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# Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 72

**[NRC–2011–0007]**

**RIN 3150–AI90**

## List of Approved Spent Fuel Storage Casks: HI–STORM Flood/Wind Addition

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Direct final rule.

**SUMMARY:** The U. S. Nuclear Regulatory Commission (NRC or the Commission) is amending its regulations to add the HI–STORM Flood/Wind cask system to the "List of Approved Spent Fuel Storage Casks." This direct final rule allows the holders of power reactor operating licenses to store spent fuel in this approved cask system under a general license.

**DATES:** The final rule is effective June 13, 2011, unless significant adverse comments are received by April 27, 2011. A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. If the rule is withdrawn, timely notice will be published in the **Federal Register**.

**ADDRESSES:** You can access publicly available documents related to this document using the following methods:

*Federal e-Rulemaking Portal:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2011–0007]. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov*.

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*. An electronic copy of the proposed Certificate of Compliance (CoC), Technical Specifications (TS), and preliminary safety evaluation report (SER) can be found under ADAMS Package Accession Number ML103020135. The ADAMS Accession Number for the Holtec international, Inc. (Holtec) application, dated September 18, 2009, is ML092650747.

CoC No. 1032, the TS, the preliminary SER, and the environmental assessment are available for inspection at the NRC's PDR, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. Single copies of these documents may be obtained from Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–6445, e-mail *Gregory.Trussell@nrc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–6445, e-mail *Gregory.Trussell@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 218(a) of the Nuclear Waste Policy Act (NWPA) of 1982, as amended, requires that "the Secretary [of the U.S. Department of Energy (DOE)] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission." Section 133 of the NWPA states, in part, that "the Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 218(a) for use at the site of any civilian nuclear power reactor."

To implement this mandate, the NRC approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule in Title 10 of the Code of Federal Regulations (10 CFR) part 72, which added a new Subpart K within 10 CFR part 72, entitled "General License for Storage of Spent Fuel at Power Reactor Sites" (55 FR 29181; July 18, 1990). This rule also established a new Subpart L within 10 CFR part 72, entitled "Approval of Spent Fuel Storage Casks," which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs.

### Discussion

This rule will add the Holtec HI–STORM Flood/Wind (FW) cask system to the list of approved spent fuel storage casks in 10 CFR 72.214. Following the procedures specified in 10 CFR 72.230 of Subpart L, Holtec submitted an application for NRC approval, together with the Safety Analysis Report (SAR) entitled "Safety Analysis Report on the HI–STORM FW System." The NRC evaluated the Holtec submittal and issued a preliminary SER and a proposed CoC for the HI–STORM FW System.

The HI–STORM FW System provides the following: (1) The ability to store and transport Boiling Water Reactor (BWR) fuel with high initial enrichment (up to 4.8 weight percent uranium-235 planer average) without reliance on burnup or gadolinium credit; (2) the ability to load and store spent nuclear fuel from the longest to the shortest currently, and expected to be produced, in the United States without requiring site crane upgrades; (3) a reduction in the 10 CFR part 71 burnup credit requirement for the Pressurized Water Reactor (PWR) basket allowing transportation of 5 weight percent uranium-235 fuel with moderate

burnup; (4) enlarged storage cell opening sizes in both PWR and BWR multipurpose canisters (MPC) to ensure distorted irradiated fuel will fit without difficulty and to permit canisterized fuel to be stored in certain designated locations; (5) greater heat rejection capacity with lower peak fuel cladding temperature than the HI–STORM 100 cask system, CoC No. 1014; and (6) a variable weight (HI–TRAC VW) transfer cask that will allow use of the full capacity of a facility's cask crane. The HI–STORM FW System consists of the following major components: HI–STORM FW Overpack, PWR MPC–37, BWR MPC–89, and HI–TRAC VW Transfer Cask.

The NRC finds that the HI–STORM FW System, as designed and when fabricated and used under the conditions specified in its CoC, meets the requirements of 10 CFR part 72. Thus, use of the HI–STORM FW System, as approved by the NRC, will provide adequate protection of public health and safety. With this final rule, the NRC is approving the use of the HI–STORM FW System under the general license in 10 CFR part 72, subpart K, by holders of power reactor operating licenses under 10 CFR part 50. Simultaneously, the NRC is issuing a final SER and CoC that will be effective on June 13, 2011. Single copies of the CoC and SER are available for public inspection and/or copying for a fee at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

This direct final rule amends 10 CFR 72.214 by adding CoC No. 1032 to the list of approved spent fuel storage casks.

The HI–STORM FW System, when used under the conditions specified in CoC No. 1032, the TS, and NRC regulations, will meet the requirements of part 72; thus, adequate protection of public health and safety will continue to be ensured.

## Discussion of Amendments by Section

*§ 72.214 List of Approved Spent Fuel Storage Casks*

CoC No. 1032 is added to the list of approved spent fuel storage casks.

## Procedural Background

The NRC is using the "direct final rule procedure" to add CoC No. 1032 to the list of approved storage casks because the Holtec HI–STORM FW cask system is considered to be similar to other previously approved storage casks and, therefore, is expected to be noncontroversial. Adequate protection of public health and safety continues to be ensured. The amendment to the rule will become effective on June 13, 2011. However, if the NRC receives significant adverse comments on this direct final rule by April 27, 2011, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published elsewhere in this issue of the **Federal Register**. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule, CoC, or TS.

For detailed instructions on filing comments, please see the companion proposed rule published elsewhere in this issue of the **Federal Register.**

## Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this direct final rule, the NRC is adding the HI–STORM FW System to the list of NRC-approved cask systems for spent fuel storage in 10 CFR 72.214. This action does not constitute the establishment of a standard that contains generally applicable requirements.

## Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" approved by the Commission on June 30, 1997, and published in the **Federal Register** on September 3, 1997 (62 FR 46517), this rule is classified as Compatibility Category "NRC." Compatibility is not required for Category "NRC" regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended, or the provisions of Title 10 of the Code of Federal Regulations. Although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws but does not confer regulatory authority on the State.

## Plain Language

The Presidential Memorandum, "Plain Language in Government Writing," published June 10, 1998 (63 FR 31883), directed that the Government's documents be in clear and accessible language. The NRC requests comments on this direct final rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the heading **ADDRESSES**, above.

## Finding of No Significant Environmental Impact: Availability

Under the National Environmental Policy Act of 1969, as amended, and the NRC regulations in Subpart A of 10 CFR part 51, the NRC has determined that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The NRC has prepared an environmental assessment and, on the basis of this environmental assessment, has made a finding of no significant impact. The rule will add the CoC for the HI–STORM FW System, CoC No. 1032, to the list of approved spent fuel storage casks that power reactor licensees can use to store spent fuel at reactor sites under a general license. The HI–STORM FW System provides the following: (1) The ability to store and transport BWR fuel with high initial enrichment (up to 4.8 weight percent uranium-235 planer average) without reliance on burnup or gadolinium credit; (2) the ability to load and store spent nuclear fuel from the longest to

the shortest currently, and expected to be produced, in the United States without requiring site crane upgrades; (3) a reduction in the 10 CFR part 71 burnup credit requirement for the PWR basket allowing transportation of 5 weight percent uranium-235 fuel with moderate burnup; (4) enlarged storage cell opening sizes in both PWR and BWR MPCs to ensure distorted irradiated fuel will fit without difficulty and to permit canisterized fuel to be stored in certain designated locations; (5) greater heat rejection capacity with lower peak fuel cladding temperature than the HI–STORM 100 cask system, CoC No. 1014; and (6) a variable weight (HI–TRAC VW) transfer cask that will allow use of the full capacity of a facility's cask crane. The HI–STORM FW System consists of the following major components: HI–STORM FW Overpack, PWR MPC–37, BWR MPC–89, and HI–TRAC VW Transfer Cask.

The environmental assessment and finding of no significant impact on which this determination is based are available for inspection at the NRC Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. Single copies of the environmental assessment and finding of no significant impact are available from Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6445, e-mail: *Gregory.Trussell@nrc.gov*.

**Paperwork Reduction Act Statement**

This rule does not contain any information collection requirements and, therefore, is not subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget (OMB), Approval Number 3150–0132.

**Public Protection Notification**

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

**Regulatory Analysis**

On July 18, 1990 (55 FR 29181), the Commission issued an amendment to 10 CFR part 72. The amendment provided for the storage of spent nuclear fuel in cask systems with designs approved by the NRC under a general license. Any nuclear power reactor licensee can use cask systems with designs approved by the NRC to store spent nuclear fuel if it notifies the NRC in advance, the spent fuel is stored under the conditions specified in the cask's CoC, and the conditions of the general license are met. In that rule, four spent fuel storage casks were approved for use at reactor sites and were listed in 10 CFR 72.214. That rule envisioned that storage casks certified in the future could be routinely added to the listing in 10 CFR 72.214 through the rulemaking process. Procedures and criteria for obtaining NRC approval of new spent fuel storage cask designs were provided in 10 CFR part 72, subpart L.

The alternative to this action is to withhold approval of this new design and issue a site-specific license to each utility that proposes to use the casks. This alternative would cost both the NRC and utilities more time and money for each site-specific license. Conducting site-specific reviews would ignore the procedures and criteria currently in place for the addition of new cask designs that can be used under a general license, and would be in conflict with NWPA direction to the Commission to approve technologies for the use of spent fuel storage at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site reviews. This alternative also would tend to exclude new vendors from the business market without cause and would arbitrarily limit the choice of cask designs available to power reactor licensees. This final rule will eliminate the above problems and is consistent with previous Commission actions. Further, the rule will have no adverse effect on public health and safety.

The benefit of this rule to nuclear power reactor licensees is to make available a greater choice of spent fuel storage cask designs that can be used under a 10 CFR part 50 general license. The new cask vendors with casks to be listed in 10 CFR 72.214 benefit by having to obtain NRC certificates only once for a design that can then be used by more than one power reactor licensee. The NRC also benefits because it will need to certify a cask design only once for use by multiple licensees. Casks approved through rulemaking are to be suitable for use under a range of environmental conditions sufficiently broad to encompass multiple nuclear power plants in the United States without the need for further site-specific approval by NRC. Vendors with cask designs already listed may be adversely impacted because power reactor licensees may choose a newly listed design over an existing one. However, the NRC is required by its regulations and NWPA direction to certify and list approved casks. This rule has no significant identifiable impact or benefit on other Government agencies.

Based on the above discussion of the benefits and impacts of the alternatives, the NRC concludes that the requirements of the final rule are commensurate with the Commission's responsibilities for public health and safety and the common defense and security. No other available alternative is believed to be as satisfactory, and thus, this action is recommended.

**Regulatory Flexibility Certification**

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only nuclear power plant licensees and Holtec. These entities do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

**Backfit Analysis**

The NRC has determined that the backfit rule (10 CFR 72.62) does not apply to this direct final rule because this amendment does not involve any provisions that would impose backfits as defined in 10 CFR Chapter 1. Therefore, a backfit analysis is not required.

**Congressional Review Act**

Under the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

**List of Subjects in 10 CFR Part 72**

Administrative practice and procedure, Hazardous waste, Nuclear materials, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistle blowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR part 72.

## PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for part 72 continues to read as follows:

**Authority:** Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–10 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c),(d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

■ 2. In § 72.214, Certificate of Compliance 1032 is added to read as follows:

**§ 72.214 List of approved spent fuel storage casks.**

* * * * *

Certificate Number: 1032.

Initial Certificate Effective Date: June 13, 2011.

SAR Submitted by: Holtec International, Inc.

SAR Title: Safety Analysis Report on the HI–STORM FW System.

Docket Number: 72–1032.

Certificate Expiration Date: June 13, 2031.

Model Numbers: MPC–37, MPC–89.

Dated at Rockville, Maryland, this 8th day of February 2011.

For the Nuclear Regulatory Commission.

**R.W. Borchardt,**

*Executive Director for Operations.*

[FR Doc. 2011–7102 Filed 3–25–11; 8:45 am]

**BILLING CODE 7590–01–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 25

**[Docket No. NM438 Special Conditions No. 25–423–SC]**

## Special Conditions: Gulfstream Model GVI Airplane; High Incidence Protection

**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 associated with the use of high incidence protection. 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 27, 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 is equipped with a novel or unusual design feature: A high incidence protection system that replaces the stall warning system during normal operating conditions, prohibits the airplane from stalling, limits the angle of attack at which the airplane can be flown during normal low speed operation, and cannot be overridden by the flight crew. The system's application of this angle of attack limit impacts the stall speed determination, the stall characteristics, the stall warning demonstration, and the longitudinal airplane handling characteristics. The current regulations, including §§ 25.103, 25.145, 25.201, 25.203, 25.207 and 25.1323, do not address this type of protection feature.

### Discussion

These special conditions, which include airplane performance requirements, will establish a level of

safety equivalent to the current regulations for reference stall speeds, stall warning, stall characteristics, and miscellaneous other minimum reference speeds.

**Discussion of Comments**

Notice of proposed special conditions No. 25–10–03–SC for Gulfstream GVI airplanes was published in the **Federal Register** on December 23, 2010 (75 FR 80735). One supportive comment was received.

**Applicability**

As discussed above, these special conditions are applicable to the high incidence protection system on the GVI. Should Gulfstream 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 special conditions would apply to that model as well.

**Conclusion**

This action affects only certain novel or unusual design features of the GVI. 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.

1. *Definitions.* For terminology that does not appear in the regulations, the following definitions apply to these special conditions:

(a) *Electronic Flight Control System (EFCS)*—The electronic and software command and control elements of the flight control system.

(b) *High Incidence Protection Function*—An airplane level function that automatically limits the maximum angle of attack that can be attained to a value below that at which an aerodynamic stall would occur.

(c) *Alpha-Limit*—The maximum angle of attack at which the airplane stabilizes with the high incidence protection function operating and the longitudinal control held on its aft stop.

(d) *Vmin*—The minimum stabilized flight speed in calibrated airspeed obtained when the airplane is decelerated at an entry rate not exceeding 1 knot/sec until the longitudinal pilot control is on the aft stop with the high incidence protection function operating.

(e) *Vmin1g*—Vmin corrected to 1g conditions. The minimum calibrated airspeed at which the airplane can develop a lift force normal to the flight path and equal to its weight when at an angle of attack not greater than that determined for Vmin.

2. *Capability and Reliability of the High Incidence Protection System*—In lieu of §§ 25.103, 25.145, 25.201, 25.203, 25.207 and 25.1323, the following special conditions are issued for capability and reliability requirements:

(a) It must not be possible during pilot-induced maneuvers to encounter a stall, and handling characteristics must be acceptable as required by paragraphs 5 and 6 of this special condition.

(b) The airplane must be protected against stalling due to the effects of environmental conditions such as windshear and gusts at low speeds as required by paragraph 7 of this special condition.

(c) The ability of the high incidence protection function to accommodate any reduction in stalling angle of attack resulting from flight in the atmospheric icing conditions of 14 CFR part 25, appendix C, must be verified.

(d) The reliability of the high incidence protection function and the effects of failures must be acceptable in accordance with § 25.1309.

(e) The high incidence protection function must not impede maneuvering for pitch angles up to the maximum required for normal maneuvering including an all-engines operating takeoff plus a suitable margin to allow for satisfactory speed control.

3. *Minimum Steady Flight Speed and Reference Stall Speed*—In lieu of the requirements of § 25.103, the following special condition is issued:

(a) *Vmin*—The minimum steady flight speed, for the airplane configuration under consideration and with the high incidence protection function operating, is the final stabilized calibrated airspeed obtained when the airplane is decelerated at an entry rate not exceeding 1 knot per second until the longitudinal pilot control is on its stop.

(b) The minimum steady flight speed, Vmin, must be determined with:

(1) The high incidence protection function operating normally.

(2) Idle thrust.

(3) All combinations of flap settings and landing gear positions.

(4) The weight used when $V_{SR}$ is being used as a factor to determine compliance with a required performance standard.

(5) The most unfavorable center of gravity allowable.

(6) The airplane trimmed for straight flight at a speed selected by the applicant, but not less than 1.13 $V_{SR}$ and not greater than 1.3 $V_{SR}$.

(7) The settings of the high incidence protection function, stall warning system, and stall identification system (if applicable) set at the low angle of attack tolerance limit, unless the production tolerances are acceptably small so as to produce insignificant changes in performance determinations.

(c) *Vmin1g*—Vmin corrected to 1g conditions, which is the minimum calibrated airspeed at which the airplane can develop a lift force normal to the flight path and equal to its weight when at an angle of attack not greater than that determined for Vmin. Vmin1g is defined as follows:

$$\mathrm{Vmin1g} = \frac{\mathrm{Vmin}}{\sqrt{n_{zw}}}$$

Where:

$n_{ZW}$ = load factor normal to the flight path at $V_{min}$.

(d) The reference stall speed, $V_{SR}$, is a calibrated airspeed selected by the applicant. $V_{SR}$ may not be less than a 1g stall speed. $V_{SR}$ is expressed as:

$$V_{SR} \geq Vs1g = \frac{V_{CL_{MAX}}}{\sqrt{n_{zw}}}$$

where:

$V_{CL_{MAX}}$ is the calibrated airspeed obtained when the load factor-corrected lift coefficient ( $\frac{n_{zw}W}{qS}$ ) is first a maximum during the maneuver prescribed in paragraph 3(e)(7) of this special condition.

$n_{ZW}$ = Load factor normal to the flight path at $V_{CLMAX}$

W = Airplane gross weight;

S = Aerodynamic reference wing area; and

q = Dynamic pressure.

(e) $V_{SR}$ must be determined with the following conditions:

(1) Engines idling, or, if that resultant thrust causes an appreciable decrease in stall speed, not more than zero thrust at the stall speed.

(2) The airplane in other respects (such as flaps and landing gear) in the condition existing in the test or performance standard in which $V_{SR}$ is being used.

(3) The weight used when $V_{SR}$ is being used as a factor to determine compliance with a required performance standard.

(4) The center of gravity position that results in the highest value of reference stall speed.

(5) The airplane trimmed for straight flight at a speed selected by the applicant, but not less than 1.13 $V_{SR}$ and not greater than 1.3 $V_{SR}$.

(f) The flight characteristics at the angle of attack corresponding to $V_{SR}$ must be suitable in the traditional sense at forward and aft center of gravity in straight and turning flight at IDLE power.

(g) If $V_{SR}$ is chosen equal to $V_{MIN,1g}$, an equivalent safety finding to the intent of § 25.103 may be considered to have been met. The applicant may choose $V_{SR}$ to be less than $V_{MIN,1g}$ but not less than $V_{S1g}$ if compensating factors are provided to ensure safe characteristics.

4. *Stall Warning*

(a) *Normal Operation*—If the conditions of paragraph 2 of this special condition are satisfied, a level of safety equivalent to that intended by § 25.207, Stall warning, will have been met.

(b) *Failure Cases*—Following failures of the high incidence protection function not shown to be extremely improbable, if the function no longer satisfies paragraphs 2(a), 2(b), and 2(c) of this special condition, stall warning must be provided in accordance with § 25.207. The stall warning should prevent inadvertent stall in the following conditions:

(1) Power off straight stall approaches to a speed 5 percent below the warning onset.

(2) Turning flight stall approaches with at least 1.5g load factor normal to the flight path at an entry rate of at least 2 knots per second when recovery is initiated not less than one second after the warning onset.

5. *High Incidence Handling Demonstrations*—In lieu of the requirements of § 25.201, the following special condition are issued:

(a) Maneuvers to the limit of the longitudinal control, in the nose up direction, must be demonstrated in straight flight and in 30 degree banked turns under the following conditions:

(1) The high incidence protection function operating normally.

(2) Power off.

(3) At a power level necessary to maintain level flight at 1.5 $V_{SR1}$, where $V_{SR1}$ is the reference stall speed with the flaps in the approach position, the landing gear retracted, and with the aircraft at its maximum landing weight. The flap position to be used to determine this power setting is that position in which the stall speed, $V_{SR1}$, does not exceed 110% of the stall speed, $V_{SR0}$, with the flaps in the most extended landing position.

(b) In each condition required by paragraph (a) of this section, it must be possible to meet the applicable requirements of § 25.203 defined in paragraph 6 of this special condition with:

(1) Flaps, landing gear, and deceleration devices in any likely combination of positions not prohibited.

(2) Deceleration devices include spoilers and other drag devices when used as air brakes, and thrust reversers. High incidence maneuver demonstrations with deceleration devices deployed should be carried out with power off except where power is normally applied during operations (*e.g.,* use of extended airbrakes during landing).

(3) Representative weights within the range for which certification is requested.

(4) The most adverse center of gravity.

(5) The airplane trimmed for straight flight at the speed prescribed in paragraph 3(e)(5) of this special condition.

(6) The settings of the high incidence protection function, stall warning system, and stall identification system (if applicable) set at the high angle of attack tolerance limit, unless the production tolerances are acceptably small so as to produce insignificant changes in performance determinations.

(c) The following procedures must be used to show compliance with § 25.203 as amended by paragraph 6 of this special condition:

(1) Starting at a speed sufficiently above the minimum steady flight speed to ensure that a steady rate of speed reduction can be established, apply the longitudinal control so that the speed reduction does not exceed one knot per second until the control reaches the stop.

(2) The longitudinal control must be maintained at the stop until the airplane has reached a stabilized flight condition and then recovered by normal recovery techniques.

(3) The requirements for turning flight maneuver demonstrations must also be met with accelerated rates of entry to the incidence limit, up to the maximum rate achievable.

6. *Characteristics in High Incidence Maneuvers*—In lieu of the requirements of § 25.203, the following special condition is issued:

(a) Throughout maneuvers with a rate of deceleration of not more than 1 knot per second, both in straight flight and in 30 degree banked turns, the airplane's characteristics must be as follows:

(1) No abnormal airplane nose-up pitching.

(2) No uncommanded nose-down pitching (which is indicative of stall). However, reasonable attitude changes associated with stabilizing the incidence at alpha limit as the longitudinal control reaches the stop is acceptable. Any reduction of pitch attitude associated with stabilizing the incidence at the alpha limit should be achieved smoothly and at a low pitch rate, so it is not likely to be mistaken for natural stall identification.

(3) No uncommanded lateral or directional motion, and the pilot must retain good lateral and directional control by conventional use of the cockpit controls throughout the maneuver.

(4) The airplane must not exhibit buffeting of a magnitude or severity that would act as a deterrent to completing the maneuver specified in § 25.201(a) as amended by this special condition.

(b) In maneuvers with increased rates of deceleration, some degradation of characteristics associated with a transient excursion beyond the stabilized alpha-limit is acceptable. However, the airplane must not exhibit dangerous characteristics or characteristics that would deter the pilot from holding the longitudinal control on the aft stop for a period of time appropriate to the maneuvers.

(c) It must always be possible to reduce incidence by conventional use of the longitudinal control.

(d) The rate at which the airplane can be maneuvered from trim speeds associated with scheduled operating speeds, such as $V_2$ and $V_{REF}$ up to alpha-limit, should not be unduly damped or significantly slower than can be achieved on conventionally controlled transport airplanes.

7. *Atmospheric Disturbances*—Operation of the high incidence protection function must not adversely affect aircraft control during expected levels of atmospheric disturbances, nor impede the application of recovery procedures in case of windshear. Simulator tests and analysis may be used to evaluate such conditions, but must be validated by limited flight testing to confirm handling qualities at critical loading conditions.

8. *Longitudinal Control*—In lieu of the requirements of § 25.145(a), (a)(1) and (b)(6), the following special conditions are issued:

(a) It must be possible, at any point between the trim speed prescribed in § 25.103(b)(6) as amended by this special condition and Vmin, to pitch the nose downward so that the acceleration to this selected trim speed is prompt.

(b) With the landing gear extended, no change in trim control, or exertion of more than 50 pounds control force (representative of the maximum short-term force that can be applied readily by one hand) may be required for the following maneuver: With power off, flaps extended and the airplane trimmed at 1.3 $V_{SR1}$, obtain and maintain airspeeds between Vmin and either 1.6$V_{SR1}$ or $V_{FE}$, whichever is lower.

9. *Airspeed Indicating System*—In lieu of § 25.1323(c)(1) and (c)(2), the following special conditions are issued:

(a) VMO to Vmin with the flaps retracted; and

(b) Vmin to VFE with flaps in the landing position.

Issued in Renton, Washington, on March 18, 2011.

**KC Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–7144 Filed 3–25–11; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Parts 520 and 529

**[Docket No. FDA–2011–N–0003]**

### New Animal Drugs; Oxytetracycline

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental abbreviated new animal drug application (ANADA) filed by Pennfield Oil Co. The supplemental ANADA provides for use of oxytetracycline hydrochloride soluble powder for control of American and European foulbrood in honey bees and for skeletal marking of finfish fry and fingerlings.

**DATES:** This rule is effective March 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** John K. Harshman, Center for Veterinary Medicine (HFV–170), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8197, e-mail: *john.harshman@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Pennfield Oil Co., 14040 Industrial Rd., Omaha, NE 68144, filed a supplement to ANADA 200–026 that provides for use of PENNOX 343 (oxytetracycline HCl) Soluble Powder for control of American and European foulbrood in honey bees and for skeletal marking of finfish fry and fingerlings by immersion. The supplemental ANADA is approved as of December 6, 2010, and the regulations in 21 CFR 520.1660d and 529.1660 are amended to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The Agency has determined under 21 CFR 25.33 that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

### List of Subjects in 21 CFR Parts 520 and 529

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21

CFR parts 520 and 529 are amended as follows:

## PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

### § 520.1660d [Amended]

■ 2. In paragraph (b)(6) of § 520.1660d, remove "cattle, and sheep" and in its place add "cattle, sheep, and honey bees."

## PART 529—CERTAIN OTHER DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 529 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

### § 529.1660 [Amended]

■ 4. In paragraph (b)(2) of § 529.1660, remove "Nos. 000069 and 059130" and in its place add "Nos. 000069, 048164, and 059130".

Dated: March 23, 2011.

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2011–7216 Filed 3–25–11; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Parts 522 and 558

**[Docket No. FDA–2011–N–0003]**

## New Animal Drugs; Arsanilate Sodium; Sulfaethoxypyridazine

**AGENCY:** Food and Drug Administration, HHS.

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

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to remove sections pertaining to use of arsanilate sodium and sulfaethoxypyridazine in medicated feed because there are no currently approved new animal drug applications (NADAs) for such uses. Conforming amendments are also being made. This action is being taken to improve the accuracy of the regulations.

**DATES:** This rule is effective March 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** George K. Haibel, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9019, e-mail: *George.Haibel@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** FDA has determined the animal drug regulations describe conditions of use for arsanilate sodium and sulfaethoxypyridazine in medicated feed for which no NADA is currently approved.

1. *Arsanilate sodium* § 558.60 (21 CFR 558.60). In the **Federal Register** of December 18, 1986 (51 FR 45346), FDA proposed to remove § 558.20 *Drugs used in medicated feeds in use before January 1, 1958, which are not otherwise listed; interim listing* (21 CFR 558.20) because this section in part 558 subpart A—*General Provisions* did not provide an appropriate basis upon which to approve medicated feed applications and because several of the drugs listed were not the subject of approved NADAs. Among other exceptions, FDA proposed to transfer the arsanilate sodium provisions of § 558.20 to § 558.60 in subpart B—*Specific New Animal Drugs for Use in Animal Feeds* (subpart B) to reflect their status as approved conditions of use.

In 1991, FDA issued a final rule removing most of § 558.20 (56 FR 19263, April 26, 1991) and codifying approved uses in subpart B. Elsewhere in the same issue of the **Federal Register**, FDA reproposed the removal of the remaining portions of § 558.20 that pertained to certain uses of arsanilate sodium (56 FR 19332, April 26, 1991). FDA reproposed those portions of the rule because it recognized that some of the uses it had proposed to codify in subpart B did not appear to be the subject of approved NADAs, as previously stated. In the discussion of the reproposed changes, FDA tentatively concluded that NADA 8–966 for arsanilate sodium for use in swine feed was voluntarily withdrawn by a letter dated November 12, 1973. The Agency acknowledged this withdrawal by a letter dated January 16, 1974 (*see* 56 FR 19332 at 19333, Refs. 1 and 2).

In 1992, FDA issued a final rule removing the remaining portions of § 558.20 (57 FR 1641, January 15, 1992) and noted that no evidence or comments were received on the 1991 reproposed rule, which had requested that anyone claiming to hold an approved NADA for arsanilate sodium in swine feed submit evidence to substantiate the approval. FDA concluded that NADA 8–966 providing for use of arsanilate sodium in medicated feeds for swine was voluntarily withdrawn at the request of the sponsor (*see* 56 FR 19332 and Refs. 1 and 2 of the reproposal).

After careful review of its NADA records, FDA has concluded that all uses of arsanilate sodium in medicated feeds in NADA 8–966 were voluntarily withdrawn by the sponsor in 1973 and that there is no currently approved NADA providing for the use of arsanilate sodium in medicated feed or in any dosage form. Accordingly, the animal drug regulations in part 558 (21 CFR part 558) are amended by removing § 558.60. Conforming amendments are also being made in §§ 558.55 and 558.680 by removing reference to use in combination with amprolium and zoalene, respectively. This action is being taken to comply with the Federal Food, Drug, and Cosmetic Act (FD&C Act) and to improve the accuracy of the regulations.

2. *Sulfaethoxypyridazine (§§ 558.579).* In 1966, FDA approved a food additive petition and codified the safe use of sulfaethoxypyridazine in feed and drinking water of swine at § 121.280 (21 CFR 121.280) (31 FR 2425 at 2426, February 5, 1966). In 1968, § 121.280 was amended to add use in cattle in feed and water, and by tablet and injection, and to make all uses, including use in feed restriction to "for sale by or on the order of a licensed veterinarian" (33 FR 627 at 628, January 18, 1968). A 1969 amendment revised that use restriction to read "for use by or on the order of a licensed veterinarian" (34 FR 20272, December 25, 1969).

In a 1976 reorganization of certain food additive regulations from 21 CFR part 121 to new part 558 *New Animal Drugs For Use in Animal Feed,* § 121.280 was redesignated as § 558.579 (41 FR 10983 at 11005, March 15, 1976). In the intervening 35 years there have been no required annual drug experience reports, or any product stability reports, submitted for any NADA for use of sulfaethoxypyridazine in medicated feed. At this time and after careful review of its NADA records, FDA has concluded that that there is no approved NADA for the use of sulfaethoxypyridazine in medicated feed for swine or cattle. Accordingly, the animal drug regulations in part 558 are amended by removing § 558.579. A conforming amendment is also being made in 21 CFR 522.2240 to remove a provision for administration of sulfaethoxypyridazine injectable solution followed by use of sulfaethoxypyridazine medicated cattle feed. This action is being taken to comply with the FD&C Act and to improve the accuracy of the regulations.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability."

Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

**List of Subjects**

*21 CFR Part 522*

Animal drugs.

*21 CFR Part 558*

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 522 and 558 are amended as follows:

## PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

■ 2. In § 522.2240 revise paragraph (e)(3) to read as follows:

### § 522.2240 Sulfaethoxypyridazine.

* * * * *

(e) * * *

(3) *Limitations.* Administer intravenously for not more than 4 days; or first treatment may be followed by 3 days of treatment with sulfaethoxypyridazine in drinking water or tablets in accordance with §§ 520.2240a(e) and 520.2240b(e) of this chapter; as sodium sulfaethoxypyridazine; do not treat within 16 days of slaughter; as sole source of sulfonamide; milk that has been taken from animals during treatment and for 72 hours (6 milkings) after the latest treatment must not be used for food. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

## PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 3. The authority citation for 21 CFR part 558 continues to read as follows:

**Authority:** 21 U.S.C. 360b, 371.

### § 558.4 [Amended]

■ 4. In § 558.4, in paragraph (d), in the "Category II" table, remove the entries for "Arsanilate sodium" and "Sulfaethoxypyridazine".

### § 558.55 [Amended]

■ 5. In § 558.55, in the tables in paragraphs (d)(2)(i), (d)(2)(ii), and (d)(2)(iv), remove the entries for "Arsanilate sodium 90 (0.01%)".

### § 558.60 [Removed]

■ 6. Remove § 558.60.

### § 558.579 [Removed]

■ 7. Remove § 558.579.

### § 558.680 [Amended]

■ 8. In § 558.680, in the tables in paragraphs (d)(1)(i), (d)(1)(ii), and (d)(1)(iii), remove the entries for "Arsanilate sodium 90 (0.01%)".

Dated: March 23, 2011.

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2011–7214 Filed 3–25–11; 8:45 am]

BILLING CODE 4160–01–P

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## DEPARTMENT OF STATE

## 22 CFR Part 62

**[Public Notice: 7346]**

**RIN 1400–AC67**

## Exchange Visitor Program—Fees and Charges

*Correction*

In rule document 2011–4276, appearing on pages 10498–10500 in the issue of Friday, February 25, 2011, make the following correction:

On page 10498, in the second column, in the **DATES** section, "*Effective Date:* This rule is effective 30 days from February 25, 2011" should read "*Effective Date:* This rule is effective March 28, 2011".

[FR Doc. C1–2011–4276 Filed 3–25–11; 8:45 am]

BILLING CODE 1505–01–D

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## DEPARTMENT OF THE INTERIOR

## National Park Service

## 36 CFR Part 7

**RIN 1024–AD96**

## Special Regulation: Areas of the National Park System, National Capital Region

**AGENCY:** National Park Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** The National Park Service (NPS) is physically moving the office of the Division of Park Programs, National Mall and Memorial Parks (NAMA) which processes applications for special events and demonstrations permits for nine parks in the National Capital Region (NCR). This rule updates the address and location of the office where these permit applications may be obtained and where completed applications are to be submitted by mail or in person.

**DATES:** Effective March 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Robbin M. Owen, Chief, Division of Park Programs, National Park Service, National Capital Region, 900 Ohio Drive SW., Washington, DC 20024. Telephone: (202) 619–7225.

