include in such a statement. Providing such statements to employees will enhance program integrity because employees will have a timely and clear understanding of the basis for their pay, and such statements will provide the Department with additional information in any investigation or audit.

i. *Transportation and Visa Fees (§ 655.20(j)).* The Department proposes changes relating to transportation and visa costs in § 655.20(j). The Department has determined that the cost of transporting workers from remote locations to the worksite is an expense that primarily benefits employers who choose to use the H–2B program and it is the Department's intention to ensure that the cost of transporting workers from remote locations to the worksite are not passed on to the employees.

The NPRM would require an employer to provide, pay for, or reimburse the worker in the first workweek the cost of transportation and subsistence from the place from which the worker has come to the place of employment. Similarly, at the end of the employment, the NPRM would require the employer to provide or pay for the U.S. or foreign worker's return transportation and daily subsistence from the place of employment to the place in the worker's home country from which the worker departed to work for the employer, if the worker has no immediate subsequent approved H–2B employment. If the worker has been contracted to work for a subsequent and registered employer, the last H–2B employer to employ the worker would be required to provide or pay the U.S. or foreign worker's return transportation. Therefore, prior employers would not be obligated to pay for return transportation costs. Employers also would be required to pay or reimburse the worker for the H–2B worker's visa, visa processing, border crossing, and other related fees including those fees mandated by the government (but not for passport expenses or other charges primarily for the benefit of the workers).

The proposed changes are consistent with the Department's interpretation of the FLSA, explained in Field Assistance Bulletin No. 2009–2 (Aug 21, 2009), that H–2B workers' transportation and visa costs are primarily for the benefit of the employer. The employer benefits because it obtains foreign workers where the employer has certified that there are not sufficient able, willing and qualified U.S. workers available to perform the work. Transporting these workers from remote locations to the workplace is primarily for the benefit of the employer who has sought authority to bring in workers from foreign countries.

The Bulletin explained that an employer must bear such expenses if shifting them to the employee would bring the employee's effective rate of pay below the FLSA minimum wage. H–2B employers covered by the FLSA must, therefore, pay such expenses to meet FLSA requirements. *See Arriaga* v. *Florida Pacific Farms, LLC,* 305 F.3d 1228 (11th Cir. 2002); but see *Castellanos-Contreras* v. *Decatur Hotels, LLC,*_F.3d, 2010 WL 3816016 (5th Cir. 2010). Moreover, the current (and proposed) H–2B regulations specifically require employers to comply with all applicable Federal, State, and local employment-related laws.

The Department's proposal would require the employer to pay these expenses if payment by the employee would bring the employee's rate of pay below the offered wage. The proposed requirement protects U.S. workers from adverse effect by protecting the integrity of the offered wage. Without these protections, the employer, who is obligated to pay the "offered wage" which is generally higher than the FLSA minimum wage, could take deductions from wages that could reduce the effective wage to the FLSA minimum.

The following illustrates the benefits of this proposal. Under the current regulation the employer is not obligated to reimburse H–2B workers for inbound transportation, visa, visa processing, border crossing, and other related costs even though the Department has determined that under the FLSA these costs are primarily for the benefit of the employer. Further, the only restriction on deductions from pay are found in current 20 CFR 655.22(g)(1), which states,

> The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

In this illustration, the employer, a landscaping contractor in Orange County, FL, provides a disclosure to the employee that the employer will advance the $800 [9] for inbound transportation, visa, visa processing, and other related fees as well as the return transportation cost, and deduct the costs from the employee's paycheck until fully repaid. The employee, from Mexico, is hired to work for a landscaping company for 12 weeks and the Level 1 prevailing wage, as determined by OES, is $8.90 per hour. The employee works 40 hours and is entitled to be paid $356.00. Since the employer disclosed that he would advance the transportation costs and visa related fees and recoup those costs through deductions from the worker's pay, the worker is paid $290.00, the amount equivalent to the FLSA minimum wage for 40 hours work. The worker would be paid $290 instead of $356.00 each of the subsequent 11 workweeks until the $800 is recouped by the employer. This is so even though the WHD has determined that the transportation and visa-related cost for H–2B workers is primarily for the benefit of the employer. Further, the Department has determined that in order to protect the labor market from the adverse effects on wages caused by the presence of temporary foreign workers in this labor market the minimum wage that must be paid by H–2B employers is $8.90. Without a provision requiring the employer to pay the transportation cost and visa-related fees the wage provisions of the H–2B program are severely compromised, providing an economic incentive for employers to hire foreign workers who

[9] The transportation cost is estimated to be $286 each way, $10.64 daily for subsistence, and $150 for visa fees. For a more detailed discussion of the estimated cost of transportation, see Section IV. Administrative Information, A. Executive Order 12866 of this preamble.

can be paid the FLSA wage instead of the "offered wage" in contravention of the Department's obligations to prevent adverse effect under the program.

This NPRM also adds daily subsistence costs during inbound and outbound travel as an expense the employer is required to cover in addition to the actual transportation, consistent with a similar provision under the H–2A program. Because U.S. workers living far away from an area of intended employment may accept an H–2B job opportunity, the proposed rule provides the same treatment for U.S. workers who are unable to return to their residence each workday.

Finally, the Department proposes that all employer-provided transportation—including transportation to and from the worksite, if provided—meet applicable safety, licensure, and insurance standards. Under this proposed rule, all transportation and subsistence costs covered by the employer (even costs not required by this section) must be disclosed in the job order.

The proposed requirement that the employer pay inbound and outbound transportation, subsistence, visa, visa processing, border crossing, and related fees in this provision applies to H–2B workers, including those who have traveled to the place of employment but have not started work due to their displacement by a U.S. worker. See Proposed § 655.40 (U.S. worker recruitment period terminates on the third day preceding the employer's date of need or the date the last foreign worker departs for the employment, whichever is later). DHS regulations currently allow H–2B workers to enter the U.S. ten days before their employment start date. 8 CFR 214.2(h)(13)(i). Thus, there may be a gap in time between the time when an H–2B worker enters the country intending to work for the employer (up to 10 days before the date of need) and the time when the employer is no longer obligated to hire qualified U.S. workers for these job opportunities (three days before the employer's date of need or the date the last foreign worker departs, if later). Because employers have the ability to control the travel of H–2B workers from the point of visa issuance to the worksite, the Department expects that employers will delay the H–2B worker's departure date until the required recruitment period has ended. In the rare event that an H–2B worker enters the country before the U.S. worker recruitment period has ended and the position has been filled by a U.S. worker, the employer must reimburse the foreign worker for these costs and/or provide payment for the cost of return transportation at the time the worker presents for employment.

j. *Employer-Provided Items (§ 655.20(k)).* The Department proposes to add a new requirement under § 655.20(k), consistent with the requirement under the FLSA regulations at 29 CFR part 531, that the employer provide to the worker without charge all tools, supplies, and equipment necessary to perform the assigned duties. The employer may not shift to the employee the burden to account for damage to, loss of, or normal wear and tear of, such items. This proposed provision gives workers additional protections against improper deductions of the employer's business expenses from required wages.

k. *Disclosure of the Job Order and Notice of Worker Rights (§§ 655.20(l) and 655.20(m)).* Worker notification is a vital component of worker protection and program compliance. Proposed §§ 655.20(l) and 655.20(m) would enhance worker notifications. Proposed § 655.20(l) requires that the employer provide a copy of the job order to H–2B workers no later than the time of application for a visa and to workers in corresponding employment no later than the first day of work. The job order will contain information about the terms and conditions of employment and employer obligations as provided in proposed § 655.18 and must be in a language understandable to the workers. Proposed § 655.20(m) requires that the employer post a notice in English of worker rights and protections in a conspicuous location and post the notice in other appropriate languages if such translations are provided by the Department.

l. *No Unfair Treatment (§ 655.20(n)).* Proposed § 655.20(n) adds new language on nondiscrimination and nonretaliation protections which are basic to statutes that the Department enforces. Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person's attempt to report or correct perceived violations of H–2B provisions. As provided in proposed 29 CFR 503.20, make-whole relief is available for victims of discrimination and retaliation under this paragraph.

m. *Comply with the Prohibitions Against Employees Paying Fees (§ 655.20(o)).* Proposed § 655.20(o) amends current § 655.22(j) by expanding the list of persons who may not seek reimbursement from workers for any costs associated with obtaining H–2B employment certification or employment, and by repeating the new requirement in proposed § 655.20(b) that wages must be paid free and clear. This paragraph also clarifies that H–2B employers or their agents may recoup costs that are the responsibility of, and primarily for, the benefit of the worker. Passport fees, currently included in § 655.22(g)(2), are noted here as an example of a cost that is primarily for the benefit of the worker.

n. *Contracts with Third Parties to Comply with Prohibitions (§ 655.20(p)).* In § 655.20(p), the Department proposes to amend current § 655.22(g)(2) to require that an employer that engages any agent or recruiter must prohibit in a written contract the agent or recruiter from seeking or receiving payments from prospective employees. The contract must be made available to the CO, WHD or other Federal party, upon request. The Department also proposes to eliminate the reference to DHS regulations at 8 CFR 214.2(h)(5)(xi)(A) to avoid confusion in light of the proposed provisions concerning the employer responsibilities for transportation and visa costs in § 655.20(j). Similarly, the current sentence allowing an employer to recover visa costs is removed, consistent with proposed § 655.20(j)(2).

o. *Prohibition Against Preferential Treatment of H–2B Workers (§ 655.20(q)).* Proposed § 655.20(q) is similar to § 655.22(a) of the current rule, which prohibits employers from providing better terms and conditions of employment to H–2B workers than to U.S. workers. The language has been modified to reflect the change to a certification process from the current attestation-based process.

p. *Non-Discriminatory Hiring Practices, Recruitment Requirements, and Continuing Requirement to Hire U.S. Workers (§§ 655.20(r), 655.20(s), and 655.20(t)).* The current regulations require that the employer recruit and hire qualified U.S. workers during a limited 10-day period before filing the *Application for Temporary Employment Certification.* The Department firmly believes that this represents inadequate time and effort to ensure that there are no or insufficient qualified U.S. workers to fill the employer's temporary employment needs. To remedy this inadequacy, the Department proposes to extend the employer's recruitment and hiring obligations by making the changes in §§ 655.20(r), 655.20(s), and 655.20(t), as described below.

First, consistent with current § 655.22(c), proposed § 655.20(r) reaffirms the Department's commitment to ensuring that U.S. workers have priority for H–2B job opportunities by stating that U.S. workers who apply must either be offered the job or rejected

only for lawful, job-related reasons, and by prohibiting discrimination. The proposal clarifies that this hiring obligation remains in effect throughout the period set forth in proposed paragraph (t).

Second, proposed § 655.20(s) requires that the employer conduct required recruitment as described in proposed §§ 655.40–46.

Last, proposed § 655.20(t) extends the period during which the employer must hire qualified U.S. workers referred by the SWA or who respond to recruitment to 3 days before the date of need or the date the last H–2B worker departs for the workplace for the certified job opportunity, whichever is later.

q. *No strike or lockout (§ 655.20(u)).* The Department proposes in § 655.20(u) to modify the "no strike or lockout" language in the current regulations at § 655.22(b) to enhance worker protections. Currently, requests for H–2B workers are not certified if the workers would be filling positions that are open due to a strike, lockout, or work stoppage. Under the proposed paragraph the CO would deny an H–2B certification if there is a strike or lockout at the worksite. Under the current regulation, an unscrupulous employer might be able to transfer U.S. workers to fill positions vacated by striking workers, thus employing H–2B workers in the positions those U.S. workers vacated.

r. *No Recent or Future Layoffs (§ 655.20(v)).* Proposed § 655.20(v) modifies the dates of impermissible layoffs of U.S. workers currently described in § 655.22(i). The period during which an H–2B employer must not lay off any similarly employed U.S. worker continues to begin 120 days before the date of need but would be extended from 120 days after the date of need to the end of the certification period. The Department also proposes adding the requirement that H–2B workers must be laid off before any U.S. worker in corresponding employment. These restrictions are essential in order to further the purpose of protecting U.S. workers.

s. *Contact with Former U.S. Employees (§ 655.20(w)).* Proposed § 655.20(w) requires employers to contact former U.S. employees who worked with them within the last year, including any who were laid off within 120 days before the date of need. This expands the current requirement that employers contact only former employees who were laid off during the 120 days preceding the date of need and for an additional 120 days after date of need.

t. *Area of Intended Employment and Job Opportunity (§ 655.20(x)).* Proposed § 655.20(x) modifies current § 655.22(l) by additionally prohibiting the employer from placing a worker in a job opportunity not specified on the *Application for Temporary Employment Certification.* This clarifies that an H–2B worker is only permitted to work in the job and in the location that OFLC approves unless the employer obtains a new certification.

u. *Abandonment/Termination of Employment (§ 655.20(y)).* In proposed § 655.20(y), the Department addresses a worker's voluntary abandonment of a job or termination. This NPRM proposes retaining, in slightly amended form, current § 655.22(f) by requiring written notification to the OFLC and to DHS when a worker separates from employment before the certified end date. DHS has published in its own regulations at 8 CFR 214.2(h)(6)(i)(F) and its instructions at 73 FR 77816 (Dec. 19, 2008). Clarifications of how an employer in such circumstances must comply with proposed transportation and subsistence requirements under paragraph (j) and the three-fourths guarantee under paragraph (f) of this section are also added to proposed § 655.20(y). Specifically, the employer would be relieved of providing return transportation expenses if an employee voluntarily abandons employment, and the three-fourths guarantee period would end with the last full 4-week period before the separation if an employee either voluntarily abandons employment or is terminated for cause.

v. *Compliance with Applicable Laws (§ 655.20(z)).* In proposed § 655.20(z), the Department proposes to retain existing provisions in § 655.22(d) with minor revisions and to add a provision prohibiting the employer from holding or confiscating workers' passports, visas, or other immigration documents in accordance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.

E. Processing of an Application for Temporary Employment Certification

1. Section 655.30 Processing of an Application and Job Order

Under the proposed rule, upon receipt of an *Application for Temporary Employment Certification* and copy of the job order, the CO at the NPC will promptly conduct a comprehensive review of all documentation submitted by the employer to verify employer compliance with program requirements. This process differs from the application processing model under the 2008 Final Rule where the CO initially reviews only attestations.

An additional difference between the 2008 Final Rule and the proposed rule in the review of the *Application for Temporary Employment Certification* is that under the proposed rule, the CO's review of the *Application for Temporary Employment Certification,* in most cases,[10] will no longer entail a determination of temporary need, i.e., whether the employer has established a need for the non-agricultural services or labor to be performed that is temporary in nature. Instead, under the proposed rule, this aspect of the CO's review will be limited to verifying that the employer previously submitted a request for and was granted *H–2B Registration,* and that the terms of the *Application for Temporary Employment Certification* have not significantly changed from those approved under the *H–2B Registration.*

The proposed rule also requires the use of next day delivery methods, including electronic mail, for any notice or request sent by the CO requiring a response from the employer and the employer's response to such a notice or request. This proposed section also communicates a long-standing program requirement that the employer's response to the CO's notice or request must be sent by the due date or the next business day if the due date falls on a Saturday, Sunday or a Federal holiday.

2. Section 655.31 Notice of Deficiency

Under the proposed rule, the CO will be required to issue a formal Notice of Deficiency where the CO determines that the *Application for Temporary Employment Certification* and/or job order contain errors or inaccuracies, or fails to comply with applicable regulatory and program requirements. The proposed provision requires the CO to issue the Notice within 7 business days from the date on which the NPC receives the employer's *Application for Temporary Employment Certification* and job order. This timeline is designed to ensure that the SWA has sufficient time to conduct its own review of the job order and notify the CO within 4 business days of any deficiencies as provided in § 655.16, as well as the timely processing of an employer's

[10] As provided in the discussion of § 655.11, each employer filing an *Application for Temporary Employment Certification* will be required under the proposed rule to establish temporary need through the registration process. However, in limited circumstances where the employer has applied for a temporary labor certification on an emergency basis under emergency procedures in § 655.17 without an approved *H–2B Registration,* the CO may be required to also make a determination regarding temporary need.

Application for Temporary Employment Certification.

Once the CO issues a Notice of Deficiency to the employer, the CO will provide the SWA and the employer's attorney or agent, if applicable, a copy of the notice. The Notice of Deficiency will include the specific reason(s) why the *Application for Temporary Employment Certification* and/or job order is deficient, identify the type of modification necessary in order for the CO to issue a Notice of Acceptance, and provide the employer with an opportunity to submit a modified application and/or job order within 10 business days from the date of the Notice of Deficiency. The Notice will also inform the employer that it may, alternatively, request administrative review before an Administrative Law Judge (ALJ) within 10 business days of the date of the Notice of Deficiency and instruct the employer regarding how to file a request for such review in accordance with the administrative review provision under this subpart. Finally, the Notice of Deficiency will inform the employer that failing to timely submit a modified *Application for Temporary Employment Certification* and/or job order, or request administrative review will cause the CO to deny that employer's *Application for Temporary Employment Certification.*

The Notice of Deficiency is similar to the Request for Information (RFI) process used by the CO under the 2008 Final Rule. The concurrent submission of the job order to the CO and the SWA will ensure the thorough examination of the employer's job requirements and enable employers to timely and effectively comply with all program requirements.

3. Section 655.32 Submission of a Modified Application or Job Order

As previously stated, the CO will deny any *Application for Temporary Employment Certification* where the employer neither submits a modification nor requests a timely administrative review. A denial of an *Application for Temporary Employment Certification* for failure to timely submit a sufficiently responsive modification or request for review as prescribed above will be final and cannot be appealed. This proposal differs from the 2008 Final Rule, in which the CO has discretion to deny the employer's application or require supervised recruitment if the employer fails to comply with an RFI.

In addition, the proposed rule requires the CO to deny an *Application for Temporary Employment Certification* and/or job order if the modification(s) made by the employer do not comply with the requirements for certification under § 655.50. The proposed rule grants the employer the right to appeal the denial of the modified *Application for Temporary Employment Certification* and/or job order via the administrative review procedures set forth in § 655.61 of this proposed rule.

Under the proposed rule, if the CO accepts the modification(s) and issues a Notice of Acceptance, the CO will require the SWA to modify the job order in accordance with the accepted modification(s), as necessary. The Department proposes this explicit requirement to ensure the integrity of the simultaneous submission process and ensure that any material terms and conditions of employment and employer obligations contained in the job order correspond to the terms, conditions and obligations contained in an accepted *Application for Temporary Employment Certification.*

In addition to requiring modification before the acceptance of an *Application for Temporary Employment Certification,* the Department proposes to permit the CO to require the employer to modify a job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the offer of employment does not contain all the applicable minimum benefits, wages, and working conditions. Where the CO requires a later modification, the CO will update the electronic job registry to reflect the necessary modification(s) and direct the SWA(s) in possession of the job order to replace the job order in their active files with the modified job order. The employer also is required to disclose the modified job order to all workers who were recruited under the original job order or *Application for Temporary Employment Certification.* This requirement is also new in the proposed rule and is intended to ensure that U.S. workers have access to meaningful employment opportunities and that workers remain informed about the benefits, wages and working conditions offered by the employer.

4. Section 655.33 Notice of Acceptance

Under the proposed rule, the Department requires the CO to issue a formal notice accepting the employer's application for processing. Upon accepting the *Application for Temporary Employment Certification* and job order, the CO will send a Notice of Acceptance to the employer (and the employer's attorney or agent, if applicable), with a copy to the SWA, within 7 business days from the CO's receipt of the *Application for Temporary Employment Certification* or modification, provided that the *Application for Temporary Employment Certification* and job order meet all the program and regulatory requirements.

The Notice of Acceptance under the proposed rule will direct the employer to recruit U.S. workers in accordance with employer-conducted recruitment provisions in §§ 655.40–655.47, as well as to conduct any additional recruitment in accordance with the CO's directions, consistent with § 655.46. The Notice of Acceptance will advise the employer that it must conduct such recruitment of U.S. workers within 14 calendar days from the date of the notice and informs the employer that such employer-conducted recruitment is required in addition to SWA circulation of the job order in intrastate and interstate clearance under § 655.16. The Notice of Acceptance also requires the employer to submit a written report of its recruitment efforts as specified in § 655.48.

The Notice of Acceptance directs the SWA: (1) To place the job order in intra- and interstate clearance, including (i) circulating the job order to the SWAs in all other States listed on the employer's *Application for Temporary Employment Certification* and job order, as anticipated worksites and (ii) to any States where the CO directs the SWA to circulate the job order; (2) to keep the job order on its active file and continue to refer U.S. workers to the employer until the end of the recruitment period defined in § 655.40(c); and (3) to transmit the same instructions to all other SWAs to which it transmits the job order. Under the proposed rule, the Notice of Acceptance advises the employer of its obligation to notify all SWAs in possession of its job order if the last H–2B worker has not departed for the place of employment by the third day preceding the employer's date of need. This indicates to the SWA when to stop referring potential U.S. workers to the employer. In order to increase the exposure of U.S. workers to H–2B job opportunities, the Notice of Acceptance also requires the SWA(s) to circulate a copy of the job order to certain labor organizations, where the job classification is traditionally or customarily unionized, as described in greater detail in § 655.44.

The elements of the Notice of Acceptance described in the proposed rule reflect an enhanced process for the recruitment of U.S. workers. The Department expects these additional requirements will provide timely and meaningful notice of job opportunities

and thus increase the likelihood that U.S. workers will learn of and apply for the available job opportunities.

5. Section 655.34 Electronic Job Registry

The Department proposes posting employers' H–2B job orders, including modifications and/or amendments approved by the CO, on an electronic job registry to disseminate the job opportunities to the widest audience possible. The electronic job registry was initially created to accommodate the posting of H–2A job orders, but the Department proposes to expand the registry to include H–2B job orders. The job orders will be posted by the CO on the job registry after acceptance of an *Application for Temporary Employment Certification* for the duration of the recruitment period, as provided in § 655.40(c). Once the recruitment period has concluded, the job order will be maintained on the registry in inactive status so that the information is available for a variety of purposes. It is expected, for example, that the continued accessibility of inactive orders will increase the transparency of the H–2B process and provide information, for example, for those currently seeking such information from the Department through Freedom of Information Act (FOIA) requests.

Posting job orders on the electronic job registry will serve as an effective, useable tool for alerting U.S. workers to jobs for which H–2B workers are being recruited. The electronic job registry will be accessible to the public through the Department's resources, including its One-Stop Career Centers, as well as through a link to the job registry on the OFLC's Web site *http://www.foreignlaborcert.doleta.gov/.*

6. Section 655.35 Amendments to an Application or Job Order

The Department proposes to permit an employer to request to amend its *Application for Temporary Employment Certification* and/or job order to increase the number of workers, to change the period of employment, or to make other changes to the application, before the CO makes a final determination to grant or deny an *Application for Temporary Employment Certification.* The Department's proposed rule would permit an employer to seek amendments to the application and/or job order only before certification, not after certification. These provisions are being proposed to provide clarity to employers and workers alike of the limitations on and processes for amending an application and the need to inform any U.S. workers already recruited of the changed job opportunity. The Department recognizes that employers can face changed circumstances from varying sources—from climactic conditions to cancelled contracts—and is providing some flexibility to assess and respond to such changes. At the same time, the Department proposes certain limitations to ensure that these job opportunities are not misrepresented as a result of such amendments.

Specifically, under the proposed rule, the employer may request an amendment of the *Application for Temporary Employment Certification* and/or job order to increase the number of workers initially requested. However, the Department is limiting such amendments to increase the number of workers to no more than 20 percent (50 percent for employers requesting fewer than 10 workers), consistent with § 655.11, that does not permit the use of an *H–2B Registration* in connection with the filing of an *Application for Temporary Employment Certification* if the number of workers required by the employer exceeds the number listed on the approved *H–2B Registration* by 20 percent.

In addition, the proposed rule permits minor changes to the period of employment at any time before the CO's final determination. However, the Department advises that such amendments to the period of employment may not exceed 14 days and may not cause the total period to exceed a total of 9 months, except in the event of a demonstrated one-time occurrence. This limitation to 14 days is consistent with the 14-day period in § 655.11 and is designed to ensure that the employer had a legitimate need before commencing the registration process and accurately estimated its date of need.

The regulation proposes that the employer may request an amendment of the *Application for Temporary Employment Certification* or job order at any time before the CO's final determination. The CO will approve these changes if the CO determines the proposed amendment(s) are justified and will not negatively affect the CO's ability to make a timely labor certification determination, as required under § 655.50, including the ability to thoroughly test the labor market. Changes will not be approved which affect the underlying approval for the job registration.

The proposed rule provides that the employer must request any amendment(s) to the *Application for Temporary Employment Certification* and/or job order in writing and that any such amendment(s) will not be effective until approved by the CO. Once the CO approves an amendment to the *Application for Temporary Employment Certification* or job order, the CO will to submit to the SWA any necessary change to the job order or the amended job order and update the electronic job registry to reflect the approved amendment(s).

The Department's proposed rule allows amendments to the *Application for Temporary Employment Certification* and/or job order only before certification and does not permit the employer to request or the CO to amend a certified *Application for Temporary Employment Certification.* This provision strikes a balance between the employer's need for flexibility in the application process and the Department's intent to make a determination based on the employer's actual need.

F. Recruitment Requirements

1. Section 655.40 Employer-Conducted Recruitment

Unlike the 2008 Final Rule, this proposal requires employers to conduct recruitment only after filing an *Application for Temporary Employment Certification* and receiving a Notice of Acceptance from the CO. The Department proposes this approach so that the employer must demonstrate rather than simply attest that there are not sufficient qualified U.S. workers who would be available to fill the job opportunities for which the employer seeks to hire H–2B workers.

The Department proposes that the employer conduct such recruitment of U.S. workers within 14 calendar days from the date of the Notice of Acceptance, unless the CO provides different instructions to the employer in the Notice. This allows the employer time within which to initiate and complete required recruitment as well as ensures that U.S. workers are notified of job opportunities as they become available. The Department further proposes that the employer offer employment to all U.S. applicants who meet the requirements of the job opportunity and will be available to fill the positions.

An employer is obligated to accept all qualified U.S. applicants referred for employment by the SWA until the third day preceding the employer's date of need or the date the last foreign worker departs for the employment, whichever is later. This timeframe increases the opportunity for U.S. workers to fill the available positions without unnecessarily burdening the employer.

Where applicable, the employer must inform the appropriate SWA(s) in writing of a later date of departure so that the SWA knows when to stop referring potential U.S. workers to the employer. Where the employer neglects to inform the SWA of the date of departure of its H–2B workers as required, the employer may be subject to debarment, and/or other remedies.

The Department is considering whether employers must inform the Department not only of the date of the last departure, but also of the actual number of H–2B workers hired under the approved *Application for Temporary Employment Certification.* In addition, the Department is interested in knowing whether the H–2B workers were hired from a foreign country or were already present in the U.S. This will provide the Department and other Federal agencies with essential information on actual utilization of the program.

Like the 2008 Final Rule, the proposed rule clarifies that employers are not required to conduct employment interviews. However, where the employer wishes to conduct interviews with U.S. workers, it must do so by telephone or at a location where workers can participate at little or no cost to the workers. This ensures that employers do not use the interview process to discourage U.S. workers from applying.

Finally, the Department proposes to require the employer to list in its recruitment report filed in accordance with § 655.48, the names of all U.S. applicants referred for employment, whether the applicant was accepted or rejected, and the reason why the applicant was rejected, if applicable.

2. Section 655.41 Advertising Requirements

The employer's advertisements and recruitment activities are essential to providing U.S. workers with sufficient information to make informed employment decisions. In order to ensure a fair test of the labor market, the Department proposes to require that all employer advertisements contain terms and conditions of employment no less favorable than those offered to the H–2B workers and reflect, at a minimum, the terms and conditions in the job order.

The remainder of this proposed section sets out the minimum content requirements for all advertisements. In addition to the requirements outlined in the 2008 Final Rule, the Department proposes to require that the advertisements include the assurances and obligations in the job order. These requirements include, but are not limited to: a statement referring to the three-fourths guarantee in § 655.20(f); a statement that transportation and subsistence to and from the place from which the employee has come to work for the employer will be provided; a statement that work tools, supplies, and equipment will be provided to the worker without charge; and if applicable, a statement that the employer is providing daily transportation to and from the worksite. In addition, the Department proposes that an employer with multiple wage offers, such as one in an itinerant or other occupation for which special procedures apply, must list the range of applicable wage offers in its advertisements/recruitment. The inclusion of such information will ensure that employers disclose all pertinent wage information and that U.S. workers are adequately informed about the wage rate for each job opportunity.

Sections 655.42 through 655.46 of the proposed rule outline the required recruitment steps. In addition to the involvement of the SWAs and the placement of two newspaper advertisements required under the 2008 Final Rule, the Department proposes to require the employer contact former U.S. employees, contact labor organizations in traditionally unionized occupations and industries, and post the availability of the job opportunity at the place of anticipated employment. These additional requirements will increase the likelihood that U.S. workers will learn of and potentially apply for the available job opportunities.

Additionally, many of these recruitment steps are aimed to increase the exposure of the job to the audience most likely to include, or to be able to locate, qualified workers—those closely associated to the job opportunity, either through direct contact with the employer (*i.e.,* former workers) or through secondary contact (*i.e.,* persons who hear about the job from current employees who see the posting notice at the worksite or from a community-based organization or a labor organization in the particular industry or occupation of the job opportunity). Employers using the H–2B program have consistently noted that U.S. workers do not seek out the jobs for which they must then seek foreign labor. Particularly in an economy in which the national unemployment rate has consistently exceeded 9 percent over the past two years, the Department assumes that some group of these available jobs would be taken by U.S. workers but for adequate notification of their existence. The concomitant downturn in the use of H–2B visas reflects the accuracy of the Department's assumption; even with recruitment far less than proposed by this NPRM, H–2B visa usage has been significantly decreased, as U.S. workers seek out these jobs.

3. Section 655.42 Newspaper Advertisements

Newspapers remain an important means to recruit U.S. workers. The Department is seeking comments on alternative advertising media that will reach the greatest number of U.S. workers.

The Department is continuing to require the employer to advertise in a newspaper of general circulation for the area of intended employment that is appropriate to the occupation and the workers likely to apply for the job opportunity. The employer's advertisements must run on 2 separate days, which may be consecutive, one of which must be a Sunday, unless the job opportunity is located in a rural area in which there is no newspaper with a Sunday edition. In such cases, the CO may permit the employer to substitute the Sunday advertisement with an advertisement in a newspaper with a regularly published daily edition that has the widest circulation in the area of intended employment. The Department further proposes to require that the content of each newspaper advertisement comply with the advertising requirements in § 655.41. The employer will be required to maintain copies of the newspaper pages, tear sheets or other proof of publication for 3 years after final determination to grant or deny the *Application for Temporary Employment Certification,* consistent with document retention requirements under § 655.56.