**SUPPLEMENTARY INFORMATION:** During the fourth week of March, the NPS is expecting to move the Division of Park Programs from 1100 Ohio Drive, SW., to the nearby 900 Ohio Drive, SW., Washington, DC 20024. Now codified at 36 CFR 7.96(g)(3), the NPS 1975 rulemaking established a centralized location where permit applications for special events and demonstrations, must be submitted, Monday—Friday from 8 a.m. to 4 p.m., holidays excepted. As the NPS explained the NCR regulatory permit application process the:

> Applications will be immediately date-and-time stamped upon receipt. * * * This provision for official receipt only during office hours is designed to permit the Park Service to properly process applications within the prescribed time period. 40 FR 58652 (1975)

As Acting Secretary of the Interior Nathaniel P. Reed explained, at 41 FR 12880 (1976):

> It is the opinion of the Department that receipt of the application in this single location is necessary in order to effectively administer the priority system for the use of park lands, to ensure that the application will be considered by an official of responsible rank, and to allow for consideration of the permit within the applicable time limitation. Even though executed permit applications must be received at that location, application blanks may be obtained at other locations in the National Capital Parks area.* * *

As to why applications had to be received at the permit offices during regular business hours, the NPS explained at 41 FR 12880 (1976), that:

> [T]his limitation is necessary in order that the required security precautions and augmentation of forces and services may be provided. The Department has weighed the administrative burdens that the absence of this limitation would impose upon the various government agencies involved against possible effects upon the exercise of First Amendment freedoms and believes on balance that these effects are inconsequential. This impact is further lessened since demonstrations may be conducted in certain areas without permit pursuant to paragraph (b).

*Need for Change:* The technical amendment is needed to provide the public with the new address of the relocated permit office where special

event/demonstration permit applications can be obtained and where completed applications shall be submitted, whether by mail or in person. The relocation of the Division of Park Programs to a nearby park location does not substantially change the function of the special event/demonstration application process. It does not create additional or change permit requirements in the Code of Federal Regulations. This technical amendment also conforms to the long-standing administrative practice that applications directed to the Regional Director go to the Division of Park Programs. Further, this technical amendment updates the name of the NPS permit program office. The Office of Public Affairs no longer administers the NCR special event/demonstration program; that responsibility was transferred to the Division of Park Programs. Although under the management of NAMA, the Division of Park Programs continues to manage this permit program for nine NCR parks.

*No Public Comment Period/ Immediate Effective Date:* The Department of the Interior has determined that the public notice and comment provisions of the Administrative Procedures Act (APA) 5 U.S.C. 553(b), do not apply to this rule because of a good cause exception under 5 U.S.C. 553(b)(3)(B). This exception allows an agency to suspend the notice-and-comment requirement when an agency finds for good cause that those requirements are impracticable, unnecessary, and contrary to the public interest. This rule changes the address for submitting applications; it makes no other substantive changes. Failure to immediately publish this change would be impracticable and would otherwise lead to confusion as to where applications should be submitted, which would undermine the ability of persons and groups to engage in permitted demonstrations and special events.

For these reasons public comment is unnecessary and good cause exists for immediately publishing the final rule. For the same reasons, we have determined that there is good cause for making the final rule effective immediately, as allowed under the APA 5 U.S.C. 553(d), and 318 DM 4.7B(1)(i).

### List of Subjects in 36 CFR Part 7

District of Columbia, National parks, Reporting and recordkeeping requirements.

In consideration of the reasons stated in the preamble, the National Park Service amends 36 CFR part 7 as follows:

## PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

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

**Authority:** 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under 36 U.S.C. 501–511, DC Code 10–137 (2001) and DC Code 50–2201.07 (2001).

■ 2. In § 7.96, in paragraph (g) (3), revise the first two sentences to read as follows:

**§ 7.96 National Capital Region.**

* * * * *

(g) * * *

(3) *Permit applications.* Permit applications may be obtained at the Division of Park Programs, National Mall and Memorial Parks, 900 Ohio Drive SW., Washington, DC 20024. Applicants shall submit permit applications in writing on a form provided by the National Park Service so as to be received by the Regional Director at the Division of Park Programs at least 48 hours in advance of any proposed demonstration or special event. * * *

* * * * *

Dated: March 14, 2011.

**Will Shafroth,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2011–7146 Filed 3–25–11; 8:45 am]

**BILLING CODE 4312–JK–P**

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 49

**[EPA–R09–OAR–2007–0296, FRL–9259–9]**

## Approval and Promulgation of Gila River Indian Community's Tribal Implementation Plan

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

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a Tribal implementation plan (TIP) submitted by the Gila River Indian Community (GRIC or Tribe) on February 21, 2007, as supplemented and amended on July 11, 2007, June 22, 2009, and July 17, 2010, and as described in our August 12, 2010 proposal. The TIP includes general and emergency authorities, ambient air quality standards, permitting requirements for minor sources of air pollution, enforcement authorities, procedures for administrative appeals and judicial review in Tribal court, requirements for area sources of fugitive dust and fugitive particulate matter, general prohibitory rules, and source category-specific emission limitations and standards. These provisions establish a base TIP that is suitable for the GRIC's reservation and regulatory capacities and that meets all applicable minimum requirements of the Clean Air Act (CAA or Act) and EPA regulations. The effect of this action is to make the approved portions of the GRIC TIP federally enforceable under the CAA and to further protect air quality within the exterior boundaries of the GRIC reservation.

**DATES:** This final rule is effective April 27, 2011. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of April 27, 2011.

**ADDRESSES:** EPA has established a docket for this action under EPA–R09–OAR–2007–0296. Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material, large maps, multi-volume reports) and some may not be available in either location (*e.g.*, confidential business information (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:** Wienke Tax, Air Planning Office, Environmental Protection Agency, Region 9 Office, 75 Hawthorne Street, San Francisco, CA 94105–3901, (415) 947–4192 or *tax.wienke@epa.gov*.

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

### Judicial Review

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 27, 2011. Under CAA section 307(d)(7)(b), only an objection to this final action that was raised with reasonable specificity during the public comment period can be raised during judicial review. This section also authorizes the convening of a proceeding for reconsideration in specified circumstances. Filing a petition requesting that the Administrator reconsider 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* CAA section 307(b)(2).)

## I. Summary of the Proposed Action

The GRIC reservation is located in south-central Arizona, adjacent to the Phoenix Metropolitan Area, in Pinal and Maricopa Counties. On August 12, 2010 (75 FR 48880), EPA proposed to approve a TIP submitted by the GRIC on February 21, 2007, as supplemented and amended on July 11, 2007, June 22, 2009, and July 17, 2010, and as described in the proposal. The TIP includes general and emergency authorities, ambient air quality standards, permitting requirements for minor sources of air pollution, enforcement authorities, procedures for administrative appeals and judicial review in Tribal court, requirements for area sources of fugitive dust and fugitive particulate matter, general prohibitory rules, and source category-specific emission limitations and standards.

The TIP is one of four regulatory programs that comprise the GRIC's Air Quality Management Plan (AQMP).[1] We proposed to approve only those portions of the GRIC AQMP that constitute a TIP containing severable elements of an implementation plan under section 110 of the CAA, as discussed in this notice and in our August 12, 2010 proposal. These severable plan elements establish a base TIP that is suitable for the GRIC's reservation and regulatory capacities and that meets all applicable minimum requirements of the CAA, the Tribal Authority Rule in 40 CFR part 49 (TAR), and other applicable CAA regulations.

For a more detailed description of the TIP, our evaluation of the TIP and supplemental information, and our rationale for our proposed action, please see the August 12, 2010 proposed rule and related Technical Support Document, both of which can be found in the docket for today's action.

## II. EPA's Response to Comments

Our August 12, 2010 proposed rule provided for a 30-day comment period, which ended on September 13, 2010. We received two public comment letters expressing only support for our proposed action. The two letters of support that we received can be found in the docket for today's action.

## III. Final Action

Under CAA sections 110(o), 110(k)(3) and 301(d), EPA is fully approving the TIP submitted by the GRIC DEQ on February 21, 2007, as supplemented and amended on July 11, 2007, June 22, 2009, and July 17, 2010, and as described in our August 12, 2010 proposal (75 FR 48880). For the reasons set forth in this document and in the August 12, 2010 proposed rule, we conclude that the TIP meets the applicable requirements of CAA section 110, EPA's implementing regulations, CAA section 301(d) and the TAR in 40 CFR part 49. The TIP includes the following severable elements of an implementation plan under section 110 of the CAA:

- General authorities that satisfy the requirement in CAA section 110(a)(2)(J) to meet applicable requirements of CAA section 121 (relating to consultation) and section 127 (relating to public notification), and that also satisfy the requirement in CAA section 110(a)(2)(M) to provide for consultation and participation by local political subdivisions affected by the plan;
- Emergency powers that satisfy the requirement in CAA section 110(a)(2)(G) to provide for authority comparable to the emergency powers in section 303 of the Act;
- Procedural requirements for preparation, adoption, submission to EPA, and revision of the TIP that satisfy the applicable requirements of CAA section 110(a)(2) and 40 CFR part 51, subpart F;
- Air quality standards and measurement methods that are consistent with the National Ambient Air Quality Standards in 40 CFR 50.4 through 50.8 and 50.10 through 50.12, as effective in October 2006;
- Legally enforceable procedures to regulate the construction, modification, and operation of "non-title V sources" ("minor sources") that establish a base program suitable to the GRIC's reservation and that satisfy the minimum requirements of CAA section 110(a)(2)(C) and 40 CFR 51.160 through 51.164;
- Requirements and procedures for enforcement consistent with CAA section 110(a)(2)(C) that provide necessary assurances that the Tribe will have adequate authority under Tribal law to carry out the TIP, as required by CAA section 110(a)(2)(E)(i);
- Requirements and procedures for administrative appeals, final administrative decisions, and judicial review of final administrative decisions that establish adequate procedures for review of the Director's decisions under the TIP and that satisfy the applicable requirements of CAA sections 110(a)(2)(C) and 110(a)(2)(E)(i); and
- Area source emission limits, general prohibitory rules, and source category-specific emission limitations that satisfy EPA's enforceability requirements under CAA section 110(a)(2)(A).

EPA is approving these provisions as elements of a base TIP under CAA section 110 that is suitable to the GRIC's reservation and regulatory capacities. We are not acting today on those elements of the GRIC AQMP that address requirements of CAA title V or any other program under the Act. We intend to take separate action on other CAA programs submitted by the GRIC DEQ, as appropriate.

## IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action approves laws of an eligible Indian tribe as meeting Federal requirements and imposes no additional requirements beyond those imposed by Tribal law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Because this rule approves pre-existing requirements under Tribal law and does not impose any additional enforceable duty beyond that required by Tribal law, it 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).

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (59 FR 22951, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." EPA has concluded that this rule will have tribal implications in that it will have substantial direct effects on the GRIC. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. EPA is

[1] The other three AQMP programs implement the New Source Performance Standards (NSPS) under CAA 111; the National Emission Standards for Hazardous Air Pollutants (NESHAP) under CAA 112; and title V operating permit requirements. We are not acting today on these other elements of the GRIC AQMP.

approving the GRIC's TIP at the request of the Tribe. Tribal law will not be preempted as the GRIC has already incorporated the TIP into Tribal Law on December 13, 2006. The Tribe has applied for, and fully supports, the approval of the TIP. This approval makes the TIP federally enforceable.

EPA worked and consulted with officials of the GRIC early in the process of developing these regulations to permit them to have meaningful and timely input into their development. In order to administer an approved TIP, tribes must be determined eligible (40 CFR part 49) for Treatment as State (TAS) for the purpose of administering a TIP. During the TAS eligibility process, the Tribe and EPA worked together to ensure that the appropriate information was submitted to EPA. GRIC and EPA also worked together throughout the process of development and Tribal adoption of the TIP. The Tribe and EPA also entered into a criminal enforcement MOA.

This action does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action approves Tribal rules implementing a TIP over areas within the exterior boundaries of the Gila River Indian Community's reservation, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This action 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, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994). This action also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing TIP submissions, EPA's role is to approve an eligible tribe's submission, provided that it meets the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the tribe to use voluntary consensus standards (VCS), EPA has no authority to disapprove a TIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a TIP submission, to use VCS in place of a TIP provision that otherwise satisfies the requirements of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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).

**List of Subjects in 40 CFR Part 49**

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Incorporation by reference, Indians, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 19, 2011.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

Part 49 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

## PART 49—[AMENDED]

■ 1. The authority citation for part 49 continues to read as follows:

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

## Subpart L—Implementation Plans for Tribes—Region IX

■ 2. Subpart L of part 49 is amended by adding an undesignated center heading and § 49.5511 to read as follows:

Implementation Plan for the Gila River Indian Community

### § 49.5511 Identification of plan.

(a) *Purpose and scope.* This section contains the approved implementation plan for the Gila River Indian Community dated August 2008. The plan consists of programs and procedures that cover general and emergency authorities, ambient air quality standards, permitting requirements for minor sources of air pollution, enforcement authorities, procedures for administrative appeals and judicial review in Tribal court, requirements for area sources of fugitive dust and fugitive particulate matter, general prohibitory rules, and source category-specific emission limitations and standards.

(b) *Incorporation by reference.*

(1) Material listed in paragraph (c) of this section was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the **Federal Register**.

(2) EPA Region IX certifies that the rules/regulations provided by EPA in the TIP compilation at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated tribal rules/regulations which have been approved as part of the Tribal Implementation Plan as of January 19, 2011.

(3) Copies of the materials incorporated by reference may be inspected at the Region IX Office of EPA at 75 Hawthorne Street, San Francisco, CA 94105–3901 or call 415–947–4192; the U.S. Environmental Protection Agency, EPA Docket Center (EPA/DC), Air and Radiation Docket and Information Center, MC 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or call 202–566–1742; and the National Archives and Records Administration. For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) *EPA-approved regulations.*

EPA-APPROVED GILA RIVER INDIAN COMMUNITY TRIBAL REGULATIONS

| Tribal citation | Title/subject | Tribal effective date | EPA approval date | Explanations |
|---|---|---|---|---|
| Gila River Indian Community, Tribal Implementation Plan, Part I, General Provisions, Sections 1–3. | Definitions, General Authority, Procedures for Preparation, Adoption, and Submittal of the Air Quality Management Program. | August 20, 2008 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | |
| Gila River Indian Community, Tribal Implementation Plan, Part I, General Provisions, Section 4. | Adoption of National Ambient Air Quality Standards as Community Standards. | August 20, 2008 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | Note: several revisions to the NAAQS have occurred since the adoption of the TIP. |
| Gila River Indian Community, Tribal Implementation Plan, Part II, Permit Requirements. | Definitions, Applicability of Permit Requirements, Non-Title V Permit Requirements, Permit Revisions at a Non-Title V Source, Continuous Emissions Monitoring, Stack Height Limitation, Confidentiality of Information, Permit Fees. | August 20, 2008 ..... | 3/29/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | Title V regulations are not approved into the TIP. |
| Gila River Indian Community, Tribal Implementation Plan, Part III, Enforcement Ordinances. | Civil Enforcement, Criminal Enforcement, Citizen Suits. | August 20, 2008 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | |
| Gila River Indian Community, Tribal Implementation Plan, Part IV, Administrative Appeals. | General Provisions, Definitions, Administrative Appeals Procedures, Final Administrative Decision: Review, Judicial Review of Final Administrative Decisions. | August 20, 2008 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | |
| Gila River Indian Community, Tribal Implementation Plan, Part V, Area Source Emission Limits, Sections 1–2. | Open Burning, General Requirements for Fugitive Dust-Producing Activities. | August 20, 2008 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | |
| Gila River Indian Community, Tribal Implementation Plan, Part VI, Generally Applicable Individual Source Requirements for Existing and New Sources, Sections 1–3. | Visible Emissions; VOC Usage, Storage, and Handling; Degreasing and Solvent Metal Cleaning. | August 20, 2008 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | |
| Gila River Indian Community, Tribal Implementation Plan, Part VII, Source/Category Specific Emission Limits for Existing and New Sources, Sections 1–3. | Secondary Aluminum Production, Aerospace Manufacturing and Rework Operations, Nonmetallic Mineral Mining and Processing. | August 20, 2008 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | |

(d) Nonregulatory.

| Name of nonregulatory TIP provision | Tribal submittal date | EPA approval date | Explanations |
|---|---|---|---|
| Gila River Indian Community, Tribal Implementation Plan, Introductory Materials. | June 22, 2009 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | |
| Technical Amendments to Part II of the 2006 Air Quality Management Program Plan, Title 17 Chapter 9 of the Gila River Indian Community Law and Order Code. | June 22, 2009 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | Minor NSR program support documents. |

| Name of nonregulatory TIP provision | Tribal submittal date | EPA approval date | Explanations |
|---|---|---|---|
| Minor New Source Review Demonstration .... | June 22, 2009 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | Minor NSR program support documents. |
| Letter from Margaret Cook, Executive Director, GRIC DEQ, to Deborah Jordan, Air Division Director, EPA Region 9, Re: Gila River Indian Community Tribal Implementation Plan. | July 17, 2010 ..... | 3/28/11 [INSERT **FEDERAL REGISTER** PAGE NUMBER WHERE THE DOCUMENT BEGINS]. | Letter discussing intent of citizen suit provisions in Part III. |

[FR Doc. 2011–7110 Filed 3–25–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

**[WC Docket No. 07–267; FCC 09–56]**

### Forbearance Petition Filing Requirements

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; confirmation of effective date.

**SUMMARY:** On August 6, 2009, the Commission published a final rule adopting procedural rules to govern petitions for forbearance filed pursuant to section 10 of the Communications Act of 1934, as amended. One section within that document could not take effect until the Office of Management and Budget (OMB) had approved the associated information collection requirements. OMB approved those information collection requirements on April 5, 2010, under OMB Control Number 3060–1138. This document confirms the effective date of that rule.

**DATES:** 47 CFR 1.54, published at 74 FR 39219, August 6, 2009, is effective March 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Reel, Competition Policy Division, Wireline Competition Bureau, at 202–418–1885 or e-mail: *Jonathan.Reel@fcc.gov*.

**SUPPLEMENTARY INFORMATION:** This document announces that, on April 5, 2010, OMB approved, for a period of three years, the information collection requirements contained in the Commission's "complete as filed rule" for forbearance petitions under section 10 of the Communications Act of 1934, as amended. The Commission adopted that rule in its *Forbearance Procedures Order*. The rule is codified at 47 CFR 1.54. This notice confirms that the Commission received OMB approval for that collection on April 5, 2010 (OMB Control Number is 3060–1138).

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. Questions concerning OMB Control Number 3060–1138 and its expiration date should be directed to Judith Boley-Herman, Federal Communications Commission, Room 1–B441, 445 12th Street, SW., Washington, DC.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2011–7236 Filed 3–25–11; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 101029427–0609–02]**

**RIN 0648–XA301**

### Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer

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

**ACTION:** Temporary rule; quota transfer.

**SUMMARY:** NMFS announces that the State of North Carolina is transferring a portion of its 2010 and 2011 commercial summer flounder quotas to the Commonwealth of Virginia. Vessels were authorized by Virginia to land summer flounder under safe harbor provisions, thereby requiring a quota transfer to account for an increase in Virginia's landings that would have otherwise accrued against the North Carolina quota. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

**DATES:** Effective March 23, 2011 through December 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Carly Knoell, Fishery Management Specialist, 978–281–9224.

**SUPPLEMENTARY INFORMATION:** Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state are described in § 648.100.

The final rule implementing Amendment 5 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which was published on December 17, 1993 (58 FR 65936), provided a mechanism for summer flounder quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine summer flounder commercial quota under § 648.100(d). The Regional Administrator is required to consider the criteria set forth in § 648.100(d)(3) in the evaluation of requests for quota transfers or combinations.

North Carolina has agreed to transfer 106,013 lb (48,087 kg) of its 2011 commercial quota and 13,500 lb (6,123 kg) of its 2010 commercial quota to Virginia. This transfer was prompted by summer flounder landings of 18 North Carolina vessels that were granted safe harbor in Virginia due to mechanical problems and/or severe winter storm conditions between December 31, 2010, and March 1, 2011. The Regional Administrator has determined that the criteria set forth in § 648.100(d)(3) have been met. The revised summer flounder quotas for calendar year 2010 are: North Carolina, 3,344,731 lb (1,517,144 kg); and Virginia, 2,935,726 lb (1,331,623 kg). The revised summer flounder quotas for calendar year 2011 are: North Carolina, 4,662,739 lb (2,114,983 kg); and Virginia, 3,809,829 lb (1,728,109 kg).

## Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: March 23, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–7233 Filed 3–23–11; 4:15 pm]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 660

**[Docket No. 100218107–0199–01]**

**RIN 0648–XA293**

## Fisheries Off West Coast States; Modifications of the West Coast Commercial and Recreational Salmon Fisheries; Inseason Actions #1, #2, #3, and #4

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

**ACTION:** Modification of fishing seasons, gear restrictions, and landing and possession limits; request for comments.

**SUMMARY:** NOAA Fisheries announces four inseason actions in the ocean salmon fisheries. Inseason action #1 modified the commercial fishery in the area from Cape Falcon, Oregon to Humbug Mountain, Oregon. Inseason action #2 modified the commercial fishery in the area from Humbug Mountain, Oregon to the Oregon/California Border. Inseason action #3 modified the recreational fishery in the area from Horse Mountain, California to Point Arena, California. Inseason action #4 modified the recreational fishery in the area from Point Arena, California to the U.S./Mexico Border.

**DATES:** Inseason actions #1 and #2 were effective on March 15, 2011. Inseason actions #3 and #4 are effective April 2, 2011. Inseason actions #1, #2, #3, and #4 remain in effect until the opening of the 2011 salmon season announced in the 2011 annual management measures or until modified through additional inseason action, which will publish in the **Federal Register**. Comments will be accepted through April 12, 2011.

**ADDRESSES:** You may submit comments, identified by RIN 0648–XA293, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.*
- *Fax:* 206–526–6736, Attn: Peggy Busby.
- *Mail:* 7600 Sand Point Way, NE., Building 1, Seattle, WA 98115.

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

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Peggy Busby, by phone at 206–526–4323.

**SUPPLEMENTARY INFORMATION:**

In the 2010 annual management measures for ocean salmon fisheries (75 FR 24482, May 5, 2010), NMFS announced the commercial and recreational fisheries in the area from the U.S./Canada Border to the U.S./Mexico Border, beginning May 1, 2010, and 2011 salmon seasons opening earlier than May 1, 2011.

The Regional Administrator (RA) consulted with representatives of the Council, Oregon Department of Fish and Wildlife and California Department of Fish and Game on March 9, 2011. The information considered during this consultation related to Chinook and coho salmon 2010 spawning escapements, 2011 abundance forecasts, and annual management objectives.

Inseason action #1 delayed the scheduled opening for the commercial salmon fishery from Cape Falcon, Oregon to Humbug Mountain, Oregon, previously scheduled for March 15, 2011, to April 15, 2011. Seven days per week. All salmon except coho. All vessels fishing in the area must land their fish in the State of Oregon. See gear restrictions and definitions (C.2, C.3 in 75 FR 24482) and Oregon State regulations for a description of special regulations at the mouth of Tillamook Bay. This action was taken to comply with conservation constraints. On March 9, 2011, the states recommended this action and the RA concurred; inseason action #1 took effect on March 15, 2011. Modification of quota and/or fishing seasons is authorized by 50 CFR 660.409(b)(1)(i).

Inseason action #2 cancelled the commercial fishery from Humbug Mountain, Oregon to the Oregon/California Border previously scheduled to open on March 15, 2011. This action was taken to comply with conservation constraints. On March 9, 2011, the states recommended this action and the RA concurred; inseason action #2 took effect on March 15, 2011. Modification of quota and/or fishing seasons is authorized by 50 CFR 660.409(b)(1)(i).

Inseason action #3 established a recreational fishery from Horse Mountain, California to Point Arena (Fort Bragg), opening April 2, 2011. Seven days per week. All salmon except coho, two fish per day (C.1 in 75 FR 24482). Chinook minimum size limit of 24 inches total length. The same gear restrictions as in 2010 (C.2, C.3 in 75 FR 24482). This action was taken to provide access to fish available for harvest within conservation constraints. On March 9, 2011, the states recommended this action and the RA concurred; inseason action #3 will take effect April 2, 2011. Modification of quota and/or fishing seasons is authorized by 50 CFR 660.409(b)(1)(i).

Inseason action #4 established a recreational fishery from Point Arena, California to the California/Mexico Border, opening April 2, 2011. Seven days per week. All salmon except coho, two fish per day (C.1 in 75 FR 24482). Chinook minimum size limit of 24 inches total length. The same gear restrictions as in 2010 (C.2, C.3 in 75 FR 24482). This action was taken to provide access to fish available for harvest within conservation constraints. On March 9, 2011, the states recommended this action and the RA concurred; inseason action #4 will take effect April 2, 2011. Modification of quota and/or fishing seasons is authorized by 50 CFR 660.409(b)(1)(i).

All other restrictions and regulations remain in effect as announced for the 2010 Ocean Salmon Fisheries and previous inseason actions.

The RA determined that the best available information indicated that the catch and effort data, and projections, supported the above inseason actions recommended by the states. The states manage the fisheries in state waters adjacent to the areas of the U.S. exclusive economic zone in accordance with these Federal actions. As provided by the inseason notice procedures of 50 CFR 660.411, actual notice of the described regulatory actions was given, prior to the date the action was effective, by telephone hotline number 206–526–6667 and 800–662–9825, and

by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF–FM and 2182 kHz.

### Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds that good cause exists for this notification to be issued without affording prior notice and opportunity for public comment under 5 U.S.C. 553(b)(B) because such notification would be impracticable. As previously noted, actual notice of the regulatory actions was provided to fishers through telephone hotline and radio notification. These actions comply with the requirements of the annual management measures for ocean salmon fisheries (75 FR 24482, May 5, 2010), the West Coast Salmon Plan, and regulations implementing the West Coast Salmon Plan 50 CFR 660.409 and 660.411. Prior notice and opportunity for public comment was impracticable because NMFS and the state agencies had insufficient time to provide for prior notice and the opportunity for public comment between the time the fishery catch and effort data were collected to determine the extent of the fisheries, and the time the fishery modifications had to be implemented in order to ensure that fisheries are managed based on the best available scientific information, thus allowing fishers access to the available fish at the time the fish were available while ensuring that quotas are not exceeded. The AA also finds good cause to waive the 30-day delay in effectiveness required under U.S.C. 553(d)(3), as a delay in effectiveness of these actions would allow fishing at levels inconsistent with the goals of the Salmon Fishery Management Plan and the current management measures.

These actions are authorized by 50 CFR 660.409 and 660.411 and are exempt from review under Executive Order 12866.

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

Dated: March 23, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–7242 Filed 3–25–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**[Docket No. 101126521–0640–02]**

**RIN 0648–XZ90**

## Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands; Final 2011 and 2012 Harvest Specifications for Groundfish; Correction

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

**ACTION:** Final rule; closures; correction.

**SUMMARY:** The National Marine Fisheries Service (NMFS) is correcting a final rule that published on March 1, 2011, implementing the final 2011 and 2012 harvest specifications and prohibited species catch allowances for the groundfish fishery of the Bering Sea and Aleutian Islands Management Area (BSAI). Two tables within the document contained errors.

**DATES:** Effective from 1200 hrs, Alaska local time (A.l.t.), March 1, 2011, through 2400 hrs, A.l.t., December 31, 2012.

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907–586–7269.

**SUPPLEMENTARY INFORMATION:**

### Need for Correction

NMFS published the Final 2011 and 2012 BSAI Harvest Specifications in the **Federal Register** on Tuesday, March 1, 2011 (76 FR 11139). Tables providing information on 2011 and 2012 Directed Fishing Closures (Table 10) and the Final 2011 and 2012 American Fisheries Act Catcher Vessel BSAI Groundfish Sideboard Limits (Table 13) contained a number of minor errors. In Table 10 on page 11154, NMFS inadvertently listed an incidental catch allowance (ICA) of rock sole at "10,000" metric tons (mt), instead of the correct number of "5,000" mt. In addition, **Federal Register** formatting issues caused misalignment in Tables 10 and 13 and affected the information contained in those tables. In Table 10 on page 11154, the **Federal Register** listed the phrase "ICA rock sole" in the "sector" column rather than the "species" column. In Table 13 on page 11156, the **Federal Register** shifted seven lines upward by one row in the following columns: "Ratio of 1995–1997 TAC"; "2011 initial TAC"; "2011 AFA catcher vessel sideboard limits"; "2012 initial TAC"; and "2012 AFA catcher vessel sideboard limits". As a result of this error, Table 13 contains incorrect information on Pacific cod sideboard limits for the following gears and seasons: "Jig gear"; "Hook and line Catcher Vessels (CV)" for "Jan 1–Jun 10"; "Pot gear CV" for "Jan 1–Jun 10"; and "Trawl gear CV" for "Jan 20–Apr 1". Table 13 also contains incorrect information on Atka mackerel sideboard limits for the following areas and seasons: "Eastern AI/BS" for "Jan 1–Jun 10"; "Central AI" for "Jan 1–Jun 10"; and "Central AI" for "Jan 1–Jun 10". NMFS' corrections to Table 10 and Table 13 are listed below.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This correction notice makes only minor changes and does not change operating practices in the fisheries. Corrections should be made as soon as possible to avoid confusion for participants in the fisheries.

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

### Correction

On pages 11153, 11154, and 11156, Tables 10 and 13 are corrected to read as follows:

TABLE 10—2011 AND 2012 DIRECTED FISHING CLOSURES [1]

[Groundfish and halibut amounts are in metric tons. Crab amounts are in number of animals]

| Area | Sector | Species | 2011 Incidental catch allowance | 2012 Incidental catch allowance |
|---|---|---|---|---|
| Bogoslof District | All | Pollock | 150 | 150 |
| Aleutian Islands subarea | All | ICA pollock | 1,600 | 1,600 |
| | | "Other rockfish" | 425 | 425 |
| Eastern Aleutian District/Bering Sea. | Non-amendment 80 and BSAI trawl limited access. | ICA Atka mackerel | 75 | 75 |

TABLE 10—2011 AND 2012 DIRECTED FISHING CLOSURES [1]—Continued

[Groundfish and halibut amounts are in metric tons. Crab amounts are in number of animals]

| Area | Sector | Species | 2011 Incidental catch allowance | 2012 Incidental catch allowance |
|---|---|---|---|---|
| Eastern Aleutian District/Bering Sea. | All | Rougheye rockfish | 234 | 240 |
| Eastern Aleutian District | Non-amendment 80 and BSAI trawl limited access. | ICA Pacific ocean perch | 100 | 100 |
| Central Aleutian District | Non-amendment 80 and BSAI trawl limited access. | ICA Atka mackerel | 75 | 75 |
| | | ICA Pacific ocean perch | 75 | 75 |
| Western Aleutian District | Non-amendment 80 and BSAI trawl limited access. | ICA Atka mackerel | 40 | 40 |
| | | ICA Pacific ocean perch | 10 | 10 |
| Central and Western Aleutian Districts. | All | Rougheye rockfish | 220 | 225 |
| Bering Sea subarea | All | Pacific ocean perch | 4,854 | 4,854 |
| | | "Other rockfish" | 500 | 500 |
| | | ICA pollock | 45,072 | 45,132 |
| Bering Sea and Aleutian Islands | All | Northern rockfish | 4,000 | 4,000 |
| | | Shortraker rockfish | 393 | 393 |
| | | Squids | 361 | 361 |
| | | Skates | 14,025 | 14,025 |
| | | Sharks | 43 | 43 |
| | | Octopuses | 128 | 128 |
| | | Sculpins | 4,420 | 4,420 |
| | Hook-and-line and pot gear | ICA Pacific cod | 500 | 500 |
| | Non-amendment 80 | ICA flathead sole | 5,000 | 5,000 |
| | ICA rock sole | 5,000 | 5,000 | |
| | Non-amendment 80 and BSAI trawl limited access. | ICA yellowfin sole | 2,000 | 2,000 |
| | BSAI trawl limited access | Rock sole/flathead sole/other flatfish—halibut mortality, red king crab zone 1, *C. opilio* COBLZ, *C. bairdi* Zone 1 and 2. | 0 | 0 |
| | | Turbot/arrowtooth/sablefish—halibut mortality, red king crab zone 1, *C. opilio* COBLZ, *C. bairdi* Zone 1 and 2. | 0 | 0 |
| | | Rockfish—red king crab zone 1 | 0 | 0 |

[1] Maximum retainable amounts may be found in Table 11 to 50 CFR part 679.