The Department proposes to no longer allow the employer to replace one of the newspaper advertisements with an advertisement in a professional, trade, or ethnic newspaper. The Department has concluded that newspapers of general circulation are more likely to reach the broader audiences who are more apt to be interested in most H–2B job opportunities and thus would be more appropriate as a recruitment requirement for all employers. However, the Department recognizes that advertisements in professional, trade, or ethnic newspapers may be appropriate for some applications, depending for instance, on the particular occupation and area of employment. Accordingly, the Department is instead proposing to permit the CO to require the employer to advertise in such publication(s) as part of any required additional

employer-conducted recruitment under § 655.46 of this subpart.

4. Section 655.43 Contact With Former U.S. Employees

In this section, the Department proposes to require the employer to contact by mail or other effective means its former U.S. workers who were employed by the employer in the same occupation and the place of employment during the previous year to that listed in the *Application for Temporary Employment Certification.* This expands the 2008 Final Rule requirement beyond former U.S. workers that have been laid off within 120 days of the employer's date of need. Employers will not be required to contact those U.S. workers who were dismissed for cause or who abandoned the worksite prior to the completion of the last employment period. Each employer must provide its former U.S. employees a full disclosure of the terms and conditions of the job order, and solicit their return to the job. Employers will be required to maintain documentation to be submitted in the event of an audit or investigation sufficient to prove contact with its former employees consistent with document retention requirements under § 655.56. This documentation may consist of a copy of a form letter sent to all former employees, along with evidence of its transmission (postage account, address list, etc.)

Since under the current regulations, most employers have a period of need of 10 months, the employer's former U.S. workers would be the same group of workers as those who were laid off at the end of work period. While the proposed requirement focuses on a longer period of time than the current requirement, it is unlikely that it will impose a significantly greater burden on employers. If an employer hires workers throughout the year to work for the period of its temporary need, it is unlikely that it will lay those workers off until the period of temporary need ends. Most, if not all workers who leave during the period of temporary need will have either quit or been terminated for cause, and the employer is not required to contact those workers. If for some reason, the employer did lay off some workers who were hired to work during the employer's period of temporary need, before the end of the period of need—*e.g.,* additional workers who were hired for a period of peakload need within the longer period of temporary need, the Department believes that it would be most appropriate to give those workers the first opportunity to take the jobs. Generally, however, there will be little practical difference between the operation of the current regulation and the operation of the proposed regulation except perhaps for seasonal jobs. In a seasonal program, reaching back to contact former employees who were employed over a cycle of a full year would be the minimum amount of time necessary to capture all of the seasonal activities for which H–2B workers are sought. For example, an oceanfront resort employer hires workers at the start of its season in May and releases them in September. The employer then seeks H–2B workers the following March, more than 60 days before the usual date of need. Reaching that particular workforce requires the employer to reach back to the time those employees were hired—the previous May—to ensure that the group of employees most likely to return to the employment are given the opportunity to do so.

5. Section 655.44 Contact With Labor Organizations

Where union representation is prevalent in the occupation or industry, the proposed rule would require the employer to formally contact the local union to inquire about the availability of qualified U.S. workers to fill the job opportunities for which the employer seeks to hire H–2B workers. The Department proposes to return to the long-standing practice of the CO directing employers to seek union assistance to fill H–2B jobs, because unions have traditionally been recognized as a reliable source for referrals of U.S. workers. While the Department has significant experience with occupations and industries that are typically unionized, we seek in particular comment on the circumstances or criteria that would trigger an employer's obligation to contact the local union to seek U.S. workers.

The employer must maintain documentation to be submitted in the event of an audit or investigation, consistent with document retention requirements under § 655.56, demonstrating that it contacted the applicable organization and that the union either did or did not respond to the employer's request for referrals. Such documentation may consist of a copy of the letter sent to the organization and an attestation from the contacting employee of the employer documenting the lack of a response, or the contents of any response received. If the union did respond to the employer's request, the employer's recruitment report must also include the number and disposition of U.S. workers who were referred.

6. Section 655.45 Contact With Bargaining Representative and Posting Requirements and Other Contact Requirements

The proposed rule requires all employers that are party to a CBA to provide written notice to the bargaining representative(s) of the employer's employees in the job classification in the area of intended employment. Where the employees in an occupation have a bargaining representative, the representative should be made aware of any job opportunities in that occupation. Seeking union assistance will help the employer in finding qualified U.S. workers who are available for the job opportunity for which the employer seeks to employ H–2B workers.

The Department proposes requiring the employer to maintain documentation demonstrating compliance with this requirement, consistent with document retention requirements under § 655.56. Additionally, the employer's recruitment report must confirm that the employer contacted the bargaining representative(s), including whether the organization referred qualified U.S. worker(s) and if so, how many workers were referred and their disposition.

Where there is no bargaining representative(s) of the employer's employees, the proposed rule requires the employer to provide notice to the employer's employees of the job opportunities by posting their availability for at least 10 consecutive business days in at least 2 conspicuous locations at the place(s) of anticipated employment, or in some other manner that provides reasonable notice. This requirement is new under the proposed rule, and is intended to ensure that each employer's existing U.S. workers receive timely notice of the job opportunities, therefore increasing the likelihood that those workers will apply for the available positions for the subsequent temporary period of need and that other U.S. workers, including former workers, will be more likely to learn of the job opportunities through word of mouth. The Department seeks comment on whether this requirement will maximize the number of U.S. workers who will be recruited to fill the vacancies for which H–2B workers are sought and other ways such notification may be effective.

The Department is also proposing to have employers contact community-based organizations to be designated by the CO in the Notice of Acceptance, to disseminate the notice of the job

opportunity. Community-based organizations are an effective means of reaching out to domestic workers interested in specific occupations. The contact is to be performed when designated specifically by the CO, as appropriate to the job opportunity and the area of intended employment.

The Department proposes to require that the employer to maintain documentation consistent with document retention requirements under § 655.56, sufficient to prove compliance with this requirement. The documentation may consist of a copy of the posted notice and a statement identifying where and when the notice was posted.

7. Section 655.46 Additional Employer-Conducted Recruitment

Where the CO determines that the employer-conducted recruitment, described in §§ 655.42 through 655.45, is not sufficient to attract qualified U.S. workers who would be available to accept employment, the proposed rule authorizes the CO to require the employer to engage in additional recruitment activities. The Department believes that such additional recruitment may be necessary in such areas to ensure that unemployed U.S. workers, who may be capable of (and desirous of) performing the job duties, are afforded maximum access to those opportunities. The Department's intention in requiring additional recruitment including, where appropriate, in areas of substantial unemployment (ASU), is predicated on the belief that more recruitment will result in more opportunities for U.S. workers. Areas of substantial unemployment by their nature have a higher likelihood of worker availability; the Department's recognition of worker availability in these areas is a strong indicator that these open job opportunities may have a more receptive potential populations. This recruitment will be conducted in addition to and occur within the same time period as the circulation of the job order and other mandatory employer-conducted recruitment described above and would not by itself result in any delay in certification.

The Department is not limiting additional recruitment only to job opportunities located in ASUs because additional recruitment might also be necessary where local employment patterns indicate a sudden increase in worker availability—*e.g.,* a plant closure. The Department also is not making additional recruitment an absolute requirement, even in situations where the job opportunity is located in an ASU. This is essential to permit the Department to be able to determine the appropriate level of recruitment based on the specific situation. The Certifying Officers, with advice from the SWAs who are familiar with local employment patterns and real-time market conditions, are well-positioned to judge where additional recruitment may or may not be required.

For example, it may be reasonable to require additional recruitment for a job that requires little training or experience in an ASU, since a larger group of available workers would be qualified for the job. However, it may not be reasonable to require additional recruitment where the employer is unlikely to find qualified workers among the unemployed U.S. worker population, for example where the job is specialized and the local population is not known to have that expertise. The CO may have cause to require additional recruitment in other situations as well. This may depend upon area-specific conditions, natural disasters, or similar events that give rise to additional workers being available. For example, workers may be available as the result of a plant closure or change in a seasonal event. While the CO will not have time to review and determine a course of action in every single application, it is expected that the existence of such situations, known to the SWA and made known to the CO, would be used as factors in determining whether to impose such additional recruitment and what type of recruitment would best reach the population known to be available for H–2B job opportunities.

The CO will describe in the Notice of Acceptance the types of additional recruitment efforts the employer will be required to undertake. Additional recruitment methods may include, but will not be limited to: additional print advertising; advertising on the employer's Web site or another Web site; contact with community-based organizations that have contact with potential worker populations; additional contact with labor unions; contact with faith-based organizations; and radio advertisements. In recognition of the invaluable SWA experience and expertise with local labor markets, the CO will consult with the SWA to determine the types of additional recruitment that may be appropriate for a particular job opportunity in the area of employment.

The Department invites stakeholders and other interested members of the public to provide comments on these proposed additional recruitment methods, and provide the Department with examples of the types of recruitment typically conducted in specific industries, occupations, or job classifications. This information will assist the Department in developing appropriate additional recruitment sources and criteria.

The Department is also proposing that the CO specify in the Notice of Acceptance the documentation or other supporting evidence the employer will be required to maintain as proof that the employer satisfied any additional recruitment requirements, consistent with document retention requirements under § 655.56.

8. Section 655.47 Referrals of U.S. Workers

The Department proposes to require SWAs to refer for employment individuals who have been informed of the details of the job opportunity and indicate that they are qualified and will be available for employment. Unlike under the 2008 Final Rule, which permitted potential applicants access to job order entries in each SWA's electronic system and self-referral to a specific job opportunity, SWA staff will provide all material terms and conditions contained in the job order to each applicant in order to ensure that the U.S. worker understands the job requirements and duties as well as the employer's obligations, including the additional worker protections proposed by this NPRM.

9. Section 655.48 Recruitment Report

Consistent with the requirements of the 2008 Final Rule, the Department proposes to continue to require the employer to submit to the NPC a written, signed recruitment report. However, the Department proposes requiring the employer to send the recruitment report on a date specified by the CO in the Notice of Acceptance instead of at the time of filing the *Application for Temporary Employment Certification.* This change is in line with the proposed recruitment model under which the employer does not begin its recruitment until directed by the CO in the Notice of Acceptance.

The remainder of this section sets out the information that the employer must include in the recruitment report. The Department proposes to require the employer to report on recruitment steps undertaken and their results. The proposed rule provides a detailed list of the specific information that must be included in the employer's recruitment report.

The Department proposes to require the employer to update the recruitment report throughout the recruitment

period to ensure that the employer accounts for contact with each prospective U.S. worker. The employer does not need to submit the updated recruitment report but is required to retain it and make it available in the event of a post-certification audit, another Federal agency investigation, or upon request by DOL.

G. Labor Certification Determinations

1. Section 655.50 Determinations

The Department proposes to retain the same requirements under this provision as provided in the 2008 Final Rule.

2. Section 655.51 Criteria for Certification

The Department anticipates that the determination process for approving or denying each *Application for Temporary Employment Certification* will be simplified under the proposed rule through the pre-filing determination of temporary need. In the majority of cases, the Department's determination should rest on a finding that the employer has a valid *H–2B Registration* and has demonstrated full compliance with the requirements of this subpart. As under the 2008 Final Rule, in ensuring that the employer met its recruitment obligations with respect to U.S. workers, the CO will treat as available all those individuals who were rejected by the employer for any reason other than a lawful, job-related reason. Additionally, the Department proposes to clarify that it will not grant certifications to employers that have failed to comply with final agency orders under the program.

3. Section 655.52 Approved Certification

The Department proposes that the CO use next day delivery methods, and preferably, electronic mail, to send the Final Determination letter to the employer. The Department is doing so in an effort to expedite the transmittal of information and introduce efficiency and cost savings into the application determination process. The proposed rule provides that the CO will send the approved certification to the employer, with a copy to the employer's attorney or agent, if applicable. This is a departure from the 2008 Final Rule, which calls for the delivery of the original certification to the employer's attorney. The Department's proposed change in procedure is the result of years of OFLC program experience evidencing complications in the relationship between employers and their agents or attorneys. The Department does not intend to be involved in, or interfere with, the employer's relationship with its attorney or agent. However, the Department believes that because it is the employer that must attest to the assurances and obligations contained in the *Application for Temporary Employment Certification* and be ultimately responsible for upholding those assurances and obligations, the employer should receive and maintain the original approved certification.

4. Section 655.53 Denied Certification

The proposed rule retains the general provisions for denying certifications from the 2008 Final Rule, except that the Department proposes that the CO will send the Final Determination letter by means guaranteeing next day delivery to the employer, with a copy to the employer's attorney or agent. Otherwise, the proposed rule continues to require the Final Determination letter to state the reason(s) that the certification was denied, cite the relevant regulatory provisions and/or special procedures that govern, and provide the applicant with information sufficient to appeal the determination.

5. Section 655.54 Partial Certification

The proposed rule retains the 2008 Final Rule provision explicitly providing that the CO may issue a partial certification, reducing either the period of need or the number of H–2B workers requested, or both. The proposed rule clarifies that the CO may reduce the number of workers certified by subtracting the number of qualified and available U.S. workers who have not been rejected for lawful job-related reasons from the total number of workers requested.

The proposed rule also continues to permit the employer to request administrative review.

6. Section 655.55 Validity of Temporary Employment Certification

The Department proposes to retain the provision that a temporary employment certification is only valid for the period specified. While the proposed rule continues to prohibit the employer from transferring the labor certification to another employer, the Department proposes to allow the employer to transfer the approved labor certification to a successor in interest in case of a merger or acquisition where the new employer is willing to continue to employ the workers certified and take on all of the legal obligations associated with the labor certification.

7. Section 655.56 Document Retention Requirements of H–2B Employers

The Department proposes to add a section that delineates document retention requirements, including the period of time during which documents must be retained. Adding this section provides a single place in which to find all document retention requirements, thus eliminating the need to search for them in various sections of the regulatory text as currently necessary under the 2008 Final Rule.

These document retention requirements apply to all employers filing an *Application for Temporary Employment Certification,* regardless of whether such applications have been certified, denied, or withdrawn. These records are invaluable to the Department in evaluating future applications filed by the employer as to whether it has demonstrated that no U.S. workers are available and that the alien's employment will not adversely affect wages and working conditions of similarly employed U.S. workers. In many such instances, the documents would allow the employer to demonstrate that it has met its obligations with respect to US workers that may have been recruited as well as other program requirements.

H. Post Certification Activities

Proposed §§ 655.60 through 655.63 concern actions an employer may take after an *Application for Temporary Employment Certification* has been adjudicated, including making a request for extension of certification, appealing a decision of the CO, and withdrawing an *Application for Temporary Employment Certification.* The Department also proposes to institute a new publicly-accessible electronic database of employers that have applied for H–2B certification that the Department will maintain.

1. Section 655.60 Extensions

In this proposed section, the Department proposes to allow an employer to request an extension of the period of employment under limited circumstances involving weather conditions or other factors beyond the control of the employer. Under the proposed rule, there will be instances when an employer will have a reasonable need for an extension of the time period that was not foreseen at the time the employer originally filed the *Application for Temporary Employment Certification.* This provision will provide flexibility to the employer in the event of unforeseen circumstances while maintaining the integrity of the

certification and the preliminary determination of temporary need.

The Department proposes that the employer would make its request to the CO in writing and would submit documentation showing that the extension is needed and that the employer could not have reasonably foreseen the need. Extensions would be available only to employers whose original certified period of employment is less than the maximum period allowable in this subpart and under DHS H–2B regulations. The extension may not result in a total work period exceeding 9 months under the proposed definition of temporary need for employers whose recurring need is seasonal, peakload, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need, except in extraordinary circumstances. Extensions will only be granted if the employer demonstrates that the need for the extension arose from unforeseeable circumstances, such as weather conditions or other factors beyond the control of the employer (including unforeseen changes in market conditions).

Upon receipt of the employer's request, the CO will inform the employer of its decision to grant or deny the request in writing. The employer may appeal the CO's denial of an extension under the administrative review provision of the proposed rule.

The employer's assurances and obligations under the original approved temporary employment certification will continue to apply to workers recruited in connection with the *Application for Temporary Employment Certification* during the extended period of employment. The employer must meet its obligations which are based on the workers' partial or full completion of the extended work period.

The Department proposes to require that the employer provide all its H–2B and corresponding U.S. workers a copy of the extension immediately upon approval. This requirement is intended to ensure that workers remain informed of all aspects of the job opportunity with the employer. Obtaining such an extension may require the employer to file an amended petition with USCIS to cover any additional periods of time granted.

2. Section 655.61 Administrative Review

This proposed section sets forth the procedures for BALCA review of a decision of a CO. The substance of this section is the same as that in the 2008 Final Rule. However, the proposed section does not refer to the particular decision of the CO that may be appealed, such as the denial of the temporary labor certification. Rather, the proposed rule refers generally to the decisions of the CO that may be appealed, where authorized in this subpart. These decisions are identified in the sections of the rule that discuss the CO's authority and procedure for making that particular decision. Additionally, the proposed rule increases from 5 business days to 7 business days: The time in which the CO will assemble and submit the appeal file in § 655.61(b); the time in which the CO may file in § 655.61(c); and the time BALCA should provide a decision upon the submission of the CO's brief in § 655.61(f).

3. Section 655.62 Withdrawal of an Application for Temporary Employment Certification

Under the proposed rule, an employer may withdraw an *Application for Temporary Employment Certification* before it is adjudicated.

4. Section 655.63 Public Disclosure

This proposed section would codify the Department's practice of maintaining, apart from the electronic job registry, an electronic database accessible to the public containing information on all employers that apply for H–2B labor certifications. The database will continue to include information such as the number of workers the employer requests on an application, the date an application is filed, and the final disposition of an application. The continued accessibility of such information will increase the transparency of the H–2B program and process and provide information for those currently seeking such information from the Department through Freedom of Information Act (FOIA) requests.

I. Integrity Measures

Proposed §§ 655.70 through 655.73 have been grouped together under the heading Integrity Measures, describing those actions the Department proposes to take to ensure that an *Application for Temporary Employment Certification* filed with the Department in fact complies with the requirements of this subpart.

1. Section 655.70 Audits

This section outlines the proposed process under which the Department will conduct audits of adjudicated applications. These provisions are similar to the 2008 Final Rule. The Department's regulatory mandate to ensure that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed U.S. workers serves as the basis for the Department's authority to audit adjudicated applications, even if the employer's application was ultimately withdrawn or denied. Adjudicated applications include those that have been certified, denied, or withdrawn after certification. There is real value in the Department's ability to audit those applications because they could be used to establish a record of employer compliance or non-compliance with program requirements and to better inform the Department in its determinations to investigate or debar an employer or its agent or attorney.

Under the proposed rule, the OFLC has the discretion to choose which *Application for Temporary Employment Certification* will be audited. When an *Application for Temporary Employment Certification* is selected for audit, the proposed rule calls for the CO to send a letter to the employer and if appropriate, its attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO.

An employer's failure to comply with the audit process may result in the revocation of its certification or in debarment, under proposed §§ 655.72 and 655.73, or require assisted recruitment in future filings of an *Application for Temporary Employment Certification,* as set forth in § 655.71. The CO may provide any findings made or documents received in the course of the audit to DHS or other enforcement agencies, as well as WHD. The CO may also refer any findings that an employer discriminated against an eligible U.S. worker to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

2. Section 655.71 CO-Ordered Assisted Recruitment

The proposed rule permits the OFLC to determine that a violation that does not warrant debarment has occurred and, as a result, require the employer to participate in assisted recruitment. This provision will also assist those employers that due to either program inexperience or confusion, have made mistakes in their *Application for Temporary Employment Certification* that indicate a need for further assistance from the Department.

Under this provision the CO will notify the employer (and its attorney or agent, if applicable) in writing of the requirement to participate in assisted

recruitment for any future filed *Application for Temporary Employment Certification* for a period of up to 2 years. The assisted recruitment will be at the discretion of the CO, determined upon the unique circumstances of the employer.

The assisted recruitment may consist of, but is not limited to, requiring the employer to conduct additional recruitment, reviewing the employer's advertisements before posting and directing the employer where such advertisements are to be placed and for how long, requesting and reviewing copies of all advertisements after they have been posted, proof of contact with past U.S. workers, and proof of SWA referrals of U.S. workers. If an employer fails to comply with the requirements of this section, the employer's application will be denied and the employer may be debarred from future program participation.

The Department invites stakeholders and other interested members of the public to provide comments and suggestions of industry specific recruitment and advertising sources to be used by the CO in administering assisted recruitment in the H–2B program under this section.

3. Section 655.72 Revocation

The Department proposes to include a provision which would allow the Administrator, OFLC to revoke an approved H–2B temporary labor certification. Under the proposed section, the Administrator, OFLC may revoke certification if he/she finds that the issuance of the temporary employment certification was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in proposed § 655.73(d). The Administrator, OFLC may also revoke certification if he/she finds that the employer substantially failed to comply with any term or condition of the approved temporary employment certification, as further defined in proposed § 655.73(d) and (e). Last, the Administrator, OFLC may also revoke certification if he/she finds that the employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit, or law enforcement function, or that the employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary, with respect to the H–2B program.

The proposed procedures for revocation begin with the Administrator, OFLC sending the employer a Notice of Revocation. Upon receiving the Notice of Revocation, the employer has two options: it may submit rebuttal evidence to the CO or appeal the revocation under the procedures in proposed § 655.61. If the employer does not file rebuttal evidence or an appeal within 10 business days of the date of the Notice of Revocation, the Notice will be deemed final agency action and will take effect immediately at the end of the 10-day period.

If the employer chooses to file rebuttal evidence, and the employer timely files that evidence, the Administrator, OFLC will review it and inform the employer of his final determination on revocation within 10 business days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the certification should be revoked, the Administrator, OFLC will inform the employer of its right to appeal under proposed § 655.61. The employer must file the appeal of the Administrator, OFLC's determination within 10 business days, or the Administrator, OFLC's decision becomes the final decision of the Secretary and will take effect immediately after the 10-day period.

If the employer chooses to appeal either in lieu of submitting rebuttal evidence, or after the Administrator, OFLC makes a determination on the rebuttal evidence, the appeal will be conducted under the procedures contained in proposed § 655.61. The timely filing of either the rebuttal evidence or an administrative appeal stays the revocation pending the outcome of those proceedings. If the labor certification is ultimately revoked, the Administrator, OFLC will notify DHS and the Department of State.

Proposed § 655.72(c) lists an employer's continuing obligations if the employer's H–2B certification is revoked. The obligations include reimbursement of actual inbound transportation, visa, and other expenses (if they have not been paid), the worker's outbound transportation expenses, payment to the worker of the amount due under the three-fourths guarantee as required by proposed § 655.20(f), and any other wages, benefits, and working conditions due or owing to the worker under this subpart.

4. Section 655.73 Debarment

The Department proposes to revise the existing debarment provision to strengthen the enforcement of H–2B labor certification requirements and to clarify the basis under which debarment may be applied. Proposed § 655.73(a) states that the Administrator, OFLC may debar an employer if s/he finds that the employer: willfully misrepresented a material fact in its *H–2B Registration,* approved *Application for Temporary Employment Certification,* or *H–2B Petition;* substantially failed to meet any of the terms and conditions of *H–2B Registration,* approved *Application for Temporary Employment Certification,* or *H–2B Petition;* or willfully misrepresented a material fact to the Department of State during the visa application process. Proposed § 655.73(a) defines a "substantial failure" to mean a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents. The Administrator, OFLC may not issue future labor certifications to an employer represented by an agent or attorney who the Administrator, OFLC finds has participated in an employer's substantial violation. The Department is proposing that the Administrator, OFLC may not debar an employer, attorney, or agent for less than 1 year or more than 5 years from the date of the Department's final debarment decision.

Proposed § 655.73(d) provides the standard for determining whether a violation was willful. Proposed § 655.73(e) describes the factors that the Administrator, OFLC may consider in determining whether a violation constitutes a significant deviation from the terms and conditions of the *H–2B Registration,* approved *Application for Temporary Employment Certification,* or *H–2B Petition.*

This list of factors is not exclusive, but it offers some guidance as to what the Administrator, OFLC generally considers when determining whether a violation would warrant debarment. The factors are the same factors used by WHD to determine whether a violation is significant under 29 CFR 503.19(c).

Proposed § 655.73(f) provides a comprehensive but not exhaustive list of violations that would meet the standards in §§ 655.73(d)–(e) and therefore warrant debarment. The text of proposed § 655.73(f) is a modified list of debarrable violations from the 2008 Final Rule. The most significant differences are that a single act, as opposed to a pattern or practice of such actions, would be sufficient to merit debarment and that the following violations would be considered debarrable:

- Improper layoff or displacement of U.S. workers or workers in corresponding employment at § 655.73(f)(4);
- A violation of the requirements of § 655.20(o) or (p) concerning fee shifting and related matters at § 655.73(f)(10);
- A violation of any of the anti-discrimination provisions listed in 29 CFR 503.16 and § 655.73(f)(11);

• Failure to comply with the assisted recruitment period; and

• A material misrepresentation of fact during the registration or application process.

Although many of the debarrable violations in the 2008 Final Rule are described as "significant failures," while many of the violations listed under proposed § 655.73(f) are simply described as "failures," the Administrator, OFLC will consider whether all violations are sufficiently significant to warrant debarment based on the criteria in proposed § 655.73(e) or meet the definition of willful at § 655.73(d).

The independent debarment authority of the WHD is a new feature of the proposed rule. See proposed 29 CFR 503.24 and the corresponding preamble. Because OFLC and WHD have concurrent debarment authority, some changes have been proposed to the OFLC debarment procedures to ensure that the procedures are consistent with the WHD debarment procedures. However, an important distinction between the OFLC and WHD debarment procedures is that the WHD debarment procedures do not provide for a 30-day rebuttal period because WHD debarments arise from investigations during which the employer has ample opportunity to submit any evidence and arguments in its favor.

Proposed § 655.73(g) describes the procedures that will be followed in the event of an OFLC debarment. These procedures are substantively the same as the debarment procedures contained in the 2008 Final Rule, with the following exceptions:

In § 655.73(g)(2), the Department proposes that an employer be provided 30 calendar days from the date the Notice is issued to submit rebuttal evidence and that the Administrator, OFLC be provided 30 calendar days from the date of receiving the rebuttal evidence to issue a final determination.

In § 655.73(g)(4), the Department proposes that the ALJ will prepare his or her decision following a debarment hearing within 60 days after completion of the hearing and closing of the record. This time constraint is consistent with the proposed debarment hearing procedures of WHD.

In § 655.73(g)(6), the Department proposes to remove the language that provides that "[i]f the [Administrative Review Board (ARB)] fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final decision of the Secretary." Given the serious consequences of debarment, the Department did not want to eliminate a party's appeal rights simply because the ARB failed to act in the time frame provided.

Proposed § 655.73(h) clarifies that while WHD and OFLC will have concurrent debarment jurisdiction, the two agencies will coordinate their activities so that a specific violation for which debarment is imposed will be cited in a single debarment proceeding.

Last, proposed § 655.73(i) provides that an employer, agent, or attorney who is debarred by OFLC or WHD from the H–2B program will also be debarred from all other foreign labor certification programs administered by the Department for the time period in the final debarment decision. Many employers, agents and attorneys participate in more than one foreign labor certification program administered by the Department. However, under the current regulation, a party that is debarred under the H–2B program may continue to file applications under the Department's other foreign labor programs. This proposal will allow the Department to refuse to accept applications filed by or on behalf of a debarred party under the H–2B program in any of the Department's foreign labor certification programs.

Addition of 29 CFR Part 503

Effective January 18, 2009, pursuant to INA section 214(c)(14)(B), DHS transferred to the Secretary enforcement authority for the provisions in section 214(c)(14)(A)(i) of the INA which govern petitions to admit H–2B workers. The 2008 Final Rule contains the regulatory provisions governing ETA's processing of the employer's *Application for Temporary Employment Certification* and the WHD's enforcement responsibilities in ensuring that the employer has not willfully misrepresented a material fact or substantially failed to meet a condition of such application.

The Department has carefully reviewed the 2008 Final Rule and proposes substantive changes to both the certification and enforcement processes to enhance protection of U.S. and H–2B workers.

This proposed rule would add a new part, 29 CFR part 503, to further define and clarify the protections for workers. This proposal and the proposed changes in 20 CFR part 655, subpart A add workers in corresponding employment to the protected worker group, impose additional recruitment obligations and employer obligations for laid off U.S. workers, and increase wage protections for H–2B workers and workers in corresponding employment. Additionally, the Department proposes to enhance the WHD's enforcement role in administrative proceedings following a WHD investigation.

To ensure consistency and clear delineation of responsibilities between Department agencies implementing and enforcing H–2B provisions, this new part 503 has been written in close collaboration with ETA and is being published concurrently with ETA's proposals in 20 CFR part 655, subpart A to amend the employer certification process.

A. General Provisions and Definitions

Proposed §§ 503.0 through 503.8 provide general background information about the H–2B program and its operation. Proposed §§ 503.1 and 503.2 are similar to the current regulations at 20 CFR 655.1 and 655.2. Proposed § 503.3 describes how the Department will coordinate both internally and with other agencies.

1. Section 503.4 Definition of Terms

Under this proposed section, definitions are identical to those contained in proposed 20 CFR part 655, Subpart A, except that this proposed section contains only those definitions that are applicable to this part. The preamble to 20 CFR part 655, subpart A contains the relevant discussion of those definitions.

2. Section 503.5 Temporary Need

Under this proposed section, the provision of temporary need is identical to the requirements set forth in proposed 20 CFR 655.6.

3. Section 503.6 Waiver of Rights Prohibited

The Department proposes to add new language that would prohibit any employer from seeking to have workers waive or modify any rights granted them under these regulations. This proposed paragraph would, with limited exceptions, void any agreement purporting to waive or modify such rights. This proposed language is consistent with similar prohibitions against waiver of rights under other laws, such as the Family and Medical Leave Act, see 29 CFR 825.220(d), and the H–2A program, see 29 CFR 501.5.

4. Section 503.7 Investigation Authority of Secretary

The Department proposes to retain the current authority established under 20 CFR 655.50, affirming WHD's authority to investigate employer compliance with these regulations and WHD's obligation to protect the confidentiality of complainants. This proposed section

also discusses the reporting of violations.

5. Section 503.8 Accuracy of Information, Statements, Data

Under this proposed section, making false representations to the government would make an entity subject to penalties, including a fine of up to $250,000 and/or up to 5 years in prison.

B. Enforcement Provisions

1. Section 503.15 Enforcement

Under this proposed section, the type of workers entitled to protection by WHD enforcement is expanded to include workers in corresponding employment, including those hired outside the 10-day recruitment period as covered in the current rule. This is necessary to ensure that U.S. workers are not adversely affected by the employment of H–2B workers.

2. Section 503.16 Assurances and Obligations of H–2B Employers

Under this section, the Department proposes requirements for employers seeking to participate in the H–2B program. These provisions are identical to those discussed in proposed 20 CFR 655.22, with the exception of an additional paragraph (aa), *Cooperation with Investigators.* In this proposed paragraph, the Department adds to the employer obligations the existing requirement in 20 CFR 655.50(c) that the employer cooperate in any administrative or enforcement proceedings. The provision states that the employer will cooperate with any employee of the Secretary exercising or attempting to exercise the authority delegated to the Department. Adding this provision to the list of employer obligations will facilitate enforcement if an employer fails to cooperate and this failure is determined to be a violation, consistent with the standards in § 503.19. The requirements for employer cooperation are set forth more fully in § 503.25.