TABLE 13—FINAL 2011 AND 2012 AMERICAN FISHERIES ACT CATCHER VESSEL BSAI GROUNDFISH SIDEBOARD LIMITS

[Amounts are in metric tons]

| Species | Fishery by area/gear/season | Ratio of 1995–1997 AFA CV catch to 1995–1997 TAC | 2011 initial TAC [1] | 2011 AFA catcher vessel sideboard limits | 2012 initial TAC [1] | 2012 AFA catcher vessel sideboard limits |
|---|---|---|---|---|---|---|
| Pacific cod | BSAI | | | | | |
| | Jig gear | 0 | n/a | 0 | n/a | 0 |
| | Hook-and-line CV | | | | | |
| | Jan 1–Jun 10 | 0.0006 | 207 | 0 | 208 | 0 |
| | Jun 10–Dec 31 | 0.0006 | 199 | 0 | 200 | 0 |
| | Pot gear CV | | | | | |
| | Jan 1–Jun 10 | 0.0006 | 8,685 | 5 | 8,749 | 5 |
| | Sept 1–Dec 31 | 0.0006 | 8,345 | 5 | 8,406 | 5 |
| | CV < 60 feet LOA using hook-and-line or pot gear. | 0.0006 | 4,055 | 2 | 4,084 | 2 |
| | Trawl gear CV | | | | | |
| | Jan 20–Apr 1 | 0.8609 | 33,290 | 28,659 | 33,532 | 28,868 |
| | Apr 1–Jun 10 | 0.8609 | 4,949 | 4,261 | 4,985 | 4,292 |
| | Jun 10–Nov 1 | 0.8609 | 6,748 | 5,809 | 6,797 | 5,852 |
| Sablefish | BS trawl gear | 0.0906 | 1,211 | 110 | 1,109 | 100 |
| | AI trawl gear | 0.0645 | 404 | 26 | 370 | 24 |
| Atka mackerel | Eastern AI/BS | | | | | |
| | Jan 1–Jun 10 | 0.0032 | 17,994 | 58 | 16,431 | 53 |
| | Jun 10–Nov 1 | 0.0032 | 17,994 | 58 | 16,431 | 53 |
| | Central AI | | | | | |
| | Jan 1–Jun 10 | 0.0001 | 5,037 | 1 | 4,596 | 0 |
| | Jun 10–Nov 1 | 0.0001 | 5,037 | 1 | 4,596 | 0 |
| | Western AI | | | | | |
| | Jan 1–Jun 10 | 0 | n/a | 0 | n/a | 0 |

TABLE 13—FINAL 2011 AND 2012 AMERICAN FISHERIES ACT CATCHER VESSEL BSAI GROUNDFISH SIDEBOARD LIMITS—Continued

[Amounts are in metric tons]

| Species | Fishery by area/gear/season | Ratio of 1995–1997 AFA CV catch to 1995–1997 TAC | 2011 initial TAC [1] | 2011 AFA catcher vessel sideboard limits | 2012 initial TAC [1] | 2012 AFA catcher vessel sideboard limits |
|---|---|---|---|---|---|---|
| | Jun 10–Nov 1 | 0 | n/a | 0 | n/a | 0 |
| Rock sole | BSAI | 0.0341 | 75,905 | 2,588 | 75,905 | 2,588 |
| Greenland turbot | BS | 0.0645 | 2,975 | 192 | 2,975 | 192 |
| | AI | 0.0205 | 1,318 | 27 | 1,233 | 25 |
| Arrowtooth flounder | BSAI | 0.069 | 22,015 | 1,519 | 22,015 | 1,519 |
| Kamchatka flounder | BSAI | 0.069 | 15,045 | 1,038 | 15,045 | 1,038 |
| Alaska plaice | BSAI | 0.0441 | 13,600 | 600 | 13,600 | 600 |
| Other flatfish | BSAI | 0.0441 | 2,550 | 112 | 2,550 | 112 |
| Flathead sole | BS trawl gear | 0.0505 | 37,102 | 1,874 | 37,102 | 1,874 |
| Pacific ocean perch | BS | 0.1 | 4,854 | 485 | 4,854 | 485 |
| | Eastern AI | 0.0077 | 5,054 | 39 | 5,054 | 39 |
| | Central AI | 0.0025 | 4,429 | 11 | 4,429 | 11 |
| | Western AI | 0 | n/a | 0 | n/a | 0 |
| Northern rockfish | BSAI | 0.0084 | 4,000 | 34 | 4,000 | 34 |
| Shortraker rockfish | BSAI | 0.0037 | 393 | 1 | 393 | 1 |
| Rougheye rockfish | EBS/EAI | 0.0037 | 234 | 1 | 240 | 1 |
| | CAI/WAI | 0.0037 | 220 | 1 | 225 | 1 |
| Other rockfish | BS | 0.0048 | 500 | 2 | 500 | 2 |
| | AI | 0.0095 | 425 | 4 | 425 | 4 |
| Squids | BSAI | 0.3827 | 361 | 138 | 361 | 138 |
| Skates | BSAI | 0.0541 | 14,025 | 759 | 14,025 | 759 |
| Sharks | BSAI | 0.0541 | 43 | 2 | 43 | 2 |
| Octopuses | BSAI | 0.0541 | 128 | 7 | 128 | 7 |
| Sculpins | BSAI | 0.0541 | 4,420 | 239 | 4,420 | 239 |

[1] Aleutian Islands Pacific ocean perch, and BSAI Atka mackerel, flathead sole, and rock sole are multiplied by the remainder of the TAC of that species after the subtraction of the CDQ reserve under § 679.20(b)(1)(ii)(C).

Dated: March 23, 2011.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 2011–7241 Filed 3–25–11; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 76, No. 59
Monday, March 28, 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.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 72

**[NRC–2011–0007]**

**RIN 3150–AI90**

## List of Approved Spent Fuel Storage Casks: HI–STORM Flood/Wind Addition

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC or the Commission) is proposing to amend its spent fuel storage cask regulations to add the HI–STORM Flood/Wind cask system to the "List of Approved Spent Fuel Storage Casks." This would allow the holders of power reactor operating licenses to store spent fuel in this approved cask system under a general license.

**DATES:** Comments on the proposed rule must be received on or before April 27, 2011.

**ADDRESSES:** Please include Docket ID NRC–2011–0007 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see Section I, "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods.

*Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0007. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668, e-mail: *Carol.Gallager@nrc.gov.*

*Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

*E-mail comments to: Rulemaking.Comments@nrc.gov.* If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1677.

*Hand-deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays (Telephone 301–415–1677).

*Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

**FOR FURTHER INFORMATION CONTACT:** Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6445, e-mail: *Gregory.Trussell@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal Rulemaking Web site, *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document using the following methods:

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *PDR.Resource@nrc.gov.*

*Federal Rulemaking Web site:* Public comments and supporting materials related to this proposed rule can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0007.

For additional information, see the Direct Final Rule published in the Rules and Regulations section of this **Federal Register**.

### Procedural Background

Because NRC considers this action noncontroversial and routine, the NRC is publishing this proposed rule concurrently as a direct final rule in the Rules and Regulations section of this **Federal Register**. Adequate protection of public health and safety continues to be ensured. The direct final rule will become effective on June 13, 2011. However, if the NRC receives significant adverse comments on the direct final rule by April 27, 2011, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments received in response to the proposed revisions in a subsequent final rule. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action in the event the direct final rule is withdrawn.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule, Certificate of Compliance (CoC), or Technical Specifications (TS).

For additional procedural information and the regulatory analysis, see the direct final rule published in the Rules and Regulations section of this **Federal Register**.

**List of Subjects in 10 CFR Part 72**

Administrative practice and procedure, Hazardous waste, Nuclear materials, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistle blowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended, and 5 U.S.C. 553; the NRC is proposing to adopt the following amendments to 10 CFR part 72.

## PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

1. The authority citation for part 72 continues to read as follows:

**Authority:** Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–10 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

2. In § 72.214, CoC 1032 is added to read as follows:

**§ 72.214 List of approved spent fuel storage casks.**

* * * * *

Certificate Number: 1032.

Initial Certificate Effective Date: June 13, 2011.

SAR Submitted by: Holtec International, Inc.

SAR Title: Safety Analysis Report on the HI–STORM FW System.

Docket Number: 72–1032.

Certificate Expiration Date: June 13, 2031.

Model Numbers: MPC–37, MPC–89.

Dated at Rockville, Maryland, this 8th day of February, 2011.

For the Nuclear Regulatory Commission.

**R.W. Borchardt,**

*Executive Director for Operations.*

[FR Doc. 2011–7091 Filed 3–25–11; 8:45 am]

**BILLING CODE 7590–01–P**

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## FINANCIAL STABILITY OVERSIGHT COUNCIL

## 12 CFR Part 1301

**RIN 4030–AA02**

## Implementation of the Freedom of Information Act

**AGENCY:** Financial Stability Oversight Council.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Financial Stability Oversight Council (the "Council" or "FSOC") proposes regulations to implement the Freedom of Information Act (the "FOIA"). This proposed rule would implement the requirements of the FOIA by setting forth procedures for requesting access to FSOC records. The Dodd-Frank Act, which established the Council, provides that FOIA applies to data or information submitted to the Council.

**DATES:** Comments must be received on or before May 27, 2011.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice of proposed rulemaking according to the instructions below. All submissions must refer to the document title. The Council encourages the early submission of comments.

*Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Council to make them available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

*Mail:* Send comments to Financial Stability Oversight Council, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

**Note:** To receive consideration as public comments, comments must be submitted through the method specified above. Again, all submissions must refer to the title of the notice.

*Public Inspection of Public Comments.* All properly submitted comments will be available for inspection and downloading at *http://www.regulations.gov.*

*Additional Instructions.* In general, comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

**FOR FURTHER INFORMATION CONTACT:** Amias Gerety, Deputy Assistant Secretary, Financial Stability Oversight Council, at (202) 622–0502. All responses to this Notice should be submitted via *http://www.regulations.gov* to ensure consideration.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (the "Act") established the Council to identify and respond to threats to the financial stability of the United States. Section 112(d)(5)(C) of the Act provides that the FOIA, "including the exceptions thereunder, shall apply to any data or information submitted under this subsection and subtitle B." These proposed regulations would implement the requirements of the FOIA as they apply to the Council.

## II. Section-by-Section Analysis

*Section 1301.1 General*

This section states that the purpose of the regulations is to implement the FOIA.

*Section 1301.2 Information Made Available*

This section outlines the types of records that the FOIA requires the Council to make available to the public, either as a matter of course or by request. The section also describes generally the conditions under which a person may request access to Council records. Finally, it sets forth the Council's policy for making discretionary disclosures of its records that are otherwise withholdable pursuant to the FOIA exemptions.

*Section 1301.3 Publication in the Federal Register*

This section implements the requirement of the FOIA that certain agency records be published in the **Federal Register** as a matter of course, including certain of the Council's organizational documents and rules of procedure.

*Section 1301.4 Public Inspection and Copying*

This section implements the requirement of the FOIA that certain agency records be made available to the public as a matter of course, including through publication on the Council's Web site and in a public reading room, including final opinions, statements of policy and interpretations, staff manuals, and copies of certain frequently requested and previously released Council records.

*Section 1301.5 Requests for Council Records*

This section sets forth general procedures for the public to follow when requesting copies of Council records. The section states the Council's requirements for the form and content of such requests, instructions for submitting requests, and general instructions for requesting fee waivers and/or expedited processing of requests. This section furthermore identifies the consequences to the requester of not following the prescribed instructions.

*Section 1301.6 Responsibility for Responding to Requests for Council Records*

This section outlines certain procedures that govern the Council's responses to FOIA requests. In particular, this section describes the default document date range that the Council will apply when searching for records responsive to requests, identifies persons responsible for making initial determinations as to whether to grant or deny requests, and sets forth circumstances under which the Council will refer FOIA requests to other agencies for consultation or direct response to requesters.

*Section 1301.7 Timing of Responses to Requests for Council Records*

This section identifies the statutory deadline for the Council to respond to FOIA requests and describes circumstances in which the Council may extend or toll this deadline. This section also sets forth the order in which the Council will respond to FOIA requests along with procedures for requesting expedited processing of requests. This section identifies the standards by which the Council shall determine whether to grant requests for expedited processing as well as the procedure for appealing denials of such expedited processing requests.

*Section 1301.8 Responses to Requests for Council Records*

This section details procedures for the Council to follow when notifying requesters of its receipt of their requests. It also outlines the Council's procedure, upon granting requests, for producing copies of or providing public access to requested records. Likewise, it contains procedures for the Council to follow when denying requests in whole or in part and when no responsive records are located.

*Section 1301.9 Classified Information*

This section explains the Council's procedure for responding to requests for records that are classified in accordance with Executive Order No. 13526. It also sets forth the Council's policy of conducting declassification reviews when classified documents become subject to FOIA requests.

*Section 1301.10 Requests for Business Information Provided to the Council*

This section sets forth the Council's procedure for responding to requests for records that contain information submitted to the government by businesses. In particular, this section details the circumstances under which the Council must notify businesses of FOIA requests that seek information comprising information these businesses submitted to the government. This section also provides business submitters with an opportunity to object to the Council's release of their information in response to such FOIA requests and sets forth a procedure for doing so. Finally, the section explains the procedure that governs the Council's consideration of and responses to such objections.

*Section 1301.11 Administrative Appeals*

This section identifies the grounds for which requesters may appeal certain of the Council's FOIA-related determinations, including its determinations to deny requests, in whole or in part, its determinations that no responsive records exist, its determinations to assign requesters to particular fee categories, and its determinations to deny requests for fee waivers and expedited processing. This section also sets forth the procedure that requesters must follow when filing administrative appeals, including the form and content of appeals, and the procedure that governs the Council's responses to such appeals.

*Section 1301.12 Fees for Processing Requests for Council Records*

This section sets forth the Council's fee schedule for FOIA-related services and describes the circumstances under which the Council will charge fees to requesters for searching for, reviewing and duplicating responsive records. Such fees are assessable based upon the nature of each FOIA requester and the nature and usage of services that are required for the Council to respond to FOIA requests. This section also describes the grounds and procedures for requesting a reduction or waiver of fees, and the Council's procedure for responding to such requests. Finally, the section explains how requesters can make payment to the Council as well as the circumstances in which the Council may require requesters to prepay fees.

*III. Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would establish procedures for access to Council information under the Freedom of Information Act. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Thus, fees assessed by the Council would be nominal and would not impose a significant economic impact on small entity requesters. Accordingly, a regulatory flexibility analysis is not required. The Council invites comments on the impact of this proposed rule on small entities.

**IV. Executive Order 12866**

This rule is not a significant regulatory action as defined in Section 3.f of Executive Order 12866.

**List of Subjects in 12 CFR Part 1301**

Freedom of Information.

**Financial Stability Oversight Council**

*Authority and Issuance*

For the reasons set forth in the preamble, the Financial Stability Oversight Council proposes to add a new part 1301 to 12 CFR chapter XIII, as proposed to be established at 76 FR 4562, January 26, 2011, to read as follows:

## PART 1301—FREEDOM OF INFORMATION

Sec.

1301.1 General.
1301.2 Information made available.
1301.3 Publication in the **Federal Register**.
1301.4 Public inspection and copying.
1301.5 Requests for Council records.
1301.6 Responsibility for responding to requests for Council records.
1301.7 Timing of responses to requests for Council records.
1301.8 Responses to requests for Council records.
1301.9 Classified information.
1301.10 Requests for business information provided to the Council.
1301.11 Administrative appeals.
1301.12 Fees for processing requests for Council records.

**Authority:** 12 U.S.C. 5322.

### § 1301.1 General.

This subpart contains the regulations of the Financial Stability Oversight Council (the "Council") implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. These regulations set forth procedures for requesting access to the Council's records. These regulations should be read together with the FOIA, which provides additional information about this topic.

### § 1301.2 Information made available.

(a) *General.* The FOIA provides for access to records developed or maintained by Federal agencies. The provisions of the FOIA are intended to assure the right of the public to information. Generally, this section divides agency records into three major categories and provides methods by which each category of records is to be made available to the public. The three major categories of records are as follows:

(1) Information required to be published in the **Federal Register** (see § 1301.3);

(2) Information required to be made available for public inspection and copying or, in the alternative, to be published and offered for sale (see § 1301.4); and

(3) Information required to be made available to any member of the public upon specific request (see §§ 1301.5 through 1301.12).

(b) *Right of access.* Subject only to the exemptions and exclusions set forth in the FOIA (5 U.S.C. 552(b) and (c)), and the regulations set forth in this subpart, any person shall be afforded access to information or records in the possession of the Council.

(c) *Exemptions.* (1) The disclosure requirements of 5 U.S.C. 552(a) do not apply to certain matters which are exempt under 5 U.S.C. 552(b); nor do the disclosure requirements apply to certain matters which are excluded under 5 U.S.C. 552(c).

(2) Even though a FOIA exemption set forth in 5 U.S.C. 552(b) may apply to the records requested, the Council may, if not precluded by law and in its sole discretion, make discretionary disclosures of its records. The fact that the exemption is not applied by the Council in response to a particular request shall have no precedential significance in processing other requests. This policy does not create any right enforceable in court.

### § 1301.3 Publication in the Federal Register.

Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)) and subject to the limitations provided in 5 U.S.C. 552(a)(1), the Council shall state, publish and maintain current in the **Federal Register** for the guidance of the public the following information:

(a) Descriptions of its central and field organization and the established places at which, the persons from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(b) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Council; and

(e) Each amendment, revision, or repeal of matters referred to in paragraphs (a) through (d) of this section.

### § 1301.4 Public inspection and copying.

(a) *In general.* Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the Council shall, in conformance with 5 U.S.C. 552(a)(2), make available for public inspection and copying, or, in the alternative, promptly publish and offer for sale the following information:

(1) Final opinions, including concurring and dissenting opinions, and orders, made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the Council but are not published in the **Federal Register**;

(3) Its administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records, regardless of form or format, which have been released previously to any person under 5 U.S.C. 552(a)(3) and §§ 1301.5 through 1301.12, and which the Council determines have become or are likely to become the subject of subsequent requests for substantially the same records because they are clearly of interest to the public at large. When the Council receives three (3) or more requests for substantially the same records, then the Council shall place those requests in front of any existing processing backlog and make the released records available in the Council's public reading room and in the electronic reading room on the Council's Web site.

(5) A general index of the records referred to in paragraph (a)(4) of this section.

(b) *Information made available by computer telecommunications.* For records required to be made available for public inspection and copying pursuant to 5 U.S.C. 552(a)(2) and paragraphs (a)(1) through (4) of this section, the Council shall make such records available on its Web site as soon as practicable but in any case no later than one year after such records are created.

(c) *Deletion of identifying details.* To prevent a clearly unwarranted invasion of personal privacy, the Council may delete identifying details contained in any matter described in paragraphs (a)(1) through (4) of this section before making such matters available for inspection or publishing it. The justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be

indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in 5 U.S.C. 552(b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.

(d) *Public reading room.* The Council shall make available for public inspection and copying, in a reading room or otherwise, the material described in paragraphs (a)(1) through (5) of this section. Fees for duplication shall be charged in accordance with § 1301.12. The location of the Council's reading room is the Department of the Treasury's Library. The Library is located in the Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. For building security purposes, visitors are required to make an appointment by calling (202) 622–0990.

(e) *Indices.* (1) The Council shall maintain and make available for public inspection and copying current indices identifying any material described in paragraphs (a)(1) through (3) of this section. In addition, the Council shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplement unless the Council determines by order published in the **Federal Register** that the publication would be unnecessary and impractical, in which case the Council shall nonetheless provide copies of the index on request at a cost not to exceed the direct cost of duplication.

(2) The Council shall make the indices referred to in paragraph (a)(5) and (e)(1) of this section available on its Web site.

**§ 1301.5 Requests for Council records.**

(a) *In general.* Except for records made available under 5 U.S.C. 552(a)(1) and (a)(2) and subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the Council shall promptly make its records available to any person pursuant to a request that conforms to the rules and procedures of this section.

(b) *Form and content of request.* A request for records of the Council shall be made as follows:

(1) The request for records shall be made in writing and state, both in the request itself and on any envelope that encloses it, that it comprises a Freedom of Information Act request.

(2) The request shall be addressed and submitted as follows: Financial Stability Oversight Council, Attention: FOIA Request for Council Records, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

(3) The request shall describe the records that the requester seeks in sufficient detail to enable Council personnel to locate them with a reasonable amount of effort. Whenever possible, the request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, the requester should include any file designations or descriptions for the records requested. As a general rule, the more specific the requester is about the records or type of records requested, the more likely the Council will be able to locate those records in response to the request;

(4) The request must include the name of and contact information for the requester, including a mailing address, telephone number, and, if available, an e-mail address at which the Council may contact the requester regarding the request;

(5) The request shall state whether the requester wishes to inspect the records or desires to have a copy made and furnished without first inspecting them.

(6) For the purpose of determining any fees that may apply to processing a request, a requester shall indicate in the request whether the requester is a commercial user, an educational institution, non-commercial scientific institution, representative of the news media, governmental entity, or "other" requester, as those terms are defined in § 1301.12(c). For the same purpose, a request for records shall also state how the records released will be used. The Council shall not use this information to determine the releasability of any record or records.

(7) If a requester seeks a waiver or reduction of fees associated with processing a request, then the request shall include a statement to that effect as is required by § 1301.12(f). Any request that does not seek a waiver or reduction of fees shall constitute an agreement of the requester to pay any and all fees (of up to $25) that may apply to the request, as otherwise set forth in § 1301.12, except that the requester may specify in the request an upper limit (of not less than $25) that the requester is willing to pay to process the request.

(8) If a requester seeks expedited processing of a request, then the request must include a statement to that effect as is required by § 1301.7(c).

(c) *Request receipt; effect of request deficiencies.* The Council shall deem itself to have received a request only if, and on the date that, it receives a complete request containing the information required by paragraph (b) of this section. The Council need not accept a request, process a request, or be bound by any deadlines in this subpart for processing a request that fails to conform to the requirements of paragraph (b) of this section. If a request is deficient in any respect, then the Council may return it to the requester and advise the requester in what respect the request is deficient. The requester may then resubmit the request, which the Council shall treat as a new request. A determination by the Council that a request is deficient in any respect is not a denial of access, and such determinations are not subject to appeal.

**§ 1301.6 Responsibility for responding to requests for Council records.**

(a) *In general.* In determining which records are responsive to a request, the Council ordinarily will include only records in its possession as of the date the Council begins its search for them. If any other date is used, the Council shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The Council records officer shall be authorized to make an initial determination to grant or deny a request for a record of the Council.

(c) *Consultations and referrals.* When the Council receives a request for a record or any portion of a record in its possession that originated with another federal or state agency, including but not limited to a constituent agency of the Council, it shall either:

(1) Respond to the request regarding that record, after consulting with the originating agency to determine whether to disclose it and with any other agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the originating agency to determine whether to disclose it, or to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the agency that originated a record will be presumed to be best able to determine whether to disclose it.

(d) *Notice of referral.* Whenever the Council refers all or any part of the responsibility for responding to a request to another agency, it shall notify the requester of the referral and inform the requester of the name of each agency to which the request has been referred and of the part of the request that has been referred.

**§ 1301.7 Timing of responses to requests for Council records.**

(a) *In general.* Except as set forth in paragraphs (b) through (d) of this

section, the Council shall respond to requests according to their order of receipt.

(b) *Multitrack processing.* (1) The Council may establish tracks to process separately simple and complex requests. The Council may assign a request to the simple or complex track based on the amount of work and/or time needed to process the request. The Council shall process requests in each track according to the order of their receipt.

(2) The Council may provide a requester in its complex track with an opportunity to limit the scope of the request to qualify for faster processing within the specified limits of the simple track(s).

(c) *Requests for expedited processing.* (1) The Council shall respond to a request out of order and on an expedited basis whenever a requester demonstrates a compelling need for expedited processing in accordance with the requirements of this paragraph (c).

(2) *Form and content of a request for expedited processing.* A request for expedited processing shall be made as follows:

(i) A request for expedited processing shall be made in writing and submitted as part of the initial request for records. When a request for records includes a request for expedited processing, both the envelope and the request itself must be clearly marked "Expedited Processing Requested."

(ii) A request for expedited processing shall contain a statement that demonstrates a compelling need for the requester to obtain expedited processing of the requested records. A "compelling need" is defined as follows:

(A) Failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The requester shall fully explain the circumstances warranting such an expected threat so that the Council may make a reasoned determination that a delay in obtaining the requested records could pose such a threat; or

(B) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity. A person "primarily engaged in disseminating information" does not include individuals who are engaged only incidentally in the dissemination of information. The standard of "urgency to inform" requires that the records requested pertain to a matter of current exigency to the American public and that delaying a response to a request for records would compromise a significant recognized interest to and throughout the American general public. The requester must adequately explain the matter or activity and why the records sought are necessary to be provided on an expedited basis.

(iii) The requester shall certify the written statement that purports to demonstrate a compelling need for expedited processing to be true and correct to the best of the requester's knowledge and belief. The certification must be in the form prescribed by 28 U.S.C. 1746: "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on [date]."

(3) *Determinations of requests for expedited processing.* Within ten (10) calendar days of its receipt of a request for expedited processing, the Council shall decide whether to grant it and shall notify the requester of the determination in writing.

(4) *Effect of granting expedited processing.* If the Council grants a request for expedited processing, then the Council shall give the expedited request priority over non-expedited requests and shall process the expedited request as soon as practicable. The Council may assign expedited requests to their own simple and complex processing tracks based upon the amount of work and/or time needed to process them. Within each such track, an expedited request shall be processed in the order of its receipt.

(5) *Appeals of denials of requests for expedited processing.* If the Council denies a request for expedited processing, then the requester shall have the right to submit an appeal of the denial determination in accordance with § 1301.11. The Council shall communicate this appeal right as part of its written notification to the requester denying expedited processing. The requester shall clearly mark its appeal request and any envelope that encloses it with the words "Appeal for Expedited Processing."

(d) *Time period for responding to requests for records.* Ordinarily, the Council shall have twenty (20) days (excepting Saturdays, Sundays, and legal public holidays) from when a request that satisfies the requirements of § 1301.5(b) is received by the Council to determine whether to grant or deny a request for records. The twenty (20) day time period set forth in this paragraph shall not be tolled by the Council except that the Council may:

(1) Make one reasonable demand to the requester for clarifying information about the request and toll the twenty (20) day time period while it awaits the clarifying information; or

(2) Toll the twenty (20) day time period while it addresses any dispute with the requester regarding the assessment of fees.

(e) *Unusual circumstances.* (1) Where the Council determines that, due to unusual circumstances, it cannot respond either to a request within the time period set forth in paragraph (d) of this section or to an appeal within the time period set forth in § 1301.11, the Council may extend the applicable time periods by informing the requester in writing of the unusual circumstances and of the date by which the Council expects to complete its processing of the request or appeal. Any extension or extensions of time shall not cumulatively total more than ten (10) days (exclusive of Saturdays, Sundays, and legal public holidays). However, if the Council determines that it needs additional time beyond a ten (10) day extension to process the request or appeal, then the Council shall notify the requester and provide the requester with an opportunity to limit the scope of the request or appeal or to arrange for an alternative time frame for processing the request or appeal or a modified request or appeal. The requester shall retain the right to define the desired scope of the request or appeal, as long as it meets the requirements contained in this subpart.

(2) As used in this paragraph (e), "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components or component offices having substantial subject matter interest therein.

(3) Where the Council reasonably believes that multiple requests submitted by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated.

The Council may disaggregate and treat as separate requests a single request that has multiple unrelated components.

**§ 1301.8 Responses to requests for Council records.**

(a) *Acknowledgements of requests.* Upon receipt of a request that meets the requirements of § 1301.5(b), the Council shall assign to the request a unique tracking number. The Council shall send an acknowledgement letter to the requester within ten (10) calendar days of receipt of the request that contains the following information:

(1) Identifies the applicable request tracking number;

(2) Identifies the date of receipt of the request, as determined in accordance with § 1301.5(c); and

(3) Confirms, with respect to any fees that may apply to the request pursuant to § 1301.12, that the requester has sought a waiver or reduction in such fees, has agreed to pay any and all applicable fees, or has specified an upper limit (of not less than $25) that the requester is willing to pay in fees to process the request.

(b) *Initial determination to grant or deny a request*—(1) *In general.* The officer designated in § 1301.6(b) shall make initial determinations either to grant or to deny in whole or in part requests for records.

(2) *Granting of request.* If the request is granted in full or in part, the Council shall provide the requester with a copy of the releasable documents, and shall do so in the format specified by the requester to the extent that the documents are readily producible by the Council in the requested format, or shall permit the requester to inspect the documents in accordance with § 1301.8(b)(3). The Council shall also send the requester a statement of the applicable fees, either at the time of the determination or shortly thereafter.

(3) *Inspection of records.* In the case of a request for inspection, the requester shall be notified in writing of the determination, when and where the requested records may be inspected, and of the fees incurred in complying with the request. The Council shall then promptly make the records available for inspection at the time and place stated, in a manner that will not interfere with the Council's operations and will not exclude other persons from making inspections. The requester shall not be permitted to remove the records from the room where inspection is made. If, after making inspection, the requester desires copies of all or a portion of the requested records, copies shall be furnished upon payment of the established fees prescribed by § 1301.12. Fees may be charged for search and review time as stated in § 1301.12.

(4) *Denial of request.* If it is determined that the request for records should be denied in whole or in part, the requester shall be notified in writing. The notification shall:

(i) State the exemptions relied on in not granting the request;

(ii) If technically feasible, indicate the amount of information deleted and the exemptions under which the deletion is made at the place in the record where such deletion is made (unless providing such indication would harm an interest protected by the exemption relied upon to deny such material);

(iii) Set forth the name and title or position of the responsible official;

(iv) Advise the requester of the right to administrative appeal in accordance with § 1301.11; and

(v) Specify the official or office to which such appeal shall be submitted.

(5) *No records found.* If it is determined, after an adequate search for records by the responsible official or his/her delegate, that no records have been found to exist, the responsible official will so notify the requester in writing. The notification letter shall also advise the requester of the right to administratively appeal the Council's determination that no records exist (*i.e.,* to challenge the adequacy of the Council's search for responsive records) in accordance with § 1301.11. The response shall specify the official to whom the appeal shall be submitted for review.

**§ 1301.9 Classified information.**

(a) *Referrals of requests for classified information.* Whenever a request is made for a record containing information that has been classified, or may be appropriate for classification, by another agency under Executive Order 13526 or any other executive order concerning the classification of records, the Council shall refer the responsibility for responding to the request regarding that information to the agency that classified the information, should consider the information for classification, or has the primary interest in it, as appropriate. Whenever a record contains information that has been derivatively classified by the Council because it contains information classified by another agency, the Council shall refer the responsibility for responding to the request regarding that information to the agency that classified the underlying information or shall consult with that agency prior to processing the record for release or withholding.

(b) *Determination of continuing need for classification of information.* Requests for information classified pursuant to Executive Order 13526 require the Council to review the information to determine whether it continues to warrant classification. Information which no longer warrants classification under the Executive Order's criteria shall be declassified and made available to the requester, unless the information is otherwise exempt from disclosure.

**§ 1301.10 Requests for business information provided to the Council.**

(a) *In general.* Business information provided to the Council by a business submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Definitions.* For purposes of this section:

(1) *Business information* means trade secrets or commercial or financial information obtained by the Council from a submitter that may be protected from disclosure under Exemption 4.

(2) *Submitter* means any person or entity from whom the Council obtains business information, directly or indirectly. The term includes corporations, state, local, and tribal governments, and foreign governments.

(3) *Exemption 4* refers to Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten (10) years after the date of the submission unless the submitter on his or her own initiative requests otherwise, and provides justification for, a longer designation period.

(d) *Notice to business submitters.* The Council shall provide a business submitter with prompt written notice of receipt of a request or appeal encompassing its business information whenever required in accordance with paragraph (e) of this section. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions of records containing the business information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *When notice is required.* The Council shall provide a business

submitter with notice of receipt of a request or appeal whenever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) The Council has reason to believe that the information may be protected from disclosure under Exemption 4 because disclosure could reasonably be expected to cause substantial competitive harm to the business submitter.

(f) *Opportunity to object to disclosure.* (1) Through the notice described in paragraph (d) of this section, the Council shall notify the business submitter in writing that he/she shall have ten (10) days from the date of the notice (exclusive of Saturdays, Sundays, and legal public holidays) to provide the Council with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under Exemption 4, including a statement of why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter shall be considered to have no objection to disclosure of the information. Information provided by a business submitter pursuant to this paragraph (f) may itself be subject to disclosure under the FOIA.

(2) When notice is given to a submitter under this section, the requester shall be advised that such notice has been given to the submitter. The requester shall be further advised that a delay in responding to the request may be considered a denial of access to records and that the requester may proceed with an administrative appeal or seek judicial review, if appropriate. However, the requester will be invited to agree to a voluntary extension of time so that the Council may review the business submitter's objection to disclosure.

(g) *Notice of intent to disclose.* The Council shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the Council decides to disclose business information over the objection of a business submitter, the Council shall provide the business submitter with a written notice which shall include:

(1) A statement of the reasons for which the business submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date which is not less than ten (10) days (exclusive of Saturdays, Sundays, and legal public holidays) after the notice of the final decision to release the requested information has been provided to the submitter. Except as otherwise prohibited by law, notice of the final decision to release the requested information shall be forwarded to the requester at the same time.

(h) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information covered in paragraph (c) of this section, the Council shall promptly notify the business submitter.

(i) *Exception to notice requirement.* The notice requirements of this section shall not apply if:

(1) The Council determines that the information shall not be disclosed;

(2) The information lawfully has been published or otherwise made available to the public;

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1987 Comp., p. 235); or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous—except that, in such a case, the Council shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

**§ 1301.11 Administrative appeals.**

(a) *Grounds for administrative appeals.* A requester may appeal an initial determination of the Council:

(1) To deny access to records in whole or in part (as provided in § 1301.8(b)(4));

(2) To assign a particular fee category to the requestor (as provided in § 1301.12(c));

(3) To deny a request for a reduction or waiver of fees (as provided in § 1301.12(f)(7));

(4) That no records exist that are responsive to the request (as provided in § 1301.8(b)(5)); or

(5) To deny a request for expedited processing (as provided in § 1301.7(c)(5)).

(b) *Time limits for filing administrative appeals.* An appeal, other than an appeal of a denial of expedited processing, must be submitted within thirty-five (35) days of the date of the initial determination or the date of the letter transmitting the last records released, whichever is later. An appeal of a denial of expedited processing must be made within ten (10) days of the date of the initial determination to deny expedited processing (see § 1301.7).

(c) *Form and content of administrative appeals.* The appeal shall—

(1) Be made in writing and signed by the requester or his or her representative;

(2) Be labeled "Freedom of Information Act Appeal" and addressed to and submitted to the officer specified in paragraph (e) of this section in the manner set forth in § 1301.5(b);

(3) Set forth the name of and contact information for the requester, including a mailing address, telephone number, or e-mail address at which the Council may contact the requester regarding the appeal;

(4) Specify the date of the initial request and date of the letter of initial determination, and, where possible, enclose a copy of the initial request and the initial determination being appealed; and

(5) Set forth specific grounds for the appeal.

(d) *Processing of administrative appeals.* Appeals shall be stamped with the date of their receipt by the office to which addressed, and shall be processed in the approximate order of their receipt. The receipt of the appeal shall be acknowledged by the Council and the requester advised of the date the appeal was received and the expected date of response.

(e) *Determinations to grant or deny administrative appeals.* The Chairperson of the Council or his/her designee is authorized to and shall decide whether to affirm the initial determination (in whole or in part) or to grant the request for records and shall notify the requester of this decision in writing within twenty (20) days (exclusive of Saturdays, Sundays, and legal public holidays) after the date of receipt of the appeal, unless extended pursuant to § 1301.7(e).

(1) If it is decided that the appeal is to be denied (in whole or in part) the requester shall be—

(i) Notified in writing of the denial;

(ii) Notified of the reasons for the denial, including the FOIA exemptions relied upon;

(iii) Notified of the name and title or position of the official responsible for the determination on appeal; and

(iv) Provided with a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has a principal place of business, the judicial district in which the requested records are located,

or the District of Columbia in accordance with 5 U.S.C. 552(a)(4)(B).

(2) If the initial determination is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

**§ 1301.12 Fees for processing requests for Council records.**

(a) *In general.* The Council shall charge the requester for processing a request under the FOIA in the amounts and for the services set forth in paragraph (b) through (d) of this section, except where a waiver or reduction of fees is granted under paragraph (f) of this section, or where, pursuant to paragraph (e)(4) of this section, the failure of the Council to comply with certain time limits precludes it from assessing certain fees.

(b) *Fees chargeable for specific services.* The fees for services performed by the Council shall be imposed and collected as set forth in this paragraph (b).

(1) *Duplicating records.* The Council shall charge a requester for the cost of copying records as follows:

(i) $.20 per page, up to 8½″ x 14″, made by photocopy or similar process.

(ii) Photographs, films, and other materials—actual cost of duplication.

(iii) Other types of duplication services not mentioned above—actual cost.

(iv) Material provided to a private contractor for copying shall be charged to the requester at the actual cost charged by the private contractor.

(2) *Search services.* The Council shall charge a requester for all time spent by its employees searching for records that are responsive to a request, including page-by-page or line-by-line identification of responsive information within records, even if no responsive records are found. The Council shall charge the requester fees for search time as follows:

(i) *Searches for other than electronic records.* The Council shall charge for search time at the salary rate(s) (basic pay plus sixteen (16) percent) of the employee(s) who conduct the search. However, where a single class of employee is used exclusively (*e.g.,* all administrative/clerical, or all professional/executive), an average rate for the range of grades typically involved may be established. This charge shall include transportation of employees and records necessary to the search at actual cost. Fees may be charged for search time even if the search does not yield any responsive records, or if records are exempt from disclosure.

(ii) *Searches for electronic records.* The Council shall charge the requester for the actual direct cost of the search, including computer search time, runs, and the operator's salary. The fee for computer output shall be the actual direct cost. For a requester in the "all other" category, when the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search (*i.e.,* the operator), the charge for the computer search will begin.

(3) *Review of records.* The Council shall charge a requester for time spent by its employees examining responsive records to determine whether any portions of such record are withholdable from disclosure, pursuant to the FOIA exemptions of 5 U.S.C. 552(b). The Council shall also charge a requester for time spent by its employees redacting any such withholdable information from a record and preparing a record for release to the requester. The Council shall charge a requester for time spent reviewing records at the salary rate(s) (*i.e.,* basic pay plus sixteen (16) percent) of the employees who conduct the review. However, when a single class of employee is used exclusively (*e.g.,* all administrative/clerical, or all professional/executive), an average rate for the range of grades typically involved may be established. Fees may be charged for review time even if records ultimately are not disclosed.

(4) *Inspection of records.* Fees for all services provided shall be charged whether or not copies are made available to the requester for inspection. However, no fee shall be charged for monitoring a requester's inspection of records.

(5) *Other services.* Other services and materials requested which are not covered by this part nor required by the FOIA are chargeable at the actual cost to the Council. This includes, but is not limited to:

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as express mail, etc.

(c) *Fees applicable to various categories of requesters*—(1) *Generally.* The Council shall assess the fees set forth in paragraph (b) of this section in accordance with the requester fee categories set forth below.

(2) *Requester selection of fee category.* A requester shall identify itself, in the initial FOIA request, as one of the following categories of requesters for purposes of that request:

(i) *Commercial.* A commercial use request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation. The Council may determine from the use specified in the request that the requester is a commercial user.

(ii) *Educational institution.* This refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. This category does not include requesters wanting records for use in meeting individual academic research or study requirements.

(iii) *Non-commercial scientific institution.* This refers to an institution that is not operated on a "commercial" basis as that term is defined in paragraph (c)(2)(i) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(iv) *Representative of the news media.* This refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this paragraph (c)(2)(iv), the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by subscription or by free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the

Council may also consider the past publication record of the requester in making such a determination.

(v) *Governmental entity.* This refers to any requester that constitutes a state, local, or foreign government or an international governmental organization.

(vi) "*Other*" *Requester.* This refers to a requester who does not fall within any of the previously described categories.

(3) *Determination of proper fee category.* Within twenty (20) calendar days of its receipt of a request, the Council shall make a determination as to the proper fee category to apply to a requester. The Council shall inform the requester of the determination in the request acknowledgment letter, or if no such letter is required, in writing. The Council shall base its determination upon a review of the requester's submission and the Council's own records. Where the Council has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Council may seek additional clarification before assigning the request to a specific category.

(4) *Appeals of adverse determinations of fee categories.* If and once the Council assigns a requester to a fee category, then the requester shall have the right to appeal the Council's determination in accordance with § 1301.11. The Council shall communicate this appeal right as part of its written notification to the requester of an adverse fee category determination. The requester shall clearly mark its appeal request and any accompanying envelope with the words "Appeal of Fee Category Determination."

(d) *Fees applicable to each category of requester.* The following fee schedule applies to Council requests processed under the FOIA. Specific levels of fees are prescribed for each category of requester defined in paragraph (c) of this section.

(1) *Commercial use requesters.* These requesters shall be charged the full direct costs of searching for, reviewing, and duplicating the records they request as set forth in paragraph (b) of this section. Moreover, when a request is received for disclosure that is primarily in the commercial interest of the requester, the Council is not required to consider a request for a waiver or reduction of fees based upon the assertion that disclosure would be in the public interest. The Council may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records or no records are located.

(2) *Educational and non-commercial scientific institution requesters.* These requesters shall be charged only for the cost of duplicating the records they request, except that the Council shall provide the first one hundred (100) pages of duplication free of charge. To be eligible, requesters must show that the request is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. These categories do not include requesters who want records for use in meeting individual academic research or study requirements.

(3) *Requesters who are representatives of the news media.* These requesters shall be charged only for the cost of duplicating the records they request, except that the Council shall provide them with the first one hundred (100) pages of duplication free of charge.

(4) *Governmental entities.* These requesters shall receive the records they request free of charge.

(5) *All other requesters.* Requesters who do not fit any of the categories described above shall be charged the full direct cost of searching for and duplicating records that are responsive to the request, as set forth in paragraph (b) of this section, except that the Council shall provide the first one hundred (100) pages of duplication and the first two hours of search time free of charge. The Council may recover the cost of searching for records even if there is ultimately no disclosure of records, or no records are located. Requests from persons for records about themselves filed in the Council's systems of records shall continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for duplication, after the first one hundred (100) pages are furnished free of charge.

(e) *Other circumstances when fees are not charged.* Notwithstanding paragraphs (b), (c), and (d) of this section, the Council may not charge a requester a fee for processing a FOIA request if any of the following applies:

(1) Services were performed without charge;

(2) The cost of collecting a fee would be equal to or greater than the fee itself;

(3) The fees were waived or reduced in accordance with paragraph (f) of this section; or

(4) If the Council fails to comply with any time limit under §§ 1301.7 or 1301.11, and no unusual circumstances (as that term is defined in § 1301.7(e)) or exceptional circumstances apply to the processing of the request, then the Council shall not assess search fees, or if the requester is an educational or noncommercial scientific institution (as set forth in paragraphs 1301.12(c)(2)(ii) and (iii) of this section), then the Council shall not assess duplication fees.

(f) *Waiver or reduction of fees.* (1) A requester shall be entitled to receive from the Council a waiver or reduction in the fees otherwise applicable to a FOIA request whenever the requester:

(i) Requests such waiver or reduction of fees in writing and submits the written request to the Council together with or as part of the FOIA request; and

(ii) Demonstrates that the fee reduction or waiver request is in the public interest because:

(A) Furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the government; and

(B) Furnishing the information is not primarily in the commercial interest of the requester.

(2) To determine whether the requester has satisfied the requirements of paragraph (f)(1)(ii)(A) of this section, the Council shall consider the following factors:

(i) The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be

enhanced by the disclosure to a significant extent.

(3) To determine whether the requester has satisfied the requirements of paragraph (f)(1)(ii)(B) of this section, the Council shall consider the following factors:

(i) The Council shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in § 1301.12(c)(2)(i)), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Council ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver or reduction of fees, a waiver or reduction shall be granted for those records.

(5) *Determinations of requests to reduce or waive fees.* The Council shall decide whether to grant or deny a request to reduce or waive fees prior to processing a request and within twenty (20) calendar days of its receipt of the request. The Council shall notify the requester of the determination in writing.

(6) *Effect of denying requests to reduce or waive fees.* If the Council denies a request to reduce or waive fees, then the Council shall advise the requester, in the denial notification letter, that the requester may incur fees if the Council proceeds to process the request. The notification letter shall also advise the requester that the Council will not proceed to process the request further unless the requester, in writing, directs the Council to do so and either agrees to pay any fees that may apply to processing the request or specifies an upper limit (of not less than $25) that the requester is willing to pay to process the request. If the Council does not receive this written direction and agreement/specification within thirty (30) days of the date of the denial notification letter, then the Council shall deem the request to be withdrawn.

(7) *Appeals of denials of requests to reduce or waive fees.* If the Council denies a request to reduce or waive fees, then the requester shall have the right to submit an appeal of the denial determination in accordance with § 1301.11. The Council shall communicate this appeal right as part of its written notification to the requester denying the fee reduction or waiver request. The requester shall clearly mark its appeal request and any envelope that encloses it with the words "Appeal for Fee Reduction/Waiver."

(g) *Advance notice and prepayment of fees.* (1) When the Council estimates the fees for processing a request will exceed the limit set by the requester, and that amount is less than $250, the requester shall be notified of the estimated costs. The requester must provide an agreement to pay the estimated costs; however, the requester shall also be given an opportunity to reformulate the request in an attempt to reduce fees.

(2) If the requester has failed to state a limit and the costs are estimated to exceed $250.00, the requester shall be notified of the estimated costs and must pre-pay such amount prior to the processing of the request, or provide satisfactory assurance of full payment if the requester has a history of prompt payment of FOIA fees. The requester shall also be given an opportunity to reformulate the request in such a way as to constitute a request for responsive records at a reduced fee.

(3) The Council reserves the right to request prepayment after a request is processed and before documents are released.

(4) If a requester has previously failed to pay a fee within thirty (30) calendar days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Council begins to process a new request or the pending request.

(5) When the Council acts under paragraphs (g)(1) through (4) of this section, the administrative time limits of twenty (20) days (excluding Saturdays, Sundays, and legal public holidays) from receipt of initial requests or appeals, plus extensions of these time limits, shall begin only after fees have been paid, a written agreement to pay fees has been provided, or a request has been reformulated.

(h) *Form of payment.* Payment may be made by check or money order payable to Financial Research Fund.

(i) *Charging interest.* The Council may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the Council. The Council will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(j) *Aggregating requests.* Where the Council reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Council may aggregate those requests and charge accordingly. The Council may presume that multiple requests of this type made within a thirty (30) calendar day period have been made in order to avoid fees. Where requests are separated by a longer period, the Council will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

Dated: March 18, 2011.

**Alastair Fitzpayne,**

*Deputy Chief of Staff and Executive Secretary, Department of the Treasury.*

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## FINANCIAL STABILITY OVERSIGHT COUNCIL

## 12 CFR Part 1320

**RIN 4030–AA01**

## Authority To Designate Financial Market Utilities as Systemically Important

**AGENCY:** Financial Stability Oversight Council.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Section 804 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "DFA") provides the Financial Stability Oversight Council (the "Council") the authority to designate a financial market utility (an "FMU") the Council determines is or is likely to become systemically important—that is, the failure of or a disruption to the functioning of which could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the United States financial

system. This notice of proposed rulemaking (NPR) describes the criteria that will inform, and the processes and procedures established under the DFA for, the Council's designation of FMUs as systemically important under the DFA. The Council, on December 21, 2010, published an advance notice of proposed rulemaking regarding the designation criteria in section 804.

**DATES:** Comments must be received on or before May 27, 2011.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice of proposed rulemaking according to the instructions below. All submissions must refer to the document title. The Council encourages the early submission of comments.

*Electronic submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Council to make them available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

*Mail:* Send comments to Financial Stability Oversight Council, *Attn:* Lance Auer, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

**Note:** To receive consideration as public comments, comments must be submitted through the method specified. Again, all submissions must refer to the title of the notice.

*Public Inspection of Public Comments.* All properly submitted comments will be available for inspection and downloading at *http://www.regulations.gov.*

*Additional Instructions.* In general comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

**FOR FURTHER INFORMATION CONTACT:** Lance Auer, Deputy Assistant Secretary (Financial Institutions), Treasury, at (202) 622–1262, Kirsten J. Harlow, Senior Policy Advisor, Treasury, at (202) 622–2612, or Steven D. Laughton, Senior Counsel, Office of the General Counsel, Treasury, at (202) 622–8413. All responses to this Notice should be submitted via *http://www.regulations.gov* to ensure consideration.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The DFA generally defines an FMU as any person that manages or operates a multilateral system for the purposes of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and that person. Section 803(6)(B) of the DFA specifically excludes a number of entities, such as designated contract markets and national securities exchanges meeting certain criteria, from the definition of an FMU. FMUs form a critical part of the nation's financial infrastructure and their smooth functioning is integral to the soundness of the financial system and the overall economy. The importance of these utility-like arrangements has been highlighted by the recent period of market stress. FMUs exist in many financial markets to support and facilitate the transferring, clearing or settlement of financial transactions. Their function, however, as well as their interconnectedness also concentrates a significant amount of risk in the market. The payment and settlement processes of these systems are highly interdependent, either directly through operational, contractual or affiliation linkages, or indirectly through liquidity flows or common participants. Problems at one system could spill over to other systems or financial institutions in the form of liquidity and credit disruptions.

Section 111 of the DFA established the Council. Among the purposes of the Council under section 112 is to "(J) identify systemically important FMUs * * * (as that term is defined in title VIII)." Section 804 of the DFA gives the Council the authority to identify and designate an FMU that is, or is likely to become, systemically important if the Council determines that a failure of or disruption to an FMU could create, or increase, the risk of significant liquidity or credit problems spreading across financial institutions and markets and thereby threaten the stability of the U.S. financial system. Any designation of an FMU requires a two-thirds vote of serving members (including an affirmative vote by the Chairperson), after consultation with the Federal Reserve Board of Governors (the "Board of Governors") and the relevant federal agency that has primary jurisdiction over a designated FMU under Federal banking, securities, or commodity futures laws ("Supervisory Agency").

The designation of an FMU as systemically important by the Council then subjects the designated FMU to the requirements of Title VIII. In particular, section 805(a) authorizes the Board of Governors, the CFTC, and the SEC, in consultation with the Council and one or more Supervisory Agencies, to prescribe risk management standards governing the operations related to the payment, clearing, and settlement activities of systemically important FMUs. The objective and principles for the risk management standards prescribed under section 805(a) shall be to promote robust risk management and safety and soundness, reduce systemic risk, and support the stability of the broader financial system. These standards may address areas, as outlined in section 805(c), such as risk management policies and procedures, margin and collateral requirements, participant or counterparty default policies and procedures, the ability to complete timely clearing and settlement of financial transactions, capital and financial resource requirements for designated FMUs and other areas that are necessary to achieve these objectives and principles. In addition, as set forth in section 806(a), the Board of Governors may authorize a Federal Reserve Bank to establish and maintain an account for a designated FMU and provide the services listed in section 11A(b) of the Federal Reserve Act to the designated FMU. Designation further subjects the designated FMU to additional examinations, enforcement actions and reporting requirements.

On December 21, 2010, the Council published an advance notice of proposed rulemaking (an "ANPR") with 10 questions to invite public comment on the statutory criteria, as laid out in section 804(a)(2), and the analytical framework that should be applied by the Council in designating FMUs under the DFA. This comment period closed on January 20, 2011. This NPR describes the criteria that will inform, and the processes and procedures established under the DFA for, the Council's designation of FMUs under the DFA. This NPR does not address the designation criteria and analytical framework for payment, clearing, or settlement activities carried out by financial institutions, as defined in section 803(7) of the DFA, which the Council is considering separately.

## II. Public Responses to ANPR

The Council received 12 comments in response to the ANPR from industry groups, advocacy and public interest

groups, individual FMUs and financial institutions.[1] These comments addressed the Council's specific questions, as well as a range of other issues. Commenters generally encouraged the development of metrics and an analytical framework as laid out under section 804(a)(2) emphasizing the need for the Council to apply consistent standards that incorporate both qualitative and quantitative factors across all FMUs under consideration for designation. Some commenters provided specific feedback on particular metrics and considerations that should be used in the designation process, while many also commented more broadly on the analytical framework that should be applied by the Council. In addition, a few commenters asked for the Council to apply a transparent and clear communication strategy surrounding all designation decisions. The questions asked by the Council in the ANPR are provided below, along with an overview of the comments received in response to each question.

1. What quantitative and qualitative information should the Council use to measure the factors it is required to consider in Section 804(a)(2) when making determinations under Section 804 of the DFA? How should quantitative and qualitative considerations be incorporated into the determination process?

The majority of comments stressed the need to apply consistent standards that incorporate both qualitative and quantitative factors that are not overly mechanical across all FMUs.[2] Most commenters stated that while there could be no "one-size-fits-all" approach, all criteria should be used to measure each FMU under consideration, with the relative importance of each criterion varying depending upon the FMU under consideration. Considerations such as the differences in the type of market served by the FMU, the nature and size of the counterparties, and the complexity and liquidity of products accepted should be taken into account. Furthermore, one commenter in particular cautioned the Council to ensure that FMUs that serve the same market are provided identical treatment, so as not to affect competition.[3] One commenter, however, emphasized the need for the flexible application of each criterion within the framework due to the different types and concentrations of risk, different market structures, different governance and risk management standards across FMUs, and differences in the potential impact of an FMU's disruption on markets, households, and the financial system.[4]

In addition, there was widespread consensus on the primary factors that should be used for consideration by the Council to assist in the assessment of systemic importance. Notably, these factors included: The level of interdependence of an FMU and its participants, the characteristics of the participants in an FMU, the type of market served by the FMU, the availability of substitute services, whether the FMU operates under finality of settlement, the risk management framework, including capital, margin and liquidity practices and financial resources available to the FMU, governance arrangements, and the extent of existing regulatory oversight. Some commenters also proposed that the Council use a matrix of criteria that incorporates actual historic measures as a way to interpret metrics based on relative thresholds. Please see the discussion of public responses to question (5b) of the ANPR below for a more comprehensive discussion of these factors.

A few commenters also noted that the process used for designation should be transparent to the public, or at least to the FMUs being considered. Many noted the importance for the Council to consider ongoing work and developments in the adoption of international standards in the area of payments, clearing and settlement organizations to ensure that a uniform and consistent cross-border approach is established that incorporates existing best practices and core principles.

2. Can the considerations listed in section 804(a)(2) be broken down into easily measured factors that the Council should use to determine whether financial market utilities are systemically important? Are there certain levels of quantitative measures (*e.g.,* for value and exposure) or qualitative characteristics (*e.g.,* registered clearing agencies versus exempt clearing agencies) that should trigger a review for systemic importance by the Council?

There was significant consensus among commenters expressing support for the statutory considerations listed to measure an FMU, with many noting that metrics should be relatively easy to develop for these considerations.[5] However, as mentioned in the discussion of public response to question (1) of the ANPR above, most commenters emphasized the importance for the Council to consider these factors in conjunction with qualitative measures and professional judgments.

3. Which of the considerations listed in section 804(a)(2) are most important for the Council to consider? Should the application of the considerations differ depending on the type of FMU, and if so how?

Most commenters believed that all the considerations listed in the statute were equally important for the Council to consider. Some commenters placed particular emphasis on systemic importance, size, interconnectedness, the availability of substitutes, and concentration, as well as the need to balance quantitative metrics with qualitative judgments for a more accurate assessment.

4. How should the Council measure and assess the aggregate monetary value of transactions processed by financial market utilities?

One commenter specifically suggested that absolute terms of value be considered relative to factors such as an FMU's market share, size, importance of the market served, and the number of households affected. An FMU, for example, may process a high absolute value of transactions but may not be systemically important if there are other FMUs that could readily provide an alternative in the event of a disruption, or if the market it serves were not systemically important. The idea that readily available substitutes for the services of an FMU would reduce its systemic importance was a common theme among the majority of commenters, although the operational practicality of switching to a substitute would have to be considered. This commenter also suggested that the value and volume of transactions be considered in light of the FMU's potential performance during actual or projected times of stress.[6]

One commenter argued that, while the absolute number of contracts and aggregate notional value of contracts cleared over a period of time are useful indicators for the measuring of value, it

[1] Comments were received from: American Bankers Association, Better Markets, The Clearing House, Debevoise & Plimpton, The Depository Trust & Clearing Corporation, The Financial Services Roundtable, International Swaps and Derivatives Association, LCH.Clearnet Group Limited, NACHA—The Electronic Payments Association, The Pew Charitable Trusts, TIAA–CREF, and Visa. Comments are available at *http://www.regulations.gov.*

[2] *See, e.g.* comment letter from International Swaps and Derivatives Association, Inc. (Jan. 20, 2011) (hereinafter the "ISDA letter"), pp. 2–3, and comment letter from Depository Trust & Clearing Corporation (Jan. 20, 2011) (hereinafter the "DTCC letter"), pp. 2–4.

[3] See the DTCC letter, p. 3.

[4] See comment letter from TIAA–CREF (Jan. 20, 2011) (hereinafter the "TIAA–CREF letter"), p. 9.

[5] *See, e.g.* the ISDA letter, p. 4.

[6] See the TIAA–CREF letter, p. 8.

is important to consider average and peak daily levels of open interest to have a more comprehensive analysis. Furthermore, the commenter suggested the importance of also considering risk and liquidity in conjunction with any measures of value. To do so, risk should be measured using the average and peak daily levels of posted margin as well as the day-over-day change in margin levels using gross margin calls. For liquidity, the commenter suggested measuring the size and historic volatility of bid/ask spreads, the number of members that actively trade the contracts cleared, and the diversity of member trading volumes.[7]

a. For each type of financial market utility (*e.g.,* central counterparty, funds transfer system), what is the best approach for measuring value (*e.g.,* notional values, margin flows, net versus gross values)?

As noted, most commenters stated that regardless of the type of FMU, the same criteria and metrics should be applied to each FMU under consideration for designation.

One commenter indicated that for central counterparties ("CCPs"), daily variation margin flow—the changes in values of securities and derivatives contracts that are cleared—and initial margin requirements, should be the primary quantitative references used. In addition, the commenter suggested that the assessment also separately examine the value of securities and commodities that are delivered between a CCP and its members upon maturity of contracts. This commenter also noted that there are two different conventions used by CCPs to process changes in mark-to-market values. Revaluations of derivatives positions tend to result in daily payments and collection of cash, while mark-to-market changes in cash markets affect collateral requirements but not cash obligations. To make assessments of transactional values, both conventions must be covered. The commenter also noted that for both types of conventions used by CCPs to process changes in mark-to-market values, it is important to consider how netting impacts such values.[8]

To assess the systemic importance of the aggregate monetary value of transactions, one commenter suggested looking at the size of an FMU at both the aggregate and transaction level.[9] Another commenter maintained that the aggregate monetary value of transactions between an FMU and its members is a rough measure of the exposure of the rest of the financial system to an FMU. This commenter lays out a framework, as outlined in response to question (9) of the ANPR that considers credit, liquidity, portfolio and fire-sale exposures, as well as the value of positions held in a depositary, the value of credit lines available to the FMU, and the gross flow between an FMU and its members.[10]

b. What time horizon/statistic should be used when assessing value (*e.g.,* daily, monthly or annual averages; daily, monthly, or annual peaks?). Should the Council consider historical values, projected future values, or both?

There was some difference in opinion expressed by commenters in response to this question with regard to the time horizons that should be used to assess value. One commenter believed that the most significant consideration is an FMU's performance during times of actual or projected market stress, arguing that no single time horizon would effectively capture this performance in all cases. The number of measures should be looked at together with one another and in conjunction with periodic stress tests that are tailored in volume and time horizon to be situation specific and contain qualitative factors. The commenter argued that a measure such as an annual peak will only show an FMU's ability to handle that volume at a given moment, but not whether it would be adequate to handle this same volume under different market conditions or whether it could absorb additional transactions if needed.[11]

In contrast, a different commenter argued that annual peaks, calculated on the basis of a rolling 365 days rather than on the previous calendar year, would be the most appropriate and conservative estimates that would ensure that periods of stress are captured.[12] Another commenter also argued that annual historical values were the most verifiable and readily available form of information and should be used when assessing value. The commenter argued that the time horizon need not be shorter to better capture the importance of an FMU to the financial system, noting that this level of importance is unlikely to change from month to month or quarter to quarter.[13]

One commenter argued that consideration should be given to both the maximum daily value of transactions processed within a given timeframe (at least one year) and, in the case of CCPs, this measure should be stress-tested using the same scenarios as required by supervisors to measure the adequacy of the FMU's default backing and liquidity resources. This would mean that if a CCP's financial resource requirement is greater than a specified value, then it should be designated. The commenter also argued that the Council should also consider whether the FMU processes a significant share of transactions of a specific type and the extent to which the FMU's major participants are domiciled, or have parent companies that are domiciled, in the U.S.[14]

c. Should different measures be applied to different types of financial market utilities based on their activities, products, or markets?

As already mentioned, the majority of commenters argued that the same framework of criteria should be applied equally to each FMU under consideration.[15] However, it was also widely emphasized that the Council must employ flexibility and qualitative judgment in its application of the criteria to evaluate each FMU under consideration in light of differences in the activities, products and markets served by FMUs.

d. What is the best approach for measuring potential aggregate monetary values for start-up financial market utilities?

One commenter argued that in light of the lack of data that would be available in the case of a start-up and the lack of reliable estimates of projected volumes, the Council would have to give greater weight to other qualitative factors, such as the sophistication of risk management techniques in the market.[16] Another commenter said that credible forecasts would be possible and should be considered by supervisors in addition to factors such as stress scenarios and the potential markets to be served.[17]

e. Should certain payment systems that transfer relatively low aggregate values be considered by the Council for designation as systemically important given that the system's failure or

[7] See comment letter from Better Markets (Jan. 20. 2011) (hereinafter the "Better Markets letter"), p. 7.

[8] See comment letter from LCH.Clearnet (Jan. 20, 2011) (hereinafter the "LCH.Clearnet letter"), p. 4.

[9] See the TIAA–CREF letter, p. 8.

[10] See comment letter from The Pew Charitable Trust (Jan. 19, 2011) (hereinafter the "Pew letter"), p. 8.

[11] See the TIAA–CREF letter, pp. 8–9.

[12] See the Pew letter, p. 10.

[13] See comment letter from The Financial Services Roundtable (Jan 20, 2011) (hereinafter the "Financial Services Roundtable letter"), p. 3.

[14] See the LCH.Clearnet letter, p. 5.

[15] See, *e.g.* the TIAA–CREF letter, p. 9.

[16] See the TIAA–CREF letter, p. 9.

[17] See the LCH.Clearnet letter, pp. 5–6.

disruption could still cause widespread disruption, especially if there is no ready alternative means of making payments? For example, the failure or disruption of a system used extensively to make payments could leave a significant portion of the general public with unexpected overdrafts and/or lack of liquid funds. If so, what factors should the Council consider in making a determination of systemic importance for such systems?

Many commenters urged the Council to consider only the largest interbank payment systems for designation, arguing that smaller retail systems do not fit the definition of "systemically important." [18] There was significant consensus among commenters in the reasons provided for this argument, namely that: (i) Retail systems operate relatively low-aggregate monetary value systems that do not settle transactions for important financial markets or other payment systems; (ii) there are reliable and timely substitutes for retail payments; (iii) retail systems do not operate real-time final settlement systems, meaning that the liquidity would not be guaranteed to be available immediately for pending outgoing payments; and (iv) retail systems are already under strong regulatory oversight and designations would result in unnecessary costs and regulatory burdens.[19] Also of note, one commenter mentioned that the ability of depository institutions to permit overdrafts to cover retail payments strongly mitigates the potential for a disruption to a low-value system to have a systemic impact that could threaten the stability of the U.S. financial system.[20]

While largely mentioning similar reasoning for why low-value systems would likely not qualify for designation, two commenters argued that such systems should first be evaluated to determine if a disruption to them would have a significant impact on a substantial market or a large number of households, or if there were no readily-available substitutes.[21]

5. How should the Council measure and assess the aggregate exposure of financial market utilities engaged in payment, clearing, or settlement activities to its counterparties?

a. How should the Council identify the extent to which financial market utilities bear and create risk exposures for themselves and their participants?

b. What measures of exposure should be considered (*e.g.,* liquidity exposures, current and potential future counterparty credit exposures, operational risk, and the degree of concentration of exposures across participants)?

There was significant consensus among commenters on the types of factors that should be used by the Council. These include: (i) The liquidity, complexity and volatility of the asset classes/market served by the FMU; (ii) whether the FMU has the potential to create significant liquidity disruptions or dislocations in the event of a failure; (iii) whether the FMU has the potential to create large credit or liquidity exposures relative to participants' financial capacity; (iv) whether the FMU covers a high proportion of large-value transactions; (v) if, and, if so, how many, large financial institutions and/or other FMUs rely on the FMU for its own operations; (vi) whether there are reliable and timely substitutes with other FMUs; [22] (vii) whether the FMU offers finality in settlement, arguing that participants rely on real-time finality to settle positions elsewhere such that a disruption in such a system is more likely to have an effect on a participant's counterparties than in a system without immediate settlement finality; [23] (viii) how the ownership and governance arrangements affect the incentives and risk-tolerance of an FMU; [24] and (ix) whether the FMU is already subject to an existing regulatory regime, arguing that an FMU already under supervision would be less likely to require further designation and that therefore a systemically important designation under Title VIII would result in unnecessary costs and regulatory burdens, as well as the establishment of duplicate regimes of oversight.[25] While some commenters did not specify which types of existing oversight were adequate to avoid designation, several commenters specifically indicated that institutions that are already subject to comprehensive Federal Reserve oversight, have access to central bank liquidity, and/or are already subject to designation under Title I of the DFA, should not be designated.[26]

A majority of commenters also suggested that if standards and policy in risk management, governance, capital, margin, and liquidity were strong and well-managed, this would reduce the need for designation. Several commenters emphasized the importance of considering the governance and ownership arrangements of FMUs, noting the importance of aligning the interests of an FMU so that it engages in prudent behavior. For those FMUs that have achieved this balance such that a significant portion of equity capital is at risk, they argue that the FMU would pose a lesser degree of systemic risk. These commenters suggest that the inherent risk alone that an FMU may concentrate or be exposed to should not be considered in isolation. Rather, they argue that the adoption of strong risk mitigating practices could greatly reduce systemic risk, and therefore the need for designation.

c. For each type of financial market utility (*e.g.,* central counterparty, funds transfer system), what is the best approach for measuring current credit exposure or, where relevant, potential future exposures? For liquidity (funding), how might the Council assess the potential liquidity risks that a financial market utility may bear or liquidity risks it may impose on the broader financial system should it fail to settle as expected?

When assessing credit risk, most commenters emphasized the importance of looking at both the quality of the counterparties and the products served by the FMU. When assessing liquidity risk, many commenters emphasized the importance of considering the concentration of the FMU in the market and the capacity/substitutability available among other FMUs. Several commenters also suggested that the Council make use of existing risk assessment tools such as approaches outlined under Basel and in the CPSS/IOSCO Recommendations for CCPs as a foundation to build on.[27] In addition, many emphasized the importance of using stress tests as a useful way to measure liquidity risk, as well as reverse stress tests to help identify issues of macro prudential concern.

[18] *See, e.g.,* comment letter from The Clearing House (Jan. 20, 2011) (hereinafter "Clearing House letter"), pp. 1–2 and comment letter from NACHA—The Electronic Payments Association (Jan. 18, 2011) (hereinafter the "NACHA letter"), pp. 3–4.

[19] *See, e.g.,* comment letter from the American Bankers Association (Jan. 20, 2010) (hereinafter "ABA letter"), pp. 3–5, comment letter VISA (Jan. 20, 2011) (hereinafter the "VISA letter"), pp. 3–6, and the Financial Services Roundtable Letter, p. 4.

[20] See the NACHA letter, p. 4.

[21] See the TIAA–CREF letter, p. 9 and the Pew letter, p. 10.

[22] *See, e.g.* the VISA letter, pp. 8–9.

[23] *See, e.g.* the VISA letter, p. 8.

[24] *See, e.g.,* the ISDA letter, p. 3.