The preamble to 20 CFR part 655, subpart A contains the relevant discussion of the other assurances and obligations for employers participating in the H–2B program.

3. Section 503.17 Documentation Retention Requirements of H–2B Employers

The NPRM proposes to consolidate in § 503.17 the documentation retention requirements previously found throughout 20 CFR part 655, subpart A. This proposal requires the retention and availability of certain documentation demonstrating compliance with the program's requirements. Documents must be retained in hard copy for a period of 3 years from the certification date if the *Application for Temporary Employment Certification* was approved, 3 years from the determination date if it was denied, or 3 years from the day the Department received the letter of withdrawal if it was withdrawn. The proposed rule contains several new document retention requirements.

Under paragraph (c)(2)(iii) of this section, employers are required to retain evidence of contact with former U.S. workers as specified under proposed 20 CFR 655.43. Under paragraph (c)(2)(v) of this section, employers are required to retain a copy of the posting of the job opportunity in circumstances where there is no bargaining representative, as specified in proposed 20 CFR 655.45(b).

Under paragraph (c)(2)(vi) of this section, employers are required to retain evidence of additional employer-conducted positive recruitment activities as specified in proposed 20 CFR 655.46.

Paragraph (c)(11) of this section requires employers to retain the approved *H–2B Petition,* as defined under proposed § 503.4, including all accompanying documents. Under paragraph (c)(5) of this section, employers are required to retain records of each worker's earnings, hours worked, and other information as specified under proposed § 503.16(i).

Paragraph (c)(7) of this section concerns proposed § 503.16(w), which requires that employers contact and offer the H–2B job opportunity to former U.S. workers employed during the previous year in the occupation and at the place of employment, including those laid off within 120 days of the date of need. The employer must retain evidence of contact with each U.S. worker, documentation that each U.S. worker had been offered the job, and documentation that each U.S. worker who was not hired either turned down the offer or was rejected for legal reasons.

Under paragraph (c)(8) of this section, employers are required to retain the written contract prohibiting a foreign labor contractor from receiving prohibited payments as specified in proposed § 503.16(p). Under paragraph (c)(9) of this section, employers are required to retain the written notice informing OFLC that an H–2B worker or worker in corresponding employment has separated from employment before the end date specified in the approved *Application for Temporary Employment Certification* (see proposed § 503.16(y)).

Proposed paragraph (c)(10) of this section keeps the requirement currently found under 20 CFR 655.15(e) related to retaining a copy of the job order. The Department would also require employers to retain a copy of the *H–2B Registration* and *Application for Temporary Employment Certification.* The proposed rule retains the requirement currently in 20 CFR 655.50(c) that employers make all records available within 72 hours following notice from the Administrator, WHD.

The Department believes it is important to require that such records be maintained and made available, as in other enforcement programs, so that in the event of an investigation the Department is able to determine compliance or, in the event of violations, the nature and extent of the violations. The Department believes that this proposed rule would not be burdensome to employers as this section does not require employers to create any new documents but simply to preserve those documents that are already required for applying for participation in the H–2B program.

4. Section 503.18 Validity of Temporary Employment Certification

The Department proposes to include clarifying edits to the current 20 CFR 655.34 (a) and (b), providing the time frame and scope for which an *Application for Temporary Employment Certification* is valid.

5. Section 503.19 Violations

Under this proposed section, the Department specifies the violations it may cite as a result of an investigation. These violations are similar to those in 20 CFR 655.60, as they conform to the statutory provisions in 8 U.S.C. 1184(c)(14)(A). Specifically, proposed paragraph (a)(1) of this section retains the provision that the Department must determine whether a willful misrepresentation of a material fact occurred and specifies that such misrepresentation must have occurred on the *H–2B Registration,* the *Application for Temporary Employment Certification,* or the *H–2B Petition.* Similar to the current provisions at 20 CFR 655.60(b) and 655.65(d), proposed paragraph (a)(2) of this section specifies that the Department must determine whether the employer substantially failed to meet any of the conditions of the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition,* and defines a "substantial failure" to mean a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents.

Under proposed paragraph (a)(3) of this section, the Department clarifies that a willful misrepresentation of a material fact to Department of State during the visa application process is also considered to be a violation, similar to 20 CFR 655.60(c). This corrects an inadvertent drafting error in the 2008 Final Rule.

Proposed paragraph (b) of this section sets out when a violation qualifies as willful. Proposed paragraph (c) of this section provides guidance on determining whether a failure to comply constitutes a significant deviation from the terms and conditions of the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition,* and provides a non-exhaustive list of factors that the Administrator, WHD may consider. The factors are the same factors used by OFLC to determine whether to initiate debarment under proposed 20 CFR 655.73 and are similar to the factors used by WHD to determine the amount of CMPs to be assessed under proposed § 503.23.

6. Section 503.20 Sanctions and Remedies—General

The proposed rule addresses the Department's authority to pursue sanctions and remedies in response to an employer violation that meets the standards set forth in proposed § 503.19, and identifies actions the Department can take if the Administrator, WHD determines that a violation has occurred. Most remedies available to WHD have not changed. They include, but are not limited to, payment of back wages, including recovery of prohibited fees paid or impermissible deductions; enforcement of the provisions of the job order; assessment of CMPs; make-whole relief for any person who has been discriminated against; and reinstatement and make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced. In addition, this NPRM would give WHD concurrent debarment authority with ETA to prohibit employers, attorneys and agents from participating in the H–2B program for certain substantial and willful violations. This new authority is addressed in detail in proposed § 503.24 below. The minimum debarment period would be 1 year and the maximum would be 5 years. Finally, the proposed rule specifies that the employer or, if applicable, the successor in interest, is liable for all the remedies as a result of a violation.

7. Section 503.21 Concurrent Actions

Under this proposed section, the Department clarifies the different roles and responsibilities of OFLC and WHD, and notes that both agencies have concurrent jurisdiction to impose debarment. Section 503.3(c) is intended to protect the employer from being debarred by both entities for a single violation.

8. Section 503.22 Representation of the Secretary

The proposed rule identifies the Solicitor of Labor and authorized representatives as the parties who would represent WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and these proposed regulations.

9. Section 503.23 Civil Money Penalty Assessment

The Department proposes to retain most of the language currently in 20 CFR 655.65(b), (d) and (g) on CMP assessments and the maximum amount of penalties that may be assessed per violation, which remains unchanged at $10,000, the statutory limit under 8 U.S.C. 1184(c)(14)(A). The assessment of the maximum penalties available would not be mandatory, but rather based on regulatory guidelines in proposed § 503.23(e) and the facts of each individual case. Higher penalty amounts would be reserved for willful failures resulting in harm to U.S. workers. The Department believes that its authority to assess CMPs will help ensure that employers meet their obligations under the H–2B program.

The NPRM also contains additional and clarifying language specifying the violations that are subject to CMP assessment if they meet the standards described in § 503.19. The Department proposes to include the following provisions:

Paragraph (a) of this section clarifies that WHD may find a separate violation for each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment;

Paragraph (b) of this section proposes that employers that violate wage requirements are subject to CMPs and defines the amount of wage-related penalties;

Paragraph (c) of this section proposes that WHD may assess CMPs for employers that improperly terminate or fail to hire qualified U.S. workers and defines the amount of these penalties;

Paragraph (d) of this section proposes that WHD may assess CMPs for any other violation that meets the standards described in § 503.19; and

Paragraph (e) of this section retains the language from 20 CFR 655.65(g) regarding the factors that would influence the amount of CMPs the Department assesses. These factors continue to include, among others, the harm to U.S. workers; the number of H–2B workers, workers in corresponding employment, or improperly rejected U.S. applicants affected; the employer's commitment to future compliance; and whether the violation brought the employer financial gain.

10. Section 503.24 Debarment

The NPRM proposes strengthening and streamlining the enforcement of the H–2B program's requirements by extending to WHD the authority already held by OFLC to debar H–2B employers. The independent debarment authority of WHD is a new feature of the proposed rule.

Proposed § 503.24(a) states that the Administrator, OFLC will not issue future labor certifications to an employer if the Administrator, WHD finds that the employer committed a violation that meets the standards of § 503.19. Proposed § 503.24 provides a comprehensive but not exhaustive list of violations that could warrant debarment where the standards set forth in § 503.19 are met, and is similar to the list of debarrable violations from the 2008 Final Rule, at 20 CFR 655.31. The most significant differences are that the Department now proposes that a single act, as opposed to a pattern or practice of such actions, would be sufficient to merit debarment and that the following violations may be considered debarrable:

Improper layoff or displacement of U.S. workers or workers in corresponding employment (§ 503.24(a)(iv));

A violation of the requirements of § 503.16(o) and (p) concerning prohibited fees (§ 503.24(a)(viii));

A violation of any of the anti-discrimination provisions listed in § 503.16(r) (§ 503.24(a)(ix)); and

A willful misrepresentation of a material fact during the registration or application process.

Proposed § 503.24(b) provides that the Administrator, OFLC may not issue future labor certifications to an employer represented by an agent or attorney who the Administrator, WHD finds has participated in an employer's violation. The Department proposes in § 503.24(c) that the Administrator, OFLC may not debar an employer, attorney, or agent for less than 1 year or more than 5 years from the date of the Department's final debarment decision.

Proposed § 503.24(d) describes the procedures that will be followed in the event of WHD debarment, cross-referencing the administrative proceedings provided in Subpart C.

Proposed § 503.24(e) clarifies that while WHD and OFLC will have concurrent debarment jurisdiction, the two agencies may coordinate their activities so that a specific violation for which debarment is imposed will be cited in a single debarment proceeding. Because OFLC and WHD would have concurrent debarment jurisdiction, some changes have been proposed to OFLC's debarment procedures (see proposed language at 20 CFR 655.73 and the corresponding preamble) to ensure that OFLC's and WHD's debarment procedures are consistent with each other. However, an important distinction between the OFLC and WHD debarment procedures is that the WHD debarment procedures do not provide for a 30-day rebuttal period because WHD debarments arise from investigations during which the employer has ample opportunity to submit any evidence and arguments in its favor.

Last, proposed § 503.24(f) provides that an employer, agent, or attorney who is debarred by OFLC or WHD from the H–2B program will also be debarred from all other foreign labor programs administered by the Department for the same period of time set forth in the final debarment decision. Many employers, agents, and attorneys participate in more than one foreign labor certification program administered by the Department. However, under the current regulation, a party that is debarred under the H–2B program may continue to file applications under the Department's other foreign labor certification programs. This proposal will allow the Department to refuse to accept applications filed by or on behalf of a debarred party under the H–2B program in any of the Department's foreign labor certification programs.

11. Section 503.25 Failure To Cooperate With Investigators

The proposed rule defines and expands the penalties for an employer's (or its agent's or attorney's) failure to cooperate with a WHD investigation. WHD's remedies for such a failure would include recommending revocation to OFLC of an employer's existing *Application for Temporary Employment Certification,* and/or debarring an employer from future certifications for up to 5 years, and/or assessing CMPs. The proposed debarment maximum of 5 years is an increase from the current maximum of 3 years.

12. Section 503.26 Civil Money Penalties—Payment and Collection

The Department proposes to revise the language instructing employers how to submit payment of any CMPs owed. This section is administrative in nature and does not propose any substantive changes.

C. Administrative Proceedings

The NPRM proposes generally to adopt the applicable administrative proceedings in current 20 CFR 655.70–655.80. The NPRM proposes few significant changes to the administrative proceedings from the 2008 Final Rule. Many of the changes were made to bring clarity to the administrative proceedings that will govern H–2B hearings, and to achieve general consistency with the procedural requirements applicable to H–2A proceedings.

In § 503.50, the Department proposes that the ALJ will prepare a decision following a debarment hearing within 60 days after completion of the hearing and closing of the record. This time constraint is consistent with the newly-proposed debarment hearing procedures of the OFLC. In § 503.55 the Department proposes to remove the language from the 2008 Final Rule, 20 CFR 655.31(e)(5)(iii)(D), that provides that "[i]f the ARB fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final decision of the Secretary."

In proposed §§ 503.40, 503.41(a), 503.42(a), and 503.50(e), the term "unpaid wages" is replaced with the term "monetary relief" to reflect the fact that WHD may seek to recover other types of relief, such as if an employer requires an H–2B employee to pay his/her own visa fees and other related government-mandated fees.

Section 503.43(c) proposes to change the number of days an employer has to request an administrative hearing from 15 calendar days after the determination to 30 calendar days after the date of the determination. Under § 503.48(b) the NPRM proposes to change the time requirement for the ALJ to notify all parties of the date, time, and place of the hearing from 14 calendar days to 30 calendar days.

IV. Administrative Information

A. Executive Order 12866

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines an economically significant regulatory action as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely and materially affects 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) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this NPRM is not an economically significant regulatory action under section 3(f)(1) of E.O. 12866. Regardless of whether the benefits of a rule exceed its costs, the rule is still considered economically insignificant under E.O. 12866. This regulation would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way. In fact, this NPRM is intended to provide employers with clear and consistent guidance on the requirements for participation in the H–2B worker program. The Department, however, has determined that this NPRM is a significant regulatory action under sec. 3(f)(4) of the E.O. and, accordingly, OMB has reviewed this NPRM.

1. Need for Regulation

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H–2B program. The Department believes that the policy underpinnings of the 2008 Final Rule, *e.g.* streamlining the H–2B process to defer many determinations of program compliance until after an application has been adjudicated, does not provide an adequate level of protection for either U.S. or foreign workers.

The Department believes that there are insufficient worker protections in the current attestation-based model in which employers attest, but do not fully demonstrate, that they have performed an adequate test of the U.S. labor market. Even in the first year of the operation of the attestation-based system, it has come to the Department's attention that employers are attesting to compliance with program obligations with which they have not complied, and that employers are not recruiting U.S. workers in accordance with established

policies. The Department obtained this information in the processing and auditing of cases and in complaints from U.S. workers brought since the effective date of the 2008 Final Rule. The identified violations come from different geographical sectors and relate to both new and experienced filers. In light of such non-compliance, the Department has chosen to revisit the use of attestations, even with the use of post-certification program integrity measures. We would emphasize that the return to the certification model which was used in the program for its entire history until January 2009, and which was recently reintroduced into the H–2A program, creates no significant additional burdens on employers. It does not change the nature of the obligations with which employers must comply, or the documentation that employers must maintain, but merely adjusts the timing and circumstances under which that documentation, the evidence of compliance with those obligations, must be produced. While this change produces no additional burden on employers, it will substantially enhance overall program integrity by allowing the Department to identify potential problematic applications at the earliest possible time. It is also much less onerous on employers to be required to amend a deficient or incomplete application before it is certified, than to subject the employer to the potential for back pay, civil money penalties or debarment, if the deficiencies in the application are not identified and the job opportunity was not properly made available to U.S. workers.

For these reasons, discussed in more detail above, the Department is proposing the changes contained in the NPRM.

2. Alternatives

The Department has considered a number of alternatives: (1) To propose the policy changes contained in this NPRM; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to propose a number of other options discussed in more detail below. We believe that this NPRM retains the best features of the 2008 Final Rule and proposes additional provisions to best achieve the Department's policy objectives, consistent with its mandate under the H–2B program. We request comments from the public on the best alternatives that would balance the needs of businesses with providing adequate protections to U.S. and H–2B workers. We are also interested in any available information regarding the number of U.S. workers that would benefit from increased opportunity for jobs.

The Department considered alternatives to a number of program proposals. First, the Department considered another alternative to the definition of full-time work (40 hours instead of the proposed 35 hours), as discussed in more detail in the preamble to proposed § 655.5.

Second, this NPRM allows certain deductions from a worker's earnings for the provision of items that are primarily for the benefit of the H–2B employer, as long as they do not bring the worker's actual wages paid below the H–2B required wage level. This is a departure from the rule under the FLSA, which specifies the Federal minimum wage as the floor beneath which such deductions cannot lower a worker's wages paid. In drafting this NPRM, the Department considered using the Federal minimum wage as the floor, but believes that the H–2B offered wage provides a stronger protection for U.S. workers. These protections are essential to meet the regulatory mandate to prevent adverse effect on wages and working conditions for U.S. workers. Using the FLSA wage level would provide a disincentive to hire U.S. workers who earn a market-driven rate that is likely to be higher than the Federal minimum. This ultimately would contradict the Secretary's mandate under the H–2B program to protect the employment of U.S. workers and preserve their wages and working conditions. Therefore, the Department rejected this alternative because it does not achieve the policy objectives of the rule and undercuts the Secretary's fulfillment of her obligations under the program.

Third, this NPRM introduces a three-fourths guarantee requirement modeled generally on that used in the H–2A program. The Department considered retaining the language of the H–2A requirement, under which employers must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total length of the contract. The Department rejected this alternative because, while this would provide workers with significant protection, it would not be sufficient to discourage the submission of imprecise dates of need and/or imprecise numbers of employees needed and would therefore fail to protect U.S. and H–2B workers from periods of unforeseen underemployment.

The Department believes that the proposal, which calculates the hours of employment offered in 4-week periods, better ensures that workers' commitment to a particular employer will result in real jobs that meet their reasonable expectations. We do not believe the proposal will create any additional burden on employers who have accurately represented their period of need and number of employees needed, and will provide an additional incentive for applicants to correctly state all of their needs on the Application for Temporary Employment Certification.

Finally, the Department considered omitting the proposed registrations of H–2B employers and instead retaining the current practice for the adjudication of the employer's temporary need and the labor market analysis to occur simultaneously. While this might be more advantageous for employers new to the program, it delays the vast majority of employers who are recurring users with relatively stable dates of need and who would benefit from separate adjudication of need and adequacy of recruitment. Moreover, all employers and potential workers benefit from a recruitment process close in time to the actual date of need which a registration process, by pre-determining temporary need, expressly permits. Therefore, the Department rejected the alternative of simultaneous adjudication because it undercuts the Secretary's fulfillment of her obligations under the program.

3. Economic Analysis

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2008 Final Rule, against the benefits and costs associated with the implementation of the provisions proposed in this NPRM. The benefits and costs of the provisions of this NPRM are estimated as incremental impacts relative to the baseline. Thus, benefits and costs attributable to the 2008 Final Rule are not considered as benefits and costs of this NPRM. We explain how the actions of workers, employers, and government agencies resulting from the NPRM are linked to the expected benefits and costs.

The Department sought to quantify and monetize the benefits and costs of this NPRM where feasible. Where we were unable to quantify benefits and costs—for example, due to data limitations—we describe them qualitatively. The analysis covers 10 years (2011 through 2020) to ensure it captures major benefits and costs that accrue over time.[11] We have sought to present benefits and costs both

[11] For the purposes of the cost-benefit analysis, the 10-year period starts on October 1, 2010.

undiscounted and discounted at 7 percent and 3 percent.

In addition, the Department provides an assessment of transfer payments associated with certain provisions of the proposed rule.[12] Transfer payments, as defined by OMB Circular A–4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect, but do not result in additional benefits or costs to society. The proposed rule would alter the transfer patterns and increase the transfers from employers to workers. The primary recipients of transfer payments reflected in this analysis are U.S. workers and H–2B workers. The primary payors of transfer payments reflected in this analysis are H–2B employers, and under the proposed rule, those employers who choose to participate are likely to be those that have the greatest need to access the H–2B program. When summarizing the benefits or costs of specific provisions of this proposed rule, we present the 10-year averages to reflect the typical annual effect.

Several provisions of the proposed rule extend to workers in corresponding employment, defined in the proposed rule as those non-H–2B workers who perform work for an H–2B employer, where such work is included in the job order that H–2B workers perform during the period of the job order and any other work performed by H–2B workers. Corresponding workers would be entitled to the same wages that the employer provides to H–2B workers, along with transportation and subsistence payments (for U.S. workers who cannot reasonably return to their residence each workday) and the disclosure of the job order. In addition, as a result of the enhanced recruiting proposed in this rule, including the new national job registry, certain costs may be avoided as employers are able to find U.S. workers in lieu of some H–2B workers. The Department believes that the costs associated with the employment of a U.S. worker would be relatively lower than the costs associated with the employment of an H–2B worker, as the costs of visa and border crossing fees will be avoided.

We cannot identify data on the number of corresponding workers at work sites on which H–2B workers are requested or the current hourly wages of those workers. The Department does not collect data regarding what we have defined as corresponding employees, and therefore cannot identify the numbers of workers to whom the obligation would attach.[13] Nor can the Department identify what such workers are currently being paid, and so cannot quantify what impacts, if any, the requirement to pay the prevailing wage would signify for such workers. Wages for such workers might not be changed because, on average, they likely earn the average wage for that particular occupation in that area of intended employment. However, the Department has been informed by employers that in many industries in which H–2B workers are sought, such as amusement and landscaping services, there are few if any corresponding employees—the very reason such employers seek H–2B workers to maintain an adequate workforce. The Department requests the public to propose possible sources of data or information on the number of corresponding workers at work sites for which H–2B workers are requested and the current hourly wages of those workers.

Employment in the H–2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the program. The H–2B program is capped at 66,000 visas issued per year (33,000 of which are made available biannually), which represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (130.9 million).[14] According to H–2B program data for FY 2007–2009, the average annual numbers of H–2B workers certified in the top five industries were as follows: Construction—30,242; Amusement, Gambling, and Recreation—14,041; Landscaping Services—78,027; Janitorial Services—30,902; and Food Services and Drinking Places—22,948. These employment numbers represent the following percentages of the total employment in each of these industries: Construction—0.4 percent (30,242/7,265,648); Amusement, Gambling, and Recreation—0.9 percent (14,041/1,506,120); Landscaping Services—13.2 percent (78,027/589,698); Janitorial Services—3.3 percent (30,902/933,245); and Food Services and Drinking Places—0.2 percent (22,948/9,617,597).[15] These percentages decrease further when scaled to the actual number of entries permitted each year: Construction—0.2 percent (14,756/7,265,648); Amusement, Gambling, and Recreation—0.5 percent (6,851/1,506,120); Landscaping Services—6.5 percent (38,073/589,698); Janitorial Services—1.6 percent (15,079/933,245); and Food Services and Drinking Places—0.1 percent (11,197/9,617,597).[16] As these data illustrate, the H–2B program represents a small fraction of the total employment even in each of the top five industries in which H–2B workers are found. As a result of the limited magnitude of the H–2B program, the Department believes that the proposed rule does not rise to the level of an economically significant regulatory action.

4. Subject-by-Subject Analysis

The Department's analysis below considers the expected impacts of the proposed NPRM provisions against the baseline (*i.e.,* the 2008 Final Rule). Sections "a" through "c" below represent additional compensation for both H–2B and workers in corresponding employment including the application of H–2B wages to corresponding U.S. workers, transportation and subsistence to and from the place of employment, and payment of visa and border crossing fees. Sections "d" through "g" represent provisions aimed at expanding efforts to recruit U.S. workers. These provisions include an enhanced U.S. worker referral period, additional recruiting directed by the Certifying Officer (CO), contacting labor organizations, and an electronic job registry. Sections "h" through "k" represent provisions to enhance transparency and worker protections. These provisions include disclosure of the job order, enhancing worker protections through the elimination of attestation-based certifications, document retention, departure time notification, job posting requirements, and notice of worker rights. Section "l" is a proposed provision aimed at reducing the administrative burden on State Workforce Agencies (SWAs) by eliminating employment verification.

[12] The specific provisions associated with transfer payments are: Wages paid to corresponding U.S. workers, payments for transportation and subsistence to and from the place of employment, and visa-related fees.

[13] The Department does not require employers to signify on an *H–2B Application for Temporary Employment Certification* the number of employees that they employ in that occupation in that area of intended employment. Nor does the Department have such information from concluded investigations.

[14] Source for total employment: *ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt.*

[15] Source for total employment by industry: 2007 Economic Census.

[16] The number of visas available under the H–2B program is 66,000, assuming no statutory increases in the number of visas available for entry in a given year. We also assume that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H–2B workers in a given year. The scale factor was derived by dividing 115,500 by the total number of workers certified per year on average during FY 2007–2009 (236,706).

For each of these subjects, the relevant benefits, costs, and transfers that may apply are discussed.[17]

a. Application of H–2B Wages to Corresponding Workers

The NPRM requires that workers in corresponding employment are paid the same wages as paid to foreign workers under the H–2B program. However, the Department cannot identify a reliable source of data to estimate the number of corresponding workers at work sites on which H–2B workers are requested, nor can it identify the current hourly wages of those workers. Therefore, the Department cannot quantify the impacts, if any, associated with this provision. The Department requests the public to propose possible sources of data or information on the number of corresponding workers at work sites for which H–2B workers are requested and the current hourly wages of those workers.

In standard economic models of labor supply and demand, any possible increase in wages paid to corresponding workers under this provision would result in a transfer from participating employers to corresponding workers. In addition, standard models show that the higher labor costs would lead to a reduction in the quantity of labor demanded. However, in a practical sense, the macroeconomic effect of reductions in the demand for corresponding workers is expected to be minimal. Because employers cannot replace U.S. workers laid off 120 days before the date of need or through the period of certification with H–2B workers, the Department concludes that there would be no reduction in the employment of corresponding workers among participating employers. When employers supplement their usual workforce levels with H–2B workers, this hiring activity leaves the employment levels of similarly employed U.S. workers unaffected.

b. Transportation and Subsistence to and From the Place of Employment

Transfers

The NPRM proposes to require H–2B employers to provide workers—both H–2B workers and workers in corresponding employment who are unable to return to their permanent residences—with transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer must also provide the worker with the cost of return transportation and daily subsistence from the worker's place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. These impacts represent transfers from H–2B employers to workers because they represent distributional effects, not a change in society's resources.

To estimate the transfer related to transportation, we first calculate the weighted average cost of transportation for the top ten countries of origin, by estimated number of certified H–2B workers who were new entrants.[18] For workers from Mexico and Canada, we assume that they travel to and from the place of employment by bus. For the remainder of the H–2B workers, we assume air travel. We estimate the weighted average one-way travel cost per employee to be approximately $286 per H–2B worker.[19] We estimate the roundtrip transportation costs by multiplying the weighted average one-way cost by two and by the annual number of H–2B workers entering the U.S. (66,000). The Department estimates average annual transfer of transportation expenditures to be approximately $37.8 million. We do not know to what extent employers are currently paying for this cost in order to secure these workers or because of their obligations under the Fair Labor Standards Act. To the extent that this is the case, this transportation transfer estimate is an upper-bound estimate.

We estimate the transfer related to subsistence payments by multiplying the annual number of H–2B workers entering the U.S. (66,000) by the subsistence per diem ($10.64), the weighted average one-way travel time for the top ten H–2B countries (1.055 days), and the number of one-way trips per worker (two).[20] The Department estimates the average annual transfer induced by subsistence payments to be approximately $1.5 million.

This provision applies not only to H–2B workers, but also to workers in corresponding employment on H–2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. We were unable to identify adequate data to estimate the number of corresponding workers and, thus, we are unable to quantify this transfer. DOL would appreciate public input that would help to quantify these costs.

c. Visa and Border Crossing Fees

Under the 2008 Final Rule, visa-related fees—including fees required by the Department of State for scheduling and/or conducting an interview at the consular post—are permitted to be paid by the temporary worker. The NPRM, however, proposes to require visa fees to be paid by the employer. Requiring employers to bear the full cost of their decision to hire foreign workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on U.S. workers. Government-mandated fees, such as visa-related fees and border crossing fees, are integral to the employer's choice to use the H–2B program to bring temporary foreign workers into the U.S.

Transfers

The reimbursement of visa application fees, fees for scheduling and/or conducting an interview at the consular post, and border crossing fees by employers is a transfer from employers to H–2B workers. The Department estimates the cost of visa fees by adding the cost per H–2B visa ($150) and the weighted average consular fee ($27.15)[21] and multiplying the resulting sum by the annual number

[17] For the purpose of this analysis, H–2B workers are considered temporary residents of the U.S.

[18] The top 10 countries of origin and the number of certified H–2B workers during FY 2007–2009 were as follows: Mexico, 134,226; Jamaica, 17,068; Guatemala, 6,530; Philippines, 4,963; Romania, 3,251, South Africa, 3,239; United Kingdom, 2,511; Canada, 2,371; Israel, 1,784; and Australia, 1,577. The H–2B visa program is capped at 66,000 new visas per year. To estimate the number of new entrants from each country, we scaled the total number of certified workers from each country by the total number of new visas allowed from FY 2007 to FY 2009 (66,000 new visas × 3 years) divided by the total number of H–2B workers certified from FY 2007 to FY 2009.

[19] The one-way travel costs used for each country are as follows: Mexico, $179; Jamaica, $285; Guatemala, $484; Philippines, $973; Romania, $1,147; South Africa, $1,168; United Kingdom, $726; Canada, $165; Israel, $908; and Australia, $1,648. The transportation cost for Mexico is based on the cost of a bus trip from Mexico City, Mexico, to Ciudad Juarez, Mexico (source: *http://www.ticketbus.com.mx*) and a bus trip from El Paso, Texas, to St. Louis, Missouri (source: *http://www.greyhound.com*). The transportation cost for Canada is based on the cost of a bus trip from Ottawa, Ontario, to St. Louis, Missouri (source: *http://www.greyhound.com*). The airfare costs for the remaining countries are based on the cost of a flight from the capital city of the country in question to St. Louis, Missouri (source: *http://www.kayak.com*).

[20] Source: 20 CFR 655. The one-way travel days applied to each country of origin is as follows: Mexico, 1; Jamaica, 1; Guatemala, 1; Philippines, 2; Romania, 1, South Africa, 2; United Kingdom, 1; Canada, 1; Israel, 1; and Australia, 2.

[21] The top 10 countries of origin and the number of certified H–2B workers during FY 2007–2009 were as follows: Mexico, 134,226; Jamaica, 17,068; Guatemala, 6,530; Philippines, 4,963; Romania, 3,251, South Africa, 3,239; United Kingdom, 2,511; Canada, 2,371; Israel, 1,784; and Australia, 1,577. We use these values to weight the country-specific consular fees to obtain the weighted average consular fee of $27.15.

of H–2B workers entering the U.S. (66,000).[22] The annual average transfer of visa-related fees from H–2B employers to H–2B workers is $11.7 million.

d. Enhanced U.S. Worker Referral Period

Under the NPRM, employers must continue to accept SWA referrals of qualified and available U.S. workers. Employers must hire any qualified U.S. worker referred up until the later of 3 days before the date of need or when the employer's last H–2B worker departs for the employer's place of business.

i. Benefits

This NPRM proposes to increase the amount of time that employers must accept referrals for temporary non-agricultural opportunities from qualified U.S. workers. The NPRM also proposes to increase the types of recruitment to ensure that U.S. workers are provided with a more robust opportunity to have access to the job opportunities that are the subject of labor certification applications. These include a greater number of ads than is required under the current regulation; the posting of jobs on an electronic job registry; contact with union representation where the industry of job classification is traditionally unionized; notice to the current workforce or to current union members where one is in place in the workforce; and contact with the former U.S. workforce. The enhanced referral period expands the time during which jobs are available to U.S. workers. Therefore, taken along with the other provisions of the rule, it improves the information between employers and workers about available jobs, increasing the likelihood that U.S. workers can be hired for those jobs. As more U.S. workers are hired as a result of this NPRM, employers would avoid visa-related costs for H–2B positions that would now be filled with U.S. workers. H–2B employers would minimize additional costs of international recruitment.[23] The Department is not able to quantify this effect, however, due to a lack of adequate data.