[25] *See, e.g.* the ABA letter, p. 2, 5.

[26] *See, e.g.,* the comment letter from Debevoise & Plimpton (Jan. 20, 2011) (hereinafter "the Debevoise letter"), pp. 2–5.

[27] *See, e.g.,* ISDA letter, p. 5; CPSS–IOSCO, "Recommendations for Central Counterparties" (November 2004); "Guidance on the Application of the 2004 CPSS–IOSCO Recommendations for Central Counterparties to OTC Derivatives CCPs—Consultative Report" (May 2010).

One commenter argued that the sources of liquidity for an FMU, which are highly related to the underlying credit of members, should be ignored or severely discounted in any analysis. The commenter argued that during a time of stress, sources of liquidity are unreliable because members will be unlikely to respond to an FMU's call for additional support during a severe market event and major default of another member. Similarly, the commenter argued that lines of credit and liquidity will not likely be available in a major default scenario.[28]

6. How should the Council identify, measure, and assess the effects of relationships, interdependencies, and other interactions of financial market utilities listed as considerations in section 804(a)(2)?

a. What role should models of interdependencies (e.g., correlations; stress tests) play in the Council's determinations?

Many commenters discussed the importance of using stress tests and correlations in any model to measure levels of interdependence, although there was some variation in the appropriate assumptions and time horizons that should be used. One commenter, for example, emphasized the need for the stress scenarios to use both historical worst-case scenarios as well as future potential events in order to apply more extreme cases of market illiquidity.[29] In addition, some argued that correlations both between counterparties and industry sectors and between financial markets and instruments should be incorporated and appropriately stress-tested.[30]

b. What role should the nature of participants or counterparties play in the Council's determinations (*e.g.* common participants across utilities, systemic importance of participants)?

The majority of commenters emphasized the importance of examining the nature of participants and counterparties to an FMU, particularly as a means of measuring interdependence and concentration. This should include considerations such as the type and number of counterparties, particularly if they are significant financial firms or FMUs, as well as the nature of relationships these counterparties have to each other and other FMUs.

c. Should the Council consider the legal, corporate, or contractual relationships of financial market utilities in assessing relationships, interdependencies, and other interactions (*e.g.,* common holding company, joint ventures, cross-margining agreements, and service provider relationships)?

One commenter emphasized the importance for FMUs to operate under a well-established and enforceable legal framework. In particular, the commenter emphasized the importance of assessing the legal risks arising from cross-border relationships, governance and corporate structures and any affiliates or holding companies that are under the same control as the FMU and thus depend on the same creditors. Furthermore, the commenter noted that the Council should consider any cross-margining and/or outsourcing and servicing relationships that an FMU may have.[31] Please see the discussion of public responses provided to question (7) of the ANPR for more detailed information.

Another commenter emphasized this point as well, noting the importance for the Council to consider legal, corporate, or contractual relationships of FMUs. This commenter emphasized the importance of paying attention to cases where the same legal entity is acting in multiple capacities, for example if a legal entity acts both as a market operator and a CCP, and also as a participant in a money or tri-party market. Furthermore, this commenter argued that the Council should carefully consider cases in which the holding company of an FMU has significant exposure to foreign markets.[32]

d. Should the Council consider whether there are readily available substitutes for the payment, clearing, and settlement services of financial market utilities?

The importance of readily available substitutes for an FMU was a theme common among all commenters, who argued that the availability of a readily-available alternative would significantly reduce the systemic threat an FMU posed to the financial system, thereby reducing the need for designation by the Council.

7. How should the Council assess whether failures or disruptions to a financial market utility could potentially threaten the financial system of the United States?

a. What measures, information and thresholds should be used in assessing the effect of a financial market utility failure or disruption on critical markets and financial institutions? For example, how might the Council assess potential credit and liquidity effects and spillovers from a financial market utility disruption?

The vast majority of commenters emphasized the importance of considering the level of interconnectedness of participants—both directly and indirectly—of an FMU as well as between FMUs. These relationships would help inform the Council on the potential effect on all relevant market participants in the event that an FMU is unable to function. While some explicitly believed that this should be limited to a more permanent long-term loss of function, noting that temporary disruptions such as operational failures should not be considered, one commenter believed that any potential disruption should be examined to understand the dependencies of participants on the FMU and the resulting impact on the economy as a whole.

Furthermore, nearly all commenters noted the importance of considering the type of counterparties to an FMU, and whether they themselves are systemically important, as well as the concentration of the market and the availability of substitutes. Other factors mentioned widely by commenters, as elaborated on in question (5b) were the capital and liquidity cushions of an FMU, its governance structure, whether or not it offered finality of settlement, and the nature, in terms of size, depth and volatility, of the market that it serves.

As mentioned in question (6a) as well, many suggested the importance of using stress tests and a variety of extreme but plausible assumptions in order to assess the effects from any disruption.

b. What factors should the Council consider when determining whether markets served by financial market utilities are critical? What qualitative or quantitative characteristics might lead the Council to scope in or out particular markets?

Many commenters emphasized the importance of considering the size, depth and volatility of a particular market in order to determine its systemic importance. Furthermore, many argue that the Council should also consider the type and number of participants to the market—for example, if they themselves are systemically important, this will increase the likelihood that the market itself is critical—as well as what percentage of a market may be used by a large percentage of U.S. households.

One commenter argued that all types of disruptions—both temporary and permanent—must be examined by the Council. In addition, the commenter suggested considering whether the

[28] See the Better Markets letter, pp. 7–8.

[29] See the Better Markets letter, p. 8.

[30] *See, e.g.,* the LCH.Clearnet letter, p. 7.

[31] See the TIAA–CREF letter, p. 11.

[32] See the LCH.Clearnet letter, p. 7.

failure or suspension of a market for a significant period of time interrupts the supply of vital foodstuffs or energy, halts commercial activity, or prevents financial institutions from managing their own risks.[33]

8. Title VIII of the DFA contains distinct provisions with respect to financial market utilities and financial institutions engaged in payment, clearing and settlement activities. What factors should the Council consider in distinguishing between a systemically important financial market utility and a financial institution that is very substantially engaged in a systemically important payment, clearing, or settlement activity?

Most commenters urged the Council to ensure that any designations did not lead to duplicative oversight regimes.[34] Furthermore, it was noted that if an institution were designated under Title I, it should not also be subject to designation under Title VIII. One commenter believes that the same qualitative and quantitative criteria and metrics should be applied in all cases, including if the potential designee is a financial institution.[35]

A different commenter stated that the distinction is a critical issue for market participants but that it requires clarification by the Council in order to allow stakeholders the ability to provide a substantive answer.[36]

9. What other types of information would be effective in helping the Council determine systemic importance? What additional factors does your organization consider when assessing exposure to, or the interconnectedness of, financial market utilities?

In addition to the set of common factors elaborated on in question (5b), one commenter also suggested that the Council consider an FMU's opacity/complexity/disclosure, leverage, rate of change of activity, role in monetary and/or fiscal policy, segregation of client margin, business conduct rules, execution requirements, and methodology of margin calculation.[37]

One commenter developed a framework for consideration by the Council. This framework attempts to measure three broad components in order to value systemic significance: fragility of the FMU, exposure of its financial firm members to its failure, and fragility of the members. The framework involves seven steps: (1) Developing a set of "heightened reporting firms;" (2) identifying factors—such as leverage, liquidity, concentration, risk management, complexity, and credit exposure—that can affect systemic significance, defining measures for each factor and dividing them into factors that affect fragility of the FMU and factors that affect exposure of firms to FMUs; (3) estimating the fragility of each heightened reporting firm that is a member of each FMU; (4) estimating the exposure of members to each FMU and for each FMU candidate; (5) creating a single measure of the system's vulnerability by adding up the measures of exposures of all heightened reporting member firms to the candidate FMU, weighted by their fragility estimates; (6) estimating systemic importance of an FMU using several statistical factors; and (7) applying a universal threshold to each FMU to ultimately determine designation.[38]

Lastly, one commenter noted that a supervisory gap existed in the oversight of internet-based payment systems, including P2P payment systems, and asked for the Council to consider the appropriate actions to take to close this loophole.[39]

10. What role should international considerations play in designating financial market utilities?

In response to this question, many commenters emphasized the importance of adopting international standards and best practices, such as the CPSS Core Principles[40] and the work of the Financial Stability Board[41] to promote common standards and cross-border cooperation. Particularly in light of the interconnectedness of global markets, commenters emphasized that adherence to internationally agreed upon standards would help ensure consistency in practice across FMUs globally.[42]

One commenter argued that the global nature of markets serviced by FMUs as well as the interconnectedness of the global financial system as a whole means that there should be no differences in criteria employed when considering the designation of FMUs that may have substantial foreign activities. As a result, the commenter argued that U.S. supervisors have a justification and need for concomitant supervisory access to any foreign FMU deemed systemically important.[43]

One commenter urged the Council to be conservative when applying Title VIII to non-U.S. entities because Title VIII does not expressly provide for extra-territorial application. To the extent that the Council does apply Title VIII to non-U.S. entities, this commenter urged the Council to ensure that any determination maintains a level playing field for domestic and foreign FMUs with a comparable regulatory regime. Furthermore, the commenter noted that participation in government support programs should not be a factor in identifying whether an FMU is systemically important.[44]

## III. Overview of Proposed Rule

Proposed part 1320 of Title 12 ("Rule 1320") lays out the framework that the Council proposes to use to determine whether an FMU should be designated as systemically important. The proposed rule incorporates and augments the requirements set forth in the DFA with respect to the determination of whether to designate an FMU as systemically important. The Council requests comment on all aspects of the proposed rule, but in particular, comments in response to the specific questions raised below. The Council is providing a sixty (60) day comment period for this proposed rule.

### *A. Considerations for Determination*

Section 804 of the DFA provides the Council with the authority to designate those FMUs the Council determines are systemically important—that is, the failure of or a disruption to the functioning of which could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system. Section 803(6)(A) of the DFA generally defines an FMU as any person that manages or operates a multilateral system for the purposes of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and that person. Under section 804(a)(2) of the DFA, in making a determination on whether the FMU should be designated as systemically important, the Council must consider:

A. The aggregate monetary value of transactions processed by the FMU;

B. The aggregate exposure of the FMU to its counterparties;

C. The relationship, interdependencies, or other interactions of the FMU with other FMUs or

[33] See the LCH.Clearnet letter, p. 8.

[34] *See, e.g.* the Debevoise letter, p. 2.

[35] See the LCH.Clearnet letter, p. 8.

[36] See the Financial Services Roundtable letter, p. 5.

[37] See the ISDA letter, pp. 5–7.

[38] See the Pew letter, pp. 3–7.

[39] See the Clearing House letter, p. 10.

[40] *See* CPSS "Core Principles for Systemically Important Payment Systems" (Jan. 2001).

[41] *See, e.g. http://www.financialstabilityboard.org.*

[42] *See, e.g.,* the ISDA letter, pp. 6–7.

[43] See the LCH.Clearnet letter, p. 9.

[44] See the Financial Services Roundtable letter, pp. 5–6.

payment, clearing or settlement activities;

D. The effect that the failure of or a disruption to the FMU would have on critical markets, financial institutions, or the broader financial system; and

E. Any other factors that the Council deems appropriate.

As discussed in Part II, there were several themes in the ANPR commentary regarding how the Council should apply the statutory considerations to the designation process.

One broad theme from the commenters is that the analytical framework for evaluating an FMU should be applied consistently across all FMUs and that the process used for designation be transparent to the public, or at least to the FMUs under consideration. The Council agrees with the broad theme raised by commenters that it is important to have a consistent framework and transparent process for all FMUs under consideration. However, not all criteria will be relevant to each FMU under consideration. The Council believes it would be appropriate to adopt a flexible approach to the analysis of metrics applicable to each FMU under consideration. Thus, the framework itself should accommodate the range of payment, clearing, and settlement activities that FMUs may engage in and allow the application of relevant criteria to each FMU under consideration, with the relative importance of the criteria applied to be informed by the specific circumstances of the FMU's role in the financial system and the Title VIII definition of "financial market utility." Several commenters also supported the need to weigh qualitative considerations in addition to quantitative factors.

The Council shares the concerns of commenters and proposes to develop a systematic and robust process that is consistent with the intent of the DFA. Such an analytical framework would be based on the four specific considerations for systemic importance set forth in section 804(a)(2) of the DFA. This framework would apply consistent criteria to FMUs under consideration, recognizing differences across FMUs, including differences in risk management structures and in the potential impact of an FMU's disruption on markets, households, and the financial system. In addition, the Council shares the view of the commenters that both quantitative and qualitative judgments be applied to this process. The Council provides further information with regard to this analytical framework and related process in sections III.B and III.C below.

The Council is equally interested in maintaining a transparent process, which is in keeping with one of the broader goals of the DFA. In particular, there is a provision in the proposed rule for notification of each FMU prior to a vote on a proposed designation, providing the FMU an opportunity to present the Council with arguments and information supporting or opposing its designation. In providing for an appropriately transparent process to the public, the Council will need to take into account that much of the information gathered and decisions made will be sensitive and likely require confidential handling so as not to reveal proprietary information or affect competition. Nonetheless, the Council will establish as transparent a process as is appropriate.

With respect to the criteria for designation, there was broad consensus in the comments on the factors that the Council should incorporate into the analytical framework. The most common suggestions included: an examination of the type of market served by the FMU, the potential for large credit or liquidity dislocations in the event of a disruption, the proportion of large-value transactions that the FMU serves, the nature of counterparties to the FMU, the availability of substitutes for participants in the event of an FMU disruption, and whether the FMU offers finality in settlement.

The Council agrees with commenters that many of these factors could offer considerable insight into the designation process and will consider incorporating them into the analytical framework that is developed. As noted, further insight into the types of factors that may be incorporated into the Council's analysis is further detailed in section III.B.

Many commenters also urged the Council to only consider the largest interbank payment systems for designation, arguing that smaller retail systems do not fit the definition of systemically important. Many of the commenters argued that retail systems settle relatively low-aggregate monetary value, that there are reliable and timely substitutes for retail payments, and that such systems do not operate with finality in settlement and are already under strong regulatory oversight.

While the Council recognizes that the definition of an FMU covers a wide variety of systems, including low-value and large-value payment systems, it acknowledges that the factors raised by several commenters concerning retail payment systems are important considerations. In considering the systemic importance of various FMUs, the Council will take these factors into consideration as well as other relevant characteristics. The Council has decided not to include any categorical exclusion for retail payment or other systems in the proposed regulations because it believes that such exclusions would impair the Council's ability to effectively respond to changing market conditions and industry developments.

Several commenters specifically indicated that institutions that are already subject to comprehensive Federal Reserve oversight, have access to central bank accounts and liquidity, or are already subject to designation under Title I should not be designated. Some also argued that FMUs that are already subject to prudential oversight, have strong risk management frameworks, governance standards, and sufficient financial resources in place have developed controls that would reduce the need for designation since the risk of a systemic disruption would be considerably lower.

The Council recognizes the importance of oversight and of FMU's maintaining strong controls to mitigate the risk of failure. However, the purpose of Title VIII is to consider designating certain FMUs as systemically important because while FMUs that conduct or support multilateral payment, clearing, or settlement activities may reduce risks for their participants, such utilities may also concentrate and create new risks. Recognizing this, Title VIII instructs the Council to designate as systemically important any FMU whose failure or disruption could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the U.S. Thus, the Council is instructed to designate FMUs based on the effect that a disruption or failure of the FMU would have on the stability of the U.S. financial system. The likelihood of that precipitating event—that is to say, the likelihood, in light of any risk mitigating practices that may be in place, that an FMU *would* experience a disruption or failure is *not* one of the statutory considerations.

There were several other suggestions raised in the comment letters in which there was no consensus. In particular, there were a number of different suggestions provided in response to ANPR question 4 on how the Council should measure and assess the aggregate monetary value of transactions processed by an FMU. Commenters suggested a variety of approaches for measuring value (notional values, margin flows, net versus gross values, etc.) and defining time horizons and

statistics (annual, peak, etc.). There was further divergence in thought with regard to ANPR question 6 on the type of model that should be used to measure interdependencies, (e.g., correlations, stress tests). The Council appreciates the range of suggestions provided by the commenters. The analytical framework and associated subcategories and metrics reflect the Council's efforts to incorporate commenters' suggestions, which are further outlined in section III.B.

Lastly, in response to ANPR question 10, many commenters took the opportunity to stress the importance of applying consistent standards across borders, specifically advocating the use of international core principles and best practices to ensure consistency and a level playing field. One commenter cautioned the Council to be conservative in applying Title VIII to non-U.S. entities. The Council requests further comment on the role international considerations should play in this rule making, in particular on the application of the proposed analytical framework and the subcategories contained in the proposed section 1320.10 given cross-border payment, clearing and settlement flows, and cross-border participation in FMUs.

*B. Statutory and Analytical Framework for Designations*

The proposed rule incorporates each of the statutory factors that must be considered into the analytical framework to determine whether an FMU should be designated. In developing the proposed rule, the Council has also taken into consideration the comments received on the ANPR. If adopted into a final rule, this framework would be used by the Council to meet its statutory obligations of assessing the threat the failure or disruption of an FMU may pose to the stability of the U.S. financial system. In addition, the Council would consider any other risk-related factors that the Council deems appropriate, under section 804(a)(2)(E).

The Council would evaluate FMUs under each of the four statutory considerations as laid out in section 804(a)(2) of the DFA, in addition to any additional factors it deems appropriate, using quantitative metrics where possible. The Council expects to use its judgment, informed by data on the four considerations, to determine whether an FMU should be designated as systemically important and thus subject to heightened risk management standards prescribed by the Board of Governors, the SEC, or the CFTC, in consultation with the Council and relevant Supervisory Agencies. These standards will take into consideration relevant international standards and existing prudential requirements governing the operations related to the payment, clearing and settlement activities of designated FMUs.

Any determinations of the Council made under the proposed rule using the analytical framework would be based on whether the failure or disruption of the FMU could pose a threat to the financial stability of the U.S. financial system as described in DFA section 803(9).

Under the proposal, the Council expects to use the four statutory considerations as a base for the framework for assessing the systemic importance of FMUs, regardless of the type of payment, clearing and/or settlement activities that they are engaged in. However, the application of this framework would be adapted for the risks presented by a particular type of FMU and business model. For example, the metrics that are best suited to measure the four categories of systemic importance will likely vary across FMUs. The Council will review these metrics on a periodic basis and revise them as appropriate.

In addition, the process that the Council will use to evaluate potential FMUs for designation under an analytical framework is outlined in more detail under section III.C. Briefly, the Council is considering using a two stage process for evaluating FMUs prior to a vote of proposed designation by the Council. The first stage will consist of a largely data-driven process for the Council, working with its committees [45] to identify a preliminary set of FMUs, whose failure or disruption could potentially threaten the stability of the U.S. financial system. In the second stage, the FMUs identified through the initial review will be subject to a more in-depth review, with a greater focus on qualitative factors, in addition to FMU and market specific considerations.

Proposed Analytical Framework

To provide further transparency into the analytical framework that the Council is considering, set forth below is additional information regarding the types of metrics that may be considered by the Council.

Stage One

As described above, the Council is proposing subcategories to further build out the four specific statutory considerations that are set forth in DFA section 804(a)(2). Some of these subcategories and associated metrics are described below to provide illustrative examples of how the factors will be considered in assessing systemic importance.

Consideration (A): Aggregate monetary value of transactions processed by an FMU

- Number of transactions processed, cleared or settled by the FMU

Within this subcategory, examples of the types of metrics that the Council may consider include the mean and median daily gross and net volumes processed, cleared or settled; the historical peak daily gross and net volumes processed; and the volumes processed, cleared or settled as a percentage of the total market volume; and for derivatives central counterparties, the median and peak daily changes in open interest.

- Value of transactions processed, cleared or settled, by the FMU

For this second subcategory, examples of the types of metrics that the Council may consider include the mean and median daily gross and net values processed, cleared or settled; the historical peak daily gross and net values processed, cleared or settled; and the values processed, cleared or settled as a percentage of the total market value.

- Value of other financial flows that may flow through an FMU

For this third subcategory, the Council may consider the mean and median daily value of variation margin; the peak daily value and change of variation margin; and the peak daily value of funding flows.

Consideration (B): Aggregate exposure of an FMU to its counterparties

- Credit exposures [46] to counterparties

Within this first subcategory, the Council may consider the use of metrics that measure the mean daily and historical peak aggregate intraday credit provided to participants; the mean and peak daily changes in the value of variation margin collected by an FMU; the mean and peak daily value of initial margin held by an FMU; and the mean and peak aggregate value of an FMU's financial resources held to address the credit risks arising from a potential participant default (i.e., participant, clearing or margin fund).

- Liquidity exposures to counterparties

Under the second subcategory, the Council may consider measures of the

[45] See "Financial Stability Oversight Council Committee Structure" (Nov. 23, 2010 Council Meeting Document), available at *http://www.treasury.gov/initiatives/Pages/FSOC-index.aspx.*

[46] In the context of derivatives clearing, the term "credit exposures" refers to potential future exposures.

estimated peak liquidity need in the case of the default of the largest single participant to the FMU, the mean and peak aggregate dollar value of pay outs by an FMU to participants; and the mean and peak value of financial resources available to the FMU, broken out by liquidity and quality.

Consideration (C): Relationship, interdependencies, or other interactions of an FMU with other FMUs or payment, clearing or settlement activities

Within this category, the Council may consider metrics that measure the relationships and interdependencies of an FMU, including those that measure interactions of an FMU with different participants, such as systemically important financial and/or nonfinancial companies, central banks, or other payment, clearing or settlement systems, with trading platforms (such as exchanges and alternative trading systems), and with the market environment more generally, including contractual relationships, that support the operations of an FMU.

Consideration (D): Effect that the failure of or disruption to an FMU would have on critical markets, financial institutions or the broader financial system

- Role of an FMU in the market served

The Council may consider metrics such as the type of market(s) served by an FMU and the FMU's role in primary and secondary markets.

- Availability of substitutes

Under the second subcategory, the Council may consider the number of other FMUs that may serve the same function and/or product and how readily available a potential substitute would be for participants, considering such additional factors as operational capability and timing.

- Concentration of participants

Under the third subcategory, the Council may consider metrics that look at concentrations of the single largest participant, the top five participants and the top ten participants, as a percentage of the value and volume of activity by all participants.

- Concentration by product type

Under this subcategory, the Council may consider information regarding the degree to which the FMU is a major or sole processor for a particular financial contract or instrument.

- Degree of tiering

Under this subcategory, the Council may consider information regarding the number of an FMU's indirect participants, as well as the concentration of such indirect clearing through an FMU's direct participants.

- Potential impact/spillover in the event of a failure or disruption.

Lastly, under this sixth subcategory, some examples of the types of metrics that the Council may consider include the number and type of systemically important financial and non-financial institutions participating in the activities of the FMU; and the daily gross value of repurchase agreements (both securities-driven and cash-driven), as well as other instruments that are cleared or settled by an FMU.

Consideration (E): Any other factors that the Council deems appropriate

Under this statutory consideration, the Council retains its ability to consider additional subcategories, metrics and qualitative factors as may be relevant based on the particular characteristics of an individual FMU being reviewed, including for example the nature of its operations, corporate structure and business model, and to add any relevant subcategories and metrics to the proposed analytical framework.

Stage Two

The second stage will provide the Council with the opportunity to perform a more in-depth review and analysis of specific FMUs from both a quantitative and qualitative perspective. In this stage, the Council can consider any elements that may be particular to a specific FMU, a type of FMU or market. Each FMU under consideration will undergo a tailored analysis of the potential impact that a failure of or a disruption to the function of the FMU has on the stability of the U.S. financial system, such as the creation of, or increase to, the risk of significant liquidity or credit problems spreading among financial institutions or markets.

Review of Prior Considerations and Designations

The Council expects to begin assessing the systemic importance of FMUs under the proposed analytical framework shortly after adopting a final rule. Subsequently, on at least an annual basis, the Council will continue to evaluate whether there are other FMUs that require designation, and whether previous designations of systemically important FMUs should be rescinded.

*C. Evaluation Process for Designations*

Overview of Process

The proposed rule implements provisions of Title VIII of the DFA that outline the process that the Council, working with its committees, will carry out in making designations. As noted, the Council is considering using a two stage process for evaluating FMUs prior to a presentation to the Council of an initial assessment of the FMU for a formal vote of proposed designation by the Council. If an FMU reaches the second stage of this evaluation process, the Council will notify the FMU under consideration and provide the FMU with an opportunity to submit written materials to the Council in support of or in opposition to, as it deems relevant, designation by the Council as outlined in proposed section 1320.11. In the case of an affirmative formal vote of the proposed designation by two-thirds of the Council, including the Chairperson, an FMU will be notified and given the opportunity to request a written or oral hearing before the Council to demonstrate that the proposed designation or rescission is not supported by substantial evidence as outlined in proposed section 1320.12. Following this, the Council will complete its considerations and carry out its final vote and notification to the FMU. Below is a more detailed stage-by-stage discussion of the proposed process.

Stage One Process: Identification of FMUs for Further Evaluation

The first stage will be largely data-driven to identify a preliminary set of FMUs, whose failure or disruption could potentially threaten the stability of the financial system of the United States, and which therefore should be subject to a more thorough review under the second stage. This first stage will be informed by both publicly available information and information that is available to a Federal agency with jurisdiction over the FMU. The assessments in stage one will result in materials that provide an overview of the FMUs for further review and consideration. This first-stage identification of potentially systemically important FMUs will be performed at least annually. A reassessment of already designated FMUs will also occur at least annually.

Stage Two Process: In-Depth Evaluation of FMUs under Consideration

The second stage will involve a more in-depth review and analysis, from both a quantitative and qualitative perspective, of the FMUs determined to merit further assessment based on the first-stage review. This stage involves consideration of additional elements that may be particular to a specific FMU or type of FMU and assembly of a detailed assessment of the FMU and in-depth analysis for consideration by the Council in connection with the Council's determination whether to

make a formal vote of proposed designation. The Council will provide an FMU with the opportunity to submit a written statement in support of or opposition to, as it deems relevant, designation by the Council as provided in proposed section 1320.11. Any statement submitted by an FMU will be included in information provided to the Council for its consideration in connection with the Council's formal vote of proposed designation. The Council is proposing to provide this opportunity as part of the two-stage evaluative process, in addition to the statutory requirement affording an FMU notification and opportunity for hearing before the Council's final vote on whether to designate an FMU as systemically important.

In addition, the Council has the opportunity under stage two to request further information from an FMU (as per section 809(a)(1) of the DFA), if the information needed is not available publicly or from a federal agency with jurisdiction over the FMU. The FMU will be notified that this information is being collected to help evaluate whether it should be designated by the Council, based on the Council's determination that there is reasonable cause to believe the FMU meets the regulatory criteria for designation.

## IV. Explanation and Proposed Rules

The Council is providing a sixty (60) day comment period for this proposed rule.

### *A. Authority and Purpose*

Proposed section 1320.1(a) clarifies that sections 111, 112, 804, 809, and 810 of the DFA provide the statutory authority for the Council to promulgate this part. Proposed section 1320.1(b) explains that the principal purpose of the part is to set forth standards and procedures governing the Council's designation of FMUs that the Council determines are, or are likely to become, systemically important.

### *B. Definitions*

Proposed section 1320.2 contains definitions that are necessary to implement the proposed rules. The proposed definitions (including "financial market utility," "Supervisory Agency," and "systemically important") are taken from the statutory language in sections 2 and 803 of the DFA. The Council is soliciting comment on all aspects of the proposed definitions. In particular, the Council requests comment on whether additional definitions are needed to implement the proposed rules.

### *C. Considerations for Designating FMUs*

Proposed section 1320.10 lists five factors for the Council to consider in making a determination on whether to designate or rescind the designation of an FMU. The five factors are derived from section 804(a)(2) of the DFA. Of the five factors, four are specific and the fifth—any other factors that the Council deems appropriate—is open-ended. For purposes of providing greater transparency as to how the Council will apply each of the specific factors, the Council proposes to include subcategories in the proposed rule. These subcategories are not exclusive, and the Council may take additional items into consideration under each statutory factor when appropriate, in the Council's experience and judgment in light of the particular circumstances of any FMU, but the Council believes including illustrative subcategories will give the public a better understanding of the designation process.

With regard to the first factor covering the aggregate monetary value of transactions processed by an FMU, the Council proposes to consider the number of transactions processed, the value of transactions cleared, settled, and processed, and the value of other financial flows.[47] The Council believes that information derived from this subcategory will inform an evaluation of the extent of an FMU's operations.

For the second factor covering the aggregate exposure of the FMU to its counterparties, the Council proposes to consider credit exposures [48] and liquidity exposures. The Council believes that these two subcategories will assist in formulating an assessment of an FMU's exposures to its counterparties.

For the third factor covering the relationship, interdependencies, or other interactions of an FMU with other FMUs or payment, clearing, or settlement activities, the proposed rule focuses on understanding the FMU's interactions by types of participants. The Council believes that this subcategory will help provide a foundation for an evaluation of the extent to which an FMU is interconnected with other FMUs, the payment, clearing, or settlement activities of financial institutions or the financial markets as a whole.

For the fourth factor covering the effect that the failure of or a disruption to an FMU would have on critical markets, financial institutions, or the broader financial system, the proposed rule lists subcategories focused on the roles of the FMU in the market served, the availability of substitutes, the concentration of participants and product types, the degree of tiering, and the potential impact or spillover in the event of a failure or disruption. The Council believes that these six subcategories will assist the Council's evaluation of the effect of the failure of or a disruption to an FMU on critical markets, financial institutions, and the broader financial system.

The Council requests comment on whether the subcategories in each specific factor are clear, sufficiently detailed, and appropriate. In particular, the Council requests comment on whether the Council should add subcategories, and whether the Council should eliminate or modify any of the proposed subcategories.

### *D. Consultation With Financial Market Utility*

Proposed section 1320.11 provides that before providing an FMU with notice of a proposed determination under section 1320.12, the Council will provide an FMU with written notice that the Council is reviewing the FMU under this part and allow the FMU to submit written materials to the Council in support of or in opposition to, as the FMU deems relevant, designation by the Council. Written materials may also include any actions the FMU proposes to take to reduce or increase its systemic risk. The proposed rule does not fix the time frame for an FMU to submit written materials, but rather leaves it up to the Council to decide such timing on a case-by-case basis. The Council believes such flexibility is appropriate to provide FMUs appropriate time to gather and submit information. The Council believes that affording FMUs that progress to Stage 2 of the review process an opportunity to voluntarily submit information to the Council will be mutually beneficial. Specifically, the Council believes an FMU will benefit by having an opportunity to provide the Council with information and analysis that the FMU deems relevant on whether to make a proposed determination. The Council believes that any written materials provided by an FMU will allow it to make a more informed decision regarding a proposed determination. However, the Council notes that the submission of any written materials by an FMU under this proposed section 1320.11 is strictly voluntary. The Council requests comment on the utility of the proposed

[47] Examples of the value other financial flows may include analysis of the gains, losses or collateral related to other transactions.

[48] In the context of derivatives clearing, the term "credit exposures" refers to potential future exposures as opposed to actual credit extended.

voluntary collection of information. In particular, the Council requests comment on whether the Council should establish a set time period for FMUs to submit written materials to the Council or whether flexibility in the time permitted for FMUs to submit information is appropriate.

*E. Advance Notice of Proposed Determination*

Proposed section 1320.12 sets out the process by which the Council will provide an FMU with advance notice and an opportunity for a hearing to contest the Council's proposed determination. As set forth in section 804(c)(2) of the DFA, the Council will provide an FMU with advance written notice of its proposed determination. The FMU will generally have thirty (30) calendar days to request a hearing before the Council to demonstrate that the Council's proposed determination is not supported by substantial evidence. Upon receipt of a timely request for a hearing, the Council will fix a time for the hearing, which in most instances will be through the submission of written materials to the Council, not more than thirty (30) calendar days after receipt of the request for a hearing. The Council requests comment on whether the proposed process is sufficiently detailed and clear.

*F. Council Determination Regarding Systemic Importance*

Proposed section 1320.13 sets out the requirement for the Council to designate an FMU and rescind the designation of a designated FMU depending on whether the standards for systemic importance are met. Proposed section 1320.13 makes clear that any Council proposed or final determination is non-delegable and requires at least a two-thirds vote of the voting members then serving, including the affirmative vote of the Chairperson of the Council. The proposed rule also requires the Council to consult with the relevant Supervisory Agency and the Federal Reserve Board before making any proposed or final determination. These requirements are taken from the statutory language in section 804(a), (b), and (c)(1) of the DFA. The Council requests comment on whether the proposed process is sufficiently detailed and clear.

*G. Emergency Exception*

Proposed section 1320.14 sets out an emergency exception that allows the Council to waive or modify the notice, consultation and hearing requirements set forth in the proposed rules and designate an FMU as systemically important. The Council may invoke this exception only where the Council makes a determination that an emergency designation is necessary to prevent or mitigate an immediate threat to the financial system posed by the FMU. The exercise of this emergency exception requires at least a two-thirds vote of the voting members of the Council then serving, including the affirmative vote of the Chairperson of the Council. In addition, the Council must provide notice of its use of the emergency exception to the FMU no later than 24 hours after such exception is invoked. The emergency exception is based on statutory language in section 804(c)(3) of the DFA. The Council requests comment on whether the proposed emergency exception is sufficiently detailed and clear. In particular, the Council requests comment on whether it should provide a designated FMU an opportunity for a hearing to contest the Council's determination to waive the notification and hearing requirements and the extent to which the opportunity for a hearing should mirror section 113(f)(4) and (5) of the DFA.