These benefits also apply to sections "e" through "g" below, which discuss additional provisions aimed at improving the recruitment of U.S. workers.

ii. Costs

The extension of the referral period proposed in this NPRM will likely result in more U.S. workers being interested in the jobs, which will require more SWA staff time to process additional referrals. The Department does not have estimates of the additional number of U.S. workers who will be interested in the jobs and, thus, is unable to estimate the costs associated with this provision.

iii. Transfers

If more U.S. workers are hired as a result of the NPRM (because employers who previously applied for H–2B visas choose to hire U.S. workers rather than participate in the H–2B program, or because H–2B employers can attract more U.S. workers as a result of enhanced recruitment measures), those workers who were previously unemployed will no longer make claims for new or continued unemployment insurance benefits.[24] Other things constant, we expect the States to experience a reduction in unemployment insurance expenditures as a consequence of more U.S. workers being hired. This reduction in unemployment insurance benefits will be passed on to employers to a certain extent. The Department, however, is not able to quantify these transfer payments due to an inability to estimate the likely increase in number of U.S. workers employed in jobs that would otherwise have been held by H–2B workers.

The Department believes that the costs associated with the employment of a U.S. worker will be lower than the costs associated with an H–2B worker, as the costs of transportation and subsistence will likely be reduced, if not avoided entirely. The cost of visa fees will be entirely avoided if U.S. workers are hired. We have not identified appropriate data to estimate any increase in the number of U.S. workers that might be hired as a result of the NPRM provisions.

e. Additional Recruiting Directed by the Certifying Officer

Under the proposed rule, the employer may be directed by the CO to conduct additional recruitment where the CO has determined that there may be available and qualified U.S. workers, including where the job opportunity is located in an area of substantial unemployment. We estimate this cost by multiplying the number of employer applicants by the average cost of a newspaper advertisement ($25.09) and by our estimate that 50 percent of H–2B employers can be expected to be directed by the CO to conduct additional recruitment for a total annual average cost for additional job advertisement of approximately $0.06 million.[25]

We also add the labor cost to post the advertisement. We estimate this cost by multiplying the number of employer applicants by the estimated time required to post the advertisement (0.08 hours, or 5 minutes), the scaled hourly compensation rate of an administrative assistant/executive secretary ($28.64),[26] and our estimate that 50 percent of H–2B employers can be expected to be directed by the CO to conduct additional recruiting for a total annual average labor cost of $0.01 million. Thus, we estimate the total average annual cost of CO-directed recruiting at approximately $0.07 million.[27]

f. Contacting Labor Organizations

The NPRM proposes to require the employer to contact the local union to locate able, willing, and qualified U.S. workers when the employer seeks to hire for a position in an occupation or industry where union representation is prevalent. The employer must provide written notice of the job opportunity to the representative(s) of any of the employer's employees in the job classification and geographic area in which the work will be performed. This provision of the proposed rule expands the requirement from the baseline established by the 2008 Final Rule because it requires the employer to contact the local union if the job is

[22] The visa fee of $150 went into effect on June 4, 2010. Source: *http://www.state.gov/r/pa/prs/ps/2010/05/142155.htm.*

[23] In this NPRM, cost savings are defined as costs that would be incurred under the 2008 Final Rule that will not be incurred as a result of this NPRM because its provisions increase the likelihood that U.S. workers will be hired for these jobs. Because the provisions of this NPRM could increase the cost of recruiting and transporting a foreign worker to the U.S. job site relative to a U.S. worker, these are avoided costs from the perspective of the employer.

[24] Similarly, when U.S. workers shift from current employment to fill jobs with H–2B employers, additional workers from the pool of the unemployed will inevitably fill the vacant positions.

[25] To obtain the average cost of a newspaper advertisement, we averaged the advertisement rates for the following newspapers: the Augusta Chronicle, the Austin Chronicle, the Huntsville Times, the Los Alamos Monitor, the San Diego Union-Tribune, and the Advertiser Times (Detroit, Michigan). Other means of recruiting are possible under this NPRM (such as listings on Monster.com and Career Builder), but they may be more costly.

[26] The hourly compensation rate for an administrative assistant/executive secretary is calculated by multiplying the hourly wage of $20.03 (as published by the Department's OES survey, O*NET Online) by 1.43 to account for private-sector employee benefits (Source: BLS). Thus, the loaded hourly compensation rate for an administrative assistant/executive secretary is $28.64.

[27] It is possible that there will be additional costs incurred by employers from interviewing additional applicants that are referred to H–2B employers by job advertisements. The Department does not have valid data on referrals resulting from job advertisements and, thus, is unable to quantify this impact.

customarily unionized, even if there is no union or CBA with the employer.

We estimate two components of the cost to contact labor organizations: labor and materials. We estimate the labor cost by multiplying the number of employer applicants by the scaled hourly labor compensation of an administrative assistant/executive secretary ($28.64), the time needed to type, print, and mail out the letter (0.25 hours, or 15 minutes), and the percent of workers in the relevant occupations that were represented by unions from 2007 to 2009 (12.3 percent).[28] We estimate the average annual labor costs of writing and mailing letters to be $0.01 million.

The second cost component of contacting labor organizations is the material costs. We calculate this cost by summing the cost of a sheet of paper ($0.02), an envelope ($0.04), and postage ($0.44), and multiplying the resulting sum by the number of employer applicants and the percent of workers in the relevant occupations that were represented by unions from 2007 to 2009 (12.3 percent). We estimate the total average annual material cost to be less than $1,000.

In total, the Department estimates the average annual cost of contacting labor organizations to be $0.01 million per year.

g. Electronic Job Registry

Under the proposed rule, the Department will post and maintain employers' H–2B job orders, including modifications approved by the CO, in a national and publicly accessible electronic job registry. The job registry will serve as a public repository of H–2B job orders for the duration of the referral period. The job orders will be posted in the registry by the CO upon the acceptance of each submission. The posting of the job orders will not require any additional effort on the part of H–2B employers or SWAs.

i. Benefits

The job registry will improve the visibility of H–2B jobs to U.S. workers. In conjunction with the longer referral period under the proposed rule, the job registry will expand the availability of information about these jobs to U.S. workers and, therefore, improve their employment opportunities. In addition, the establishment of a job registry will provide greater transparency with respect to the Department's administration of the H–2B program to the public, members of Congress, and other stakeholders. Transferring these job orders into electronic records for the job registry will result in an improved and more complete record of job opportunities for which H–2B workers are sought. Employers seeking temporary workers, in turn, will likely experience an increase in job applications from U.S. workers and would not need to incur additional expenses, including visa and border crossing fees, of hiring H–2B workers. The Department, however, is not able to estimate the increase in job applications resulting from the job registry and, thus, is unable to quantify this benefit.

ii. Costs

The establishment of an electronic job registry in this NPRM represents an increased cost to the Department for maintaining the job registry.[29] We estimate average annual costs of maintaining an electronic job registry to be approximately $0.5 million.[30]

h. Disclosure of Job Order

The NPRM proposes to require an employer to provide a copy of the job order to an H–2B worker outside of the U.S. no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day that work starts. The job order must be translated to a language understood by the worker. For an H–2B worker changing employment from an H–2B employer to a subsequent H–2B employer, the copy must be provided no later than the time the subsequent H–2B employer makes an offer of employment.

We estimate two cost components for the disclosure of job orders: the cost of reproducing the document containing the terms and conditions of employment, and the cost of translation. We obtain the cost of reproducing the terms and conditions document by multiplying the number of H–2B workers (66,000) by the number of pages to be photocopied (3), the cost per photocopy ($0.12), and the percent of certified H–2B workers that are not involved in reforestation (88.3 percent).[31] The Department estimates average annual costs of reproducing the document containing the terms and conditions of employment to be approximately $0.02 million.

For the cost of translation, the Department assumes that an employer hires all of its H–2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is necessary per employer needing translation. We obtain the cost of translation by multiplying the number of H–2B employers by the percent of H–2B workers who do not speak English (83.92 percent, for the top ten countries of origin), the number of pages of the terms and conditions (3), and the translation cost per page ($21.00).[32] We estimate average annual translation costs of approximately $0.2 million.

i. Elimination of Attestation-Based Model

The 2008 Final Rule used an attestation-based model: employers conducted the required recruitment in advance of application filing and, based on the results of that effort, applied for certification from the Department for a number of foreign workers to fill the remaining openings. Employers simply attested that they had undertaken the necessary activities and made the required assurances to workers. The Department has determined that there are insufficient worker protections in the attestation-based model. In

[28] Unionization data for the following occupations were used: Arts, entertainment, sports, and media; food preparation and serving related; building and grounds cleaning and maintenance; personal care and service; farming, fishing, and forestry; construction and extraction; and installation, maintenance, and repair. These occupational categories represent the majority of H–2B occupations. Source: *http://www.bls.gov/webapps/legacy/cpslutab3.htm.*

[29] Our analysis accounts for the fact that the cost of development and implementation has been incurred by the electronic job registry developed for the H–2A Program.

[30] For registry maintenance activities, the Department assumes that 376 hours will be required for the following labor categories: Program Manager, Computer Systems Analyst II & III, Computer Programmer III & IV, Computer Programmer Manager, Data Architect, Web Designer, Database Analyst, Technical Writer II, Help Desk Support Analyst, and Production Support Manager. Finally, the Department uses the following loaded rates based on an Independent Government Cost Estimate (ICGE) produced by OFLC and inclusive of direct labor and overhead costs for each labor category: Program Manager, $138.34; Computer Systems Analyst II, $92.14; Computer Systems Analyst III, $109.84; Computer Programmer III, $89.63; Computer Programmer IV, $107.72; Computer Programmer Manager, $123.88; Data Architect, $104.99; Web Designer, $124.76; Database Analyst, $77.80; Technical Writer II, $84.81; Help Desk Support Analyst, $55.28; Production Support Manager, $125.76. The Department multiplies the assumed number of hours by the appropriate labor rates to obtain a first-year cost of $561,364 and a cost in subsequent years of $464,341. We average the costs over the 10-year analysis period to obtain an average annual cost of $474,044.

[31] The new cost of disclosure of job orders does not apply to reforestation employers because the Migrant and Seasonal Agricultural Worker Protection Act presently requires reforestation employers to make this disclosure. According to H–2B program data for FY 2000–FY2007, 88.3 percent of H–2B workers work in an industry other than reforestation.

[32] The source of the percentage of H–2B workers who do not speak English is the "Yearbook of Immigration Statistics", 2007–2009 (*http://www.dhs.gov/xlibrary/assets/statistics/yearbook/*). The source for the translation cost per page is *http://www.languagescape.com.*

eliminating the attestation-based model, the NPRM shifts the recruitment process to after the application is filed so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor market. Therefore, the primary effect of eliminating the attestation based-model is a change in the timing of recruitment more so than a change in substantive requirements.

i. Benefits

The return to a certification model in which employers demonstrate compliance with program obligations prior to certification will improve worker protections. Greater compliance will, in turn, provide improved administration of the program and conserve Government resources at both the State and Federal levels. It will also result in cost savings to employers, subjecting them to fewer requests for additional information and denials of applications and saving them both time and the expense of responding to such inquiries. It will also result in the intangible benefit of more H–2B visas being available to those employers who have conducted bona fide recruitment around an actual date of need. The Department, however, is not able to estimate the impacts resulting from the elimination of the attestation-based model and is unable to quantify these benefits.

ii. Costs

The elimination of the attestation-based model will impose minimal costs on employers because they will only need to include additional information in their recruitment report, including information on additional recruitment conducted, means of posting, contact with former U.S. workers, and contact with labor organizations where the occupation is customarily unionized. We estimate two costs for the elimination of the attestation-based model: the material cost of reproducing and mailing the documents, and the labor cost to reproduce and mail the documents. To estimate the cost of reproducing and mailing the documents, we multiply the number of H–2B employers (3,966) by the additional number of pages that must be submitted (3) and the additional postage required to ship those pages ($0.17). We estimate this cost to be less than $0.01 million (or $3{,}966 \times 3 \times \$0.17 = \$2{,}023$) per year. To estimate the labor cost of reproducing and mailing the documents, we multiply the number of H–2B employers (3,966) by the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes) and the scaled hourly labor compensation of an administrative assistant/executive secretary ($28.64). We estimate this cost to be less than $0.01 million (or $3{,}966 \times 0.08 \times \$28.64 = \$9{,}087$) per year.

j. Document Retention

Under the NPRM, H–2B employers must retain documentation in addition to that required by the 2008 Final Rule. The Department assumes that each H–2B employer will purchase a filing cabinet ($21.99) in which to store the additional documents starting in the first year of the rule.[33] To obtain the cost of storing documents, we multiply the number of H–2B employers by the cost per drawer for a total one-time cost of $0.09 million.

k. Departure Time Determination

The NPRM proposes to require employers to provide notice to the local SWA of the time at which the last H–2B worker departs for the place of employment, if the last worker has not departed by 3 days before the date of need. The cost of this provision is the sum of the time required for the employer to place a phone call to the H–2B workers' representative to verify when the last H–2B worker will depart for the place of employment, the cost of the long-distance phone call, the time required to prepare and mail a letter to the SWA (one call per employer), and the cost of paper, an envelope, and postage.

To estimate the cost of placing the phone calls, we multiply the number of H–2B employers by the time needed to contact an H–2B worker representative (0.08 hours, or 5 minutes) and the scaled hourly compensation rate of an administrative assistant/executive secretary ($28.64). To this product, we add the product of the number of H–2B employers and the average cost of a long distance phone call to the top 10 countries ($3.23) to obtain total average annual costs of contacting H–2B workers equal to $0.02 million.[34]

Once the H–2B employer has determined when the last H–2B worker will depart his or her home, the employer must notify the local SWA in writing, but only if the last worker has not departed by three days prior to the date of need. The Department estimates the cost of preparing and mailing a letter to the SWA by summing the labor costs to prepare and mail a letter and the cost of paper, an envelope, and postage. We estimate the labor cost by multiplying the number of H–2B employers by the percentage of H–2B applicants that will be required under this provision to ensure the contact with the SWA (10 percent), the scaled hourly labor compensation of an administrative assistant/executive secretary, and the sum of the time needed to draft the main content of a letter (0.25 hours, or 15 minutes) and the time needed to type the letter and prepare it for mailing (0.08 hours, or 5 minutes). This calculation yields average annual labor costs of $0.01 million.

We estimate the material costs of contacting the SWA by multiplying the number of H–2B employers by the percentage of H–2B employers that we assume will be required to contact the SWA (10 percent) and by the sum of the cost of a sheet of paper ($0.02), the cost of an envelope ($0.04), and the postage per envelope ($0.44). We estimate the total annual average material costs to be less than $1,000 per year.

In total, the Department estimates the total average annual costs of departure time determination to be approximately $0.03 million per year.

l. Reduced SWA Administrative Burden by Eliminating Employment Verification

Under this NPRM, SWAs will no longer be responsible for conducting employment eligibility verification activities. These activities include completion of Form I–9 and vetting of application documents by SWA personnel.

i. Benefits

Under the 2008 Final Rule, SWAs are required to complete Form I–9 for non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this NPRM, SWAs will no longer be required to complete this process, resulting in cost savings. Due to a lack of data on the number of SWA referrals, we are not able to quantify this benefit.

m. Other

During the first year that the rule would be in effect, employers would need to learn about the new processes and requirements. We estimate this cost by multiplying the number of H–2B employer applicants by the time required to read the new rule and any educational and outreach materials that explain the H–2B application process under the rule (3 hours) by the average compensation of a human resources

[33] Source: *http://www.staples.com.*

[34] We collected long distance call charges from both AT&T and Verizon and averaged them. Source: *http://www.wireless.att.com/learn/international/long-distance/in-the-us.jsp* and *http://www22.verizon.com/longdistance/business_east/plan_ttw_brates.jsp.*

manager ($61.42).[35] In the first year of the rule, this amounts to approximately $1.2 million in labor costs for an average annual cost of $0.12 million.

The NPRM proposes to require employers to post the availability of the job opportunity in two conspicuous locations at the place of anticipated employment (where there is no union representative) for at least 10 consecutive days. This provision entails additional reproduction costs. To obtain the total cost incurred due to the job posting requirement, we multiply the number of employer applicants by the cost per photocopy ($0.12) and the number of postings per place of employment (2), which amounts to approximately $2,000 per year.

In addition, the NPRM proposes to require employers to post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary which sets out the rights and protections for workers. Employers must post the poster in English and, to the extent necessary and as provided by the Secretary, foreign language(s) common to a significant portion of the workers if they are not fluent in English. To estimate the cost of producing workers' rights posters, we multiply the number of H–2B employers by the cost per poster ($0.12). In total, the cost of producing workers' rights posters is less than $1,000 per year.

5. Summary of Cost-Benefit Analysis

Exhibit 1 presents a summary of the costs associated with this NPRM. Because of data limitations on the number of corresponding workers and U.S. workers expected to fill positions currently held by H–2B workers, the Department was not able to monetize any costs to the rule that would arise as a result of deadweight losses associated with higher employment costs under the proposed rule. However, because the size of the H–2B program is limited, the Department expects that any deadweight loss would be small. The monetized costs displayed are the yearly summations of the calculations described above.

EXHIBIT 1—SUMMARY OF MONETIZED COSTS

Year		Monetized costs ($millions/year)
1	2011	2.10
2	2012	0.81
3	2013	0.81
4	2014	0.81
5	2015	0.81
6	2016	0.81
7	2017	0.81
8	2018	0.81
9	2019	0.81
10	2020	0.81
Undiscounted total		9.35
Total with 7 percent discounting		6.42
Total with 3 percent discounting		7.89

Totals may not sum due to rounding.

The 10-year monetized costs of this NPRM range from $6.87 million to $8.04 million (with 7 percent and 3 percent discounting, respectively).

Because the Department was not able to monetize any benefits for this NPRM due to the lack of adequate data, the monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate.

The Department did not identify data to provide monetary estimates of several important benefits to society, including increased employment opportunities for U.S. workers and enhancement of worker protections for U.S. and H–2B workers. These important benefits result from the following provisions of this NPRM: Transportation to and from the place of employment, payment of visa and border crossing fees, the enhanced U.S. worker referral period, additional recruiting directed by the CO, contacting labor organizations, the electronic job registry, and the job posting requirement.

Because the enhanced referral period expands the time during which jobs are available to U.S. workers, it increases the likelihood that U.S. workers are hired for those jobs. In addition, the job registry will improve the visibility of H–2B jobs to U.S. workers. Thus, the job registry will benefit U.S. workers by expanding the period during which these jobs are available to U.S. workers and, therefore, improving their employment opportunities. In addition, the establishment of a job registry will provide greater transparency with respect to the Department's administration of the H–2B program to the public, members of Congress, and other stakeholders. These benefits, however, are difficult to quantify due to data limitations.

Several unquantifiable benefits result in the form of cost savings. As more U.S. workers are hired as a result of this NPRM, employers will experience cost savings in the form of avoided visa and border crossing fees for H–2B positions that are now filled with U.S. workers. Under the 2008 Final Rule, SWAs are required to complete Form I–9 for non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this NPRM, SWAs will no longer be required to complete this process, resulting in cost savings to SWAs. We were not able to quantify these cost savings due to a lack of data regarding the number of I–9 verifications SWAs have been performing for H–2B referrals.

The Department has concluded that after consideration of both the quantitative and qualitative impacts of this NPRM, the societal benefits of the rule justify the societal costs.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, as amended (RFA), requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. *See* 5 U.S.C. 605. For the reasons explained in this section, the Department believes this NPRM is not likely to impact a substantial number of small entities and, therefore, an Initial Regulatory Flexibility Analysis is not required by the RFA.

However, in the interest of transparency and to provide a full opportunity for public comment, we have prepared the following Initial Regulatory Flexibility Analysis to assess the impact of this regulation on small entities, as defined by the applicable Small Business Administration (SBA) size standards. We specifically request comments on the following burden estimates, including the number of small entities affected by the requirements, and whether alternatives exist that will reduce the burden on small entities. The Chief Counsel for Advocacy of the Small Business Administration was notified of a draft of this rule upon submission of the rule to OMB under E.O. 12866, as amended, "Regulatory Planning and Review"

[35] The hourly compensation rate for a human resources manager is calculated by multiplying the hourly wage of $42.95 (as published by the Department's OES survey, O*NET Online) by 1.43 to account for private-sector employee benefits (Source: BLS). Thus, the loaded hourly compensation rate for a human resources manager is $61.42.

(58 FR 51735, Oct. 4, 1993; 67 FR 9385, Feb. 28, 2002; 72 FR 2763, Jan. 23, 2007).

Because employers seeking to participate in the H–2B program are derived from virtually all segments of the economy and across industries, those participating businesses are a small portion of the national economy overall. A Guide for Government Agencies: How to Comply with the RFA, Small Business Administration, at 20 ("the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall"). Accordingly, the Department believes that the rule will not impact a substantial number of small entities in a particular industry or segment of the economy.

Employment in the H–2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the H–2B program. The H–2B program is capped at 66,000 visas issued per year, which represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (130.9 million).[36] According to H–2B program data for FY 2007–2009, the average annual numbers of H–2B workers certified in the top five industries were as follows: Construction—30,242; Amusement, Gambling, and Recreation—14,041; Landscaping Services—78,027; Janitorial Services—30,902; and Food Services and Drinking Places—22,948. These employment numbers represent the following percentages of the total employment in each of these industries: Construction—0.4 percent (30,242/7,265,648); Amusement, Gambling, and Recreation—0.9 percent (14,041/1,506,120); Landscaping Services—13.2 percent (78,027/589,698); Janitorial Services—3.3 percent (30,902/933,245); and Food Services and Drinking Places—0.2 percent (22,948/9,617,597).[37] These percentages decrease further when scaled to the actual number of entries permitted each year: Construction—0.2 percent (14,756/7,265,648); Amusement, Gambling, and Recreation—0.5 percent (6,851/1,506,120); Landscaping Services—6.5 percent (38,073/589,698); Janitorial Services—1.6 percent (15,079/933,245); and Food Services and Drinking Places—0.1 percent (11,197/9,617,597).[38] As these data illustrate, the H–2B program represents a small fraction of the total employment even in each of the top five industries in which H–2B workers are found.[39]

1. Description of the reasons that action by the agency is being considered.

As discussed in more detail earlier in this preamble, the Department has determined that a new rulemaking effort is necessary for the H–2B program because the policy underpinnings of the 2008 Final Rule, *e.g.,* streamlining the H–2B process to defer determinations of program compliance until after an application has been adjudicated, do not provide an adequate level of protection for either U.S. or foreign workers. The proposed protections are essential to meet the regulatory mandate to prevent adverse effect on wages and working conditions for U.S. workers, including measures to ensure access to jobs for U.S. workers through enhanced recruitment in order to satisfy the statutory requirement that certifications be granted only if no U.S. workers are available.

Additionally, the NPRM seeks to help employers meet legitimate short-term temporary labor needs where and when there are no available U.S. workers. Over the years as the program has evolved, stakeholders in diverse industries throughout the country repeatedly have expressed concerns that some employers were inappropriately using H–2B workers for job opportunities that were permanent, thereby denying U.S. workers the opportunity for long-term employment. These employers' actions are to the detriment of other employers with a legitimate temporary need that are ultimately denied access to the program due to the annual cap on available visas. By preventing employers with a long-term permanent need from participating in the H–2B program, the Department would provide employers with genuine unmet temporary needs with a greater opportunity to participate in the program.

2. Succinct statement of the objectives of, and legal basis for, the proposed rule.

The Department seeks to help employers meet their legitimate short-term temporary labor needs where and when there are no available U.S. workers and to increase worker protections and strengthen program integrity under the H–2B labor certification program. The legal basis for the proposed rule is the Department's authority, as delegated from DHS under its regulations at 8 CFR 214.2(h)(6), to grant temporary labor certifications under the H–2B program.

3. Description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply.

Definition of a Small Business

A small entity is one that is independently owned and operated and that is not dominant in its field of operation. The definition of small business varies from industry to industry to properly reflect industry size differences. An agency must either use the SBA definition for a small entity or establish an alternative definition for the industry. The Department has conducted a small entity impact analysis on small businesses in the five industries with the largest number of H–2B workers and for which data were available, as mentioned above: Landscaping Services; Janitorial Services (includes housekeeping services); Food Services and Drinking Places; Amusement, Gambling, and Recreation; and Construction. These top five industries accounted for almost 75 percent of the total number of H–2B workers certified during FY 2007–2009.[40]

One industry, Forest Services, made the initial top-five list but is not included in this analysis because the only data available for forestry also include various agriculture, fishing, and hunting activities. Relevant data for Forestry only were not available. The Department requests the public to propose possible sources of data or information on the revenues and average number of workers of a typical small Forestry firm so that the

[36] Source: *ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt.*

[37] Source for total employment by industry: 2007 Economic Census.

[38] The number of visas available under the H–2B program is 66,000, assuming no statutory increases in the number of visas available for entry in a given year. We also assume that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H–2B workers in a given year. The scale factor was derived by dividing 115,500 by the total number of workers certified per year on average during FY 2007–2009 (236,706).

[39] H–2B workers are not the only workers affected by this NPRM. Rather, certain provisions of the NPRM also extend to workers in corresponding employment, as addressed in section 4 of this analysis. While including the number of workers in corresponding employment would produce a more accurate determination of the portion of total employment affected by the H–2B program, the Department has not identified a reliable source of data to estimate the number of workers in corresponding employment at work sites on which H–2B workers are requested.

[40] According to H–2B program data, the average annual number of firms (of all sizes) and H–2B workers certified for these industries during FY2007–2009 were as follows: Landscaping Services, Firms—2,754, Workers—78,027; Janitorial Services, Firms—788, Workers—30,902; Food Services and Drinking Places, Firms—851, Workers—22,948; Amusement, Gambling, and Recreation, Firms—227, Workers—14,041; and Construction, Firms—860, Workers—30,242.

Department can better account for any impacts on this industry.

We have adopted the SBA small business size standard for each of the five industries, which is a firm with annual revenues equal to or less than the following: Landscaping Services, $7 million; Janitorial Services, $16.5 million; Food Services and Drinking Places, $7 million; Amusement, Gambling, and Recreation, $7 million; and Construction, $20.7 million.[41]

4. Description of the projected reporting, recordkeeping and other compliance.

The Department has estimated the incremental costs for small businesses from the baseline. For this proposed rule, the baseline is the 2008 Final Rule.[42] This analysis reflects the incremental cost of this rule as it adds to the requirements in the 2008 Final Rule. Using available data, we have estimated the costs of the payment of transportation and subsistence to workers, visa and border crossing fees, the disclosure of job orders, additional recruiting directed by the CO, the time required to read and review the Final Rule, contacting H–2B workers to determine their time of departure, contacting labor organizations, and other impacts.

Several provisions of the proposed rule extend to workers in "corresponding employment," defined in the NPRM as those non-H–2B workers who perform work included in the job order that H–2B workers perform during the period of the job order and any other work performed by H–2B workers. These provisions include the application of H–2B wages to workers in corresponding employment, the transportation and subsistence payments (for workers who cannot reasonably return to their residence each workday), and the disclosure of the job order.

The Department receives an average of 8,717 applications annually (which is not necessarily the same as the number of applicants, because one employer may file more than one application) for the H–2B program, and the Department estimates that an average of 6,980 of those applications result in petitions for H–2B workers that are approved by DHS. Even if all 6,980 applications are filed by unique small entities, all of which were in the top 5 industries, the percentage of small entities authorized to employ temporary non-agricultural workers will be less than 1 percent of the total number of small entities in these industries.[43] Based on this analysis, the Department estimates that the rule will impact less than 1 percent of the total number of small businesses. A detailed industry-by-industry analysis is provided below.

To examine the impact of this proposed rule on small entities, the Department evaluates the impact of the incremental costs on a hypothetical small entity of average size, in terms of the total number of both U.S. and foreign workers, in each industry if it were to fill 50 percent of its workforce with H–2B workers. There are no available data to estimate the breakdown of the workforce into U.S. and foreign workers. Based on Economic Census data, the total number of workers (including both U.S. and foreign workers) for this hypothetical small business is as follows: Landscaping Services, 2.3 workers; Janitorial Services, 11.3 workers; Food Services and Drinking Places, 6.3 workers; Amusement, Gambling, and Recreation, 5.0 workers; and Construction, 6.3 workers.[44]

Also using Economic Census data, we derived the annual revenues for small entities in each of the top five industries by multiplying the average number of workers by the average revenue per worker for each of the industries. The Department estimates that small businesses in the top five industries have the following annual revenues: Landscaping Services, $0.181 million; Janitorial Services, $0.336 million; Food Services and Drinking Places, $0.223 million; Amusement, Gambling, and Recreation, $0.209 million, and Construction, $0.884 million.

The following sections present the impacts that this NPRM is estimated to have on a small business that chooses to hire H–2B workers: these include impacts on the application of H–2B wages to workers in corresponding employment, transportation and subsistence costs, visa-related and border crossing fees, disclosure of job orders, additional recruiting that may be directed by the CO, reading and reviewing the new processes and requirements, contacting labor organizations, and other impacts. Note that the costs estimated below are not costs to all small businesses or to the average small business in an industry. Most small businesses in the relevant industry do not hire H–2B workers and, therefore, incur no cost burden from the proposed rule. The costs estimated apply only to the relatively small number of firms that are expected to hire H–2B workers. In the estimates below, the hypothetical firm that chooses to hire H–2B workers is assumed to be of the average total employment and revenue size for small businesses in its industry.

a. Application of H–2B Wages to Workers in Corresponding Employment

The NPRM requires that workers in corresponding employment are paid the same wages paid to foreign workers under the H–2B program. However, the Department has not identified a reliable source of data to estimate the number of workers in corresponding employment at work sites on which H–2B workers are requested, and thus, cannot identify the current hourly wages of those workers. Therefore, the Department cannot quantify the impacts, if any, associated with this provision. The Department requests the public to propose possible sources of data or information on the number of workers in corresponding employment at work sites for which H–2B workers are requested and the current hourly wages of those workers.

The NPRM will result in additional opportunities for U.S. workers to obtain a job and is therefore expected to result in lower government expenditures on unemployment insurance benefit claims. The lower unemployment insurance benefits reduce government expenditures, and these cost reductions are passed on to employers as a whole to a certain extent. The Department, however, is not able to quantify these transfer payments with precision.

[41] The SBA small business size standards for construction range from $7 million (land subdivision) to $33.5 million (general building and heavy construction). However, because employers representing all types of construction businesses may apply for certification to employ H–2B workers, the Department used an average of $20.7 million as the size standard for construction.

[42] The Department published a revised final rule modifying the methodology by which prevailing wage rates are calculated for the H–2B program. 76 FR 3452, Jan. 10, 2011. However, because that final rule is limited to the prevailing wage rate issue, the baseline for this proposal remains the 2008 Final Rule with regard to the non-prevailing wage rate issues in this NPRM.