*H. Notification of Final Determination*

In accordance with section 804(d) of the DFA, proposed section 1320.15 sets out the deadline for the Council to notify an FMU of the Council's final determination after providing an FMU notice of the proposed determination and an opportunity for a hearing. If the FMU has timely requested a hearing, the Council must notify the FMU in writing of its final determination within 60 calendar days of the hearing, which must also include the Council's findings of fact upon which the Council's determination is based. If an FMU does not timely request a hearing, the Council will notify the FMU in writing of its final determination within 30 calendar days after the expiration of the date by which the FMU could have requested a hearing. The Council requests comment on whether the notification process is sufficiently detailed and clear. In particular, the Council requests comment on whether the notification to an FMU that did not timely request a hearing should also include the Council's findings of fact.

*I. Extension of Time Periods*

As set forth in section 804(e) of the DFA, proposed section 1320.16 authorizes the Council to extend the time periods by which an FMU may request a hearing and submit written materials to contest the Council's proposed determination, the 24 hour time period for the Council to notify an FMU of an emergency designation, and the time period for the Council to notify an FMU of its final determination. The Council requests comment on whether the extension of time periods process is sufficiently detailed and clear.

*J. Council Information Collection and Coordination*

Proposed section 1320.20 authorizes the Council to require any FMU to submit information that the Council may require for the sole purpose of assessing whether the FMU is systemically important. However, before the Council may impose an information collection burden on an FMU, the Council must have reasonable cause to believe that the FMU meets the standards for systemic importance. The Council must also coordinate with the FMU's Supervisory Agency to determine if the requested information is available from or may be obtained by the Supervisory Agency. If the Supervisory Agency is unable to provide the Council with the requested information in less than 15 calendar days after the date the material is requested, the Council may then request the information directly from the FMU. In requesting information from an FMU, the Council must provide a written explanation of the basis for the Council's reasonable cause determination. The Council believes that providing a written explanation to the FMU will help reduce or mitigate an FMU's paperwork burden by providing specific context to the Council's request. This information collection and coordination authority is substantially derived from the statutory language in section 809 of the DFA. The Council requests comment on whether the information collection and consultation process is sufficiently detailed and clear. In particular, the Council requests comment on the utility of the Council providing an FMU with a written explanation of the basis for its belief that the FMU is systemically important.

**V. Regulatory Flexibility Act**

It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. The rule would apply only to FMUs whose failure could pose a threat to the stability of the U.S. financial system Size is an important factor, although not the exclusive factor, in assessing whether an FMU's failure could pose a threat the stability of the U.S. financial system. The Council does not expect the rule to directly affect a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory

Flexibility Act (5 U.S.C. 601, *et seq.*) is not required.

**VI. Paperwork Reduction Act**

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Financial Stability Oversight Council, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to Kirsten J. Harlow, Department of the Treasury, Washington, DC 20220. Comments on the collection of information must be received by May 27, 2011. Comments are specifically requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Council, including:

Whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these proposed regulations are found in § 1320.11, § 1320.12, and § 1320.20.

Estimated total annual reporting burden: 500 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 valid control number assigned by the Office of Management and Budget.

**VII. Executive Order 12866**

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. 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.

**List of Subjects in 12 CFR Part 1310**

Administrative practice and procedure, Banks, banking, Commodity futures, Electronic funds transfers, Financial market utilities, Securities.

**Financial Stability Oversight Council**

*Authority and Issuance*

For the reasons set forth in the preamble, the Financial Stability Oversight Council proposes to add a new part 1320 to 12 CFR chapter XIII, as proposed to be established at 76 FR 4562, January 26, 2011, to read as follows:

## PART 1320—DESIGNATION OF FINANCIAL MARKET UTILITIES

Sec.

**Subpart A—General**

1320.1 Authority and purpose.
1320.2 Definitions.

**Subpart B—Consultations, Determinations and Hearings**

1320.10 Factors for consideration in designations.
1320.11 Consultation with Financial Market Utility.
1320.12 Advance notice of proposed determination.
1320.13 Council determination regarding systemic importance.
1320.14 Emergency exception.
1320.15 Notification of final determination.
1320.16 Extension of time periods.

**Subpart C—Information Collection**

1320.20 Council information collection and coordination.

**Authority:** 12 U.S.C. 5321; 12 U.S.C. 5322; 12 U.S.C. 5463; 12 U.S.C. 5468; 12 U.S.C. 5469

### Subpart A—General

**§ 1320.1 Authority and purpose.**

(a) *Authority.* This part is issued by the Financial Stability Oversight Council under sections 111, 112, 804, 809, and 810 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") (12 U.S.C. 5321, 5322, 5463, 5468, and 5469).

(b) *Purpose.* The principal purpose of this part is to set forth the standards and procedures governing the Council's designation of a financial market utility that the Council determines is, or is likely to become, systemically important.

**§ 1320.2 Definitions.**

The terms used in this regulation have the following meanings:

*Appropriate Federal banking agency.* The term "appropriate Federal banking agency" has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), as amended.

*Board of Governors.* The term "Board of Governors" means the Board of Governors of the Federal Reserve System.

*Council.* The term "Council" means the Financial Stability Oversight Council.

*Designated financial market utility.* The term "designated financial market utility" means a financial market utility that the Council has designated as systemically important under § 1320.13.

*Designated clearing entity.* The term "designated clearing entity" means a designated financial market utility that is a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) or a clearing agency registered with the Securities and Exchange Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1).

*Financial institution.* The term "financial institution"—

(1) Means—

(i) A depository institution as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(ii) A branch or agency of a foreign bank, as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101);

(iii) An organization operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601–604a and 611 through 631);

(iv) A credit union, as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);

(v) A broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c);

(vi) An investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3);

(vii) An insurance company, as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a-2);

(viii) An investment adviser, as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2);

(ix) A futures commission merchant, commodity trading advisor, or commodity pool operator, as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a); and

(x) Any company engaged in activities that are financial in nature or incidental to a financial activity, as described in section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) Does not include designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, securities information processors solely with respect to the activities of the entity as a securities information processor, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or designated clearing entities, provided that the exclusions in this paragraph apply only with respect to the activities that require the entity to be so registered.

*Financial market utility.* The term "financial market utility"—

(1) Means any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person; and

(2) Does not include—

(i) Designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap data execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered; and

(ii) Any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a financial market utility or a participant therein in connection with the furnishing by the financial market utility of services to its participants or the use of services of the financial market utility by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the financial market utility.

*Payment, clearing, or settlement activity.*

(1) The term "payment, clearing, or settlement activity" means an activity carried out by 1 or more financial institutions to facilitate the completion of financial transactions, but shall not include any offer or sale of a security under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), or any quotation, order entry, negotiation, or other pre-trade activity or execution activity.

(2) For purposes of paragraph (1), the term "financial transaction" includes—

(i) Funds transfers;

(ii) Securities contracts;

(iii) Contracts of sale of a commodity for future delivery;

(iv) Forward contracts;

(v) Repurchase agreements;

(vi) Swaps;

(vii) Security-based swaps;

(viii) Swap agreements;

(ix) Security-based swap agreements;

(x) Foreign exchange contracts;

(xi) Financial derivatives contracts; and

(xii) Any similar transaction that the Council determines to be a financial transaction for purposes of this part.

(3) When conducted with respect to a financial transaction, payment, clearing, and settlement activities may include—

(i) The calculation and communication of unsettled financial transactions between counterparties;

(ii) The netting of transactions;

(iii) Provision and maintenance of trade, contract, or instrument information;

(iv) The management of risks and activities associated with continuing financial transactions;

(v) Transmittal and storage of payment instructions;

(vi) The movement of funds;

(vii) The final settlement of financial transactions; and

(viii) Other similar functions that the Council may determine.

(4) Payment, clearing, and settlement activities shall not include public reporting of swap transactions under section 727 or 763(i) of the Dodd-Frank Act.

*Supervisory Agency.* The term "Supervisory Agency"—

(1) Means the Federal agency that has primary jurisdiction over a designated financial market utility under Federal banking, securities, or commodity futures laws as follows—

(i) The Securities and Exchange Commission, with respect to a designated financial market utility that is a clearing agency registered with the Securities and Exchange Commission.

(ii) The Commodity Futures Trading Commission, with respect to a designated financial market utility that is a derivatives clearing organization registered with the Commodity Futures Trading Commission.

(iii) The appropriate Federal banking agency, with respect to a designated financial market utility that is an institution described in section 3(q) of the Federal Deposit Insurance Act.

(iv) The Board of Governors, with respect to a designated financial market utility that is otherwise not subject to the jurisdiction of any agency listed in clauses (i), (ii), and (iii).

(2) If a designated financial market utility is subject to the jurisdictional supervision of more than one agency listed in paragraph (1), then such agencies should agree on one agency to act as the Supervisory Agency, and if such agencies cannot agree on which agency has primary jurisdiction, the Council shall decide which is the Supervisory Agency for purposes of this part.

*Systemically important and systemic importance.* The terms "systemically important" and "systemic importance" mean a situation where the failure of or a disruption to the functioning of a financial market utility could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.

## Subpart B—Consultations, Determinations and Hearings

### § 1320.10 Factors for consideration in designations.

In making any proposed or final determination with respect to whether a financial market utility is, or is likely to become, systemically important under this part, the Council shall take into consideration:

(a) The aggregate monetary value of transactions processed by the financial market utility, including without limitation—

(1) The number of transactions processed, cleared or settled;

(2) The value of transactions processed, cleared or settled; and

(3) The value of other financial flows.

(b) The aggregate exposure of the financial market utility to its counterparties, including without limitation—

(1) Credit exposures, which includes but is not limited to potential future exposures; and

(2) Liquidity exposures.

(c) The relationship, interdependencies, or other interactions of the financial market utility with other financial market utilities or payment, clearing, or settlement activities, including without limitation interactions by types of participants.

(d) The effect that the failure of or a disruption to the financial market utility would have on critical markets, financial institutions, or the broader financial system, including without limitation—

(1) Role of the financial market utility in the market served;

(2) Availability of substitutes;

(3) Concentration of participants;

(4) Concentration by product type;

(5) Degree of tiering; and

(6) Potential impact or spillover in the event of a failure or disruption.

(e) Any other factors that the Council deems appropriate.

**§ 1320.11 Consultation with Financial Market Utility.**

Before providing a financial market utility notice of a proposed determination under section 1320.12, the Council shall provide the financial market utility with—

(a) Written notice that the Council is considering whether to make a proposed determination with respect to the financial market utility under § 1320.13; and

(b) An opportunity to submit written materials to the Council, within such time as the Council determines to be appropriate, concerning—

(1) Whether the financial market utility is systemically important taking into consideration the factors set out in § 1320.10; and

(2) Proposed changes by the financial market utility that could—

(i) Reduce or increase the inherent systemic risk the financial market utility poses; and

(ii) Reduce or increase the need for designation under § 1320.13; or

(iii) Reduce or increase the appropriateness of rescission under § 1320.13.

(3) The Council shall consider any written materials submitted by the financial market utility under this section before making a proposed determination under section 1320.13.

**§ 1320.12 Advance notice of proposed determination.**

(a) *Notice of proposed determination and opportunity for hearing.* Before making any final determination under § 1320.13, the Council shall provide the financial market utility with advance notice of the proposed determination of the Council, and proposed findings of fact supporting that determination.

(b) *Request for hearing.* Within 30 calendar days from the date of any provision of notice of the proposed determination of the Council, the financial market utility may request, in writing, an opportunity for a written or oral hearing before the Council to demonstrate that the proposed designation or rescission of designation is not supported by substantial evidence.

(c) *Written submissions.* Upon receipt of a timely request, the Council shall fix a time, not more than 30 calendar days after receipt of the request, unless extended at the request of the financial market utility, and place at which the financial market utility may appear, personally or through counsel, to submit written materials, or, at the sole discretion of the Council, oral testimony or oral argument.

**§ 1320.13 Council determination regarding systemic importance.**

(a) *Designation determination.* The Council shall designate a financial market utility if the Council determines that the financial market utility is, or is likely to become, systemically important.

(b) *Rescission determination.* The Council shall rescind a designation of systemic importance for a designated financial market utility if the Council determines that the financial market utility no longer meets the standards for systemic importance.

(c) *Vote required.* Any proposed or final determination under paragraph (a) or (b) of this section shall—

(1) Be made by the Council and may not be delegated by the Council; and

(2) Require the vote of not fewer than two-thirds of the members of the Council then serving, including the affirmative vote of the Chairperson of the Council.

(d) *Consultations.* Before making any determination under paragraph (a) or (b) of this section, the Council shall consult with the relevant Supervisory Agency and the Board of Governors.

**§ 1320.14 Emergency exception.**

(a) *Emergency exception.* Notwithstanding §§ 1320.11 and 1320.12, the Council may waive or modify any or all of the notice, hearing, and other requirements of §§ 1320.11 and 1320.12 with respect to a financial market utility if—

(1) The Council determines that the waiver or modification is necessary to prevent or mitigate an immediate threat to the financial system posed by the financial market utility; and

(2) The Council provides notice of the waiver or modification to the financial market utility concerned, as soon as practicable, but not later than 24 hours after the waiver or modification.

(b) *Vote required.* Any determination by the Council under paragraph (a) to waive or modify any of the requirements of §§ 1320.11 and 1320.12 shall—

(1) Be made by the Council;

(2) Require the affirmative vote of not fewer than two-thirds of members then serving, including the affirmative vote of the Chairperson of Council.

**§ 1320.15 Notification of final determination.**

(a) *Notification of final determination after a hearing.* (1) Within 60 calendar days of any hearing under § 1320.12, the Council shall provide to the financial market utility written notification of the final determination of the Council under § 1320.13, which shall include findings of fact upon which the determination of the Council is based.

(b) *Notification of final determination if no hearing.* If the Council does not receive a timely request for a hearing under § 1320.12, the Council shall provide the financial market utility written notification of the final determination of the Council under § 1320.13 not later than 30 calendar days after the expiration of the date by which a financial market utility could have requested a hearing.

**§ 1320.16 Extension of time periods.**

The Council may extend the time periods established in §§ 1320.12, 1320.14, or 1320.15 as the Council determines to be necessary or appropriate.

## Subpart C—Information Collection

**§ 1320.20 Council information collection and coordination.**

(a) *Information collection to assess systemic importance.* The Council may require any financial market utility to submit such information to the Council as the Council may require for the sole purpose of assessing whether the financial market utility is systemically important.

(b) *Prerequisites to information collection.* Before requiring any financial market utility to submit information to the Council under paragraph (a) of this section, the Council shall—

(1) Determine that it has reasonable cause to believe that the financial market utility meets the standards for systemic importance in § 1320.10; or

(2) Determine that that it has reasonable cause to believe that the designated financial market utility no longer meets the standards for systemic importance in § 1320.10; and

(3) Coordinate with the Supervisory Agency for the financial market utility to determine if the information is available from or may be obtained by the Supervisory Agency in the form, format, or detail required by the Council.

(c) *Timing of response from the appropriate Supervisory Agency.* If the information, reports, records, or data requested by the Council under paragraph (b)(3) of this section are not provided in full by the Supervisory Agency in less than 15 calendar days after the date on which the material is requested, the Council may request the information directly from the financial market utility with notice to the Supervisory Agency.

(d) *Notice to financial market utility of information collection requirement.* In requiring a financial market utility to submit information to the Council, the Council shall provide to the financial market utility the following—

(1) Written notice that the Council is considering whether to make a proposed determination under § 1320.13; and

(2) A description of the basis for the Council's belief under paragraphs (b)(1) or (b)(2) of of this section.

Dated: March 18, 2011.

**Alastair Fitzpayne,**

*Deputy Chief of Staff and Executive Secretary, Department of the Treasury.*

[FR Doc. 2011–7003 Filed 3–25–11; 8:45 am]

**BILLING CODE 4810–25–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 25

**[Docket No. NM451; Notice No. 25–11–10–SC]**

## Special Conditions: Bombardier Model BD–700–1A10 and BD–700–1A11 Airplanes, Head-Up Display (HUD) With Video Synthetic Vision System (SVS)

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

**ACTION:** Notice of proposed special conditions.

**SUMMARY:** This action proposes special conditions for Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. These airplanes, as modified by Bombardier Inc., will have a novel or unusual design features associated with a SVS that displays video imagery on the HUD. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. 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:** We must receive your comments by April 18, 2011.

**ADDRESSES:** You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM451, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM451 You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** Dale Dunford, FAA, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2239 facsimile (425) 227–1100.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite interested people to take part in this rulemaking by sending 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 special conditions. You can inspect the docket 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 preamble 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 these special conditions based on the comments we receive.

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

### Background

On January 26, 2007, Transport Canada Civil Aviation (TCCA), on behalf of Bombardier Inc., located in Montreal, Canada, applied to the New York Aircraft Certification Office (NYACO) for FAA approval of a type-design change on the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. Per Type Certificate Data Sheet (TCDS) T00003NY, those aircraft models are known under the marketing designation of Global Express and Global 5000, respectively. The change is to introduce the Rockwell-Collins avionics suite to replace the existing Honeywell Primus 2000EP avionics suite. It includes the installation of a SVS that displays video imagery.

Video display on the HUD constitutes new and novel technology for which the FAA has no certification criteria. Title 14, Code of Federal Regulations (14 CFR) 25.773 does not permit visual distortions and reflections that could interfere with the pilot's normal duties and was not written in anticipation of such technology. Other applications for certification of such technology are anticipated in the near future and magnify the need to establish FAA safety standards that can be applied consistently for all such approvals. Special conditions are therefore proposed as prescribed under the provisions of § 21.16.

### Type Certification Basis

Under the provisions of 14 CFR 21.101, Bombardier Inc. must show that the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in T00003NY or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The regulations incorporated by reference in T00003NY are as follows:

Based on the application date, January 26, 2007, under the provisions of § 21.101, the applicable type-certification standards for the modification to the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes are as follows:

**Airworthiness & Environmental Standards for Components and Areas Not Affected by the Change**

The original certification basis for the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes shown on TCDS T00003NY, Revision 13.

**Airworthiness and Environmental Standards for Components and Areas Affected by the Change**

14 CFR part 25, effective February 1, 1965, including the latest applicable requirements of Amendments 25–1 through 25–119.

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 Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of 14 CFR 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 or similar novel or unusual design feature, or should any other model 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 under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes 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 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 14 CFR 21.101.

**Novel or Unusual Design Features**

The Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes will incorporate the following novel or unusual design features:

An SVS that displays video imagery on a HUD.

**Discussion**

For many years the FAA has approved, on transport category airplanes, the use of HUD that display flight symbology, without a significant visual obscuration of the outside view. When the FAA began to evaluate the display of enhanced vision system (EVS) imagery on the HUD, significant potential to obscure the outside view became apparent, contrary to the requirements of 14 CFR 25.773. This rule does not permit distortions and reflections in the pilot-compartment view that can interfere with normal duties, and the rule was not written in anticipation of such technology. The video image potentially interferes with the pilot's ability to see the natural scene in the center of the forward field of view. Therefore, the FAA issued special conditions for such HUD/EVS installations to ensure that the level of safety required by § 25.773 would be met even when the image might partially obscure the outside view. While many of the characteristics of EVS and SVS video differ in some ways, they have one thing in common; the potential for interference with the outside view through the airplane windshield. The FAA proposes special conditions for new and novel technologies to achieve equivalent levels of safety.

Although the pilot may readily be able to see around and through small, individual, stroke-written symbols on the HUD, the pilot may not be able to see around or through the image that fills the display without some interference of the outside view. Nevertheless, the SVS may be capable of meeting the required level of safety when considering the combined view of the image and the outside scene visible to the pilot through the image. It is essential that the pilot can use this combination of image and natural view of the outside scene as safely and effectively as the pilot-compartment view currently available without the SVS image.

Because § 25.773 does not provide for any alternatives or considerations for such a new and novel system, the FAA establishes safety requirements that assure an equivalent level of safety and effectiveness of the pilot-compartment view as intended by that rule. The purpose of this special condition is to provide the unique pilot-compartment-view requirements for the SVS installation.

**Applicability**

As discussed above, these special conditions are applicable to the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. Should Bombardier Inc. apply at a later date for a change to the type certificate to include another model 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 Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. 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 Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes.

1. During any phase of flight in which it is to be used, the SVS imagery on the HUD must not degrade flight safety or interfere with the effective use of outside visual references for required pilot tasks.

2. To avoid unacceptable interference with the safe and effective use of the pilot-compartment view, the SVS must meet the following requirements:

a. The SVS design must minimize unacceptable display characteristics or artifacts (*e.g.*, terrain shadowing against a dark background) that obscure the desired image of the scene, impair the pilot's ability to detect and identify visual references, mask flight hazards, distract the pilot, or otherwise degrade task performance or safety.

b. Control of SVS image display brightness must be sufficiently effective in dynamically changing background (ambient) lighting conditions to avoid pilot distraction, impairment of the pilot's ability to detect and identify visual references, masking of flight hazards, or to otherwise degrade task performance or safety. If automatic control for image brightness is not provided, it must be shown that a single, manual setting is satisfactory for the range of lighting conditions encountered during a time-critical, high-workload phase of flight (*e.g.*, low-visibility instrument approach).

c. A readily accessible control must be provided that permits the pilot to immediately deactivate and reactivate display of the SVS image on demand, without having to remove hands from the flight controls and throttles.

d. The SVS image on the HUD must not impair the pilot's use of guidance information, or degrade the presentation and pilot awareness of essential flight information displayed on the HUD, such

as alerts, airspeed, attitude, altitude and direction, approach guidance, windshear guidance, TCAS resolution advisories, or unusual-attitude recovery cues.

e. The SVS image and the HUD symbols, which are spatially referenced to the pitch scale, outside view, and image, must be scaled and aligned (*i.e.,* conformal) to the external scene. In addition, the SVS image and the HUD symbols—when considered singly or in combination—must not be misleading, cause pilot confusion, or increase workload. Airplane attitudes or cross-wind conditions may cause certain symbols (*e.g.,* the zero-pitch line or flight-path vector) to reach field-of-view limits, such that they cannot be positioned conformally with the image and external scene. In such cases, these symbols may be displayed but with an altered appearance that makes the pilot aware that they are no longer displayed conformally (for example, "ghosting"). The combined use of symbology and runway image may not be used for path monitoring when path symbology is no longer conformal.

f. A HUD system used to display SVS images must, if previously certified, continue to meet all of the requirements of the original approval.

3. The safety and performance of the pilot tasks associated with the use of the pilot-compartment view must not be degraded by the display of the SVS image. These tasks include the following:

a. Detection, accurate identification and maneuvering, as necessary, to avoid traffic, terrain, obstacles, and other flight hazards.

b. Accurate identification and utilization of visual references required for every task relevant to the phase of flight.

4. Appropriate limitations must be stated in the Operating Limitations section of the Airplane Flight Manual to prohibit the use of the SVS for functions that have not been found to be acceptable.

Issued in Renton, Washington, on March 18, 2011.

**K.C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–7147 Filed 3–25–11; 8:45 am]

**BILLING CODE 4910–13–P**

## ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

### 36 CFR Chapter XI

**[Docket No. 2011–02]**

**RIN 3014–AA41**

## Shared Use Path Accessibility Guidelines

**AGENCY:** Architectural and Transportation Barriers Compliance Board.

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

**SUMMARY:** The Architectural and Transportation Barriers Compliance Board (Access Board) is issuing this Advance Notice of Proposed Rulemaking (ANPRM) to develop accessibility guidelines for shared use paths. Shared use paths are designed for both transportation and recreation purposes and are used by pedestrians, bicyclists, skaters, equestrians, and other users. The guidelines will include technical provisions for making newly constructed and altered shared use paths covered by the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA) accessible to persons with disabilities.

**DATES:** Submit comments by June 27, 2011.

**ADDRESSES:** Submit comments by any of the following methods:

- *Federal eRulemaking Portal http://www.regulations.gov*. Follow the instructions for submitting comments. Regulations.gov ID for this docket is ATBCB–2011–0002.
- *E-mail: sharedusepathrule@access-board.gov*. Include docket number 2011–02 or RIN number 3014–AA41 in the subject line of the message.
- *Fax:* 202–272–0081.
- *Mail or Hand Delivery/Courier:* Office of Technical and Informational Services, U.S. Access Board, 1331 F Street, NW., Suite 1000, Washington, DC 20004–1111.

All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Peggy H. Greenwell, Office of Technical and Information Services, Access Board, 1331 F Street, NW., Suite 1000, Washington, DC 20004–1111. Telephone number: 202–272–0017 (voice); 202–272–0082 (TTY). Electronic mail address: *greenwell@access-board.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for developing accessibility guidelines to ensure that new construction and alterations of facilities subject to the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. 12101 *et seq.*) and the Architectural Barriers Act (ABA) of 1968 (42 U.S.C. 4151 *et seq.*) are readily accessible to and usable by individuals with disabilities. The ADA applies to state and local governments, places of public accommodation, and commercial facilities. The ABA applies to facilities designed, built, altered, or leased with Federal funds.

In separate rulemakings, the Board is developing accessibility guidelines for outdoor developed areas, including trails, and accessibility guidelines for pedestrian facilities in the public right-of-way, including sidewalks.

The Board issued a Notice of Proposed Rulemaking (NPRM) for the outdoor developed areas accessibility guidelines, including trails, under the ABA in 2007. 72 FR 34074 (June 20, 2007). The NPRM was based on a consensus report containing recommended accessibility guidelines for trails and other outdoor elements from the Board's Regulatory Negotiation Committee on Outdoor Developed Areas. The Board made available for public review a draft of the final outdoor developed areas accessibility guidelines in 2009. The NPRM and draft of the final outdoor developed areas accessibility guidelines included technical provisions for trails. References in this notice to the "Trails Guidelines" refer to the 2009 draft of the final outdoor developed areas accessibility guidelines (*see http://www.access-board.gov/outdoor/draft-final.htm*).

The Board will issue a Notice of Proposed Rulemaking (NPRM) for pedestrian facilities in the public rights-of-way accessibility guidelines, including sidewalks, in the summer of 2011. The Board made available for public review drafts of the proposed public rights-of-way accessibility guidelines in 2002 and 2005. The drafts of the proposed public rights-of-way accessibility guidelines included technical provisions for pedestrian access routes within sidewalks. References in this notice to the "Pedestrian Access Route—Sidewalk Guidelines" refer to the 2005 draft of the proposed public rights-of-way accessibility guidelines (*see http://*

*www.access-board.gov/prowac/draft.htm*).

Public comments received during these rulemakings raised questions about applying the technical provisions for trails and pedestrian access routes within sidewalks to shared use paths. Commenters recommended that the Board develop specific accessibility guidelines for shared use paths that address their unique characteristics. The Board agrees that shared use paths differ sufficiently from trails and sidewalks to warrant specific guidelines for making them accessible.

**Applicability**

Like all of the Board's accessibility guidelines, the guidelines for shared use paths will apply to newly constructed and altered facilities. When the Board's final guidelines are adopted by other Federal agencies authorized to issue ADA or ABA standards, they will be enforceable.[1] The Board's guidelines do not address existing facilities unless the facilities are included in the scope of an alteration undertaken at the discretion of a covered entity. The Department of Justice has issued separate regulations on program accessibility for State and local governments and on barrier removal for places of public accommodation owned or operated by private entities that address existing facilities that are not altered. 28 CFR 35.150 and 28 CFR 36.304. When the Department of Justice initiates rulemaking to adopt the shared use path accessibility guidelines as accessibility standards, the Department of Justice will address how program accessibility and barrier removal apply to existing shared use paths that are not altered. Comments concerning shared use paths that are not altered should be directed to the Department of Justice when it initiates rulemaking to adopt the shared use path accessibility guidelines as accessibility standards.

**Key Differences Between Shared Use Paths, Trails, Sidewalks, and Accessible Routes**

Shared use paths are a type of trail designed to be part of a transportation system, providing off-road routes for a variety of users. The primary users of shared use paths are bicyclists and pedestrians, including pedestrians using mobility devices such as manual or motorized wheelchairs. While they may coincidently provide a recreational experience, shared use paths differ from other types of trails with their transportation focus and serving as a supplement to on-road bike lanes, shared roadways, bike boulevards, and paved shoulders. They may extend or complement a roadway network. Shared use path design is similar to roadway design but on a smaller scale and for lower speeds. Whether located within a highway right-of-way, provided along a riverbank, or established over natural terrain within an independent right-of-way, shared use paths differ from sidewalks and trails in that they are primarily designed for bicyclists and others for transportation purposes such as commuting to work.

Trails, on the other hand, are designed primarily for recreational purposes. Since they are not designed with a transportation focus, they are typically not parallel to a roadway. Trails are pedestrian routes developed primarily for outdoor recreational purposes and do not connect elements, spaces, or facilities within a site. Trails are largely designed for pedestrians and other users to "experience" the outdoors and may be used by a variety of users, but they are not designed for transportation purposes.

Sidewalks are located in a public right-of-way and typically are parallel to a roadway. Consequently, sidewalk grades (running slopes) must be generally consistent with roadway grades so that they fit into the right-of-way. Sidewalks are designed for pedestrians and are not designed for bicycles or other recreational purposes.

**American Association of State Highway and Transportation Officials (AASHTO) Guide on Bicycle Facilities and Shared Use Paths**

The American Association of State Highway and Transportation Officials (AASHTO) advocates transportation-related policies and provides technical services to support states in their efforts to efficiently and safely move people and goods. AASHTO develops and publishes more than 125 volumes of standards and guidelines that are used worldwide in the design, construction, maintenance, operation, and administration of highways, bridges, and other transportation facilities. AASHTO is considered a leading source of information related to the design and construction of pedestrian and bicycle facilities. The Board has worked closely with AASHTO over the years in developing accessibility criteria for pedestrian facilities and shared use paths. AASHTO developed the "Guide for the Planning, Design, and Operation of Pedestrian Facilities" (July 2004) and the "Guide for the Development of Bicycle Facilities" (1999). Although compliance with these AASHTO documents is voluntary, many states adopt these AASHTO documents as standards.

In February 2010, AASHTO made available draft revisions to the 1999 "Guide for the Development of Bicycle Facilities." The February 2010 draft is named the "Guide for Planning, Design, and Operation of Bicycle Facilities." References in this notice to the AASHTO Bicycle Facilities Guide refer to the February 2010 draft of the "Guide for Guide for Planning, Design, and Operation of Bicycle Facilities." Chapter 5 of the AASHTO Bicycle Facilities Guide contains technical provisions for shared use paths. Chapter 5 applies a combination of the technical provisions in Board's Trails Guidelines and Pedestrian Access Route—Sidewalk Guidelines to shared use paths. The Board's rulemaking on shared use paths is timely given AASHTO's current plan to revise its guide for bicycle facilities and shared use paths. This rulemaking presents an opportunity for AASHTO and the Board to coordinate their efforts. AASHTO and the Board share a common interest in providing clear and consistent technical provisions for designers, owners and operators of shared use paths. The Board welcomes this opportunity.

**Information Meeting on Shared Use Paths**

On September 13, 2010, the Board held a public information meeting in conjunction with the ProWalk/ProBike 2010 Conference convened by the National Center for Bicycling and Walking. This was an opportunity for individuals with disabilities, designers of shared use paths, and other interested parties to provide information to assist the Access Board to consider how best to approach the development of accessibility guidelines for shared use paths. The meeting featured representatives from the State of Washington Department of Transportation, Florida Department of Transportation, AASHTO, and the Federal Highway Administration (FHWA). Meeting participants addressed major issues, including how to define shared use paths and possible technical provisions. Input from this meeting is reflected in this notice.

**Request for Public Comment**

The Board seeks input from the public, including individuals with disabilities, and from representatives of

[1] The Department of Justice and Department of Transportation are authorized to issue enforceable accessibility standards for the ADA. The General Services Administration, Department of Defense, Department of Housing and Urban Development, and United States Postal Service are authorized to issue enforceable accessibility standards for the ABA.

Federal, State, or local governments, public transportation organizations, and industry professionals regarding matters covered in this notice. In particular, the Board invites comments on the draft definition of "shared use path" and draft technical provisions in this document. Please provide responses to the specific questions included in the notice and provide any additional information that may assist the Board to further refine the draft definition and technical provisions.

**Shared Use Path Definition**

Given the similarity between exterior pedestrian routes, including shared use paths, sidewalks, trails, and accessible routes, it is important to define the term "shared use path" used in this document in order to minimize any potential confusion regarding applicable accessibility criteria.

To accomplish this, the Board has developed a draft definition for "shared use path". AASHTO and several city, state, and Federal agencies have developed definitions; however, currently there is no universally accepted definition. The table below includes some of those definitions.

| Source | Definition: Shared use path |
|---|---|
| AASHTO Bicycle Facilities Guide ..... *http://design.transportation.org/Documents/DraftBikeGuideFeb2010.pdf.* | A bikeway physically separated from motorized vehicular traffic by an open space or barrier and either within the highway right-of-way or within an independent right-of-way. Shared use paths may also be used by pedestrians, skaters, wheelchair users, joggers, and other nonmotorized users. |
| U.S. Department of Transportation, Federal Highway Administration ..... *http://www.fhwa.dot.gov/environment/bikeped/freeways.htm.* | The term "shared use path" means a multi-use trail or other path, physically separated from motorized vehicular traffic by an open space or barrier, either within a highway right-of-way or within an independent right-of-way, and usable for transportation purposes. Shared use paths may be used by pedestrians, bicyclists, skaters, equestrians, and other nonmotorized users. |
| State of Washington, Department of Transportation ..... *http://www.wsdot.wa.gov/Publications/Manuals/M22-01.htm.* | A facility physically separated from motorized vehicular traffic within the highway right-of-way or on an exclusive right of way with minimal crossflow by motor vehicles. Primarily used by pedestrians and bicyclists, shared use paths are also used by joggers, skaters, wheelchair users (both nonmotorized and motorized), equestrians, and other nonmotorized users. |

In related rulemaking, the Board developed a definition for "trails" in the Trails Guidelines and will reference the 2009 Manual of Uniform Traffic Control Devices (MUTCD) definition of "sidewalks" in the Pedestrian Access Route—Sidewalk Guidelines. These definitions are provided below for comparison to the above definitions of "shared use path."

*Trail.* A pedestrian route developed primarily for outdoor recreational purposes. A pedestrian route developed primarily to connect elements, spaces, or facilities within a site is not a trail. (Trails Guidelines, Section F106.5)

*Sidewalk.* That portion of a street between the curb line, or the lateral line of a roadway, and the adjacent property line or on easements of private property that is paved or improved and intended for use by pedestrians. (2009 MUTCD Section 1A.13.192)

Participants attending the information meeting in September 2010 held in conjunction with the ProWalk/ProBike meeting noted the need for a definition of "shared use path." They identified the key characteristics of a shared use path. The focus on a "transportation" purpose and "multi-use" were found to be primary factors distinguishing shared use paths from sidewalks and trails. Shared use paths are designed primarily for bicycles and pedestrians. The Board has used this input to develop the draft definition below.

*Shared Use Path.* A shared use path is a multi-use path designed for both transportation and recreation purposes. Shared use paths typically are separated from motorized vehicular traffic by an open space or barrier, either within a highway right-of-way or within an independent right-of-way.

Shared use paths are used by pedestrians and bicyclists, joggers, skaters, wheelchair users (both nonmotorized and motorized), equestrians, and other nonmotorized users. The draft definition does not include a list of all the groups that may use a shared use path. The purpose of the definition is to clarify when to apply the scoping and technical provisions for these paths. Local jurisdictions have authority to establish permissible uses on shared use paths. The Department of Justice (DOJ) ADA regulations require local jurisdictions to permit individuals with mobility disabilities to use manually-operated and power-driven wheelchairs in any areas open to the public. *See* 28 CFR 35.137 (a) as amended on September 15, 2010 (75 FR 56178). The DOJ ADA regulations further require local jurisdictions to establish policies regarding the use of other power-driven mobility devices by individuals with mobility disabilities subject to legitimate safety requirements. *See* 28 CFR 35.137 (b) as amended on September 15, 2010 (75 FR 56178). FHWA has issued similar guidance regarding use of other power-driven mobility devices by individuals with mobility disabilities on pedestrian routes funded with Federal-aid highway funds. See *http://www.fhwa.dot.gov/environment/bikeped/framework.htm.*

*Question 1.* Does the draft definition of "shared use path" sufficiently distinguish these paths from trails and sidewalks? If not, please provide any recommendations that would strengthen this distinction.

**Draft Technical Provisions for Shared Use Paths**

Based on input at the information meeting in September 2010 and other sources, the Board has developed draft technical provisions for shared use paths and invites public comment. Discussion follows each of the draft technical provisions. For some of the draft provisions, we have provided tables showing corresponding provisions for sidewalks in the Pedestrian Access Route—Sidewalk Guidelines; trails in the Trails Guidelines; and shared use paths in the February 2010 draft AASHTO Bicycle Facilities Guide. The draft technical provisions establish criteria for the following components of a shared use path: surface; changes in level (vertical alignment and surface discontinuities); horizontal openings; width; grade and cross slope; protruding objects; gates

and barriers; and intersections and curb ramps.

*Question 2.* What technical provisions, if any, should apply where separate unpaved paths are provided for equestrian use? Additional information and guidance on this issue is welcomed.

*1. Surface*

*Surface.* The surface of the shared use path shall be firm, stable, and slip resistant.

A firm, stable, and slip resistant surface is necessary for persons with disabilities using wheeled mobility devices. Bicyclists with narrow-tired bicycles and in-line skaters also need a hard, durable surface. Shared use paths typically are comprised of asphalt or concrete and these surfaces are generally accessible for people with disabilities. These surfaces perform well in inclement weather and require minimal maintenance. Unpaved surfaces that are firm, stable, and slip resistant may be used; however, they may erode over time requiring regular maintenance.

| Surface | Provisions |
|---|---|
| Access Board Pedestrian Access Route—Sidewalk Guidelines | Firm, stable, and slip resistant. |
| Access Board Trail Guidelines | Firm and stable. |
| AASHTO Bicycle Facilities Guide | Hard, durable surface such as asphalt or Portland cement concrete recommended. |

*2. Changes in Level*

*Vertical Alignment.* Vertical alignment shall be planar within curb ramp runs, blended transitions, landings, and gutter areas within the shared use path. Grade breaks shall be flush. Where the shared use path crosses rail tracks at grade, the surface of the shared use path shall be level and flush with the top of the rail at the outer edges of the rail. The surface between the rails shall be aligned with the top of the rail.

*Surface Discontinuities.* Surface discontinuities shall not exceed 0.50 inch (13 mm) maximum. Vertical discontinuities between 0.25 inch (6.4 mm) and 0.5 inch (13 mm) maximum shall be beveled at 1:2 maximum. The bevel shall be applied across the entire level change.

In addition to firm, stable, and slip resistant surfaces, smooth surfaces are also necessary for the safe use of wheeled mobility devices, as well as bicycles and in-line skaters. The draft technical provisions allow vertical changes in level up to ¼ inch without treatment and other vertical changes in level from ¼ to ½ inch if they are beveled with a slope no greater than 1:2. Surfaces with individual units laid out of plane and those that are heavily textured, rough, or chamfered, will greatly increase rolling resistance and will subject pedestrians who use wheelchairs, scooters, and rolling walkers to the stressful (and often painful) effects of vibration. Surface discontinuities are also dangerous for bicyclists and in-line skaters. It is highly desirable to minimize surface discontinuities. However, when discontinuities are unavoidable, they should be widely separated.

*3. Horizontal Openings*

*Joints and Gratings.* Openings shall not permit passage of a sphere more than 0.5 inch (13 mm) in diameter. Elongated openings shall be placed so that the long dimension is perpendicular to the dominant direction of travel.

*Flangeway Gaps at Non-Freight Rail Crossings.* Openings for wheel flanges at pedestrian crossings of non-freight rail track shall be 2.5 inches (64 mm) maximum.

*Flangeway Gaps at Freight Rail Crossings.* Openings for wheel flanges at pedestrian crossings of freight rail track shall be 3 inches (75 mm) maximum.

Surface openings or gaps must be minimized in order to ensure a smooth surface on shared-use paths. Utility covers and drainage grates can be hazards and, for the safety of all users, must be treated. Special treatment is necessary where shared use paths cross railroad crossings, both freight and non-freight for the safe passage of wheeled mobility devices, as well as bicycles and other users. The AASHTO Bicycle Facilities Guide recommends that railroad crossings be smooth and be designed at an angle between 60 and 90 degrees to the direction of travel in order to minimize the danger of falls.

The draft technical provisions for surface gaps in shared use paths are consistent with the draft provisions in the Pedestrian Access Route—Sidewalk Guidelines. In most cases, the guidelines will require surface gaps or openings on shared use paths to be no wider than 1/2 inch. However, this specification is not practicable at rail tracks where gaps must be at least 2½ inches to safely accommodate rail car wheel flanges. Due to variations in load and wheel play, the gap must be even larger (3 inches) to accommodate heavy freight trains. The Board is aware that such a gap can trap wheelchair caster wheels which are prone to turning sideways against vertical displacements, even slight ones but is unaware of a way to resolve this conflict.

*4. Width*

*Width.* The clear width of shared use paths shall be 5 feet (1.5 m) minimum.

The AASHTO Bicycle Facilities Guide recommends the paved width for a shared use path to be 10 feet minimum. Typically, widths range from 10 to 14 feet with the wider ranges in areas with high use or when planning for a wider variety of user groups. In very rare circumstances, a reduced width of 8 feet may be used. Wider shared use paths also are recommended where the path is used by larger maintenance vehicles; on steep grades to provide additional passing area; or through curves to provide more operating space.

The Board is considering requiring accessible shared use paths to provide at least 5 feet minimum width to address those rare circumstances where the AASHTO Bicycle Facilities Guide is not applied so that sufficient space is provided for wheelchair turning and to allow wheelchair users and others to pass one another.

| Width | Provisions |
|---|---|
| Access Board Pedestrian Access Route—Sidewalk Guidelines | 4 feet minimum. |
| Access Board Trail Guidelines | 3 feet minimum. |
| AASHTO Bicycle Facilities Guide | 10 feet minimum (in rare cases, 8 feet minimum). |

*5. Grade and Cross Slope*

*Grade.* The maximum grade of a shared use path shall be 5 percent.

*Exception:* Where the shared use path is contained within a street or highway border, its grade shall not exceed the general grade established for the adjacent street or highway.

Individuals with disabilities using wheeled mobility devices generally need less steep slopes in order to conserve energy and to better maintain control of the wheeled mobility device. For these reasons, the Board is considering a 5 percent maximum grade on newly constructed and altered shared paths that are not contained within a street or highway border. The AASHTO Bicycle Facilities Guide recommends that grades greater than 5 percent are undesirable for a variety of reasons. Bicyclists may find ascents over-taxing and descents uncomfortable where speed is likely to build. Steep grades affect the safety of all users, particularly where multiple types of users are on the path at the same time. For example, pedestrians with disabilities may have difficulty avoiding faster moving bicycles. More importantly, however, pedestrians with disabilities are likely to experience greater difficulty traveling on steeper slopes than others.

| Grade (running slope) | Provisions | | |
|---|---|---|---|
| Access Board Pedestrian Access Route—Sidewalk Guidelines | Where pedestrian access route within a sidewalk is contained within a street or highway border, its grade shall not exceed the general grade established for the adjacent street or highway. | | |
| Access Board Trail Guidelines | Running Slope of Trail Segment | | Maximum Length of Segment |
| | Steeper than | But not steeper than | |
| | 1:20 | 1:12 | 200 feet (61 m). |
| | 1:12 | 1:10 | 30 feet (9 m). |
| | 1:10 | 1:8 | 10 feet (3050 mm). |
| | * No more than 30 percent of the total length of a trail shall have a running slope steeper than 1:12. | | |
| AASHTO Bicycle Facilities Guide | Grades greater than 5 percent are undesirable. | | |

*Question 3.* Are there conditions where a 5 percent maximum grade cannot be achieved on a newly constructed shared use path? If so, the Board is interested in a description of the specific conditions that might prevent compliance. The Board will consider providing additional exceptions where it may be difficult or impossible to meet the 5 percent maximum grade.

*Question 4.* Should the Board provide guidance on how to address steeper segments of shared use paths when they cannot be avoided? For example, would providing space for bicyclists or wheelchair users to move off of the shared use path in order to avoid conflict with other traffic be helpful?

Where the shared use path is contained within a street or highway border, the grade may not exceed the general grade established for the adjacent street or highway. This is consistent with the grade provisions for sidewalks.

*Question 5.* What would be considered a sufficient separation between a shared use path and a roadway, or outside border of a roadway, where it may not be necessary for the shared use path to follow the grade of the roadway?

*Cross Slope.* The maximum cross slope shall be 2 percent.

Excessive cross slope (exceeding 2 percent) is a major barrier to travel along shared use paths for individuals using wheeled mobility devices and can significantly impede forward progress on an uphill slope and compromise control and balance in downhill travel and on turns. Cross slope also negatively affects pedestrians who have braces or lower-limb prostheses and may use walkers or crutches, and those with gait, balance, and stamina impairments. Energy that might otherwise be used in forward travel must be expended to resist the perpendicular force of a cross slope along a route of travel. The AASHTO Bicycle Facilities Guide recommends a one percent cross slope, particularly at turns where bicyclists tend to lean to one side while turning. A one percent cross slope also provides sufficient slope to convey surface drainage in most situations.

| Cross Slope | Provisions |
|---|---|
| Access Board Pedestrian Access Route—Sidewalk Guidelines | The cross slope of the pedestrian access route within a sidewalk shall be 2 percent maximum. |
| Access Board Trail Guidelines | Where the surface is concrete, asphalt, or boards, the cross slope shall not be steeper than 2 percent.<br>Where the surface is other than concrete, asphalt, or boards, the cross slope shall not be steeper than 5 percent. |
| AASHTO Bicycle Facilities Guide | 1 percent recommended where possible. |

*Question 6.* Are there conditions where cross slope steeper than 2 percent is necessary in new construction? If so, the Board is interested in a description of these specific conditions and

recommendations for appropriate allowances.

*6. Protruding Objects*

*Protruding Objects.* Protruding objects along or overhanging any portion of the shared use path shall not reduce the clear width of the shared use paths.

*Protrusion Limits.* Objects with leading edges more than 27 inches (685 mm) and not more than 80 inches (2 m) above the finish surface or ground shall not protrude more than 4 inches (100 mm) horizontally into shared use paths.

*Post-Mounted Objects.* Where objects are mounted on free-standing posts or pylons and the objects are 27 inches (685 mm) minimum and 80 inches (2030 mm) maximum above the finish surface or ground, the objects shall not overhang shared use paths more than 4 inches (100 mm) beyond the post or pylon base measured 6 inches (150 mm) minimum above the finish surface or ground. Where a sign or other obstruction is mounted between posts or pylons and the clear distance between the posts or pylons is greater than 12 inches (305 mm) the lowest edge of sign or obstruction shall be 27 inches (685 mm) maximum or 80 inches (2 m) minimum above the finish surface or ground.

The draft technical provisions for protruding objects are derived from the Board's ADA and ABA Accessibility Guidelines and Pedestrian Access Route—Sidewalk Guidelines. The provisions addresses objects that may project into shared use paths in a manner hazardous to people with vision impairments. Any protrusion on a shared use path is considered hazardous for all users, including individuals with disabilities. These technical provisions would apply to the full width of the shared use path. Objects mounted on walls or posts with leading edges above the standard sweep of canes (27 inches) and below the standard head room clearance (80 inches) would be limited to a 4 inch protrusion.

*7. Gates and Barriers*

*Clear Width.* Where gates or other barriers are provided, openings in gates and barriers shall provide a clear width of 32 inches (815 mm) minimum.

*Gate Hardware.* Gate hardware shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate operable parts shall be 5 pounds (22.2 N) maximum. Operable parts of such hardware shall be 34 inches (865 mm) minimum and 48 inches (1220 mm) maximum above the finish surface or ground.

The draft technical provisions for gates and barriers are based on the Board's ADA and ABA Accessibility Guidelines and Trails Guidelines. Gates or barriers often are wider than 32 inches to allow for the safe passage of bicycles and other authorized users of shared use paths. The Board is proposing to require a 32 inch minimum clearance to address the rare circumstance where gate or barrier openings are deliberately narrow and could restrict access by wheelchair users unless a minimum width applies. A 32 inch wide clear opening provides the minimum clearance necessary to allow passage of an occupied wheelchair or other mobility device. The operation and location provisions for gate hardware are necessary to ensure that individuals with disabilities can operate the hardware.

*8. Intersections and Curb Ramps*

Curb Ramps and Blended Transitions

*Curb Ramps.* Curb ramps shall have a running slope that cuts through or is built up to the curb at right angles or meets the gutter grade break at right angles.

*Running Slope.* The running slope of curb ramps shall be 5 percent minimum and 8.3 percent maximum but shall not require the ramp length to exceed 15 ft. (4.5 m).

*Cross Slope.* The cross slope of a curb ramp at intersections shall be 2 percent maximum. The cross slope of a curb ramp at midblock crossings shall be permitted to be equal to the street or highway grade.

*Landing.* A landing 4 feet (1.2 m) minimum by 4 feet (1.2 m) minimum shall be provided at the top of the curb ramp and shall be permitted to overlap other landings and clear space. The running and cross slope of a curb ramp at midblock crossings shall be permitted to be equal to the street or highway grade.

*Blended Transitions.* Where blended transitions are provided, the running slope shall be 5 percent maximum and cross slope shall be 2 percent maximum.

**Common Technical Provisions for Curb Ramps and Blended Transitions**

*Width.* The clear width of blended transitions and curb ramps, excluding flares, shall be at least as wide as the shared use path.

*Detectable Warning Surfaces.* Detectable warning surfaces shall be provided where a shared use path connects to or crosses a roadway or railway crossing.

*Grade Breaks.* Grade breaks at the top and bottom of curb ramps shall be perpendicular to the direction of the ramp run. At least one end of the bottom grade break shall be at the back of curb. Grade breaks shall not be permitted on the surface of curb ramps, blended transitions, landings, and gutter areas within the shared use path. Surface slopes that meet at grade breaks shall be flush.

*Counter Slopes.* The counter slope of the gutter or street at the foot of a curb ramp, landing, or blended transition shall be 5 percent maximum.

*Clear Space.* Beyond the curb face, a clear space of 4 feet (1.2 m) minimum by 4 feet. (1.2 m) minimum shall be provided within the width of the crossing.

**Detectable Warning Surfaces**

*Truncated Domes.* Detectable warning surfaces shall consist of truncated domes aligned in a square or radial grid pattern.

*Dome Size.* Truncated domes in detectable warning surfaces shall have a base diameter of 0.9 inch (23 mm) minimum to 1.4 inches (36 mm) maximum, a top diameter of 50 percent of the base diameter minimum to 65 percent of the base diameter maximum, and a height of 0.2 inch (5 mm).

*Dome Spacing.* Truncated domes in a detectable warning surface shall have a center-to-center spacing of 1.6 inches (41 mm) minimum and 2.4 inches (61 mm) maximum, and a base-to-base spacing of 0.65 inches (17 mm) minimum, measured between the most adjacent domes.

*Contrast.* Detectable warning surfaces shall contrast visually with adjacent gutter, street or highway, or shared use path surfaces, either light-on-dark or dark-on-light.

*Size.* Detectable warning surfaces shall extend 24 inches (610 mm) minimum in the direction of travel and the full width of the curb ramp or the blended transition.

**Location and Alignment of Detectable Warning Surfaces**

*Curb Ramps.* Where both ends of the bottom grade break are 5.0 feet (1.5 m) or less from the back of curb, the detectable warning surfaces shall be located on the ramp surface at the bottom grade break. Where either end of the bottom grade break is more than 5.0 feet (1.5 m) from the back of curb, the detectable warning surfaces shall be located on the lower landing.

*Blended Transitions.* The detectable warning surfaces shall be located on the blended transition at the back of curb.

*Rail Crossings.* The detectable warning surfaces shall be located so that the edge nearest the rail crossing is 6

feet (1.8 m) minimum and 15 feet (4.6 m) maximum from the centerline of the nearest rail. The rows of truncated domes in a detectable warning surface shall be aligned to be parallel with the direction of pedestrian travel.

Treatment of elevation changes, such as at curbs, and controlling cross slope are key factors in ensuring accessibility, particularly where shared use paths and roadways intersect. The draft technical provisions for curb ramps, blended transitions, and detectable warnings are based on the Board's Pedestrian Access Route—Sidewalk Guidelines. In general, the draft provisions for shared use paths require the following.

- The opening of a shared use path at a roadway must be at least as wide as the shared use path itself;
- A curb ramp or blended transition must be provided, and must be the full width of the shared use path;
- The running slope of the curb ramp must not exceed 8.3 percent and blended transition must not exceed 5 percent;
- The cross slope must be the same as the running slope of the roadway at midblock crossings; and
- Where the shared use path crosses a roadway or railway, detectable warnings must be provided the full width of the curb ramp or blended transition for a depth of 2 feet.

Markings at crossings of shared use paths and roadways must also comply with the provisions of Part 3—Markings of the 2009 Manual on Uniform Traffic Control Devices (MUTCD).

The Board has limited the requirement for detectable warnings to locations where a shared use path crosses a roadway or a railway. The Board has not included a requirement for detectable warnings where shared use paths cross other paths or pedestrian facilities. Where pedestrians and bicyclists share a pathway, established bicycle and pedestrian "rules of the road" should provide sufficient guidance for safe use.

*Question 7.* Is there a need to provide additional warnings or information to bicyclists regarding potential conflicts with other shared use paths users, including pedestrians with disabilities?

*9. Other Issues*

Overlap of Trails, Sidewalks, and Shared Use Paths

In some locations, a shared use path may be part of a sidewalk, or part of a trail. Guidance is needed to clarify which set of guidelines should be applied where there is overlap since the technical provisions are different in some areas. For example, Pedestrian Access Route—Sidewalk Guidelines permit the grade to follow the slope of the roadway and Trails Guidelines specify a maximum grade. The Board is interested in suggestions for ways to treat areas of shared use paths that overlap sidewalks and trails that will provide an acceptable level of accessibility while taking into consideration any unique conditions or situations that may occur where these routes overlap.

*Question 8.* What technical provisions should apply where the shared use path overlaps a trail or sidewalk?

**Shared Use Path Connections**

The draft technical provisions in this ANPRM apply to the newly constructed and altered shared use paths. Shared use paths may be constructed over many miles and connected with other pedestrian routes, creating a network for transportation purposes. The Board is interested in more information regarding connections between shared use paths and other parts of a transportation network.

*Question 9.* Are different technical provisions needed when applying the draft technical provisions for shared use paths that "connect" shared use paths together or with other pedestrian routes (*e.g.*, sidewalks, trails, accessible routes)? If so, please provide any additional information or recommendations.

**Where should the accessibility guidelines for shared use paths be located?**

The Board is considering including the accessibility guidelines for shared use paths in the same document as the accessibility guidelines for pedestrian facilities in the public right-of-way. State and local government departments of transportation appear to be the principal entities that design and construct shared use paths since these facilities are an extension of the transportation network, and having the accessibility guidelines for shared use paths in the same document as pedestrian facilities in the public right-of-way appears to be a logical choice. In addition, many of the draft technical provisions for shared use paths (*i.e.*, intersection and curb ramps/blended transitions, detectable warning surfaces, 4 inch limit on post-mounted protruding objects (signs), and rail flangeway gaps) are the same as those in draft guidelines for pedestrian facilities in the public-right-of-way.

*Question 10.* Should the accessibility guidelines for shared use paths be included in the same document as the accessibility guidelines for pedestrian facilities in the public right-of-way?

*Question 11.* Are there other issues that need to be addressed by the accessibility guidelines for shared use paths? If so, please provide specific information on any additional areas that should be addressed in the guidelines.

**Regulatory Process Matters**

The Board will prepare regulatory assessments required by Executive Orders 12866 and 13563, and the Regulatory Flexibility Act as a part of a Notice of Proposed Rulemaking (NPRM), the next step in this rulemaking.

*Question 12.* The Board requests commenters to provide information for the regulatory assessments, including:

- Number of existing and planned shared-use paths at the state or national level;
- Number of shared-use paths constructed each year (on average) within your jurisdiction;
- Typical cost for a new shared-use path on a per-mile basis;
- Sources of funding for the construction of shared-use paths (*e.g.*, Federal highway funds, other Federal grant programs, state funds, local funds);
- The extent to which the AASHTO Bicycle Facilities Guide, or other design guides and standards are used for shared use paths;
- Whether any of the draft technical provisions would result in additional costs for design work, materials, earthmoving, retaining structures, or other items compared to current construction practices or design guides and standards currently followed;
- What, if any, unintended consequences (positive or negative) could result from an agency adopting the guidelines, and
- What impacts will the draft technical provisions have on small entities and are there alternatives that would minimize those impacts?

**Nancy Starnes,**

*Chair, Architectural and Transportation Barriers Compliance Board.*

[FR Doc. 2011–7156 Filed 3–25–11; 8:45 am]

BILLING CODE 8150–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

**[MB Docket No. 10–71; FCC 11–31]**

### Amendment of the Commission's Rules Related to Retransmission Consent

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Federal Communications Commission (FCC) seeks comment on a series of proposals to streamline and clarify the Commission's rules concerning or affecting retransmission consent negotiations. The Commission believes that these rule changes could allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers.

**DATES:** Submit comments on or before May 27, 2011, and submit reply comments on or before June 27, 2011. See **SUPPLEMENTARY INFORMATION** section for additional comment dates.

**ADDRESSES:** You may submit comments, identified by MB Docket No. 10–71, 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 comments on the Paperwork Reduction Act proposed information 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 on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov,* of the Media Bureau, Policy Division, 202–418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at 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 the ICR as show in the Supplementary Information section below (3060–0649) 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 the Commission's Notice of Proposed Rulemaking (NPRM), MB Docket No. 10–71, FCC No. 11–31, adopted and released March 3, 2011. The full text of the NPRM is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; the contractor's Web site, *http://www.bcpiweb.com;* or by calling 800–378–3160, facsimile 202–488–5563, or e-mail *FCC@BCPIWEB.com.* Copies of the NPRM also may be obtained via the Commission's Electronic Comment Filing System (ECFS) by entering the docket number, MB Docket No. 10–71. Additionally, the complete item is available on the Federal Communications Commission's Web site at *http://www.fcc.gov.*

This document contains proposed 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, Public Law 104–13. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before May 27, 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; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. 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:* 3060–0649.

*Title:* Sections 76.1601, Deletion or Repositioning of Broadcast Signals, 76.1617 Initial Must-Carry Notice, 76.1607 and 76.1708 Principal Headend.

*Form Number:* Not applicable.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Businesses or other for-profit entities; Not-for-profit institutions.

*Number of Respondents and Responses:* 3,380 respondents and 4,200 responses.

*Estimated Time per Response:* 0.5 to 2 hours.

*Frequency of Response:* On occasion reporting requirement; Third party disclosure requirement; Recordkeeping requirement.

*Total Annual Burden:* 2,400 hours.

*Total Annual Costs:* None.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this information collection is contained in Section 4(i) of the

Communications Act of 1934, as amended.

*Nature and Extent of Confidentiality:* No need for confidentiality required with this collection of information.

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* 47 CFR 76.1601 requires that effective April 2, 1993, a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

47 CFR 76.1607 states that a cable operator shall provide written notice by certified mail to all stations carried on its system pursuant to the must-carry rules at least 60 days prior to any change in the designation of its principal headend.

47 CFR 76.1617(a) states within 60 days of activation of a cable system, a cable operator must notify all qualified NCE stations of its designated principal headend by certified mail.

47 CFR 76.1617(b) states within 60 days of activation of a cable system, a cable operator must notify all local commercial and NCE stations that may not be entitled to carriage because they either:

(1) Fail to meet the standards for delivery of a good quality signal to the cable system's principal headend, or

(2) May cause an increased copyright liability to the cable system.

47 CFR 76.1617(c) states within 60 days of activation of a cable system, a cable operator must send by certified mail a copy of a list of all broadcast television stations carried by its system and their channel positions to all local commercial and noncommercial television stations, including those not designated as must-carry stations and those not carried on the system.

47 CFR 76.1708(a) states that the operator of every cable television system shall maintain for public inspection the designation and location of its principal headend. If an operator changes the designation of its principal headend, that new designation must be included in its public file.

The NPRM proposes to redesignate 47 CFR 76.1601 as 47 CFR 76.1601(a), and to add a new 47 CFR 76.1601(b). If adopted, new 47 CFR 76.1601(b) would require broadcast television stations and multichannel video programming distributors (MVPDs) to notify affected subscribers of the potential deletion of a broadcaster's signal a minimum of 30 days in advance of a retransmission consent agreement's expiration, unless a renewal or extension agreement has been executed, and regardless of whether the signal is ultimately deleted. All other remaining existing information collection requirements would stay as they are, and the various burden estimates would be revised to reflect new 47 CFR 76.1601(b).

## Synopsis of the Notice of Proposed Rulemaking

### I. Introduction

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on a series of proposals to streamline and clarify our rules concerning or affecting retransmission consent negotiations. Our primary objective is to assess whether and how the Commission rules in this arena are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and, to the extent possible, minimize video programming service disruptions to consumers.

2. The Communications Act of 1934, as amended (the Act), prohibits cable systems and other multichannel video programming distributors (MVPDs) from retransmitting a broadcast station's signal without the station's consent. 47 U.S.C. 325(b)(1)(A). This consent is what is known as "retransmission consent." The law requires broadcasters and MVPDs to negotiate for retransmission consent in good faith. *See* 47 U.S.C. 325(b)(3)(C)(ii) and (iii); 47 CFR 76.65. Since Congress enacted the retransmission consent regime in 1992, there have been significant changes in the video programming marketplace. One such change is the form of compensation sought by broadcasters. Historically, cable operators typically compensated broadcasters for consent to retransmit the broadcasters' signals through in-kind compensation, which might include, for example, carriage of additional channels of the broadcaster's programming on the cable system or advertising time. *See, e.g., General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee,* Memorandum Opinion and Order, 19 FCC Rcd 473, 503, para. 56 (2004). Today, however, broadcasters are increasingly seeking and receiving monetary compensation from MVPDs in exchange for consent to the retransmission of their signals. Another important change concerns the rise of competitive video programming providers. In 1992, the only option for many local broadcast television stations seeking to reach MVPD customers in a particular Designated Market Area (DMA) was a single local cable provider. Today, in contrast, many consumers have additional options for receiving programming, including two national direct broadcast satellite (DBS) providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet. One result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.

3. Accordingly, we have concluded that it is appropriate for us to reexamine our rules relating to retransmission consent. We consider below revisions to the retransmission consent and related rules that we believe could allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. Accordingly, as discussed below, we seek comment on rule changes that would:

- Provide more guidance under the good faith negotiation requirements to the negotiating parties by:
  - Specifying additional examples of per se violations in § 76.65(b)(1) of the Commission's rules; and
  - Further clarifying the totality of the circumstances standard of § 76.65(b)(2) of the Commission's rules;
- Improve notice to consumers in advance of possible service disruptions by extending the coverage of our notice rules to non-cable MVPDs and broadcasters as well as cable operators, and specifying that, if a renewal or extension agreement has not been executed 30 days in advance of a retransmission consent agreement's expiration, notice of potential deletion of a broadcaster's signal must be given to consumers regardless of whether the signal is ultimately deleted;
- Extend to non-cable MVPDs the prohibition now applicable to cable operators on deleting or repositioning a local commercial television station during ratings "sweeps" periods; and
- Allow MVPDs to negotiate for alternative access to network programming by eliminating the Commission's network non-duplication and syndicated exclusivity rules.

We also seek comment on any other revisions or additions to our rules within the scope of our authority that would improve the retransmission consent negotiation process and help protect consumers from programming disruptions. The Commission does not have the power to force broadcasters to consent to MVPD carriage of their

signals nor can the Commission order binding arbitration. *See infra* para. 18. *See also* Letter from Chairman Julius Genachowski, FCC, to The Honorable John F. Kerry, Chairman, Subcommittee on Communications, Technology, and the Internet, Committee on Commerce, Science, and Transportation, U.S. Senate, at 1 (Oct. 29, 2010) ("[C]urrent law does not give the agency the tools necessary to prevent service disruptions.").

## II. Background

### *A. Retransmission Consent*

4. The current regulatory scheme for carriage of broadcast television stations was established by the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Public Law 102–385, 106 Stat. 1460 (1992). In 1992, unlike today, local broadcast television stations seeking to reach viewers in a particular DMA through an MVPD service often had only one option—namely, a single local cable provider. While broadcasters benefited from cable carriage, Congress recognized that broadcast programming "remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations." *See* 1992 Cable Act sec. 2(a)(19). In adopting the retransmission consent provisions of the 1992 Cable Act, Congress found that cable operators obtained great benefit from the local broadcast signals that they were able to carry without broadcaster consent or copyright liability, and that this benefit resulted in an effective subsidy to cable operators. *See id.* Accordingly, Congress adopted its retransmission consent provisions to allow broadcasters to negotiate to receive compensation for the value of their signals. Through the 1992 Cable Act, Congress modified the Communications Act, inter alia, to provide television stations with certain carriage rights on cable television systems in their local market. *See* 47 U.S.C. 325, 534.

5. Pursuant to the statutory provisions enacted in 1992, television broadcasters elect every three years whether to proceed under the retransmission consent requirements of section 325 of the Act, or the mandatory carriage (must carry) requirements of sections 338 and 614 of the Act. *See* 47 U.S.C. 325(b), 338, 534. Section 338 governs mandatory carriage on satellite, and Section 614 (codified at 47 U.S.C. 534) governs mandatory carriage of commercial television stations on cable. There are important differences between the retransmission consent and must carry regimes. Specifically, a broadcaster electing must carry status is guaranteed carriage on cable systems in its market, and the cable operator is generally prohibited from accepting or requesting compensation for carriage, whereas a broadcaster who elects carriage under the retransmission consent rules may insist on compensation. In order to reach MVPD customers, most broadcasters elected carriage under the must carry rules in the early years following enactment of the new regime. By 2009, only 37 percent of stations relied on must carry. *See* Omnibus Broadband Initiative, *Spectrum Analysis: Options for Broadcast Spectrum,* OBI Technical Paper No. 3, at 8 (June 2010); *see also id.* at Exhibit C (showing decrease in must carry elections and increase in retransmission consent elections since 2003); *id.* at n. 23.

6. Since 2001, broadcasters have also had mandatory carriage rights on DBS systems. The Satellite Home Viewer Improvement Act of 1999 (SHVIA) gives satellite carriers a statutory copyright license to retransmit local broadcast stations to subscribers in the station's market, also known as "local-into-local" service. SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (IPACORA) (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Public Law 106–113, 113 Stat. 1501, Appendix I (1999). Generally, when a satellite carrier provides local-into-local service pursuant to the statutory copyright license, the satellite carrier is obligated to carry any qualified local television station in the particular DMA that has made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA or the station does not provide a good quality signal to the carrier's local receive facility. *See* 47 U.S.C. 338.

7. As an alternative to seeking mandatory carriage, a broadcaster may elect carriage under the retransmission consent rules, which allow for negotiations with cable operators and other MVPDs for carriage. A broadcaster electing retransmission consent may accept or request compensation for carriage in retransmission consent negotiations. The legislative history of section 325 indicates that Congress intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations." S. Rep. No. 92, 102nd Cong., 1st Sess. 1991, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169. Under section 325(b)(1)(A) of the Act, if a broadcaster electing retransmission consent and an MVPD are unable to reach an agreement, or do not agree to the extension of an existing agreement prior to its expiration, then the MVPD may not retransmit the broadcasting station's signal because the signal cannot be carried without the broadcast station's consent. Section 325(b)(1)(A) of the Act states, "No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—(A) with the express authority of the originating station. * * *" 47 U.S.C. 325(b)(1). Pursuant to section 325(b)(2), there are five circumstances in which the retransmission restrictions do not apply.