[43] The total number of firms classified as small entities in these industries is as follows: Landscaping Services, 63,210; Janitorial Services, 45,495; Food Services and Drinking Places, 293,373; Amusement, Gambling, and Recreation, 43,726; and Construction, 689,040.

[44] Source: 2002 County Business Patterns and 2002 Economic Census. These data do not distinguish between U.S. workers and foreign workers. Compare to data obtained from H–2B program data for FY 2007–2009, which indicated that the average annual number of firms (of all sizes) and H–2B workers certified for these industries during FY 2007–2009 were as follows: Landscaping Services, Firms—2,754, Workers—78,027, an average of 28 workers per firm; Janitorial Services, Firms—788, Workers—30,902, an average of 39 workers per firm; Food Services and Drinking Places, Firms—851, Workers—22,948, and average of 27 workers per firm; Amusement, Gambling, and Recreation, Firms—227, Workers—14,041, an average of 62 workers per firm; and Construction, Firms—860, Workers—30,242, an average of 35 workers per firm.

Difficulty in calculating these transfer payments arises primarily from uncertainty about the number of U.S. workers who will become employed as a result of this rule.

b. Transportation and Subsistence to and From the Place of Employment

The NPRM proposes to require H–2B employers to provide workers—both H–2B workers and workers in corresponding employment unable to return each day to their permanent residence—with transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer must also provide the worker with the cost of return transportation and daily subsistence from the worker's place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer.

To estimate the cost of transportation, we first calculate the weighted average cost of transportation for the top ten countries of origin, by the estimated number of certified H–2B workers who were new entrants.[45] [46] For workers from Mexico and Canada, we assume that they travel to and from the place of employment by bus. For the remainder of the H–2B workers, we assume air travel.

We estimate the weighted average one-way travel cost per employee to be approximately $286 per H–2B worker.[47] We estimate the roundtrip transportation costs by multiplying the weighted average one-way cost by two, by the number of H–2B workers per average small entity and the probability that the worker is a new entrant to the country (57 percent).[48] The total annual average roundtrip transportation costs incurred by the average small employer in the top five industries are as follows: Landscaping Services, $375.89 ($286 × 2 × 1.2 × 0.57); Janitorial Services, $1,846.74 ($286 × 2 × 5.7 × 0.57); Food Services and Drinking Places, $1,029.60 ($286 × 2 × 3.2 × 0.57); Amusement, Gambling, and Recreation, $817.14 ($286 × 2 × 2.5 × 0.57); and Construction, $1,029.60 ($286 × 2 × 3.2 × 0.57). We do not know to what extent employers are currently paying for this cost in order to secure these workers or because of their obligations under the Fair Labor Standards Act. To the extent that this is the case, these transportation cost estimates are upper-bound estimates.

We estimate the per-worker cost of subsistence by multiplying the subsistence per diem ($10.64) by the weighted average one-way travel time for the top ten H–2B countries (1.055 days), the number of one-way trips (two), and the probability that the worker is a new entrant to the country (57 percent).[49] We estimate the average annual cost of subsistence to be approximately $12.83 ($10.64 × 1.055 × 2 × 0.57) per H–2B worker.

This provision applies not only to H–2B workers, but also to workers in corresponding employment on H–2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. We were unable to identify adequate data to estimate the number of corresponding workers and, thus, we are unable to quantify this impact.

c. Visa-Related and Border Crossing Fees

Under the 2008 Final Rule, visa fees are permitted to be paid by the temporary worker. The NPRM, however, proposes to require visa fees to be paid by the employer. Requiring employers to bear the full cost of hiring foreign workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on domestic workers.

The Department estimates the cost of visa fees by adding the cost per H–2B visa ($150) and the weighted average consular fee ($27.15)[50] by the average number of H–2B employees in small entities in each of the top five industries and the probability that the worker is a new entrant to the country (57 percent).[51] The total annual average visa fee costs incurred by the average small employer in the top five industries are as follows: Landscaping Services, $121.17 ($177.15 × 1.2 × 0.57); Janitorial Services, $575.56 ($177.15 × 5.7 × 0.57); Food Services and Drinking Places, $323.12 ($177.15 × 3.2 × 0.57); Amusement, Gambling, and Recreation, $252.44 ($177.15 × 2.5 × 0.57); and Construction, $323.12 ($177.15 × 3.2 × 0.57).[52]

d. Disclosure of Job Order

The NPRM proposes to require an employer to provide a copy of the job order to an H–2B worker no later than the time at which the worker outside of the U.S. applies for the H–2B visa or to a worker in corresponding employment no later than on the day that work starts. The job order must be translated to a language understood by the worker. For an H–2B worker changing employment from an H–2B employer to a subsequent H–2B employer, the copy must be provided no later than the time the subsequent H–2B employer makes an offer of employment.

We estimate two cost components of the disclosure of job orders: The cost of reproducing the document containing the terms and conditions of employment, and the cost of translation. We obtain the cost of reproducing the terms and conditions by multiplying the number of pages to be photocopied (3) by the cost per photocopy ($0.12) and the percent of certified H–2B workers that are not involved in reforestation

[45] The H–2B visa program is capped at 66,000 new visas per year. To estimate the number of new entrants from each country, we scaled the total number of certified workers from each country by the total number of new visas allowed from FY 2007 to FY 2009 (66,000 new visas × 3 years, or 198,000 workers) divided by the total number of workers from FY 2007 to FY 2009.

[46] The top 10 countries of origin by the number of certified H–2B workers who entered during FY 2007–2009 are as follows: Mexico, 134,226; Jamaica, 17,068; Guatemala, 6,530; Philippines, 4,963; Romania, 3,251, South Africa, 3,239; United Kingdom, 2,511; Canada, 2,371; Israel, 1,784; and Australia, 1,577.

[47] The one-way travel costs used for each country are as follows: Mexico, $179; Jamaica, $285; Guatemala, $484; Philippines, $973; Romania, $1,147; South Africa, $1,168; United Kingdom, $726; Canada, $165; Israel, $908; and Australia, $1,648. The transportation cost for Mexico is based on the cost of a bus trip from Mexico City, Mexico, to Ciudad Juarez, Mexico (source: *http://www.ticketbus.com.mx*) and a bus trip from El Paso, Texas, to St. Louis, Missouri (source: *http://www.greyhound.com*). The transportation cost for Canada is based on the cost of a bus trip from Ottawa, Ontario, to St. Louis, Missouri (source: *http://www.greyhound.com*). The airfare costs for the remaining countries are based on the cost of a flight from the capital city of the country in question to St. Louis, Missouri (source: *http://www.kayak.com*).

[48] The H–2B program is capped at 66,000 new visas per year. We estimate the probability that the worker is a new entrant by dividing 66,000 by the total number of H–2B workers (115,500), which includes both new entrants and H–2B workers who entered in the previous 2 years. We assume that 33,000 of the 66,000 workers stay one additional year and 16,500 workers stay two additional years, for a total of 115,500 H–2B workers in any given year.

[49] Source: 20 CFR 655. The one-way travel days applied to each country of origin is as follows: Mexico, 1; Jamaica, 1; Guatemala, 1; Philippines, 2; Romania, 1, South Africa, 2; United Kingdom, 1; Canada, 1; Israel, 1; and Australia, 2.

[50] The top 10 countries of origin and the number of certified H–2B workers during FY 2007–2009 were as follows: Mexico, 134,226; Jamaica, 17,068; Guatemala, 6,530; Philippines, 4,963; Romania, 3,251, South Africa, 3,239; United Kingdom, 2,511; Canada, 2,371; Israel, 1,784; and Australia, 1,577. We use these values to weight the country-specific consular costs to obtain the weighted average consular fee of $27.15.

[51] The visa fee of $150 went into effect on June 4, 2010. Source: *http://www.state.gov/r/pa/prs/ps/2010/05/142155.htm*.

[52] Similar to the transportation and subsistence cost discussed in the previous section, this analysis accounts for the annual 66,000-person cap on the issuance of H–2B visas.

(88.3 percent).[53] We estimate average annual reproduction costs per H–2B employee per small H–2B employer of $0.32 per year (3 × $0.12 × 0.883). We then multiply this product by the average number of H–2B workers in the top five industries to obtain the following average annual costs per small employer: Landscaping Services, $0.37 ($0.32 × 1.2); Janitorial Services, $1.80 ($0.32 × 5.7); Food Services and Drinking Places, $1.00 ($0.32 × 3.2); Amusement, Gambling, and Recreation, $0.79 ($0.32 × 2.5); and Construction, $1.00 ($0.32 × 3.2).

For the cost of translation, the Department assumes that an employer hires all of its H–2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is necessary per employer needing translation. Using DHS data, we determined that approximately 83.92 percent of H–2B workers from the top ten countries of origin do not speak English. We use this as a proxy for the probability that an H–2B employer will need to translate the job order. We obtain the cost of translation by multiplying the percent of H–2B workers who do not speak English (83.92) by the number of pages of the terms and conditions (3) and by the translation cost per page ($21.00).[54] We estimate average annual translation costs of $52.87 per employer (0.8392 × 3 × $21.00).

e. Additional Recruiting Directed by the Certifying Officer

Under the proposed rule, the employer may be directed by the CO to conduct additional recruitment of the CO has determined that there may be available and qualified U.S. workers, including where the job opportunity is located in an area of substantial unemployment. There is no such provision in the 2008 Final Rule.

We estimate this cost by multiplying the average cost of a newspaper advertisement ($25.09) by 0.5 based on our estimate that 50 percent of H–2B employers can be expected to be directed by the CO to conduct additional recruitment for a total cost of $12.55 ($25.09 × 0.50) per employer.[55] We also add the labor cost to prepare the advertisement. The latter cost is calculated by multiplying the estimated time required to post the advertisement (0.08 hours, or 5 minutes) by the scaled hourly compensation rate of an administrative assistant/executive secretary ($28.64) [56] and our estimate that 50 percent of H–2B employers can be expected to be directed by the CO to conduct additional recruiting for a total labor cost of $1.15 (0.08 × $28.64 × 0.50) per employer. Thus, the total annual cost of CO-directed recruiting is estimated to be $13.69 ($12.55 + $1.15) per employer.[57]

f. Reading and Reviewing the New Processes and Requirements

During the first year that this rule would be in effect, employers would need to learn about the new processes and requirements. We estimate this cost for a hypothetical small entity which is interested in applying for H–2B workers by multiplying the time required to read the new rule and any educational and outreach materials that explain the H–2B application process under the rule by the average compensation of a human resources manager.[58] In the first year of the rule, the Department estimates that the average small business participating in the program will spend approximately 3 hours of staff time to read and review the new processes and requirements, which amounts to approximately $184.26 ($61.42 × 3) in labor costs in the first year.[59]

g. Departure Time Determination

The NPRM proposes to require employers to provide notice to the local SWA of the time at which the last H–2B worker departs for the place of employment, if the last worker has not departed by 3 days before the date of need. The cost of this provision is the sum of the time required to place a phone call by the employer to the H–2B workers' representative to verify when the last H–2B worker will depart for the place of employment, the cost of the long-distance phone call (one call per employer), the time required to prepare and mail a letter to the SWA, and the cost of paper, an envelope, and postage.

To estimate the cost of placing the phone calls, we multiply the time needed to contact a representative of the H–2B workers (0.08 hours, or 5 minutes) by the scaled hourly compensation rate; of an administrative assistant/executive secretary ($28.64), which totals $2.39 (0.08 × $28.64).[60] To this product, we add the weighted average cost of a long distance phone call to the top 10 countries ($3.23) to obtain total average annual costs of contacting H–2B workers equal to $5.62 ($2.39 + $3.23).[61]

Once the H–2B employer has determined when the last H–2B worker will depart his or her home, if the last worker has not departed by three days before the date of need, the employer must notify the local SWA in writing. We estimate the cost of preparing and mailing a letter to the SWA by summing the labor costs to prepare and mail a letter and the cost of paper, an envelope, and postage.

We estimate the labor cost by multiplying the scaled hourly labor compensation of an administrative assistant/executive secretary ($28.64) by the percentage of H–2B applicants that will be required under this provision to ensure contact with the SWA (10 percent) and the sum of the time needed to draft the main content of a letter (0.25

[53] The requirement to disclose the job order does not result in a new cost to reforestation employers because the Migrant and Seasonal Agricultural Worker Protection Act presently requires reforestation employers to make this disclosure. According to H–2B program data for FY2000–FY2009, 88.3 percent of H–2B workers work in an industry other than reforestation.

[54] The source of the percentage of H–2B workers who do not speak English is the "Yearbook of Immigration Statistics", 2007–2009 (*http://www.dhs.gov/xlibrary/assets/statistics/yearbook/*). The source for the translation cost per page is *http://www.languagescape.com.*

[55] To obtain the average cost of a newspaper advertisement, we averaged the advertisement rates for the following newspapers: The Augusta Chronicle, the Austin Chronicle, the Huntsville Times, the Los Alamos Monitor, the San Diego Union-Tribune, and the Advertiser Times (Detroit, Michigan). Other means of recruiting are possible under this NPRM (such as listings on Monster.com and Career Builder), but they may be more costly, while other recruiting means (such as contacting community-based organizations) may be less costly.

[56] It is possible that there will be additional costs incurred by small employers due to interviewing additional applicants who are referred to H–2B employers by job advertisements. The Department does not have valid data on referrals resulting from job advertisements and, thus, is unable to quantify this impact.

[57] It is possible that there will be additional costs incurred by small employers due to interviewing additional applicants who are referred to H–2B employers by job advertisements. The Department does not have valid data on referrals resulting from job advertisements and, thus, is unable to quantify this impact.

[58] The hourly compensation rate for a human resources manager is calculated by multiplying the hourly wage of $42.95 (as published by the Department's OES survey, O*NET Online) by 1.43 to account for private-sector employee benefits (Source: BLS). Thus, the loaded hourly compensation rate for a human resources manager is $61.42.

[59] The number of small businesses that will read and review the Final Rule is likely to include some that will not apply for the program. There are no available data to quantify this possible effect.

[60] The hourly compensation rate for an administrative assistant/executive secretary is calculated by multiplying the hourly wage of $20.03 (as published by the Department's OES survey, O*NET Online) by 1.43 to account for private-sector employee benefits (Source: BLS). Thus, the loaded hourly compensation rate for an administrative assistant/executive secretary is $28.64.

[61] We collected long distance call charges from both AT&T and Verizon and averaged them. Source: *htpp://www.wireless.att.com/learn/international/long-distance/in-the-us.jsp* and *htpp://www22.verizon.com/longdistance/business_east/plan_ttw_brates.jsp.*

hours, or 15 minutes), and the time needed to type the letter and prepare it for mailing (0.08 hours, or 5 minutes). This calculation yields average annual labor costs of $0.95 ($28.64 × 0.10 × (0.25 + 0.08)). We estimate the material costs of contacting the SWA by multiplying the percentage of H–2B employer applicants that we assume will be requested to contact the SWA (10 percent) by the sum of the cost of a sheet of paper ($0.02), the cost of an envelope ($0.04), and the postage per envelope ($0.44). We estimate the total material costs at $0.05 (0.10 × ($0.02 + $0.04 + $0.44)) per letter.

In total, the Department estimates the total average annual costs of departure time determination to be approximately $6.62 ($5.62 + $0.95 + $0.05) per year.

h. Contacting Labor Organizations

The NPRM proposes to require the employer to contact the local union to locate able, willing, and qualified U.S. workers where union representation is prevalent in the occupation or where the position is currently governed by a collective bargaining agreement. The employer must provide written notice of the job opportunity to the representative(s) of any of the employer's employees in the job classification and geographic area in which the work will be performed. This provision of the proposed rule expands the requirement from the baseline established by the 2008 Final Rule because it requires the employer to contact the local union if the job is customarily unionized even if there is no union or CBA with the employer.

We estimate two components of the cost to contact labor organizations: labor and materials. We estimate the labor cost by multiplying the scaled hourly labor compensation of an administrative assistant/executive secretary ($28.64) by the time needed to draft, type, print, and mail out the letter (0.25 hours, or 15 minutes, to draft, type, and print the letter, and 0.08 hours, or 5 minutes, to mail the letter) and the percent of workers in the relevant occupations that were represented by unions from 2007 to 2009 (12.3 percent).[62] We estimate the annual average labor costs per letter to be $1.18 ($28.64 × (0.25 + 0.08) × 0.123).

The second cost component we estimate is the material costs. We calculate this cost by summing the cost of a sheet of paper ($0.02), an envelope ($0.04), and postage ($0.44), and multiplying the resulting sum by the percent of workers in the relevant occupations that were represented by unions from 2007 to 2009 (12.3 percent). We estimate the total material costs at $0.06 (($0.02 + $0.04 + $0.44) × 0.123) per letter.

In total, the Department estimates the cost of contacting labor organizations and bargaining representatives to be $1.24 ($1.18 + $ 0.06) per employer.

i. Document Retention

Under the NPRM, H–2B employers must retain documentation beyond that required by the 2008 Final Rule. The Department assumes that each H–2B employer will purchase a filing cabinet ($21.99) in which to store the additional documents starting in the first year of the rule.[63]

j. Elimination of Attestation-Based Model

The 2008 Final Rule uses an attestation-based model: employers conduct the required recruitment in advance of application filing and, based on the results of that effort, apply for certification from the Department for a number of foreign workers to fill the remaining openings. Employers currently attest that they have undertaken the necessary activities and made the required assurances to workers. The Department has determined that there are insufficient worker protections in the attestation-based model. In eliminating the attestation based-model, the NPRM shifts the recruitment process to after the application is filed so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor market. Therefore, the primary effect of eliminating the attestation based-model is a change in the timing of recruitment more so than a change in substantive requirements.

The elimination of the attestation-based model will impose minimal costs on employers because they will only need to include additional information in their recruitment report, including information on additional recruitment conducted, means of posting, contact with former U.S. workers, and contact with labor organizations where the union representation is prevalent in the occupation. We estimate two costs for the elimination of the attestation-based model: The material cost to reproduce and mail the documents, and the labor cost to reproduce and mail the documents. To estimate the cost of reproducing and mailing the documents, we multiply the additional number of pages that must be submitted (3) by the additional postage required to ship those pages ($0.17). We estimate this cost to be approximately $0.51 per employer. To estimate the labor cost of reproducing and mailing the documents, we multiply the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes) by the scaled hourly labor compensation of an administrative assistant/executive secretary ($28.64). We estimate this cost to be approximately $2.39 per employer.

k. Other

The NPRM proposes to require employers to post the availability of the job opportunity in at least two conspicuous locations at the place of anticipated employment for at least 10 consecutive days. This provision entails additional reproduction costs. For the job posting requirement, the total cost to photocopy the additional job postings (two) is $0.24 per employer.

3. Total Cost Burden for Small Entities

The Department's calculations indicate that for a hypothetical small entity in the top five industries that applies for one worker (representing the smallest of the small entities that hire H–2B workers), the total average annual cost of the NPRM is $539. The average annual costs for employers in the top five industries that hire the average number of employees for their respective industries are as follows: Landscaping Services, $614; Janitorial Services, $2,851; Food Services and Drinking Places, $1,608; Amusement, Gambling, and Recreation, $1,285, and Construction, $1,608.

The proposed rule is not expected to have a significant economic impact on a hypothetical small entity that applied for enough workers to fill 50 percent of its workforce. To evaluate this impact, the Department calculates the total cost burden as a percent of revenue for each of the top five industries. The estimated revenues for small entities in the top five industries that hire one employee are as follows: Landscaping Services, $79,315; Janitorial Services, $29,839; Food Services and Drinking Places, $35,365; Amusement, Gambling, and Recreation, $41,644; and Construction, $140,306.[64] The Department then

[62] Unionization data for the following occupations were used: Arts, entertainment, sports, and media; food preparation and serving related; building and grounds cleaning and maintenance; personal care and service; farming, fishing, and forestry; construction and extraction; and installation, maintenance, and repair. These occupational categories represent the majority of H–2B occupations. Source: *http://www.bls.gov/webapps/legacy/cpslutab3.htm.*

[63] Source: *http://www. staples.com.*

[64] Source: 2002 County Business Patterns and 2002 Economic Census. *http://www.census.gov/econ/susb/data/susb2002.html.*

divides the total cost burden for small entities hiring one worker by the total estimated revenue for small entities in each of the top five industries. The total costs as a percent of revenues for the top five industries are as follows: Landscaping Services, 0.7 percent ($539/$79,315); Janitorial Services, 1.8 percent ($539/$29,839); Food Services and Drinking Places, 1.5 percent ($539/$35,365); Amusement, Gambling, and Recreation, 1.3 percent ($539/$41,644); and Construction, 0.4 percent ($539/$140,306).

To estimate the revenues for small entities hiring the average number of employees, the Department multiplies the average revenue per employee for small entities in the top five industries by the average number of employees per small entity. The estimated revenues for small entities in the top five industries that hire the average number of employees are as follows: Landscaping Services, $182,425 ($79,315 × 2.3); Janitorial Services, $337,181 ($29,839 × 11.3); Food Services and Drinking Places, $222,800 ($35,365 × 6.3); Amusement, Gambling, and Recreation, $208,220 ($41,644 × 5); and Construction, $883,928 ($140,306 × 6.3). The total cost burden as a percent of revenue for small entities hiring the average number of workers in the top five industries are as follows: Landscaping Services, 0.3 percent ($614/$182,425); Janitorial Services, 0.9 percent ($2,851/$337,181); Food Services and Drinking Places, 0.7 percent ($1,608/$222,800); Amusement, Gambling, and Recreation, 0.6 percent ($1,285/$208,220); and Construction, 0.2 percent ($1,608/$883,928).

Moreover, the small entities that have historically applied for H–2B workers represent very small proportions of all small businesses. The following are the percentages of firms that were certified for H–2B workers among all small U.S. businesses in their respective industries: Landscaping Services, 2.2 percent [(2,754 × 0.50)/63,210]; Janitorial Services, 0.9 percent [(788 × 0.50)/45,595]; Food Services and Drinking Places, 0.1 percent [(851 × 0.50)/293,373]; Amusement, Gambling, and Recreation, 0.3 percent [(227 × 0.50)/43,726], and Construction, 0.1 percent [(860 × 0.50)/689,040].[65] Due to the statutory annual cap on available visas, the percentage of small entities receiving H–2B visas, to which the full cost burden would apply, would be even lower.

Therefore, the Department believes that this proposed rule is expected to have a net direct cost impact on a very limited number of small non-agricultural employers above the baseline of the current costs incurred by the program as it is currently implemented under the 2008 Final Rule. Accordingly, the proposed rule is not expected to impact a substantial number of small entities.

5. Identification of All Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

The Department is not aware of any relevant Federal rules that duplicate, overlap of conflict with the proposed rule.

6. Alternatives Considered as Options for Small Businesses

While we have concluded that this proposed regulation will not have a significant economic impact on a substantial number of small entities, we have made every effort to minimize the cost burden on the relatively small number of businesses that do use the program. The Department's mandate under the H–2B program is to set requirements for employers that wish to hire temporary foreign non-agricultural workers. Those requirements are designed to ensure that foreign workers are used only if qualified domestic workers are not available and that the hiring of H–2B workers will not adversely affect the wages and working conditions of similarly employed domestic workers. These regulations set those minimum standards. To create different and likely lower standards for one class of employers (*e.g.,* small businesses) would essentially sanction the very adverse effect that the Department is compelled to prevent.

The Department considered a number of alternatives: (1) To propose the policy changes contained in this NPRM; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to propose a number of other options discussed in more detail below. We believe that this NPRM retains the best features of the 2008 Final Rule and proposes additional provisions to best achieve the Department's policy objectives, consistent with its mandate under the H–2B program. We request comments from the public on the best alternatives that would balance the needs of small businesses with providing adequate protections to U.S. and H–2B workers. We are also interested in any available information about the number of U.S. workers that would benefit from increased opportunity for jobs.

The Department considered alternatives to a number of program proposals. First, the Department considered defining full-time as 40 hours a week instead of the proposed 35 hours a week, as discussed in more detail in the preamble to proposed § 655.5. The Department concluded that defining full-time as 35 hours is more consistent with the Department's historical practice for the H–2B program, and should therefore not pose difficulty for the regulated community. Nevertheless the Department has asked for comments as to whether extending the definition of a full-time workweek to at least 40 hours is more protective of U.S. workers and whether it conforms better to employer standards and needs.

Second, while the Department proposed to allow certain deductions from a worker's earnings for the provision of items that are primarily for the benefit of the H–2B employer, as long as they do not bring the worker's actual wages paid below the H–2B required wage level, the Department considered as an alternative using the rule under the FLSA, which specifies the Federal minimum wage as the floor beneath which such deductions cannot lower a worker's wages paid. The Department rejected this alternative because using the H–2B required wage level as the floor rather than the Federal minimum wage offers greater protection to U.S. workers from adverse effect by preserving the integrity of the offered wage. Otherwise, the employer, who is obligated to pay the "offered wage" which is generally higher than the FLSA minimum wage, could take deductions from wages that could reduce the effective wage to the FLSA minimum.

Third, this NPRM introduces a three-fourths guarantee requirement modeled generally on that used in the H–2A program. The Department considered retaining the language of the H–2A requirement, under which employers must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total length of the contract. The Department rejected this alternative because, while this would provide workers with significant protection, it would not be sufficient to discourage the submission of imprecise dates of need and/or imprecise numbers of employees needed and would therefore fail to protect U.S. and H–2B workers from periods of unforeseen underemployment.

The Department believes that the proposal, which calculates the hours of

[65] The source of the numerator (*i.e.,* the number of certified H–2B employers) is H–2B program data for FY 2007–2009. The source of the denominator (*i.e.,* the total number of U.S. businesses meeting the SBA small-size criteria) is the 2002 County Business Patterns and 2002 Economic Census. *http://www.census.gov/econ/susb/data/susb2002.html.* We multiply the numerator by 0.50 to reflect our assumption that 50 percent of H–2B employers are small businesses.

employment offered in 4-week periods, better ensures that workers' commitment to a particular employer will result in real jobs that meet their reasonable expectations. We do not believe the proposal will create any additional burden on employers who have accurately represented their period of need and number of workers needed, and will provide an additional incentive for applicants to correctly state ALL OF their needs on the Application for Temporary Employment Certification.

Finally, the Department considered not including a separate registration process under which H–2B employers first file a registration application with the Department. This registration process, as proposed, is intended to resolve the question of whether the employer's need is temporary before the employer is required to begin recruitment. The Department considered instead retaining the current practice for the adjudication of the employer's temporary need and the labor market analysis to occur simultaneously. While this might be more advantageous for employers new to the program, it delays the vast majority of employers who are recurring users with relatively stable dates of need and who would benefit from separate adjudication of need and adequacy of recruitment. Moreover, all employers and potential workers benefit from a recruitment process close in time to the actual date of need which a registration process, by pre-determining temporary need, expressly permits. Therefore, the Department rejected the alternative of simultaneous adjudication because it undercuts the Secretary's fulfillment of her obligations under the program.

Ultimately, the decision of an employer to apply for H–2B workers is a voluntary choice. That is, any individual employer can avoid the costs associated with the NPRM by not applying for H–2B workers.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. The proposed rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H–2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

SWAs are mandated to perform certain activities for the Federal Government under the H–2B program, and receive grants to support the performance of these activities. Under the 2008 Final Rule the SWA role was changed to accommodate the attestation-based process. The current regulation requires SWAs to accept and place job orders into intra and interstate clearance, review referrals, and verify employment eligibility of the applicants who apply to the SWA to be referred to the job opportunity. Under the proposed rule the SWA would continue to play a significant and active role. The Department is proposing to continue the requirement that employers submit their job orders to the SWA having jurisdiction over the area of intended employment as is the case in the current regulation. In addition to providing the job order the Department proposes that the employer will provide a copy of the *Application for Temporary Employment Certification* to the SWA; however, this is simply a copy for disclosure purposes and would require no additional information collection or review activities by the SWA. The Department is also proposing to continue to require SWAs to place job orders into clearance, as well as provide employers with referrals received in connection with the job opportunity. The Department recognizes that based on the extended recruitment times and the possibility that the CO could require additional interstate recruitment under this proposed rule, SWAs may experience a slight increase in their workload. However, the Department is proposing to eliminate the employment verification responsibilities the SWA has under the current regulations. With the elimination of workload created by the employment verification requirement SWAs can now apply those resources to the additional recruitment requirements proposed under this rule.

SWA activities under the H–2B program are currently funded by the Department through grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* The Department anticipates continuing funding under the Wagner-Peyser Act. As a result of this NPRM and the publication of a final regulation, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs.

D. Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

The Department has determined that this rulemaking does not impose a significant impact on a substantial number of small entities under the RFA; therefore, the Department is not required to produce any compliance guides for small entities as mandated by the SBREFA. The Department has similarly concluded that this proposed rule is not a major rule requiring review by the Congress under the SBREFA because it will not likely result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

E. Executive Order 13132—Federalism

The Department has reviewed this proposed rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The proposed rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government as described by E.O. 13132. Therefore, the Department has determined that this proposed rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

F. Executive Order 13175—Indian Tribal Governments

This proposed rule was reviewed under the terms of E.O. 13175 and determined not to have tribal implications. The proposed rule does 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. As a result, no tribal summary impact statement has been prepared.

G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of

1999 (Pub. L. 105–277, 112 Stat. 2681) requires the Department to assess the impact of this proposed rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this proposed rule and determines that it will not have a negative effect on families.

H. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

The proposed rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

I. Executive Order 12988—Civil Justice

The proposed rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has developed the proposed rule to minimize litigation and provide a clear legal standard for affected conduct, and has reviewed the proposed rule carefully to eliminate drafting errors and ambiguities.

J. Plain Language

The Department drafted this NPRM in plain language.

K. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This process helps to ensure that the public understands the Department's collection instructions; respondents provide requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department properly assesses the impact of collection requirements on respondents.

The PRA requires all Federal agencies to analyze proposed regulations for potential time burdens on the regulated community created by provisions within the proposed regulations that require the submission of information. These information collection (IC) requirements must be submitted to OMB for approval. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l) or it is exempt from the PRA.

The majority of the IC requirements for the current H–2B program are approved under OMB control number 1205–0466 (which includes ETA Form 9141 and ETA Form 9142). The Department is proposing to add a new IC to the same OMB control number, specifically, the ETA Form 9155. In addition, the IC for the ETA Form 9142 will need to be modified to account for new requirements under the proposed regulation.

A number of the provisions under this proposed rule are exempt from a burden analysis. Below is a section-by-section analysis of the PRA burden. Any necessary adjustments to the burden calculations have been submitted to OMB for review under sec. 3507(d) of the PRA. For an additional explanation of how the Department calculated the burden hours and related costs, the PRA package for IC 1205–0466 may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.*

PRA Addressee: Sherril Hurd, Office of Policy Development and Research, U.S. Department of Labor, Employment & Training Administration, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210. Telephone: 202–693–3700 (this is not a toll-free number).

Comments regarding the IC should be sent to (1) the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employment and Training Administration; and a copy to (2) Office of Foreign Labor Certification, Room C–4312, 200 Constitution Ave., NW., Washington, DC 20210 or fax: 202–693–2768. Comments to OMB may be submitted by using the Federal eRulemaking portal at *http://www.regulations.gov* (follow instructions for submission of comments) or by fax: 202–395–5806. OMB requests that comments be received within 60 days of publication of the Proposed Rule to ensure their consideration. Please note that comments submitted to OMB are a matter of public record.

When submitting comments on the information collection, your comments should address one or more of the following four points:

- 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 submissions of responses.

Summary

The information collection is required by Title 8 CFR 214.2(h)(6) of the DHS regulations. Title 8 CFR 214.2(h)(6)(b)(iii)(A) and (iv)(A) require the Secretary to certify, among other things, that any foreign worker seeking to enter the U.S. for the purpose of performing certain temporary nonagricultural labor will not, by doing so, adversely affect wages and working conditions of U.S. workers similarly employed. The Secretary must also certify that qualified workers in the U.S. are not available for the job opportunity. Before any employer may petition for any temporary nonagricultural foreign workers, it must submit a request for certification to the Secretary containing the elements prescribed by the DHS regulations.

This proposed rule is designed to obtain the necessary information for the Secretary to make an informed decision in meeting the Department's obligations. The information collected will be used, among other things: To inform U.S. workers of the job opportunity thereby testing the labor market; to determine whether or not the employer is offering the proper wage to all employees; to ensure that the employer (and its agent) is eligible to employ foreign workers under the H–2B program; to have written assurances from the employer of its intent to comply with program requirements; and to ensure program integrity.

BILLING CODE 4510–FP–P

BILLING CODE 4510–FP–C

Hourly Burden

NPRM Section	IC Action	Obligation to Respond[66]	Covered under OMB#	Total # Resp.	Hourly Burden	Total Hours
655.8(a)	Proof of agent relationship	M	1205-0466	1,875	30 min.	938
655.8(b)	Agent's proof of MSPA license	M	1205-0466	12	5 min.	1
655.9	Foreign recruitment contracts	M	1205-0466	3,966	5 min.	331
655.11	Fill out 9155	M	1205-0466	8,717	1 hour	8,717
655.11(g)	Respond to RFI	R	1205-0466	2,711	1 hour	2711
655.12	Fill out 9141	M	1205-0466	8,717	1 hour	8,717
655.13(a)	Written request for Center Director review	R	1205-0466	110	30 min.	55
655.13(c)	Written request for BALCA review	R	1205-0466	5	30 min.	3
655.15	Fill out 9142	M	1205-0466	8,717	1 hour	8,717
655.16	Employer review of Job Order	M	1205-0466	8,717	1 hour	8,717
655.17	Request waiver of filing deadline	R	1205-0466	111	30 min.	56
655.20(l)/503.16(l)	Provide copy of Job Order to workers	M	1205-0466	236,706	5 min.	19,726
655.20(m)/503.16.(m)	Workers' rights poster	M	Exempt[67]	------	------	------
655.20(p)/503.16(p)	Inform of fee prohibition	M	1205-0466	3,966	15 min.	992
655.20(y)/503.16(y)	Notify of abscondment or termination	M	1205-0466	2,500	10 min.	417
655.32	Modify application	R	1205-0466	2,711	1 hour	2,711
.655.33(b)(3)	Notify SWA if H-2B workers early or late	M	1205-0466	653	20 min.	218
655.33(b)(4)-(7)	SWA posts, refers, and distributes	M	Exempt[68]	------	------	------
655.35	Amend application	R	1205-0466	522	30 min.	261
655.40, 42, & 46	Advertising	R	Exempt[69]	------	------	------
655.43	Contact old employees	R	1205-0466	8,717	1 hour	8,717
655.44, 45	Contact union	R	1205-0466	8,717	15 min	2,179
655.45	Creating and posting notice of job vacancy	R	1205-0466	8,717	30 min.	4,359
655.45(c), 46	Additional recruitment	R	1205-0466	1,983	5 min.	165
655.46(c)	Proof of recruitment	M	Exempt[70]	------	------	------
655.47	SWA informs applicants of requirements	M	1205-0466	60,000	5 min.	5,000
655.48	Recruitment report	R	1205-0466	8,717	1 hour	8,717
655.56/503.17	Document retention	M	1205-0466	8,717	10 min.	1,453
655.60	Extension application	R	1205-0466	326	30 min.	163
655.61(a)	Notice of Appeal	R	1205-0466	110	1 hour	110
655.62	Request withdrawal	R	1205-0466	184	10 min.	31
655.70, 71, 72, & 73	Audit, revocation, debarment	R	Exempt[71]	------	------	------
503.16(aa)	Compliance with investigation	R	Exempt[72]	------	------	------
503.43	Request for hearing with ALJ	R	1205-0466	2	2 hour	4
503.51	Request for hearing with ARB	R	1205-0466	1	30 min.	1
			Total Responses:	**396,907**	**Total Hrs: 94,187**	

Annual Hourly Burden

In order to estimate the potential hourly burden of the information collection required to apply for a labor certification as described in this proposed rule, the Department relied upon program experience and program data from FY 2000–2009. Based on information on program usage from these years, the Department estimates that it will receive an average of 8,717 applications requesting approximately 236,706 foreign workers. This is a decrease from the 12,000 applications estimated in the previous submission used to calculate the original burden in 1205–0466 and is in part due to the fluctuating U.S. economy over the years. Specifically, the methodology used to arrive at the current lower estimate includes periods in which the U.S. economy grew and periods in which the U.S. economy contracted.

For the number of appeals, modifications, requests for waivers of the filing time, extensions, and other program components requiring information collection under the PRA, the Department based its estimates on program experience in the current program and its other programs with similar procedures to determine annual hourly burdens described in the chart above.

The total annual hourly burden for the IC in this NPRM is 94,187 hours.

Monetized Hourly Burden

Employers filing applications for temporary alien employment certification represent a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars, where the corporate executive office of a large company performs some or all of these functions itself. However, the Department recognizes that in most companies a Human Resources Manager will perform these activities. Therefore, in estimating employer staff time and costs, the Department used the hourly wage rate for a Human Resources Manager ($42.95), as published by the U.S. Department of Labor's Occupational Employment Statistics OnLine,[73] and increased by a factor of 1.43 to account for employee benefits and other compensation for a total hourly cost of $61.42. Total annual respondent hour costs for the information collection is estimated as follows:

1205–0466 94,187 hours × $61.42 = $5,784,966

Cost Burden to Respondents

The proposed rule does not alter any out-of-pocket expenses such as filing fees to participate in the program. There is also no capital investment required to participate.

Affected Public: Farms, business or other for-profit; not-for-profit institutions.

Estimated Number of Respondents: 3,966.

Estimated Number of Responses: 396,984.

Frequency of Response: Annually; occasionally.

Estimated Annual Burden Hours: 94,187.

Estimated Annual Hourly Burden Cost: $5,784,966.

Estimated Annual Cost Burden: $0.

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

29 CFR Part 503

Administrative practice and procedure, Employment, Foreign Workers, Housing, Housing standards, Immigration, Labor, Nonimmigrant workers, Penalties, Transportation, Wages.

Title 20—Employees' Benefits

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts A and C issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

2. In subpart A, revise §§ 655.1 through 655.6 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

Sec.

655.1 Scope and purpose of subpart A.
655.2 Authority of the agencies, offices, and divisions in the Department of Labor.
655.3 Territory of Guam.
655.4 Special procedures.
655.5 Definition of terms.
655.6 Temporary need.

* * * * *

§ 655.1 Scope and purpose of subpart A.

The Immigration and Nationality Act (INA) at 8 U.S.C. 1184(c)(1) requires the Secretary of the Department of Homeland Security (DHS) to consult with appropriate agencies before authorizing the entry of H–2B workers. DHS regulations at 8 CFR 214.2(h)(6)(iv) provide that an employer's petition to employ nonimmigrant workers on H–2B visas for temporary non-agricultural employment in the United States (U.S.), except for Guam, must be accompanied by an approved temporary employment certification from the Secretary of Labor (Secretary).

(a) *Purpose.* The temporary employment certification reflects a determination by the Secretary that:

[66] Obligation to respond to this information collection is mandatory (M), required for benefit (R), or voluntary (V).

[67] See 5 CFR 1320.3(c)(2).

[68] See 5 CFR 1320.3(b)(3); this is a normal function of SWAs.

[69] See 5 CFR 1320.3(b)(2).

[70] See 29 CFR 1602.14 (OMB 3046–0040); 29 CFR 1627.3(B)(3) (OMB 3046–0018); 29 CFR 1627.3(b)(3).

[71] *See* 5 CFR 1320.3(h)(6) & (9) and 5 CFR 1320.4(a)(2).

[72] *See* 5 CFR 1320.4(a)(2).

[73] Source: Bureau of Labor Statistics 2009 OES wage data for Washington, DC.

(1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to import foreign workers, and that

(2) The employment of the H–2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the H–2B visa category, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(b). It also establishes obligations with respect to the terms and conditions of the temporary employment certification with which H–2B employers must comply, as well as their obligations to H–2B workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the temporary employment certification.

§ 655.2 Authority of the agencies, offices, and divisions in the Department of Labor.

(a) *Authority and role of the Office of Foreign Labor Certification (OFLC).* The Secretary has delegated her authority to make determinations under this subpart, pursuant to 8 CFR 214.2(h)(6)(iv), to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to OFLC. Determinations on an *Application for Temporary Employment Certification* in the H–2B program are made by the Administrator, OFLC who, in turn, may delegate this responsibility to designated staff members, *e.g.,* a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division (WHD).* Pursuant to its authority under the INA, 8 U.S.C. 1184(c)(14)(B), DHS has delegated to the Secretary certain investigatory and law enforcement functions with respect to terms and conditions of employment in the H–2B program. The Secretary has, in turn, delegated that authority to WHD. The regulations governing WHD investigation and enforcement functions, including those related to the enforcement of temporary employment certifications, issued under this subpart, may be found in 29 CFR part 503.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy under § 655.73 or under 29 CFR 503.24.

§ 655.3 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, except that an applicant seeking certification for a job opportunity on Guam must obtain a prevailing wage from the Department in accordance with § 655.10 of this subpart. The Department of Labor (Department or DOL) does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas, or enforce compliance with the provisions of the H–2B visa program, in the Territory of Guam. Under DHS regulations, administration of the H–2B temporary employment certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

§ 655.4 Special procedures.

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities, the Administrator, OFLC has the authority to establish, continue, revise, or revoke special procedures in the form of variances for processing certain H–2B applications. Employers must demonstrate in writing to the Administrator, OFLC that special procedures are necessary. Before making determinations under this section, the Administrator, OFLC may consult with affected employers and worker representatives. Special procedures in place on the effective date of this regulation, including special procedures currently in effect for handling applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers, will remain in force until modified or withdrawn by the Administrator, OFLC.

§ 655.5 Definition of terms.

For purposes of this subpart:

Act means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

Administrator, Wage and Hour Division (WHD) means the primary official of the WHD, or the Administrator's designee.

Agent means a legal entity or person who:

(1)(i) Is authorized to act on behalf of an employer for temporary nonagricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this subpart with respect to a specific application; and

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

Agricultural labor or services means those duties and occupations defined in subpart B of this part.

Applicant means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (Form ETA 9142 and the appropriate appendices).

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved Form ETA 9142 and the appropriate appendices, a valid wage determination, as required by § 655.12, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary employment certification determination from DOL.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.,* near the border of) the MSA.

Area of substantial unemployment means a contiguous area with a population of at least 10,000 in which there is an average unemployment rate equal to or exceeding 6.5 percent for the 12 months preceding the determination of such areas made by the ETA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge, and consisting of ALJs assigned to the Department and designated by the Chief ALJ to be members of BALCA. The Board is located in Washington, DC, and reviews and decides appeals in Washington, DC.

Certifying Officer (CO) means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H–2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under this subpart.

Chief Administrative Law Judge means the chief official of the Department's Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Corresponding employment means the employment of workers who are not H–2B workers by an employer that has an accepted H–2B *Application for Temporary Employment Certification* in any work included in the job order or in any work performed by the H–2B workers. To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

Date of need means the first date the employer requires services of the H–2B workers as listed on the *Application for Temporary Employment Certification.*

Department of Homeland Security (DHS) means the Federal Department having jurisdiction over certain immigration-related functions, acting through its agencies, including USCIS.

Employee means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms "employee" and "worker" are used interchangeably in this subpart.

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H–2B worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification,* a valid Federal Employer Identification Number (FEIN).

Employment and Training Administration (ETA) means the agency within the Department which includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Full time means 35 or more hours of work per week for the purposes of the H–2B program.

H–2B Petition means the DHS *Petition for a Nonimmigrant Worker* form, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2B nonimmigrant workers. The *H–2B Petition* includes the approved *Application for Temporary Employment Certification* and the Final Determination letter.

H–2B Registration means the OMB-approved Form ETA 9155, submitted by an employer to register its intent to hire H–2B workers and to file an *Application for Temporary Employment Certification.*

H–2B worker means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision or control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Job offer means the offer made by an employer or potential employer of H–2B workers to both U.S. and H–2B workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Job order means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including all obligations and assurances under 29 CFR part 503 and this subpart that is posted between and among the State Workforce Agencies (SWAs) on their inter- and intra-State job clearance systems.

Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

Layoff means any involuntary separation of one or more U.S. employees without cause.

Metropolitan Statistical Area (MSA) means a geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Prevailing Wage Center (NPWC) means that office within OFLC

from which employers, agents, or attorneys who wish to file an *Application for Temporary Employment Certification* receive a prevailing wage determination.

NPWC Director means the OFLC official to whom the Administrator, OFLC has delegated authority to carry out certain NPWC operations and functions.

National Processing Center (NPC) means the office within OFLC which is charged with the adjudication of an *Application for Temporary Employment Certification* or other applications. For purposes of this subpart, the NPC receiving a request for an *H–2B Registration* and an *Application for Temporary Employment Certification* will be the Chicago NPC whose address is published in the **Federal Register.**

NPC Director means the OFLC official to whom the Administrator, OFLC has delegated authority for purposes of certain Chicago NPC operations and functions.

Non-agricultural labor and services means any labor or services not considered to be agricultural labor or services as defined in subpart B of this part. It does not include the provision of services as members of the medical profession by graduates of medical schools.

Occupational employment statistics (OES) survey means the program under the jurisdiction of the BLS that provides annual wage estimates for occupations at the State and MSA levels.

Offered wage means the wage that equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities for the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Prevailing wage determination (PWD) means the prevailing wage for the position, as described in § 655.12, that is the subject of the *Application for Temporary Employment Certification.*

Professional athlete is defined in 8 U.S.C. 1182(a)(5)(A)(iii)(II), and means an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of Homeland Security means the chief official of the U.S. Department of Homeland Security or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

State Workforce Agency (SWA) means a State government agency that receives funds under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

Strike means a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest means

(1) Where an employer has violated 29 CFR part 503, or this subpart, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

(vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(vii) Similarity in machinery, equipment, and production methods;

(viii) Similarity of products and services; and

(ix) The ability of the predecessor to provide relief.

(2) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

United States (U.S.) means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

United States Citizenship and Immigration Services (USCIS) means the Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H–2B workers to perform temporary nonagricultural work in the U.S.

United States worker (U.S. worker) means a worker who is:

(1) A citizen or national of the U.S.;

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Wage and Hour Division (WHD) means the agency within the Department with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c).

Wages mean all forms of cash remuneration to a worker by an employer in payment for personal services.

§ 655.6 Temporary need.

(a) An employer seeking certification under this subpart must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A). The need of a job contractor is inherently permanent in nature and the CO will deny a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* where the employer is a job contractor.

(b) The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS. 8 CFR 214.2(h)(6)(ii)(B). Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.

3. In subpart A, add §§ 655.7 through 655.9 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.

655.7 Persons and entities authorized to file.
655.8 Requirements for agents.
655.9 Disclosure of foreign worker recruitment.

* * * * *

§ 655.7 Persons and entities authorized to file.

(a) *Persons authorized to file.* In addition to the employer applicant, a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* may be filed by an attorney or agent, as defined under § 655.5.

(b) *Employer's signature required.* Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the *H–2B Registration* and *Application for Temporary Employment Certification* and all documentation submitted to the Department.

§ 655.8 Requirements for agents.

An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide:

(a) A copy of the agent agreement or other document demonstrating the agent's authority to represent the employer; and

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration, if the agent is required under MSPA, at 29 U.S.C. 1801 *et seq.,* to have such a certificate, identifying the specific farm labor contracting activities the agent is authorized to perform.

§ 655.9 Disclosure of foreign worker recruitment.

(a) The employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers under this *Application for Temporary Employment Certification.*

(b) The Department will maintain a publicly available list of agents and recruiters who are party to such agreements.

4a. In subpart A add an undesignated center heading before § 655.10 to read as follows:

Prefiling Procedures

4b. In § 655.10, revise paragraphs (a) and (c) through (g), and add paragraphs (h) and (i) to read as follows:

§ 655.10 Prevailing wage.

(a) *Offered wage.* The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H–2B workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.

* * * * *

(c) *Request for PWD.* (1) The employer must request a PWD from the NPWC before filing the job order with the SWA.

(2) The PWD must be valid on the date the posting of the job order begins.

(d) *Multiple worksites.* If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the opportunity within the area of intended employment, the prevailing wage is the highest applicable wage among all the worksites. The provisions of this paragraph do not apply to occupations that are covered under special procedures.

(e) *NPWC action.* The NPWC will provide the PWD, indicate the source, and return the form with its endorsement to the employer.

(f) *Validity period.* The NPWC must specify the validity period of the prevailing wage, which in no event may be more than 365 days and no less than 90 days from the date that the determination is issued.

(g) *Professional athletes.* In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage. See 8 U.S.C. 1182(p)(2).

(h) *Retention of documentation.* The employer must retain the PWD for 3 years from the date of issuance or the date of a final determination on the Application, whichever is later, and submit it to a CO if requested by a Notice of Deficiency, described in § 655.31, or audit, as described in § 655.70, or to a WHD representative during a WHD investigation.

(i) *Guam.* The requirements of this paragraph shall apply to any request filed for an H–2B job opportunity on Guam.

5. Revise § 655.11 to read as follows:

§ 655.11 Registration of H–2B employers.

All employers that desire to hire H–2B workers must establish their need for services or labor is temporary by filing an *H–2B Registration* with the NPC.

(a) *Registration filing.* An employer must file an *H–2B Registration.* The *H–2B* Registration must be accompanied by documentation evidencing:

(1) The number of positions that will be sought in the first year of registration;

(2) The time period of need for the workers requested; and

(3) That the nature of the employer's need for the services or labor to be performed is non-agricultural and temporary, and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined at 8 CFR 214.2(h)(6)(ii)(B) and § 655.6.

(b) *Original signature.* The *H–2B Registration* must bear the original signature of the employer (and that of the employer's attorney or agent if applicable).

(c) *Timeliness of registration filing.* A completed request for an *H–2B Registration* must be received by no less than 120 calendar days and no more than 150 calendar days before the employer's date of need.

(d) *Temporary need.* (1) The employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A).

(2) The employer's need will be assessed in accordance with the definitions provided by the Secretary of DHS and as further defined in § 655.6.

(e) *NPC review.* The CO will review the *H–2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors:

(1) The job classification and duties qualify as nonagricultural;

(2) The employer's need for the services or labor to be performed is temporary in nature;

(3) The number of worker positions and period of need are justified; and

(4) The request represents a bona fide job opportunity.

(f) *Mailing and postmark requirements.* Any notice or request pertaining to *H–2B Registration* sent by the CO to an employer requiring a response will be mailed using the provided address using methods to assure next day delivery, including electronic mail. The employer's response to such a notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date specified by the CO or by the next

business day if the due date falls on a Saturday, Sunday or Federal holiday.

(g) *Request for information (RFI).* If the CO determines the *H–2B Registration* cannot be approved, the CO will issue an RFI. Normally the RFI will be issued within 7 business days of the CO's receipt of the *H–2B Registration.* The RFI will:

(1) State the reason(s) why the *H–2B Registration* cannot be approved and what supplemental information or documentation is needed to correct the deficiencies;

(2) Specify a date, no later than 7 business days from the date the RFI is issued, by which the supplemental information or documentation must be sent by the employer;

(3) State that, upon receipt of a response to the RFI, the CO will review the *H–2B Registration* as well as any supplemental information and documentation and issue a Notice of Decision on the *H–2B Registration.* The CO may, at her discretion, issue one or more additional RFIs before issuing a Notice of Decision on the *H–2B Registration;* and

(4) State that failure to comply with an RFI, including not responding in a timely manner or not providing all required documentation within the specified timeframe, will result in a denial of the *H–2B Registration.*

(h) *Notice of Decision.* The CO will notify the employer in writing of the final decision on the *H–2B Registration.*

(1) Approved *H–2B Registration.* If the *H–2B Registration* is approved, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will notify the employer that it is eligible to seek H–2B workers in the occupational classification for the anticipated number of positions and period of need stated on the approved *H–2B Registration.* The CO may approve the *H–2B Registration* for a period of up to 3 consecutive years.

(2) Denied *H–2B Registration.* If the *H–2B Registration* is denied, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will:

(i) State the reason(s) why the *H–2B Registration* is denied;

(ii) Offer the employer an opportunity to request administrative review under § 655.61; and

(iii) State that if the employer does not request administrative review in writing within 10 business days from the date the Notice of Decision is issued, the denial is final and the Department will not further consider the *H–2B Registration.*

(i) *Retention of documents.* All employers filing an *H–2B Registration* are required to retain any documents and records not otherwise submitted proving compliance with this subpart. Such records and documents must be retained for a period of 3 years from the final date of applicability of the *H–2B Registration,* if approved, or 3 years from the date the decision is issued if the *H–2B Registration* is denied or 3 years from the day the Department receives written notification from the employer withdrawing its pending *H–2B Registration.*

6. In subpart A, add §§ 655.12 and 655.13 to read as follows:

§ 655.12 Use of registration of H–2B employers.

(a) Upon approval of the *H–2B Registration,* the employer is authorized for the specified period of up to 3 consecutive years from the date the *H–2B Registration* is approved to file an *Application for Temporary Employment Certification,* unless:

(1) The number of workers to be employed has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers) from the initial year;

(2) The beginning or ending date of need for the job opportunity has changed by more than 14 days from the initial year;

(3) The nature of the job classification and/or duties has materially changed; or

(4) The temporary nature of the employer's need for services or labor to be performed has materially changed.

(b) If any of the changes in paragraphs (a)(1) through (4) of this section apply, the employer must file a new *H–2B Registration* in accordance with § 655.11.

§ 655.13 Review of PWDs.

(a) *Request for review of PWDs.* Any employer desiring review of a PWD must make a written request for such review to the NPWC Director within 7 business days from the date the PWD is issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) *NPWC review.* Upon the receipt of the written request for review, the NPWC Director will review the employer's request and accompanying documentation, including any supplementary material submitted by the employer, and after review may:

(1) Affirm the PWD issued by the NPWC; or

(2) Modify the PWD.

(c) *Request for review by BALCA.* Any employer desiring review of the NPWC Director's decision on a PWD must make a written request for review of the determination by BALCA within 10 business days from the date the Final Determination letter is issued.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only the evidence that was within the record upon which the decision on the PWD was based.

(2) The request for BALCA review must be in writing and addressed to the NPWC Director who made the final determination. Upon receipt of a request for BALCA review, the NPWC will prepare an appeal file and submit it to BALCA.

(3) BALCA will handle appeals in accordance with § 655.61.

7. In subpart A, add an undesignated center heading above § 655.15 to read as follows:

Application for Temporary Employment Certification Filing Procedures

8. Revise § 655.15 to read as follows:

§ 655.15 Application filing requirements.

All registered employers that desire to hire H–2B workers must file an *Application for Temporary Employment Certification* with the NPC designated by the Administrator, OFLC. Except for employers that qualify for emergency procedures at § 655.17, employers that fail to register under the procedures in § 655.11 and/or that fail to submit a PWD obtained under § 655.10 will not be eligible to file an *Application for Temporary Employment Certification* and their applications will be returned without review.

(a) *What to file.* A registered employer seeking H–2B workers must file a completed *Application for Temporary Employment Certification* (Form ETA 9142 and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, as set forth in § 655.16, and copies of all contracts and agreements with any agent or recruiter executed in connection with the job opportunities, as specified in § 655.9.

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need.

(c) *Location and method of filing.* The employer must submit the *Application for Temporary Employment*

Certification and all required supporting documentation by U.S. Mail or private mail courier to the NPC. The Department may also require an *Application for Temporary Employment Certification,* at a future date, to be filed electronically in addition to or instead of by mail, notice of which will be published in the **Federal Register**.

(d) *Original signature.* The *Application for Temporary Employment Certification* must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is so represented).

(e) *Requests for multiple positions.* Certification of more than one position may be requested on the *Application for Temporary Employment Certification* as long as all H–2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(f) *Separate applications.* Except as otherwise permitted under § 655.4, a separate *Application for Temporary Employment Certification* must be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment. Except where otherwise permitted under § 655.4, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H–2B program.

(g) *One-time occurrence.* Where a one-time occurrence lasts longer than 1 year, the CO will instruct the employer on any additional requirements with respect to the continuing validity of the labor market test or offered wage obligation.

(h) *Information dissemination.* Information received in the course of processing a request for an *H–2B Registration,* an *Application for Temporary Employment Certification* or program integrity measures such as audits may be forwarded from OFLC to WHD, or any other Federal agency as appropriate, for investigative and/or enforcement purposes.

9. Add § 655.16 to read as follows:

§ 655.16 Filing of the job order at the SWA.

(a) *Submission of the job order.* (1) The employer must submit the job order to the SWA serving the area of intended employment at the same time it submits the *Application for Temporary Employment Certification* and a copy of the job order to the NPC in accordance with § 655.15. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit the job order to any one of the SWAs having jurisdiction over the anticipated worksites, but must identify the receiving SWA on the copy of the job order submitted to the NPC with its *Application for Temporary Employment Certification.* The employer must inform the SWA that the job order is being placed in connection with a concurrently submitted *Application for Temporary Employment Certification* for H–2B workers.

(2) The job order submitted to the SWA must satisfy the requirements set forth in § 655.18.

(b) *SWA review of the job order.* The SWA must review the job order and ensure that it complies with criteria set forth in § 655.18. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO at the NPC of the noted deficiencies within 4 business days of receipt of the job order.

(c) *Intrastate and interstate clearance.* Upon receipt of the Notice of Acceptance, the SWA must promptly place the job order in intrastate and interstate clearance.

(d) *Duration of job order posting and SWA referral of U.S. workers.* Upon receipt of the Notice of Acceptance, any SWA in receipt of the employer's job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.40(c), and must refer to the employer in a manner consistent with § 655.47 all U.S. workers who apply for the job opportunity or on whose behalf a job application is made.

(e) *Amendments to a job order.* The employer may amend the job order at any time before the CO makes a final determination, in accordance with procedures set forth in § 655.35.

10. Revise § 655.17 to read as follows:

§ 655.17 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period(s) for filing an *H–2B Registration* and/or an *Application for Temporary Employment Certification* for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50.

(b) *Employer requirements.* The employer requesting a waiver of the required time period(s) must submit to the NPC a request for a waiver of the time period requirement, a completed *Application for Temporary Employment Certification* and the job order identifying the SWA serving the area of intended employment, and must otherwise meet the requirements of § 655.15. If the employer did not previously apply for an *H–2B Registration,* the employer must also submit a completed *H–2B Registration* with all supporting documentation, as required by § 655.11. If the employer did not previously apply for a PWD, the employer must also submit a completed PWD request. The employer's waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, unforeseen changes in market conditions, or pandemic health issues. A denial of a previously submitted *H–2B Registration* in accordance with the procedures set forth in § 655.11 does not constitute good and substantial cause necessitating a waiver under this section.

(c) *Processing of emergency applications.* The CO will process the emergency *H–2B Registration* and/or *Application for Temporary Employment Certification* and job order in a manner consistent with the provisions of this subpart and make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.50. If the CO grants the waiver request, the CO will forward a Notice of Acceptance and the approved job order to the SWA serving the area of intended employment identified by the employer in the job order. If the CO determines that the certification cannot be granted because, under paragraph (a) of this section, the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51, the CO will send a Final Determination letter to the employer in accordance with § 655.53.

11. Add § 655.18 to read as follows:

§ 655.18 Contents of the job order.

An employer must ensure that the job order contains the information about the job opportunity as required for the advertisements required in § 655.41 and the following assurances:

(a) *Prohibition against preferential treatment.* The employer's job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2B workers. This

does not relieve the employer from providing to H–2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Bona fide job requirements.* Each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H–2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H–2B workers.

(c) *Minimum benefits, wages, and working conditions.* Every job order accompanying an *Application for Temporary Employment Certification* must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (k) of this section.

(d) *Rate of pay.* The wage listed in the job order must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage.

(e) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent.

(f) *Deductions.* The job order must specify that the employer will make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's paycheck.

(g) *Job opportunity is full-time.* The job order must clearly state that the job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek, and that the employer will use a single workweek as its standard for computing wages due.

(h) *Three-fourths guarantee.* The job order must clearly state the applicability of the three-fourths guarantee, offering the worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period in accordance with § 655.20(f).

(i) *Transportation and visa fees.* (1) The job order must detail how the worker will be provided with transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, consistent with § 655.20(j)(1)(i), and that the employer will provide or pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, consistent with § 655.20(j)(1)(ii). If applicable, the job order must state that the employer will provide the daily transportation to and from the worksite.

(2) The job order must state that the employer will reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees including those mandated by the government incurred by the H–2B worker (but not for passport expenses or other charges primarily for the benefit of the worker).

(j) *Employer-provided items.* The job order must specify that the employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with § 655.20(k).

(k) *Board, lodging, or facilities.* If the employer provides the worker with the option of board, lodging, or other facilities or intends to assist workers to secure such lodging, such provision of board, lodging, or other facilities must be listed in the job order. If the employer intends to make any wage deductions related to such provision of board, lodging or other facilities, they must be disclosed in the job order.

12. In subpart A, add an undesignated center heading before § 655.20 to read as follows:

Assurances and Obligations

13. Revise § 655.20 to read as follows:

§ 655.20 Assurances and obligations of H–2B employers.

An employer employing H–2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions:

(a) *Rate of pay.* (1) The offered wage set forth in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* accepted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and must be normal and usual for non-H–2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must pay a piece rate that is no less than the normal rate for workers performing the same activity in the area of intended employment. The average hourly piece-rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece-rate does not result in average hourly piece-rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly rate, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage rate for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or negotiable instrument payable at par. The payment must be made finally and unconditionally and "free and clear." The principles applied in determining whether deductions are reasonable and payments are received free and clear and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay. Deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those

required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter, including any agents or workers, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *Application for Temporary Employment Certification.*

(d) *Job opportunity is full time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek, and the employer will use a single workweek as its standard for computing wages due. An employee's workweek will be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H–2B employers in the same occupation and area of intended employment. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job order.

(f) *Three-fourths guarantee.* (1) The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each 4-week period beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any.

(2) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 4-week period during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the job order and all extensions thereof are in effect.

(4) The 4-week periods to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 4-week period also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 4 weeks and 6 days). The final 4-week period includes any time remaining after the last full 4-week period ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 10-week period, during which a normal workweek is specified as 5 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 120 hours (4 weeks × 40 hours/week = 160 hours × 75 percent = 120) in the first 4-week period, at least 120 hours in the second 4-week period, and at least 60 hours (2 weeks × 40 hours/week = 80 hours × 75 percent = 60) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(7) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 4-week period during the period of the job order the employer affords the U.S. or H–2B worker less employment than that required under paragraph (f)(1) of this section, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in a 4-week period if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 4-week period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) *Impossibility of fulfillment.* If, before the expiration date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H–2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H–2B employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: Records showing the nature

and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee in paragraph (f) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages;

(vi) If piece rates are used, the units produced daily;

(vii) The beginning and ending dates of the pay period; and

(viii) The employer's name, address and FEIN.

(j) *Transportation and visa fees.* (1)(i) Transportation to the place of employment. The employer must provide the worker transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer may arrange and pay for the transportation and subsistence directly, advance the reasonable cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker in the first workweek for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H–2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H–2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in § 655.173.

(ii) Transportation from the place of employment. If the worker has no immediate subsequent H–2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State, or local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) Disclosure. All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees including those mandated by the government-incurred by the H–2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

(k) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(l) *Disclosure of job order.* The employer must provide to an H–2B worker if outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent modifications. For an H–2B worker changing employment from an H–2B employer to a subsequent H–2B employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H–2B employer. The disclosure of all documents required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

(m) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department which sets out the rights and protections for H–2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department, in any language common to a significant portion of the workers if they are not fluent in English.

(n) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart, or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder.

(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H–2B employment certification or employment, including payment of the employer's attorney or agent fees, visa or other application and *H–2B Petition* fees, recruitment costs, or any fees

falsely attributed to obtaining the approved *Application for Temporary Employment Certification.* For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H–2B workers to seek or receive payments or other compensation from prospective workers. This documentation must be made available upon request by the CO or another Federal party.

(q) *Prohibition against preferential treatment of foreign workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2B workers. This does not relieve the employer from providing to H–2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(r) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 655.56.

(s) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as determined by the CO, and as specified in §§ 655.40–.46.

(t) *Continuing requirement to hire U.S. workers.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified, eligible U.S. worker who applies to the employer for the job opportunity, until the later of the date the last H–2B worker departs for the job opportunity or 3 days before the date of need. If the last H–2B worker has not departed by 3 days before the date of need, the employer is required to immediately inform the SWA in writing and notify the SWA of the new departure date as soon as available.

(u) *No strike or lockout.* There is no strike or lockout at the worksite for which the employer is requesting H–2B certification at the time the *Application for Temporary Employment Certification* is filed.

(v) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H–2B workers are laid off before any U.S. worker in corresponding employment.

(w) *Contact with former U.S. employees.* The employer will contact by mail or other effective means all of its former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job. This includes, but is not limited to, those former U.S. workers who have been laid off within a period of 120 days before the date of need.

(x) *Area of intended employment and job opportunity.* The employer will not place any H–2B workers employed under the approved *Application for Temporary Employment Certification* outside the area of intended employment or in a job opportunity not listed on the approved *Application for Temporary Employment Certification* unless the employer has obtained a new approved *Application for Temporary Employment Certification.*

(y) *Abandonment/termination of employment.* Upon the separation from employment of H–2B worker(s) employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification,* the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by DHS in the **Federal Register** or Code of Federal Regulations) of such separation of an H–2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H–2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 4-week period preceding the worker's voluntary abandonment or termination for cause.

(z) *Compliance with applicable laws.* During the period of employment that is the subject of the *Application for Temporary Employment Certification,* the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents.

§§ 655.21–655.24 [Reserved]

13. Remove and reserve §§ 655.21–655.24.

14. In subpart A, add an undesignated center heading before § 655.30 to read as follows:

Processing of an Application for Temporary Employment Certification

15. In subpart A, revise §§ 655.30 through 655.35 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.

655.30 Processing of an application and job order.
655.31 Notice of deficiency.
655.32 Submission of a modified application or job order.
655.33 Notice of acceptance.
655.34 Electronic job registry.
655.35 Amendments to an application or job order.

* * * * *

§ 655.30 Processing of an application and job order.

(a) *NPC review.* The CO will promptly review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO to an employer requiring a response will be mailed to the address provided in the *Application for Temporary Employment Certification* using methods to assure next day delivery, including electronic mail. The employer's response to such a notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date or the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(c) *Information dissemination.* OFLC may forward information received in the course of processing *Applications for Temporary Employment Certification* and program integrity measures to WHD, or any other Federal agency, as appropriate, for investigation and/or enforcement purposes.

§ 655.31 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and/or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 business days from the CO's receipt of the *Application for Temporary Employment Certification.* If applicable, the Notice of Deficiency will include job order deficiencies identified by the SWA under § 655.16. The CO will send a copy of the Notice of Deficiency to the SWA serving the area of intended employment identified by the employer on its job order, and if applicable, to the employer's attorney or agent.

(b) *Notice content.* The notice will:

(1) State the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 10 business days from the date of the Notice of Deficiency. The Notice will state the modification needed for the CO to issue a Notice of Acceptance;

(3) Offer the employer an opportunity to request administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61. The notice will inform the employer that it must submit a written request for review to the Chief ALJ of DOL within 10 business days from the date the Notice of Deficiency is issued by facsimile or other means normally assuring next day delivery and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the *Application for Temporary Employment Certification.* The notice will inform the employer that the denial of the *Application for Temporary Employment Certification* is final, and cannot be appealed. The Department will not further consider that *Application for Temporary Employment Certification.*

§ 655.32 Submission of a modified application or job order.

(a) *Review of a modified Application for Temporary Employment Certification or job order.* Upon receipt of a response to a Notice of Deficiency, including any modifications, the CO will review the response. The CO may, at her discretion, issue one or more additional Notices of Deficiency before issuing a Notice of Decision. The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application.

(b) *Acceptance of a modified Application for Temporary Employment Certification or job order.* If the CO accepts the modification(s) to the *Application for Temporary Employment Certification* and/or job order, the CO will issue a Notice of Acceptance. The CO will send a copy of the Notice of Acceptance to the SWA instructing it to make any necessary modifications to the not yet posted job order and, if applicable, to the employer's attorney or agent and follow the procedure set forth in § 655.33.

(c) *Denial of a modified Application for Temporary Employment Certification or job order.* If the CO does not accept the modification(s) to the *Application for Temporary Employment Certification* and/or job order, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.50.

(d) *Appeal from denial of a modified Application for Temporary Employment Certification or job order.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* and/or job order are the same as for appealing the denial of a non-modified *Application for Temporary Employment Certification* outlined in § 655.61.

(e) *Post acceptance modifications.* The CO may require modifications to the job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions as set forth in § 655.20. Such modifications must be made by the employer or certification will be denied under § 655.53. The employer must provide all workers recruited in connection with the job opportunity in the *Application for Temporary Employment Certification* with a copy of the modified job order as approved by the CO.

§ 655.33 Notice of acceptance.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and job order are complete and meet the requirements of this subpart, the CO will notify the employer in writing within 7 business days from the date the CO received the *Application for Temporary Employment Certification* and job order or modification thereof. A copy of the Notice of Acceptance will be sent to the SWA serving the area of intended employment identified by the employer on its job order and, if applicable, to the employer's attorney or agent.

(b) *Notice content.* The notice will:

(1) Direct the employer to engage in recruitment of U.S. workers as provided in §§ 655.40–655.47, including any

additional recruitment ordered by the CO under § 655.46;

(2) State that such employer-conducted recruitment is in addition to the job order being circulated by the SWA(s) and that the employer must conduct recruitment within 14 calendar days from the date the Notice of Acceptance is issued, consistent with § 655.40;

(3) Advise the employer that it must inform the SWA with which the employer has placed its job order in writing if the last H–2B worker has not departed for the place of employment by the third day preceding the employer's date of need, and that the employer must advise the SWA when the last H–2B worker has departed;

(4) Direct the SWA to place the job order into intra and interstate clearance as set forth in § 655.16 and to commence such clearance by:

(i) Sending a copy of the job order to other States listed as anticipated worksites in the *Application for Temporary Employment Certification* and job order, if applicable; and

(ii) Sending a copy of the job order to the SWAs for all States designated by the CO for interstate clearance;

(5) Instruct the SWA to keep the approved job order on its active file until the end of the recruitment period as defined in § 655.40(c), and to transmit the same instruction to other SWAs to which it circulates the job order in the course of interstate clearance;

(6) Where the occupation or industry is traditionally or customarily unionized, direct the SWA to circulate a copy of the job order to the following labor organizations;

(i) The central office of the State Federation of Labor in the State(s) in which work will be performed; and

(ii) The office(s) of local union(s) representing employees in the same or substantially equivalent job classification in the area(s) in which work will be performed;

(7) Advise the employer, as appropriate, that it must contact the appropriate community-based organization with notice of the job opportunity; and

(8) Require the employer to submit a report of its recruitment efforts as specified in § 655.48.

§ 655.34 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Employment Certification* under § 655.33, the CO will promptly place for public examination a copy of the job order posted by the SWA on the Department's electronic job registry, including any amendments or required modifications approved by the CO.

(b) *Length of posting on electronic job registry.* The Department will keep the job order posted on the electronic job registry until the end of the recruitment period, as set forth in § 655.40(c).

(c) *Conclusion of active posting.* Once the recruitment period has concluded, the SWA will inform the CO and the job order will be placed in inactive status on the electronic job registry.

§ 655.35 Amendments to an application or job order.

The *Application for Temporary Employment Certification* and/or job order may be amended by the employer before the CO makes a final determination to grant or deny the *Application for Temporary Employment Certification.* All U.S. workers hired under the original job order must be immediately provided copies of any approved amendments.

(a) *Increases in number of workers.* The employer may request to increase the number of workers noted in the initial *Application for Temporary Employment Certification* and listed on its job order by no more than 20 percent (50 percent for employers requesting fewer than 10 workers). All requests for increasing the number of workers must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry.

(b) *Minor changes to the period of employment.* The employer may request minor changes to the total period of employment listed on its initial *Application for Temporary Employment Certification* and job order, for a period of up to 14 days, but the period of employment may not exceed a total of 9 months, except in the event of a one-time occurrence. All requests for minor changes to the total period of employment must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry.

(c) *Other amendments to the Application for Temporary Employment Certification and job order.* The employer may request other amendments to the *Application for Temporary Employment Certification* and job order. All such requests must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry.

(d) *Amendments after certification.* The employer may not request an amendment to an *Application for Temporary Employment Certification* or job order and the CO may not amend an *Application for Temporary Employment Certification* after the CO has made a final determination to grant or deny the *Application for Temporary Employment Certification.*

§§ 655.36–655.39 [Reserved]

16. Add reserved §§ 655.36–655.39.

17. Add an undesignated center heading and §§ 655.40 through 655.48 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.

Post-Acceptance Requirements

655.40 Employer-conducted recruitment.
655.41 Advertising requirements.
655.42 Newspaper advertisements.
655.43 Contact with former U.S. employees.
655.44 Contact with labor organizations.
655.45 Contact with bargaining representative and posting and other contact requirements.
655.46 Additional employer-conducted recruitment.
655.47 Referrals of U.S. workers.
655.48 Recruitment report.

* * * * *

Post-Acceptance Requirements

§ 655.40 Employer-conducted recruitment.

(a) *Employer obligations.* Employers must conduct recruitment of U.S. workers to ensure that there are not qualified workers who will be available for the positions listed in the *Application for Temporary Employment Certification.*

(b) *Employer-conducted recruitment period.* Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.41—655.47 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.

(c) *U.S. worker referrals.* Employers must continue to accept referrals of all

U.S. applicants interested in the position until the later of the date the last H–2B worker departs for the job opportunity or 3 days before the date of need. If the last H–2B worker has not departed by 3 days before the date of need, the employer is required to immediately inform the SWA in writing and notify the SWA of the new departure date as soon as available.

(d) *Interviewing U.S. workers.* Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H–2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews.

(e) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity. The employer must accept and hire any applicants who are qualified and who will be available.

(f) *Recruitment report.* The employer must prepare a recruitment report that lists all applicants and whether they were accepted or rejected. This report must include all reasons why an applicant was rejected in accordance with § 655.48.

§ 655.41 Advertising requirements.

(a) All recruitment conducted under § 655.40 must meet the requirements set forth in this section and must contain terms and conditions of employment that are not less favorable than those offered to the H–2B workers and reflect, at a minimum, those contained in the job order.

(b) In addition to those terms and conditions contained in the job order, all advertising must contain the following information:

(1) The employer's name and appropriate SWA contact information for applicants to inquire about the job opportunity or to send applications, indications of availability, and/or resumes directly to the SWA;

(2) The geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(3) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) A statement that the position is temporary and a statement of the total number of job openings the employer intends to fill;

(5) If applicable, a statement that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(6) If applicable, a statement indicating that on-the-job training will be provided to the worker;

(7) The wage offer, or in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures for an employer), the range of applicable wage offers;

(8) A statement that transportation and subsistence from the place where the worker has come to work for the employer to the place of employment will be provided;

(9) If applicable, a statement that work tools, supplies, and equipment will be provided to the worker without charge;

(10) If applicable, a statement that daily transportation to and from the worksite will be provided by the employer;

(11) A statement summarizing the three-fourths guarantee as required by § 655.20(f); and

(12) A statement directing applicants to apply for the job opportunity at the nearest office of the SWA in the State in which the advertisement appeared.

§ 655.42 Newspaper advertisements.

(a) The employer must place an advertisement (in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (b) of this section), in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity.

(b) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(c) The newspaper advertisements must satisfy the requirements in § 655.41.

(d) The employer must maintain copies of newspaper pages (with date of publication and full copy of the advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication furnished by the newspaper containing the text of the printed advertisements and the dates of publication, consistent with the document retention requirements in § 655.56.

§ 655.43 Contact with former U.S. employees.

The employer must contact by mail or other effective means, its former U.S. workers including those who have been laid off within 120 calendar days before the date of need (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job. The employer must maintain documentation sufficient to prove such contact in accordance with § 655.56.

§ 655.44 Contact with labor organizations.

Where the occupation or industry is customarily unionized, the employer must contact the local union in writing to seek U.S. workers who are qualified and who will be available. The employer must maintain documentation in accordance with § 655.56 demonstrating that such organization(s) were contacted and whether the organization(s) referred qualified U.S. workers, including the number of referrals, or were non-responsive to the employer's requests.

§ 655.45 Contact with bargaining representative and posting and other contact requirements.

(a) If there is a bargaining representative for any of the employer's employees in the occupation and area of intended employment, the employer must provide written notice of the job opportunity, by providing a copy of the *Application for Temporary Employment Certification* and the job order, and maintain documentation that it was sent to the bargaining representative(s). An employer governed by this paragraph must include information in its recruitment report that confirms that the bargaining representative(s) was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

(b) If there is no bargaining representative, the employer must post the availability of the job opportunity in at least 2 conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in

which the work will be performed by the H–2B workers. The notice must meet the requirements under § 655.41 and be posted for at least 10 consecutive business days. The employer must maintain a copy of the posted notice and identify where and when it was posted in accordance with § 655.56.

(c) If appropriate to the occupation and area of intended employment, as indicated by the CO in the Notice of Acceptance, the employer must provide written notice of the job opportunity to a community-based organization, and maintain documentation that it was sent to the designated community-based organization. An employer governed by this paragraph must include information in its recruitment report that confirms that the community-based organization was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

§ 655.46 Additional employer-conducted recruitment.

(a) *Requirement to conduct additional recruitment.* The employer may be instructed by the CO to conduct additional recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there may be U.S. workers who are qualified and who will be available for the work, including but not limited to where the job opportunity is located in an area of substantial unemployment.

(b) *Nature of the additional employer-conducted recruitment.* The CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but will not be limited to, posting on the employer's Web site or another Web site, contact with community-based organizations, contact with State One-Stop Career Centers, and other print advertising, such as using a professional, trade or ethnic publication where such a publication is appropriate for the occupation and the workers likely to apply for the job opportunity.

(c) *Proof of the additional employer-conducted recruitment.* The CO will specify the documentation or other supporting evidence that must be maintained by the employer as proof that the additional recruitment requirements were met. Documentation must be maintained as required in § 655.56.

§ 655.47 Referrals of U.S. workers.

SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity that they are qualified and will be available for employment.

§ 655.48 Recruitment report.

(a) *Requirements of the recruitment report.* The employer must prepare, sign, and date a written recruitment report. The recruitment report must be mailed by a date specified by the CO in the Notice of Acceptance and contain the following information:

(1) The name of each recruitment activity or source (*e.g.,* job order and the name of the newspaper);

(2) The name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;

(3) Confirmation that former U.S. employees were contacted, if applicable, and by what means;

(4) Confirmation that labor organizations were contacted, if applicable, and by what means. Such documentation must demonstrate that the organization was contacted and notified of the job openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests;

(5) Confirmation that the bargaining representative was contacted, if applicable, and by what means or that the employer posted the availability of the job opportunity to all employees;

(6) Confirmation that the community-based organization designated by the CO was contacted, if applicable;

(7) If applicable, confirmation that additional recruitment was conducted as directed by the CO; and

(8) If applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update recruitment report.* The employer must continue to update the recruitment report throughout the recruitment period. The updated report need not be submitted to the Department, but must be made available in the event of a post-certification audit or upon request by DOL.

§ 655.49 [Reserved]

18. Add reserved § 655.49.

19. Add an undesignated center heading before § 655.50 to read as follows:

Labor Certification Determinations

20. Revise § 655.50 to read as follows:

§ 655.50 Determinations.

(a) *Certifying Officers (COs).* The Administrator, OFLC is the Department's National CO. The Administrator, OFLC and the CO(s) by virtue of delegation from the Administrator, OFLC, have the authority to certify or deny *Applications for Temporary Employment Certification* under the H–2B nonimmigrant classification. If the Administrator, OFLC directs that certain types of temporary employment certification applications or a specific *Application for Temporary Employment Certification* under the H–2B nonimmigrant classification be handled by the OFLC's National Office, the Director of the NPC will refer such applications to the Administrator, OFLC.

(b) *Determination.* Except as otherwise provided in this paragraph, the CO will make a determination either to grant, partially grant, or deny the *Application for Temporary Employment Certification.* The CO will grant the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought and that the employment of the H–2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

21. In subpart A, add §§ 655.51 through 655.56 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.

655.51 Criteria for certification.
655.52 Approved certification.
655.53 Denied certification.
655.54 Partial certification.
655.55 Validity of temporary employment certification.
655.56 Document retention requirements of H–2B employers.

* * * * *

§ 655.51 Criteria for certification.

(a) The criteria for certification include whether the employer has a valid *H–2B Registration* to participate in the H–2B program and has complied with all of the requirements of this program.

(b) In making a determination whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason.

(c) Certifications will not be granted to employers that have failed to comply with one or more sanctions or remedies imposed by final agency actions under the H–2B program.

§ 655.52 Approved certification.

If temporary employment certification is granted, the CO will send the approved *Application for Temporary Employment Certification* and a Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if appropriate, to the employer's attorney or agent.

§ 655.53 Denied certification.

If temporary employment certification is denied, the CO will send the Final Determination letter to the employer by means normally assuring next day delivery and a copy, if appropriate, to the employer's attorney or agent. The Final Determination letter will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures;

(b) Offer the employer an opportunity to request administrative review of the denial under § 655.61; and

(c) State that if the employer does not request administrative review in accordance with § 655.61, the denial is final and the Department will not further consider that *Application for Temporary Employment Certification.*

§ 655.54 Partial certification.

The CO may issue a partial certification, reducing either the period of need or the number of H–2B workers or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification.* The number of workers certified will be reduced by one for each referred U.S. worker who is qualified and who will be available at the time and place needed and has not been rejected for lawful job-related reasons, to perform the services or labor. If a partial labor certification is issued, the CO will amend the *Application for Temporary Employment Certification* and then return it to the employer with a Final Determination letter, with a copy to the employer's attorney or agent, if applicable. The Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H–2B workers requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(b) If applicable, address the availability of U.S. workers in the occupation;

(c) Offer the employer an opportunity to request administrative review of the partial certification under § 655.61; and

(d) State that if the employer does not request administrative review in accordance with § 655.61, the partial certification is final and the Department will not further consider that *Application for Temporary Employment Certification.*

§ 655.55 Validity of temporary employment certification.

(a) *Validity period.* A temporary employment certification is valid only for the period of time between the beginning and ending dates of employment, as approved on the *Application for Temporary Employment Certification.* The certification expires on the last day of authorized employment.

(b) *Scope of validity.* A temporary employment certification is valid only for the number of H–2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved *Application for Temporary Employment Certification.* The temporary employment certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 655.56 Document retention requirements of H–2B employers.

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H–2B workers are required to retain the documents and records proving compliance with 29 CFR part 503 and this subpart, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of required retention.* The employer must retain records and documents for 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of adjudication if the *Application for Temporary Employment Certification* is denied or 3 years from the day the Department receives the letter of withdrawal provided in accordance with § 655.62.

(c) *Documents and records to be retained by all applicants.* All employers filing an *H–2B Registration* and an *Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in § 655.16;

(ii) Advertising as specified in §§ 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in § 655.43;

(iv) Contact with labor organizations, if applicable, as specified in § 655.44;

(v) Contact with bargaining representative(s), or copy of the posting of the job opportunity, if applicable, as specified in § 655.45(a) or (b); and

(vi) Additional employer-conducted recruitment efforts as specified in § 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with § 655.48, such as evidence of nonapplicability of contact with former workers as specified in § 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in § 655.48;

(5) Records of each worker's earnings, hours offered and worked, and other information as specified in § 655.20(i);

(6) Evidence of contact with U.S. workers who applied for the job opportunity in the *Application for Temporary Employment Certification,* including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 655.20(r);

(7) Evidence of contact with any former U.S. worker in the occupation and the area of intended employment in the *Application for Temporary Employment Certification,* including documents demonstrating that the U.S. worker had been offered the job opportunity in the *Application for Temporary Employment Certification,* as specified § 655.20(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 655.20(r);

(8) The written contracts with agents or recruiters, including the written contract prohibiting an agent or recruiter from receiving payments, as specified in § 655.20(p);

(9) Written notice provided to and informing OFLC that an H–2B worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *Application for Temporary Employment Certification,* as specified in § 655.20(y);

(10) The *H–2B Registration,* job order and a copy of the *Application for Temporary Employment Certification;* and

(11) The *H–2B Petition,* including all accompanying documents.

(d) *Availability of documents for enforcement purposes.* An employer must make available to the Administrator, OFLC within 72 hours following a request by the OFLC the documents and records required under 29 CFR part 503 and this section so that the Administrator, OFLC may copy, transcribe, or inspect them.

§§ 655.57—655.59 [Reserved]

22. Add reserved §§ 655.57–655.59.

23. Add an undesignated center heading before § 655.60 to read as follows:

Post Certification Activities

24. Revise § 655.60 to read as follows:

§ 655.60 Extensions.

An employer may apply for extensions of the period of employment in the following circumstances. Extensions are available only to employers whose approved period of employment, as listed on the *Application for Temporary Employment Certification,* does not exceed the maximum period of temporary need for a seasonal need, a peakload need, an intermittent need, or a one-time occurrence, in accordance with § 655.6, and DHS regulations at 8 CFR 214.2(h)(6)(ii)(B). Such requests must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing. The CO will not grant an extension where the total work period under that *Application for Temporary Employment Certification* and the authorized extension would exceed 9 months for employers whose temporary need is seasonal, peakload, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in § 655.61. The H–2B employer's assurances and obligations under the temporary employment certification will continue to apply with respect to the workers recruited in connection with the *Application for Temporary Employment Certification* during the extended period of employment. For purposes of the assurances and obligations that are based on the workers' partial or full completion of the work period specified in the job order, the employer must continue to meet its obligations based on the extended work period listed in the approved *Application for Temporary Employment Certification.* The employer must immediately provide to its workers a copy of any approved extension.

25. In subpart A, add §§ 655.61 through 655.63 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.

655.61 Administrative review.
655.62 Withdrawal of an Application for Temporary Employment Certification.
655.63 Public disclosure.

* * * * *

§ 655.61 Administrative review.

(a) *Request for review.* Where authorized in this subpart, employers may request an administrative review before the BALCA of a determination by the CO. In such cases, the request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 business days from the date of determination;

(2) Must clearly identify the particular determination for which review is sought;

(3) Must set forth the particular grounds for the request;

(4) Must include a copy of the CO's determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued.

(b) *Appeal file.* Upon the receipt of a request for review, the CO will, within 7 business days, assemble and submit the Appeal File using means to ensure same day or next day delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) *Briefing schedule.* Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or next day delivery, a brief in support of the CO's decision.

(d) *Assignment.* The Chief Administrative Law Judge may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) *Review.* The BALCA must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

(1) Affirm the CO's determination; or

(2) Reverse or modify the CO's determination; or

(3) Remand to the CO for further action.

(f) *Decision.* The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

§ 655.62 Withdrawal of an Application for Temporary Employment Certification.

Employers may withdraw an *Application for Temporary Employment Certification* after it has been accepted and before it is adjudicated.

§ 655.63 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary nonagricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

§ 655.64 [Reserved]

26. Add reserved § 655.64.

§ 655.65 [Removed and Reserved]

27. Remove and reserve § 655.65.

§§ 655.66–655.69 [Reserved]

28. Add reserved §§ 655.66 through 655.69.

29. Add an undesignated center heading before § 655.70 to read as follows:

Integrity Measures

30. In subpart A, revise §§ 655.70 through 655.73 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.
655.70 Audits.
655.71 CO-ordered assisted recruitment.
655.72 Revocation.
655.73 Debarment.
* * * * *

§ 655.70 Audits.

The CO may conduct audits of adjudicated temporary employment certification applications.

(a) *Discretion.* The CO has the sole discretion to choose the applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will send an audit letter to the employer and a copy, if appropriate, to the employer's attorney or agent. The audit letter will:

(1) Specify the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and

(3) Advise that failure to comply with the audit process may result:

(i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.71 in future filings of H–2B temporary employment certification applications for a period of up to 2 years, or

(ii) In a revocation of the certification and/or debarment from the H–2B program and any other foreign labor certification program administered by the Department.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer in order to complete the audit. If circumstances warrant, the CO can issue one or more requests for additional supplemental information.

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS, WHD, or other appropriate enforcement agencies. The CO will refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.71 CO-ordered assisted recruitment.

(a) *Requirement of assisted recruitment.* If, as a result of audit or otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future *Application for Temporary Employment Certification.*

(b) *Notification of assisted recruitment.* The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of a temporary employment certification, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in § 655.6l apply.

(c) *Assisted recruitment.* The assisted recruitment process will be in addition to any recruitment required of the employer by §§ 655.41–.47 and may consist of, but is not limited to, one or more of the following:

(1) Requiring the employer to submit a draft advertisement to the CO for review and approval at the time of filing the *Application for Temporary Employment Certification;*

(2) Designating the sources where the employer must recruit for U.S. workers, including newspapers and other publications, and directing the employer to place the advertisement(s) in such sources;

(3) Extending the length of the placement of the advertisement and/or job order;

(4) Requiring the employer to notify the CO and the SWA in writing when the advertisement(s) are placed;

(5) Requiring an employer to perform any additional assisted recruitment directed by the CO;

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO, in addition to providing a copy of the job order;

(7) Requiring the employer to provide proof of all SWA referrals made in response to the job order;

(8) Requiring the employer to submit any proof of contact with all referrals and past U.S. workers; and/or

(9) Upon request, requiring the employer to provide any additional documentation verifying it conducted the assisted recruitment as directed by the CO.

(d) *Failure to comply.* If an employer fails to comply with requirements ordered by the CO under this section, the certification will be denied and the employer and/or its attorney or agent may be debarred under § 655.73.

§ 655.72 Revocation.

(a) *Basis for DOL revocation.* The Administrator, OFLC may revoke a temporary employment certification approved under this subpart, if the Administrator, OFLC finds:

(1) The issuance of the temporary employment certification was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in § 655.73(d);

(2) The employer substantially failed to comply with any of the terms or conditions of the approved temporary employment certification. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in §§ 655.73(d) and (e);

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (under § 655.73), or law enforcement function under 29 CFR part 503 or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary with the respect to the H–2B program.

(b) *DOL procedures for revocation—*

(1) *Notice of Revocation.* If the Administrator, OFLC makes a determination to revoke an employer's temporary employment certification, the Administrator, OFLC will send to the employer (and its attorney or agent) a Notice of Revocation. The notice will contain a detailed statement of the grounds for the revocation and inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 10 business days from the date the Notice of Revocation is issued, the notice is the final agency action and will take effect immediately at the end of the 10-day period.

(2) *Rebuttal.* If the employer timely submits rebuttal evidence, the Administrator, OFLC will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the certification should be revoked, the Administrator, OFLC will inform the employer of its right to appeal according to the procedures of § 655.61. If the employer does not appeal the final determination, it will become the final agency action.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final

determination of the Administrator, OFLC after the review of rebuttal evidence, according to the appeal procedures of § 655.61. The ALJ's decision is the final agency action.

(4) *Stay.* The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) *Decision.* If the temporary employment certification is revoked, the Administrator, OFLC will send a copy of the final agency action to DHS and the Department of State (DOS).

(c) *Employer's obligations in the event of revocation.* If an employer's temporary employment certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and other expenses;

(2) The workers' outbound transportation expenses;

(3) Payment to the workers of the amount due under the three-fourths guarantee; and

(4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

§ 655.73 Debarment.

(a) *Debarment of an employer.* The Administrator, OFLC may not issue future labor certifications under this subpart to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, OFLC finds that the employer committed the following violations:

(1) Willful misrepresentation of a material fact in its *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition;*

(2) Substantial failure to meet any of the terms and conditions of its *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition.* A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the Department of State during the visa application process.

(b) *Debarment of an agent or attorney.* If the Administrator, OFLC finds, under this section, that an attorney or agent participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment.* Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) *Determining whether a violation is willful.* A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows a statement is false or that the conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(e) *Determining whether a violation is significant.* In determining whether a violation is a significant deviation from the terms and conditions of the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition,* the factors that the Administrator, OFLC may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the H–2B program;

(2) The number of H–2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and

(5) Whether U.S. workers have been harmed by the violation.

(f) *Violations.* Where the standards set forth in paragraphs (d) and (e) in this section are met, debarrable violations would include but would not be limited to:

(1) Failure to pay or provide the required wages, benefits or working conditions to the employer's H–2B workers and/or workers in corresponding employment;

(2) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(3) Failure to comply with the employer's obligations to recruit U.S. workers;

(4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H–2B obligations, or with one or more decisions or orders of the Secretary or a court under this subpart or 29 CFR part 503;

(6) Failure to comply with the Notice of Deficiency process under this subpart;

(7) Failure to comply with the assisted recruitment process under this subpart;

(8) Impeding an investigation of an employer under 29 CFR part 503 or an audit under this subpart;

(9) Employing an H–2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(10) A violation of the requirements of § 655.20(o) or (p);

(11) A violation of any of the provisions listed in 29 CFR 503.16(r);

(12) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(13) Fraud involving the *H–2B Registration, Application for Temporary Employment Certification* or the *H–2B Petition;* or

(14) A material misrepresentation of fact during the registration or application process.

(g) *Debarment procedure*—(1) *Notice of Debarment.* If the Administrator, OFLC makes a determination to debar an employer, attorney, or agent, the Administrator, OFLC will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the party subject to the Notice of its right to submit rebuttal evidence or to request a debarment hearing. If the party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of any rebuttal evidence or a request for a hearing stays the debarment pending the outcome of the appeal as provided in paragraphs (g)(2)–(6) of this section.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the Notice within 30 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed, the Administrator, OFLC will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the party should be debarred, the Administrator, OFLC will inform the party of its right to request a debarment hearing according to the procedures in this section. The party must request a hearing within 30 calendar days after the date of the Administrator, OFLC's final determination, or the Administrator

OFLC's determination will be the final agency order and the debarment will take effect at the end of the 30-day period.

(3) *Hearing.* The recipient of a Notice of Debarment seeking to challenge the debarment must request a debarment hearing within 30 calendar days of the date of a Notice of Debarment or the date of a final determination of the Administrator, OFLC after review of rebuttal evidence submitted under paragraph (g)(2) of this section. To obtain a debarment hearing, the recipient must, within 30 days of the date of the Notice or the final determination, file a written request with the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy on the Administrator, OFLC. The debarment will take effect 30 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is timely filed. Within 10 business days of receipt of the request for a hearing, the Administrator, OFLC will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(4) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the Administrator, OFLC's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided to the parties to the debarment hearing by means normally assuring next day delivery. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) *Review by the ARB.* (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ is the final agency action. If a petition for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

(ii) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete hearing record to the ARB.

(iii) Where the ARB has determined to review the decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (*e.g.,* briefs or oral argument), and the time within which the presentation must be submitted.

(6) *ARB Decision.* The ARB's final decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

(h) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to debar under this section or under 29 CFR 503.24. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(i) *Debarment from other foreign labor programs.* Upon debarment under this subpart or 29 CFR 503.24, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§§ 655.74–655.81 [Removed and Reserved]

31. In subpart A, remove §§ 655.74 through 655.81.

§§ 655.82–655.99 [Reserved]

32. Add reserved §§ 655.82 through 655.99.

TITLE 29

33. Add part 503 to read as follows:

PART 503—ENFORCEMENT OF OBLIGATIONS FOR TEMPORARY NONIMMIGRANT NON-AGRICULTURAL WORKERS ADMITTED UNDER SECTION 214(c)(1) OF THE IMMIGRATION AND NATIONALITY ACT

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Authority: Section 503 is issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184(c), and 8 CFR 214.2(h).

Subpart A—General Provisions

§ 503.0 Introduction.

These regulations cover the enforcement of all statutory and regulatory obligations, including

requirements under 8 U.S.C. 1184(c) and 20 CFR part 655, subpart A, applicable to the employment of H–2B workers admitted under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by these regulations or 20 CFR part 655, subpart A.

§ 503.1 Scope and purpose.

(a) *Statutory standard.* 8 U.S.C. 1184(c)(1) requires the Secretary of the Department of Homeland Security (DHS) to consult with appropriate agencies before authorizing the entry of H–2B workers. DHS regulations 8 CFR 214.2(h)(6)(iv) provide that a petition to bring nonimmigrant workers on H–2B visas into the U.S. for temporary nonagricultural employment may not be approved by the Secretary of Homeland Security unless the petitioner has applied for and received a temporary employment certification from the U.S. Secretary of Labor (Secretary). The temporary employment certification reflects a determination by the Secretary that:

(1) There are not sufficient U.S. workers who are qualified and will be available at the time and place needed to perform the labor or services involved in the petition; and

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certifications under 8 U.S.C. 1184(c) has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL), which in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an H–2B employer related to the temporary employment certification process are administered by OFLC, including obligations and assurances made by employers, overseeing employer recruitment, and assuring program integrity. The regulations pertaining to the issuance, denial, and revocation of labor certification for temporary foreign workers by the OFLC are found in 20 CFR part 655, subpart A.

(c) *Role of the Wage and Hour Division (WHD).* DHS, effective January 18, 2009, under section 214(c)(14)(B) of the INA, 8 U.S.C. 1184(c)(14)(B), has delegated to the Secretary certain investigatory and law enforcement functions to carry out the provisions under 8 U.S.C. 1184(c). The Secretary has delegated these functions to the WHD. In general, matters concerning the rights of H–2B workers and workers in corresponding employment under this part and the employer's obligations are enforced by the WHD, including whether employment was offered to U.S. workers as required under 20 CFR part 655, subpart A, or whether U.S. workers were laid off or displaced in violation of program requirements. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certifications, and to seek remedies for violations, including recovery of unpaid wages and reinstatement of improperly laid off or displaced U.S. workers.

(d) *Effect of regulations.* The enforcement functions carried out by the WHD under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, and these regulations apply to the employment of any H–2B worker and any worker in corresponding employment as the result of an *Application for Temporary Employment Certification* filed with the Department on or after the effective date of these regulations.

§ 503.2 Territory of Guam.

This part does not apply to temporary employment in the Territory of Guam. The Department does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas, or enforce compliance with the provisions of the H–2B visa program in the Territory of Guam. Under DHS regulations, 8 CFR 214.2(h)(6)(v), administration of the H–2B temporary employment certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

§ 503.3 Coordination among Governmental agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding noncompliance with H–2B statutory or regulatory labor standards will be immediately forwarded to the appropriate WHD office for suitable action under these regulations.

(b) Information received in the course of processing registrations and applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H–2B program, may be forwarded to other agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is sought will be cited in a single debarment proceeding. OFLC and the WHD will coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

§ 503.4 Definition of terms.

For purposes of this part:

Act means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

Administrator, Wage and Hour Division (WHD) means the primary official of the WHD, or the Administrator's designee.

Agent means a legal entity or person who:

(1)(i) Is authorized to act on behalf of an employer for temporary nonagricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this part with respect to a specific application; and

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Agricultural labor or services means those duties and occupations defined in 20 CFR 655.100.

Applicant means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (Form ETA 9142 and the appropriate appendices).

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved Form ETA 9142 and the appropriate appendices, a valid wage determination, as required by § 655.12, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary employment certification determination from DOL.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.,* near the border of) the MSA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Certifying Officer (CO) means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H–2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under 20 CFR part 655, subpart A.

Chief Administrative Law Judge means the chief official of the Department's Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Corresponding employment means the employment of workers who are not H–2B workers by an employer that has an accepted H–2B *Application for Temporary Employment Certification* in any work included in the job order or in any work performed by the H–2B workers. To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

Date of need means the first date the employer requires services of the H–2B workers as listed on the application.

Department of Homeland Security (DHS) means the Federal Department having jurisdiction over certain immigration-related functions, acting through its agencies, including USCIS.

Employee means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms "employee" and "worker" are used interchangeably in this part.

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H–2B worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification,* a valid Federal Employer Identification Number (FEIN).

Employment and Training Administration (ETA) means the agency within the Department which includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Full time means 35 or more hours of work per week for the purpose of the H–2B program.

H–2B Petition means the DHS *Petition for a Nonimmigrant Worker* form, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2B nonimmigrant workers. The *H–2B Petition* includes the approved *Application for Temporary Employment Certification* and the Final Determination letter.

H–2B Registration means the OMB-approved Form ETA 9155, submitted by an employer to register its intent to hire H–2B workers and to file an *Application for Temporary Employment Certification.*

H–2B worker means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision or control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Job offer means the offer made by an employer or potential employer of H–2B workers to both U.S. and H–2B workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Job order means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including all obligations and assurances under 20 CFR part 655 and this part that is posted between and among the State Workforce Agencies (SWAs) on their inter- and intra-State job clearance systems.

Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

Layoff means any involuntary separation of one or more U.S. employees without cause.

Metropolitan Statistical Area (MSA) means a geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro

area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center (NPC) means the office within OFLC which is charged with the adjudication of an *Application for Temporary Employment Certification* or other applications.

Non-agricultural labor and services means any labor or services not considered to be agricultural labor or services as defined in subpart B of this part. It does not include the provision of services as members of the medical profession by graduates of medical schools.

Occupational employment statistics (OES) survey means the program under the jurisdiction of the BLS that provides annual wage estimates for occupations at the State and MSA levels.

Offered wage means the wage that equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities for the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Prevailing wage determination (PWD) means the prevailing wage for the position, as described in 20 CFR 655.12, which is the subject of the *Application for Temporary Employment Certification.*

Professional athlete is defined in 8 U.S.C. 1182(a)(5)(A)(iii)(II), and means an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of Homeland Security means the chief official of the U.S. Department of Homeland Security or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

State Workforce Agency (SWA) means a State government agency that receives funds under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

Strike means a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest means

(1) Where an employer has violated 20 CFR part 655, Subpart A or this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

(vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(vii) Similarity in machinery, equipment, and production methods;

(viii) Similarity of products and services; and

(ix) The ability of the predecessor to provide relief.

(2) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

United States (U.S.) means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

United States Citizenship and Immigration Services (USCIS) means the Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H–2B workers to perform temporary nonagricultural work in the U.S.

United States worker (U.S. worker) means a worker who is:

(1) A citizen or national of the U.S.;

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Wage and Hour Division (WHD) means the agency within the Department with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c).

Wages mean all forms of cash remuneration to a worker by an employer in payment for personal services.

§ 503.5 Temporary need.

(a) An employer seeking certification under 20 CFR part 655, subpart A must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A). The need of a job contractor is inherently permanent in nature and the CO will deny a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* where the employer is a job contractor.

(b) The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS. 8 CFR 214.2(h)(6)(ii)(B). Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.

§ 503.6 Waiver of rights prohibited.

A person may not seek to have an H–2B worker, a worker in corresponding employment, or any other person, including but not limited to a U.S. worker improperly rejected for employment or improperly laid off or displaced, waive or modify any rights conferred under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations. Any agreement by an employee purporting to waive or modify any rights given to said person under

these provisions will be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder in favor of the Secretary will be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

§ 503.7 Investigation authority of Secretary.

(a) *Authority of the Administrator, WHD.* The Secretary of DHS has delegated to the Secretary, under 8 U.S.C. 1184(c)(14)(B), the authority to perform all investigative and enforcement functions under 8 U.S.C. 1101, 1103(a)(6), and 1184(c). The Administrator, WHD will perform all such functions.

(b) *Conduct of investigations.* The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations, either under a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, worksite, vehicles, structure, facility, place and records (and make transcriptions, photographs, scans, videos, photocopies, or use any other means to record the content of the records or preserve images of places or objects), question any person, or gather any information, in whatever form, as may be appropriate.

(c) *Confidential investigation.* The WHD will conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations to the Secretary by advising any local office of the SWA, ETA, WHD or any other authorized representative of the Secretary. The office or person receiving such a report will refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 503.8 Accuracy of information, statements, data.

Information, statements, and data submitted in compliance with 8 U.S.C. 1184(c) or these regulations are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S., knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, will be fined not more than $250,000 or imprisoned not more than 5 years, or both.

Subpart B—Enforcement

§ 503.15 Enforcement.

The investigation, inspection, and law enforcement functions that carry out the provisions of 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or the regulations in this part pertain to the employment of any H–2B worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced.

§ 503.16 Assurances and obligations of H–2B employers.

An employer employing H–2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions:

(a) *Rate of pay.* (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* accepted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and must be normal and usual for non-H–2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must pay a piece rate that is no less than the normal rate for workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly rate, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage rate for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or negotiable instrument payable at par. The payment must be made finally and unconditionally and "free and clear." The principles applied in determining whether deductions are reasonable and payments are received free and clear and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay. Deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter, including any agents or

workers, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *Application for Temporary Employment Certification.*

(d) *Job opportunity is full time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H–2B employers in the same occupation and area of intended employment. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job order.

(f) *Three-fourths guarantee.* (1) The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each 4-week period beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any.

(2) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 4-week period during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the job order and all extensions thereof are in effect.

(4) The 4-week periods to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 4-week period also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 4 weeks and 6 days). The final 4-week period includes any time remaining after the last full 4-week period ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 10-week period, during which a normal workweek is specified as 5 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 120 hours (4 weeks × 40 hours/week = 160 hours × 75 percent = 120) in the first 4-week period, at least 120 hours in the second 4-week period, and at least 60 hours (2 weeks × 40 hours/week = 80 hours × 75 percent = 60) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(7) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 4-week period during the period of the job order the employer affords the U.S. or H–2B worker less employment than that required under paragraph (f)(1) of this section, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in a 4-week period if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 4-week period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) *Impossibility of fulfillment.* If, before the expiration date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H–2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H–2B employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee in paragraph (f) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages;

(vi) If piece rates are used, the units produced daily;

(vii) The beginning and ending dates of the pay period; and

(viii) The employer's name, address and FEIN.

(j) *Transportation and visa fees.* (1)(i) Transportation to the place of employment. The employer must provide the worker transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer may arrange and pay for the transportation and subsistence directly, advance the reasonable cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker in the first workweek for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H–2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H–2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in 20 CFR 655.173.

(ii) Transportation from the place of employment. If the worker has no immediate subsequent H–2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State, or local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) Disclosure. All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees including those mandated by the government incurred by the H–2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

(k) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(l) *Disclosure of job order.* The employer must provide to an H–2B worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent modifications. For an H–2B worker changing employment from an H–2B employer to a subsequent H–2B employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H–2B employer. The disclosure of all documents required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

(m) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department which sets out the rights and protections for H–2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department, in any language common to a significant portion of the workers if they are not fluent in English.

(n) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder.

(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H–2B employment certification or employment, including payment of the employer's attorney or agent fees, application and *H–2B Petition* fees, recruitment costs, or any fees falsely attributed to obtaining the approved *Application for Temporary Employment Certification.* For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or

employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H–2B workers to seek or receive payments or other compensation from prospective workers. This documentation must be made available upon request by the CO or another Federal party.

(q) *Prohibition against preferential treatment of foreign workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2B workers. This does not relieve the employer from providing to H–2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(r) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 503.17.

(s) *Recruitment requirements.* The employer must conduct all recruitment activities, including any additional employer-conducted recruitment activities as determined by the CO, and as specified in 20 CFR 655.40–.46.

(t) *Continuing requirement to hire U.S. workers.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified, eligible U.S. worker who applies to the employer for the job opportunity, until the later of the date the last H–2B worker departs for the job opportunity or 3 days before the date of need. If the last H–2B worker has not departed by 3 days before the date of need, the employer is required to immediately inform the SWA in writing and notify the SWA of the new departure date as soon as available.

(u) *No strike or lockout.* There is no strike or lockout at the worksite for which the employer is requesting H–2B certification at the time the *Application for Temporary Employment Certification* is filed.

(v) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H–2B workers are laid off before any U.S. worker in corresponding employment.

(w) *Contact with former U.S. employees.* The employer must contact by mail or other effective means all of its former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job. This includes, but is not limited to, those former U.S. workers who have been laid off within a period of 120 days before the date of need.

(x) *Area of intended employment and job opportunity.* The employer must not place any H–2B workers employed under the approved *Application for Temporary Employment Certification* outside the area of intended employment or in a job opportunity not listed on the approved *Application for Temporary Employment Certification* unless the employer has obtained a new approved *Application for Temporary Employment Certification.*

(y) *Abandonment/termination of employment.* Upon the separation from employment of worker(s) employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification,* the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by the Department or DHS in the **Federal Register** or the Code of Federal Regulations) of such separation of an H–2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H–2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 4-week period preceding the worker's voluntary abandonment or termination for cause.

(z) *Compliance with applicable laws.* During the period of employment that is the subject of the *Application for Temporary Employment Certification,* the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents.

(aa) *Cooperation with investigators.* The employer must cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's authority pursuant to 8 U.S.C. 1184(c).

§ 503.17 Document retention requirements of H–2B employers.

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H–2B workers are required to retain the documents and records proving compliance with 20 CFR part 655, subpart A and this part, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of required retention.* The employer must retain records and documents for 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of adjudication if the *Application for Temporary Employment Certification* is denied or 3 years from the day the Department receives the letter of withdrawal provided in accordance with 20 CFR 655.62.

(c) *Documents and records to be retained by all applicants.* All employers filing an *H–2B Registration* and an *Application for Temporary Employment Certification* must retain the following documents and records

and must provide the documents and records in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in 20 CFR 655.16;

(ii) Advertising as specified in 20 CFR 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in 20 CFR 655.43;

(iv) Contact with labor organizations, if applicable, as specified in 20 CFR 655.44;

(v) Contact with bargaining representative(s), copy of the posting of the job opportunity, and contact with community-based organizations, if applicable, as specified in 20 CFR 655.45(a), (b) and (c); and

(vi) Additional employer-conducted recruitment efforts as specified in 20 CFR 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with 20 CFR 655.48, such as evidence of nonapplicability of contact with former workers as specified in 20 CFR 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in 20 CFR 655.48;

(5) Records of each worker's earnings, hours offered and worked, and other information as specified in § 503.16(i);

(6) Evidence of contact with U.S. workers who applied for the job opportunity in the *Application for Temporary Employment Certification,* including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 503.16(r);

(7) Evidence of contact with any former U.S. worker in the occupation and the area of intended employment in the *Application for Temporary Employment Certification,* including documents demonstrating that the U.S. worker had been offered the job opportunity in the *Application for Temporary Employment Certification,* as specified in § 503.16(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 503.16(r);

(8) The written contracts with agents or recruiters, including the written contract prohibiting an agent or recruiter from receiving payments, as specified in § 503.16(p);

(9) Written notice provided to and informing OFLC that an H–2B worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *Application for Temporary Employment Certification,* as specified in § 503.16(y);

(10) The *H–2B Registration,* job order, and the *Application for Temporary Employment Certification;* and

(11) The approved *H–2B Petition,* including all accompanying documents.

(d) *Availability of documents for enforcement purposes.* An employer must make available to the Administrator, WHD within 72 hours following a request by the WHD the documents and records required under 20 CFR part 655, Subpart A and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

§ 503.18 Validity of temporary employment certification.

(a) *Validity period.* A temporary employment certification is valid only for the period of time between the beginning and ending dates of employment, as approved on the *Application for Temporary Employment Certification.* The certification expires on the last day of authorized employment.

(b) *Scope of validity.* A temporary employment certification is valid only for the number of H–2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved *Application for Temporary Employment Certification.* The temporary employment certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 503.19 Violations.

(a) *Types of violations.* Pursuant to the statutory provisions governing enforcement of the H–2B program, 8 U.S.C. 1184(c)(14)(A), a violation exists under this part where the Administrator, WHD, through investigation, determines that there has been a:

(1) Willful misrepresentation of a material fact on the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition;*

(2) Substantial failure to meet any of the terms and conditions of the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition.* A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the Department of State during the visa application process.

(b) *Determining whether a violation is willful.* A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(c) *Determining whether a violation is significant.* In determining whether a violation is a significant deviation from the terms and conditions of the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition,* the factors that the Administrator, WHD may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the H–2B program;

(2) The number of H–2B workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and

(5) Whether U.S. workers have been harmed by the violation.

(d) *Employer acceptance of obligations.* The provisions of this part become applicable upon the date that the employer's *Application for Temporary Employment Certification* is accepted. The employer's submission of and signature on the approved *H–2B Registration,* Appendix B of the *Application for Temporary Employment Certification,* and *H–2B Petition* constitute the employer's representation that the statements on the forms are accurate and that it knows and accepts the obligations of the program.

§ 503.20 Sanctions and remedies—general.

Whenever the Administrator, WHD determines that there has been a violation(s), as described in § 503.19, such action will be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Institute administrative proceedings, including for: The recovery of unpaid wages (including recovery of prohibited recruitment fees paid or impermissible deductions from pay, and recovery of wages due for improperly placing workers in areas of employment

or in occupations other than those identified on the *Application for Temporary Employment Certification* and for which a prevailing wage was not obtained); the enforcement of provisions of the job order, 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced; or debarment for no less than 1 or no more than 5 years.

(b) The remedies referenced in paragraph (a) of this section will be sought either directly from the employer, or from its successor in interest, as appropriate.

§ 503.21 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in § 503.1(b) and in 20 CFR part 655, subpart A. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 503.1(c). The taking of any one of the actions referred to above will not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.73 or under § 503.24.

§ 503.22 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, will represent the Administrator, WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and these regulations.

§ 503.23 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator, WHD for each violation that meets the standards described in § 503.19. Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition,* constitutes a separate violation. Civil money penalty amounts for such violations are determined as set forth in paragraphs (b) through (e) of this section.

(b) Upon determining that an employer has violated any provisions of § 503.16 related to wages, impermissible deductions or prohibited fees and expenses, the Administrator, WHD may assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s), not to exceed $10,000 per violation.

(c) Upon determining that an employer has terminated by layoff or otherwise or has refused to employ any worker in violation of § 503.16(r), § 503.16(t), or § 503.16(v), within the periods described in those sections, the Administrator, WHD may assess civil money penalties that are equal to the wages that would have been earned but for the layoff or failure to hire, not to exceed $10,000 per violation. No civil money penalty will be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(d) The Administrator, WHD may assess civil money penalties in an amount not to exceed $10,000 per violation for any other violation that meets the standards described in § 503.19.

(e) In determining the amount of the civil money penalty to be assessed under paragraphs (c) and (d) of this section, the Administrator, WHD will consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties will be reserved for willful failures to meet any of the conditions of the *Application for Temporary Employment Certification* and *H–2B Petition* that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or these regulations;

(2) The number of H–2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, and these regulations;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

§ 503.24 Debarment.

(a) *Debarment of an employer.* The Administrator, OFLC may not issue future labor certifications under 20 CFR part 655, subpart A to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, WHD finds that the employer committed a violation that meets the standards of § 503.19. Where these standards are met, debarrable violations would include but not be limited to:

(1) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H–2B workers and/or workers in corresponding employment;

(2) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(3) Failure to comply with the employer's obligations to recruit U.S. workers;

(4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H–2B obligations, or with one or more decisions or orders of the Secretary or a court under 20 CFR part 655, subpart A or this part;

(6) Impeding an investigation of an employer under this part;

(7) Employing an H–2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(8) A violation of the requirements of § 503.16(o) or (p);

(9) A violation of any of the provisions listed in § 503.16(r);

(10) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(11) Fraud involving the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition;* or

(12) A material misrepresentation of fact during the registration or application process.

(b) *Debarment of an agent or attorney.* If the Administrator, WHD finds, under this section, that an agent or attorney participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment.* Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) *Debarment procedure*—(1) *Notice of Debarment.* If the Administrator, WHD makes a determination to debar an employer, attorney, or agent, the Administrator, WHD will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the party subject to the Notice of its right to request a debarment hearing and the timeframe under which such rights must be exercised under § 503.43. If the party does not request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 503.43(e).

(2) [Reserved]

(e) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction debar under 20 CFR 655.73 or under this part. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(f) *Debarment from other labor certification programs.* Upon debarment under this part or 20 CFR 655.73, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§ 503.25 Failure to cooperate with investigators.

(a) No person will interfere or refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's investigative or enforcement authority under 8 U.S.C. 1184(c). Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 114.

(b) Where an employer (or employer's agent or attorney) interferes or does not cooperate with an investigation concerning the employment of an H–2B worker or a worker in corresponding employment, or a U.S. worker who has been improperly rejected for employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H–2B workers giving rise to the investigation. In addition, WHD may take such action as appropriate where the failure to cooperate meets the standards in § 503.19, including initiating proceedings for the debarment of the employer from future certification for up to 5 years, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action will not bar the taking of any additional action.

§ 503.26 Civil money penalties—payment and collection.

Where a civil money penalty is assessed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty must be received by the Administrator, WHD within 30 calendar days of the date of the final order. The person assessed the penalty will remit the amount ordered to the Administrator, WHD by certified check or by money order, made payable to the Wage and Hour Division, United States Department of Labor. The remittance will be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 503.40 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative appeal process that will be applied with respect to a determination to assess civil money penalties, to debar, to enforce provisions of the job order or obligations under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations, or to the collection of monetary relief due as a result of any violation.

Procedures Related to Hearing

§ 503.41 Administrator, WHD's determination.

(a) Whenever the Administrator, WHD decides to assess a civil money penalty, to debar, or to impose other appropriate administrative remedies, including for the recovery of monetary relief, the employer against which such action is taken will be notified in writing of such determination.

(b) The Administrator, WHD's determination will be served on the employer by personal service or by certified mail at the employer's last known address. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

§ 503.42 Contents of notice of determination.

The notice of determination required by § 503.41 will:

(a) Set forth the determination of the Administrator, WHD, including:

(1) The amount of any monetary relief due; or

(2) Other appropriate administrative remedies; or

(3) The amount of any civil money penalty assessment; or

(4) Whether debarment is sought and the term; and

(5) The reason or reasons for such determination;

(b) Set forth the right to request a hearing on such determination;

(c) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge (Chief ALJ) within 30 calendar days of the date of the determination, the determination of the Administrator, WHD will become final and not appealable;

(d) Set forth the time and method for requesting a hearing, and the related procedures for doing so, as set forth in § 503.43, and give the addresses of the Chief ALJ (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served); and

(e) Where appropriate, inform the employer that the Administrator, WHD will notify OFLC and DHS of the occurrence of a violation by the employer.

§ 503.43 Request for hearing.

(a) An employer desiring review of a determination issued under § 503.41, including judicial review, must make a request for such an administrative hearing in writing to the Chief ALJ at the address stated in the notice of determination. In such a proceeding, the Administrator will be the plaintiff, and the employer will be the respondent. If such a request for an administrative hearing is timely filed, the Administrator, WHD's determination will be inoperative unless and until the case is dismissed or the Administrative Law Judge (ALJ) issues an order affirming the decision.

(b) No particular form is prescribed for any request for hearing permitted by this section. However, any such request will:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by the agent or attorney of such employer; and

(6) Include the address at which such employer or agent or attorney desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief ALJ, at the address stated in the Administrator, WHD's notice of determination, no later than 30 calendar days after the date of the determination. An employer which fails to meet this 30-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the ALJ.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service within the time set forth in paragraph (c) of this section. For the requesting employer's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or its attorney or agent, must be filed within 25 days.

(e) The determination will take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

(f) Copies of the request for a hearing will be sent by the employer or attorney or agent to the WHD official who issued the notice of determination on behalf of the Administrator, WHD, and to the representative(s) of the Solicitor of Labor identified in the notice of determination.

Rules of Practice

§ 503.44 General.

(a) Except as specifically provided in these regulations and to the extent they do not conflict with the provisions of this part, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary at 29 CFR part 18 will apply to administrative proceedings described in this part.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and Subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence will guide the admission of evidence. The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 503.45 Service of pleadings.

(a) Under this part, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the ALJ may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any ALJ proceeding must be served on the attorneys for the Administrator, WHD. One copy must be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–2716, Washington, DC 20210, and one copy must be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following service and includes the last day of the period unless it is a Saturday, Sunday, or Federally-observed holiday, in which case the time period includes the next business day.

§ 503.46 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1184(c)(14) and these regulations will be commenced upon receipt of a timely request for hearing filed in accordance with § 503.43.

§ 503.47 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1184(c)(14) and these regulations will be captioned in the name of the person requesting such hearing, and will be styled as follows:

In the Matter of ____, Respondent.

(b) For the purposes of such administrative proceedings the Administrator, WHD will be identified as plaintiff and the person requesting such hearing will be named as respondent.

§ 503.48 Conduct of proceeding.

(a) Upon receipt of a timely request for a hearing filed under and in accordance with § 503.43, the Chief ALJ will promptly appoint an ALJ to hear the case.

(b) The ALJ will notify all parties of the date, time and place of the hearing. Parties will be given at least 30 calendar days notice of such hearing.

(c) The ALJ may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement must be served upon each other party. Post-hearing briefs will not be permitted except at the request of the ALJ. When permitted, any such brief must be limited to the issue or issues specified by the ALJ, will be due within the time prescribed by the ALJ, and must be served on each other party.

Procedures Before Administrative Law Judge

§ 503.49 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but before the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof will be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof will also provide:

(1) That the order will have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based will consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their attorney or agent may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefore, the ALJ, within 30 days thereafter, will, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures

§ 503.50 Decision and order of Administrative Law Judge.

(a) The ALJ will prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator, WHD.

(b) The decision of the ALJ will include a statement of the findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision will also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD. The reason or reasons for such order will be stated in the decision.

(c) In the event that the Administrator, WHD assesses back wages for wage violation(s) of § 503.16 based upon a PWD obtained by the Administrator from OFLC during the investigation and the ALJ determines that the Administrator's request was not warranted, the ALJ will remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the ALJ, the ALJ will accept as final and accurate the wage determination obtained from OFLC or, in the event the employer filed a timely appeal under 20 CFR 655.13 the final wage determination resulting from that process. Under no circumstances will the ALJ determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The decision will be served on all parties.

(e) The decision concerning civil money penalties, debarment, monetary relief, and/or other administrative remedies, when served by the ALJ will constitute the final agency order unless the Administrative Review Board (ARB), as provided for in § 503.51, determines to review the decision.

Review of Administrative Law Judge's Decision

§ 503.51 Procedures for initiating and undertaking review.

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ will, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition will be served on all parties and on the ALJ.

(b) No particular form is prescribed for any petition for the ARB's review permitted by this part. However, any such petition will:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the ALJ decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Include as an attachment the ALJ's decision and order, and any other record documents which would assist the ARB in determining whether review is warranted.

(c) If the ARB does not issue a notice accepting a petition for review of the decision within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action.

(d) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same will be served upon the ALJ and upon all parties to the proceeding.

§ 503.52 Responsibility of the Office of Administrative Law Judges (OALJ).

Upon receipt of the ARB's Notice under § 503.51, the OALJ will promptly forward a copy of the complete hearing record to the ARB.

§ 503.53 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify the parties of:

(a) The issue or issues raised;

(b) The form in which submissions will be made (i.e., briefs, oral argument, etc.); and

(c) The time within which such presentation will be submitted.

§ 503.54 Submission of documents to the Administrative Review Board.

All documents submitted to the ARB will be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–5220, Washington, DC 20210. An original and two copies of all documents must be filed. Documents are not deemed filed with the ARB until actually received by the ARB. All documents, including documents filed by mail, must be received by the ARB either on or before the due date. Copies of all documents filed with the ARB must be served upon all other parties involved in the proceeding.

§ 503.55 Final decision of the Administrative Review Board.

The ARB's final decision will be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

Record

§ 503.56 Retention of official record.

The official record of every completed administrative hearing provided by these regulations will be maintained and filed under the custody and control of the Chief ALJ, or, where the case has been the subject of administrative review, the ARB.

Signed in Washington, this 11th day of March 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

Nancy Leppink,

Deputy Administrator, Wage and Hour Division.

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