### *B. Good Faith Negotiations*

8. Initially, section 325 of the Act did not include any standards governing retransmission consent negotiations between broadcasters and MVPDs. That changed in 1999 when Congress adopted SHVIA, which contained provisions concerning the satellite industry, as well as television broadcast stations and terrestrial MVPDs. Specifically, Congress required broadcast television stations engaging in retransmission consent negotiations with any MVPD to negotiate in good faith. *See* 47 U.S.C. 325(b)(3)(C). SHVIA also prohibited broadcasters from entering into exclusive retransmission consent agreements. *See* 47 U.S.C. 325(b)(3)(C). Congress required the Commission to revise its regulations so that they:

> * * * prohibit a television broadcast station that provides retransmission consent from * * * failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.

47 U.S.C. 325(b)(3)(C)(ii). The Joint Explanatory Statement of the Committee of Conference (Conference Report) did not explain or clarify the statutory language, instead merely stating that the regulations would:

> * * * prohibit a television broadcast station from * * * refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The [Commission] may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.

Conference Report at 13. This good faith negotiation obligation was later made reciprocal to MVPDs as well as broadcasters by the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Public Law 108–447, 118 Stat. 2809 (2004).

9. In implementing the good faith negotiation requirement, the Commission concluded "that the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission. Instead, the order concludes that Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement." *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity,* 65 FR 15559, March 23, 2000 (*Good Faith Order*). Given the dearth of guidance in section 325 and its legislative history, the Commission drew guidance from analogous statutory standards, such as the good faith bargaining requirement of section 8(d) of the Taft-Hartley Act. *Id.* The Commission also looked to its own rules implementing the good faith negotiation requirement of section 251 of the Act, which largely relies on labor law precedent. *Id.*

10. The Commission adopted a two-part framework to determine whether broadcasters and MVPDs negotiate retransmission consent in good faith. First, the Commission established a list of seven objective good faith negotiation standards, the violation of which is considered a per se breach of the good faith negotiation obligation. *See* 47 CFR 76.65(b)(1). Second, even if the seven specific standards are met, the Commission may consider whether, based on the totality of the circumstances, a party failed to negotiate retransmission consent in good faith. *See* 47 CFR 76.65(b)(2). The Commission has stated that, where "a broadcaster is determined to have failed to negotiate in good faith, the Commission will instruct the parties to renegotiate the agreement in accordance with the Commission's rules and section 325(b)(3)(C)." *Good Faith Order.* While the Commission did not find any statutory authority to impose damages, it noted "that, as with all violations of the Communications Act or the Commission's rules, the Commission has the authority to impose forfeitures for violations of section 325(b)(3)(C)." *Id.* In discussing remedies for a violation of the good faith negotiation requirement, the Commission did not reference continued carriage as a potential remedy, and stated that it could not adopt regulations permitting retransmission during good faith negotiation or while a good faith complaint is pending before the Commission, absent broadcaster consent to such retransmission. *Id.*

11. The Commission concluded that Congress did not intend for it to sit in judgment of the terms of every executed retransmission consent agreement. *Id.* Rather, the Commission said, "[w]e believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process." *Id.* In adopting the good faith negotiation rules, the Commission pointed to commenters' arguments that intrusive Commission action was unnecessary because of the thousands of retransmission consent agreements that had been concluded successfully since the adoption of the 1992 Cable Act. *Id.*

12. There have been very few complaints filed alleging violations of the Commission's good faith rules. For example, in 2001, the former Cable Services Bureau issued an order denying EchoStar Satellite Corporation's retransmission consent complaint alleging that Young Broadcasting, Inc. et al. failed to negotiate in good faith. *See EchoStar Satellite Corp.* v. *Young Broadcasting, Inc. et al.,* Memorandum Opinion and Order, 16 FCC Rcd 15070 (CSB 2001). More recently, in 2007, the Media Bureau issued an order denying Mediacom Communications Corporation's (Mediacom) retransmission consent complaint alleging that Sinclair Broadcast Group, Inc. (Sinclair) failed to negotiate in good faith. *See Mediacom Communications Corp.* v. *Sinclair Broadcast Group, Inc.,* Memorandum Opinion and Order, 22 FCC Rcd 47 (MB 2007). Although Mediacom filed an application for review of the Media Bureau's order, Mediacom and Sinclair subsequently announced the completion of a retransmission consent agreement, and the Media Bureau thus granted Mediacom's motion to dismiss the case with prejudice. *See Mediacom Communications Corp.* v. *Sinclair Broadcast Group, Inc.,* Order, 22 FCC Rcd 11093 (MB 2007). Also in 2007, the Media Bureau ruled that a cable operator failed to negotiate in good faith under the totality of the circumstances, and ordered resumption of negotiations within 10 days and status updates every 30 days. *See* Letter to Jorge L. Bauermeister, 22 FCC Rcd 4933 (MB 2007); *see also infra* para. 33. Further, in 2009, the Media Bureau issued an order denying ATC Broadband LLC and Dixie Cable TV, Inc.'s retransmission consent complaint alleging that Gray Television Licensee, Inc. failed to negotiate in good faith. *See ATC Broadband LLC and Dixie Cable TV, Inc.* v. *Gray Television Licensee, Inc.,* Memorandum Opinion and Order, 24 FCC Rcd 1645 (MB 2009). Also in 2009, Mediacom filed another retransmission consent complaint alleging that Sinclair failed to negotiate in good faith, but, following an agreed-upon extension, the parties announced the completion of a retransmission consent agreement and the Media Bureau granted Mediacom's motion to dismiss the case with prejudice. *See Mediacom Communications Corp.* v. *Sinclair Broadcast Group, Inc.,* Order, 25 FCC Rcd 257 (MB 2010). Accordingly, there is little Commission precedent regarding the good faith rules, and there has only been one finding that a party to a retransmission consent agreement negotiated in bad faith.

### *C. Petition for Rulemaking*

13. In March 2010, 14 MVPDs and public interest groups filed a rulemaking petition arguing that the Commission's retransmission consent regulations are outdated and are harming consumers. Time Warner Cable Inc. et al. Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10–71, at 1 (filed Mar. 9, 2010) (the Petition). The petitioners argued that changes in the marketplace, and the increasingly contentious nature of retransmission consent negotiations, justify revisions to the Commission's rules governing retransmission consent. Specifically, the Petition stated that, in 1992, Congress acted out of "concern that cable operators were functioning as monopolies and in turn threatened to undercut the public interest benefits associated with over-the-air broadcasting." Petition at 2–3 (footnote omitted). The petitioners argued that broadcasters today "enjoy distribution options beyond the cable incumbent in

nearly every [DMA]." *Id.* at 4. The Petition also contended that Congress expected broadcaster demands for compensation, if any, to be modest, because of the benefits that broadcasters derive from carriage. *Id.* The Petition argued that the recent shift of bargaining power to broadcasters has resulted in retransmission consent negotiations in which MVPDs must either agree to the significantly higher fees requested by broadcasters or lose access to programming. *Id.* at 5.

14. On March 19, 2010, the Media Bureau released a Public Notice inviting public comment on the Petition. *See* Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* DA 10–474 (MB 2010) (the Public Notice). Following the grant of an extension, comments were due May 18, 2010, and reply comments were due June 3, 2010. *See Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* Order, 25 FCC Rcd 3334 (MB 2010). While some commenters agree with the petitioners that the retransmission consent regime is in need of reform, others argue that the retransmission consent process is working as intended and that the shift in retransmission consent pricing represents a market correction reflecting the increased competition faced by incumbent cable operators.

*D. Consumer Impact*

15. In the past year, we have seen high profile retransmission consent disputes result in carriage impasses. When Cablevision Systems Corp. (Cablevision) and News Corp.'s agreement for two Fox-affiliated television stations and one MyNetwork TV-affiliated television station expired on October 15, 2010 and the parties did not reach an extension or renewal agreement, Cablevision was forced to discontinue carriage of the three stations until agreement was reached on October 30, 2010. The carriage impasse resulted in affected Cablevision subscribers being unable to view on cable the baseball National League Championship Series, the first two games of the World Series, a number of NFL regular season games, and other regularly scheduled programs. Previously, on March 7, 2010, Walt Disney Co. (Disney) and Cablevision were unable to reach agreement on carriage of Disney's ABC signal for nearly 21 hours after a previous agreement expired. As a result, the approximately 3.1 million households served by Cablevision were unable to view the first 14 minutes of the Academy Awards through their cable provider. Most recently, we are aware of losses of programming resulting from retransmission consent carriage impasses involving DISH Network and Chambers Communications Corp., Time Warner Cable and Smith Media LLC, DISH Network and Frontier Radio Management, DirecTV and Northwest Broadcasting, Mediacom and KOMU–TV, and Full Channel TV and Entravision.

16. In addition, consumers have been concerned about other high profile retransmission consent negotiations that seemed close to an impasse. For example, a retransmission consent agreement with Time Warner Cable for News Corp.'s Fox television stations expired at midnight on December 31, 2009. A statement from FCC Chairman Julius Genachowski at the time acknowledged that a failure to conclude a new agreement could harm consumers, noting that "[c]ompanies shouldn't force cable-watching football fans to scramble for other means of TV delivery on New Year's weekend." *See* News Release, *FCC Chairman Julius Genachowski Statement on Retransmission Disputes,* (rel. Dec. 31, 2009). Ultimately, Fox and Time Warner reached agreement without any carriage interruption, but consumers who were aware of the dispute were unsure if they would have continued access to Fox programming through their Time Warner subscription. We are concerned about the uncertainty that consumers have faced regarding their ability to continue receiving certain broadcast television stations during recent contentious retransmission consent negotiations. The early termination fees imposed by some MVPDs may cause consumers faced with a potential retransmission consent negotiating impasse to be unwilling or unable to consider switching to another MVPD to maintain access to a particular broadcast station. *See infra* para. 30. Accordingly, recognizing the consumer harm caused by retransmission consent negotiation impasses and near impasses, the Commission seeks comment on certain proposals to modify the rules governing retransmission consent.

**III. Discussion**

17. Our goal in this proceeding is to take appropriate action, within our existing authority, to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services. Subscribers are the innocent bystanders adversely affected when broadcasters and MVPDs fail to reach an agreement to extend or renew their retransmission consent contracts. In light of the changing marketplace, our proposals in this NPRM are intended to update the good faith rules and remedies in order to better utilize the good faith requirement as a consumer protection tool. While one way to protect consumers' interests might be for the Commission to order that a station continue to be carried notwithstanding the parties' failure to reach an agreement, the statute does not authorize carriage without the station's consent, as discussed below. Therefore, we have identified other measures that we could take to improve the process and decrease the occurrence of these disruptions. As detailed in this NPRM, we seek comment on these measures and on others that could be beneficial and constructive. Is there an impact on the basic service rate that consumers pay as a result of the retransmission consent fees or disputes?

18. As a threshold matter, we note that the Petition proposed, among other suggestions, that the Commission adopt a mandatory arbitration mechanism for retransmission consent disputes, and provide for mandatory interim carriage while an MVPD negotiates in good faith or while dispute resolution proceedings are pending. Petition at 31–40. In response to the Public Notice seeking comment on the Petition, some commenters have agreed that the Commission should adopt mandatory dispute resolution procedures and/or interim carriage mechanisms. In contrast, other commenters have argued that the Commission should not, as a matter of policy, adopt mandatory dispute resolution procedures or interim carriage mechanisms, and/or that in any event the Commission lacks authority to adopt such procedures and mechanisms. We do not believe that the Commission has authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations. First, regarding interim carriage, examination of the Act and its legislative history has convinced us that the Commission lacks authority to order carriage in the absence of a broadcaster's consent due to a retransmission consent dispute. Rather, section 325(b) of the Act expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent. 47 U.S.C. 325(b)(1)(A) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—(A) with the express authority of the originating station"). Furthermore, consistent with the

statutory language, the legislative history of section 325(b) states that the retransmission consent provisions were not intended "to dictate the outcome of the ensuing marketplace negotiations" and that broadcasters would retain the "right to control retransmission and to be compensated for others' use of their signals." S.Rep.No. 92, 102nd Cong., 1st Sess. 1991, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169. We thus interpret section 325(b) to prevent the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement. Consistent with this interpretation, the Commission previously found that it has "no latitude * * * to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission." *Good Faith Order.* Contrary to the suggestion of some commenters, section 4(i) of the Act does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act, and thus does not support Commission-ordered carriage in this context. Second, we believe that mandatory binding dispute resolution procedures would be inconsistent with both section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements, and with the Administrative Dispute Resolution Act (ADRA), which authorizes an agency to use arbitration "whenever all parties consent." 5 U.S.C. 575(a)(1).

19. In light of the statutory mandate in section 325 and the restrictions imposed by the ADRA, we do not believe that we have authority to require either interim carriage requirements or mandatory binding dispute resolution procedures. Parties may comment on that conclusion. We seek comment below on other ways the Commission can protect the public from, and decrease the frequency of, retransmission consent negotiation impasses within our existing statutory authority.

*A. Strengthening the Good Faith Negotiation Standards of § 76.65(b)(1) of the Commission's Rules*

20. When the Commission originally adopted the good faith standards in 2000, the circumstances were different from the conditions industry and consumers face today. At that time programming disruptions due to retransmission consent disputes were rare. The Commission's approach then was to provide broad standards of what constitutes good faith negotiation but generally leave the negotiations to the parties. *See, e.g., Good Faith Order* ("[T]he Commission concluded in the *Broadcast Signal Carriage Order* that Congress did not intend that the Commission should intrude in the negotiation of retransmission consent. We do not interpret the good faith requirement of SHVIA to alter this settled course and require that the Commission assume a substantive role in the negotiation of the terms and conditions of retransmission consent."). As the Commission stated, "The statute does not appear to contemplate an intrusive role for the Commission with regard to retransmission consent." *See id.* Instead, the Commission stated that "[w]e believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process." *See id.* The good faith provision of SHVIA was specifically targeted at constraining unacceptable negotiating conduct on the part of broadcasters, but Congress subsequently recognized that it is necessary to constrain unacceptable retransmission consent negotiating conduct of MVPDs as well as broadcasters, and thus imposed a reciprocal bargaining obligation in SHVERA. *See, e.g., Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation,* 70 FR 40216, July 13, 2005 (*SHVERA Reciprocal Bargaining Order*) ("Section 207 [of SHVERA] * * * amends [section 325(b)(3)(C) of the Act] to impose a reciprocal good faith retransmission consent bargaining obligation on [MVPDs]. This section alters the bargaining obligations created by [SHVIA] which imposed a good faith bargaining obligation only on broadcasters.") (footnote omitted). In recent times, the actual and threatened service disruptions resulting from increasingly contentious retransmission consent disputes present a growing inconvenience and source of confusion for consumers. We believe that these changes in circumstances support reevaluation of the good faith rules, particularly to ameliorate the impact of retransmission consent negotiations on innocent consumers. We note that recent letters from members of Congress have emphasized the effect of retransmission consent negotiations on consumers.

21. As discussed above, in implementing the reciprocal good faith negotiation requirement of section 325 of the Act, the Commission established a list of seven objective good faith negotiation standards. Violation of any of these standards by a broadcast station or MVPD is considered a per se breach of its obligation to negotiate in good faith. The record indicates that there is some uncertainty in the marketplace about whether certain conduct constitutes a failure to negotiate in good faith. Accordingly, we seek comment on augmenting our rules to include additional objective good faith negotiation standards, the violation of which would be considered a per se breach of § 76.65 of the Commission's rules. We believe that additional per se good faith negotiation standards could increase certainty in the marketplace, thereby promoting the successful completion of retransmission consent negotiations and protecting consumers from impasses or near impasses. In addition, we seek comment on clarifying various aspects of our existing good faith rules.

22. First, we seek comment on whether it should be a per se violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision. In response to the Public Notice seeking comment on the Petition, certain commenters discussed network involvement in the retransmission consent process. Some commenters have argued that the Commission should consider preventing networks from dictating whether and by what terms an affiliated station may grant retransmission consent. Others have argued that provisions in network-affiliate agreements do not interfere with the requirement that broadcasters negotiate retransmission consent in good faith. Interested parties have argued that, in recent retransmission consent negotiations, a network's exercise of its contractual approval right has hindered the progress of the negotiations. The good faith rules currently require the Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent and not unreasonably delay negotiations. 47 CFR 76.65(b)(1)(ii) and (iii). If a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has arguably impaired its own ability to designate a representative who can

bind the station in negotiations, contrary to our rules. Do provisions in network affiliation agreements giving the network approval rights over the grant of retransmission consent by its affiliate represent a reasonable exercise by a network of its distribution rights in network programming? If so, in considering revisions to the good faith rules, how should the Commission balance the networks' rights against the stations' obligation to negotiate in good faith and the regulatory goal of protecting consumers from service disruptions? We seek comment on the appropriate parameters of network involvement in retransmission consent negotiations. We would also welcome comment and data regarding how frequently a network's assertion of the right to review or approve an agreement affects negotiations. In our consideration of the role of the network in its affiliates' retransmission consent negotiations, we do not intend to interfere with the flow of revenue between networks and their affiliates. We recognize the special value of broadcast network programming to local broadcast television stations and to MVPDs. Accordingly, we do not propose to prevent a network from contracting to receive a portion of its affiliates' retransmission consent fees. Rather, we seek comment on the permissible scope of a network's involvement in the negotiations or right to approve an agreement. If the Commission decides to prohibit stations from granting networks the right to approve their affiliates' retransmission consent agreements, should we, on a going-forward basis, abrogate any provisions restricting an affiliate's power to grant retransmission consent without network approval that appear in existing agreements?

23. Second, we seek comment on whether it should be a per se violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned. Such consent might be reflected in local marketing agreements (LMAs), Joint Sales Agreements (JSAs), shared services agreements, or other similar agreements. Some commenters have noted problems that occur when one station or station group negotiates retransmission consent on behalf of a station or station group that is not commonly owned. The Commission believes that, when a station relinquishes its responsibility to negotiate retransmission consent, there may be delays to the negotiation process, and negotiations may become unnecessarily complicated if an MVPD is forced to negotiate with multiple parties with divergent interests, potentially including interests that extend beyond a single local market. The proposal on which we seek comment would effectively prohibit joint retransmission consent negotiations by stations that are not commonly owned. Should the Commission, on a going-forward basis, abrogate any such terms that appear in existing agreements? One commenter has argued that the negotiating arrangements about which others complain are rare, and that they are largely in small markets "where such sharing agreements may well be necessary for the stations to survive economically." Accordingly, we seek comment on the prevalence of agreements that grant one station or station group the right to negotiate or approve the retransmission consent agreement of a station or station group that is not commonly owned; the impact of such arrangements on the negotiation process; and the potential harms and benefits of prohibiting such agreements. How should the Commission balance any asserted benefits of such sharing agreements against the goal of protecting consumers from service disruptions?

24. Third, we seek comment on whether it should be a per se violation for a Negotiating Entity to refuse to put forth bona fide proposals on important issues. One commenter has stated that a refusal to make proposals as to key issues is a bad faith tactic in retransmission consent negotiations. How should we identify the category of issues about which a Negotiating Entity is required to put forth a bona fide proposal? How should we determine what constitutes a bona fide proposal, or whether a proposal is sufficiently unreasonable as to constitute bad faith? We note that the Commission has defined a bona fide request in the context of a programmer's request for leased access on a system of a small cable operator. *See* 47 CFR 76.970(i)(3).

25. Fourth, we seek comment on whether it should be a per se violation for a Negotiating Entity to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement. We seek comment on whether 30 days from the expiration of the retransmission consent agreement is the appropriate time frame within which to require non-binding mediation. In previous retransmission consent disputes, the Commission has encouraged parties to engage in voluntary dispute resolution mechanisms as a means to reach agreement because a neutral third party may be able to facilitate agreement where the parties have otherwise failed. The Commission previously stated its belief "that voluntary mediation can play an important part in the facilitation of retransmission consent and [we] encourage parties involved in protracted retransmission consent negotiations to pursue mediation on a voluntary basis." *See Good Faith Order* (also stating that the Commission would revisit the issue of mandatory retransmission consent mediation if its experience in enforcing the good faith provision indicates that it is necessary). If parties are unable to reach agreement on their own and the expiration of their existing agreement is imminent, should we consider it bad faith for them to refuse to participate in non-binding mediation? Would mediation advance the successful completion of retransmission consent negotiations, even if it is not binding on the parties? Although as noted above we do not believe we have authority to mandate binding arbitration, we believe that we have authority to require non-binding mediation. Because the mediation would be non-binding, we believe that it would be consistent with the statutory prohibition on retransmission without the originating station's express authority. Non-binding mediation would also be consistent with the ADRA, which prohibits compelled binding arbitration. *See* 5 U.S.C. 571 through 584. We seek comment on our proposal to require non-binding mediation. If we require mediation, how should a mediator be selected, and how should the parties determine who is responsible for the costs of mediation? How would the ground rules of the mediation be determined?

26. Fifth, we seek comment on what it means to "unreasonably" delay retransmission consent negotiations. Section 76.65(b)(1)(iii) of the Commission's rules currently provides that "[r]efusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations," constitutes a violation of the Negotiating Entity's duty to negotiate retransmission consent in good faith. 47 CFR 76.65(b)(1)(iii). Commenters report that negotiations have been adversely affected by a party—either a broadcaster or an MVPD—delaying the commencement or progress of a negotiation as a tactic to gain advantage rather than out of necessity. We believe that delaying retransmission consent negotiations could predictably and intentionally lead

to the type of impasse and threat of disruption that inconveniences consumers. Accordingly, we seek comment on what standards we should consider in determining whether a Negotiating Entity has acted in a manner that "unreasonably" delays retransmission consent negotiations and thus violates the duty to negotiate in good faith.

27. Sixth, we seek comment on whether a broadcaster's request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market "significantly viewed" (SV) station violates § 76.65(b)(1)(vi) of the Commission's rules. Section 76.65(b)(1)(vi) of the Commission's rules provides that "[e]xecution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor" is a violation of the Negotiating Entity's duty to negotiate in good faith. *See* 47 CFR 76.65(b)(1)(vi). Despite the existence of this rule, in the Commission's proceeding implementing section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA), DISH Network L.L.C. requested that the Commission adopt a rule to "clarify that tying retransmission consent to restrictions on SV station carriage" violates the requirement that parties negotiate retransmission consent in good faith. *See* Comments and Petition for Further Rulemaking of DISH Network L.L.C., MB Docket No. 10–148, at 9 (filed Aug. 17, 2010). DISH Network stated that some "local stations have tied the grant of their retransmission consent for local-into-local service to concessions from satellite carriers that the carriers will not introduce any SV stations of the same network." *Id.* (footnote omitted). We note that the Commission previously interpreted § 76.65(b)(1)(vi) of the Commission's rules narrowly, as involving collusion between a broadcaster and an MVPD. *See, e.g., Good Faith Order* ("For example, Broadcaster A is prohibited from agreeing with MVPD B that it will not reach retransmission consent with MVPD C."); *SHVERA Reciprocal Bargaining Order* ("As is evidenced by the discussion in the *Good Faith Order,* that provision is intended to cover collusion between a broadcaster and an MVPD requiring non-carriage by another MVPD * * *."); *see also ATC Broadband LLC and Dixie Cable TV, Inc.* v. *Gray Television Licensee, Inc.,* 24 FCC Rcd at 1649, para. 7. We seek comment on whether to interpret this rule more expansively to preclude a broadcast station from executing an agreement prohibiting an MVPD from carrying an out-of-market SV station that might otherwise be available to consumers as a partial substitute for the in-market station's programming, in the event of a retransmission consent negotiation impasse. Should we expand our prior interpretation of this rule to cover any additional scenarios? Have there been instances in which an MVPD would have carried an out-of-market SV station, but for a local broadcaster's request or requirement to the contrary? Do the holders of the rights to certain programming, including but not limited to broadcast networks, impose geographic restrictions on the stations to which they license programming, such that an out-of-market SV station may be prohibited from consenting to carriage, in any event? We also invite comment on whether stations have threatened to delay or refuse to reach a retransmission agreement unless the MVPD commits to forego carriage of out-of-market SV stations without including such commitment in the executed agreement. Do such threats circumvent the rule as written by keeping the commitment out of the executed document? Should we revise the rule to prevent such circumvention?

28. Finally, we seek comment on whether there are any additional actions or practices that should be deemed to constitute per se violations of a Negotiating Entity's duty to negotiate retransmission consent agreements in good faith under § 76.65 of the Commission's rules, or that we should otherwise prohibit in order to protect consumers. For example, if a broadcaster or MVPD repeatedly insists on month-to-month retransmission consent agreements or a new agreement term of less than one year, should that constitute a per se violation of the Negotiating Entity's duty to negotiate retransmission consent in good faith? Month-to-month retransmission consent agreements are different from short-term extensions to existing retransmission consent agreements for the purpose of negotiating a mutually satisfactory long-term retransmission consent agreement, which the Commission encourages as a means of avoiding a loss of programming. In addition, how should the Commission view the required inclusion of a "most favored nation" (MFN) clause in a retransmission consent agreement? An MFN clause refers to an agreement that if Party A awards terms or conditions to a third party that are more favorable than those currently in place with Party B, then Party A must offer the more favorable terms or conditions to Party B. How often are MFN clauses included in retransmission consent agreements, what is their intended purpose, and what is their effect on retransmission consent negotiations?

29. With respect to other practices the Commission should consider, one commenter stated, "Small and mid-size MVPDs could greatly enhance their ability to negotiate with broadcasters if they were permitted to pool their resources, appoint an agent, and negotiate as a group." We seek comment on this proposal, including how to reconcile it with the proposal described above that would prevent a broadcast station from granting to another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned. In addition, we ask parties to comment on whether small and new entrant MVPDs are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so, whether this is fair. And, several commenters have suggested that the Commission should address the ability of broadcasters to condition retransmission consent on the purchase of other programming services, such as the programming of affiliated non-broadcast networks. We note that a number of commenters see problems with such broadcaster requirements. Is this something that the Commission should consider in evaluating whether broadcasters have negotiated in good faith?

30. Are there additional actions that should be listed as presumptive breaches of good faith but subject to arguments rebutting the presumption in special circumstances? Would the approach of rebuttable presumptions rather than per se violations offer beneficial flexibility or diminish the benefits of greater specificity in the good faith rule? We also invite comment on ways the Commission can strengthen the remedies available upon finding a violation of the good faith standards to encourage compliance with the rules. Are there additional penalties that the Commission can impose for failure to negotiate in good faith that would provide a meaningful incentive for compliance with the good faith standard, such as considering such failure in the context of license renewals, including, *e.g.,* satellite and CARS licenses? *See, e.g.,* 47 CFR 25.102, 25.156, 25.160, 78.11 *et seq.;* 47 U.S.C. 301, 308(b), 309. Finally, to what extent do MVPDs impose early termination

fees (ETFs) on their subscribers, and what effect, if any, do ETFs have on retransmission consent negotiations and on consumers' ability to switch MVPDs in the event of a negotiation impasse? What actions, if any, could the Commission take to address any problems involving ETFs?

*B. Specification of the Totality of the Circumstances Standard of § 76.65(b)(2) of the Commission's Rules*

31. We seek comment on revising the "totality of the circumstances" standard for determining whether actions in the negotiating process are taken in good faith, in an effort to improve the standard's utility and to better serve innocent consumers. As described in greater detail below, we invite comment on how the Commission can more effectively evaluate complaints that do not allege per se violations but involve behavior calculated to threaten disruption of consumer access as a negotiating tactic. We seek comment on particular behavior that the Commission should evaluate in the context of the "totality of the circumstances" standard.

32. Pursuant to § 76.65(b)(2) of the Commission's rules, "a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith * * *." 47 CFR 76.65(b)(2). The Commission has stated, "[w]e do not intend the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties." *Good Faith Order.* Rather, the totality of the circumstances test enables the Commission to consider a complaint alleging that, while a Negotiating Entity did not violate the per se objective standards, its proposals or actions were "sufficiently outrageous," or included terms or conditions not based on competitive marketplace considerations, so as to violate the good faith negotiation requirement. *See id.*

33. Some commenters have argued that the Commission should clarify or expand on the totality of the circumstances standard, including the related concept of competitive marketplace considerations, while others do not support changes to our rules governing retransmission consent. We seek comment on whether to provide more specificity for the meaning and scope of the "totality of the circumstances" standard of § 76.65(b)(2) of the Commission's rules, in order to define more clearly the instances in which a Negotiating Entity may violate this standard. For example, the Media Bureau previously found a violation of the totality of the circumstances standard, in response to a petition filed by WLII/WSUR Licensee Partnership, G.P. against Choice Cable T.V. (Choice), regarding the parties' negotiations for carriage of WLII–TV and its booster stations WSUR–TV and WORA–TV. *See* Letter to Jorge L. Bauermeister, 22 FCC Rcd 4933. While Choice stated that it halted negotiations because it began carrying WLII's programming through arrangements with WORA, Choice failed to provide evidence of a valid retransmission consent agreement with WORA, and thus the Media Bureau found that Choice breached its duty to negotiate in good faith. *See id.* at 4933–34. Are there additional circumstances that the Commission should consider in evaluating the totality of the circumstances, or is the "totality of the circumstances" best left as a general provision to capture those actions and behaviors that we do not now foresee but that may impede productive and fair negotiations? We note that the Commission previously provided examples of bargaining proposals that are presumptively consistent and presumptively inconsistent with competitive marketplace considerations and the good faith negotiation requirement. *See Good Faith Order.* Should any of the potential additional per se violations proposed in Section III.A., above, instead be considered as part of the totality of the circumstances of a particular negotiation? Is it sufficient to retain the existing flexible standard, and look to precedent to provide specificity as warranted? We seek comment on particular ways in which we could provide more specificity in defining when conduct would breach the duty of good faith negotiation under the "totality of the circumstances."

*C. Revision of the Notice Requirements*

34. Adequate advance notice of retransmission consent disputes for consumers can enable them to prepare for disruptions in their video service. However, such notice can be unnecessarily costly and disruptive when it creates a false alarm, i.e., concern about disruption that does not come to pass, and induces subscribers to switch MVPD providers in anticipation of a service disruption that never takes place. We seek comment on how best to balance useful advance notice against the potential for causing unnecessary anxiety to consumers. We invite comment on how best to revise our notice rules in light of these considerations, as well as the economic impact of notice requirements on both broadcasters and MVPDs.

35. Our current notice requirements apply to cable operators only and are not violated by a failure to provide notice unless service is actually disrupted. Specifically, section 614(b)(9) of the Act requires a cable operator to notify a local commercial television station in writing at least 30 days before either deleting or repositioning that station. 47 U.S.C. 534(b)(9). Section 76.1601 of the Commission's rules further specifies that a cable operator must "provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system." 47 CFR 76.1601. (§§ 76.1602 and 76.1603 of the Commission's rules contain additional requirements for notifying subscribers and cable franchise authorities. 47 CFR 76.1602, 76.1603.) Accordingly, under the current rule, if a cable operator fails to give notice 30 days before the retransmission consent agreement's expiration, and the agreement is ultimately renewed without the station being deleted, then the cable operator has not violated the rule. If, however, the station is ultimately deleted, and the cable operator has not given the required 30 day notice, then the cable operator is in violation of § 76.1601 of the Commission's rules. Of course, the cable operator does not know whether the negotiations will ultimately fail and it will be required to delete the broadcast signal until the agreement actually expires. We note that, notwithstanding the fact that the Commission may not have enforced the current notice requirements in all instances in which a station is deleted without notice, it reserves the right to do so in its discretion. *See Heckler* v. *Chaney,* 470 U.S. 821, 831 (1985) ("an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

36. Some commenters have proposed that we not only clarify but also expand our existing notice requirements so that consumers will have sufficient time to determine their options and take appropriate action in the event that a broadcast signal is deleted from an MVPD's service. Asserted benefits of enhanced notice include providing consumers with sufficient time to obtain access to particular broadcast signals by alternative means, and encouraging the successful completion of renewal

retransmission consent agreements more than 30 days before an existing agreement expires. In contrast, other commenters have argued that enhanced notice would have negative results such as unnecessarily alarming consumers and public officials, making negotiations increasingly contentious, providing broadcasters and rival MVPDs with more time to encourage customers to switch MVPDs, and causing customers who do switch to bear the associated costs unnecessarily if the negotiations are resolved without service disruption. We note that some cable operators have expressed their view that the existing notice requirements are not triggered by failed retransmission consent negotiations because the loss of the signal is not within the cable operators' "control." *See* 47 CFR 76.1603(b) ("Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator."). We clarify that the notice requirements of § 76.1601 of the Commission's rules do not vary based on whether a change is within the cable operator's control. Our focus in this NPRM is on § 76.1601 of the Commission's rules, which requires notice when a cable operator deletes or repositions broadcast signals, rather than § 76.1603 of the Commission's rules, which addresses customer service rules applicable to cable operators. Additionally, even if we were concerned with § 76.1603 of the Commission's rules, we would consider retransmission consent negotiations to be within the control of both parties to the negotiations, and thus, failure to reach retransmission consent agreement would not be an excuse for failing to provide notice.

37. We seek comment on whether we should revise our notice rules to require that notice of potential deletion of a broadcaster's signal be given to consumers once a retransmission consent agreement is within 30 days of expiration, unless a renewal or extension has been executed, and regardless of whether the station's signal is ultimately deleted. Under this approach, if parties have not reached a new agreement prior to 30 days from the agreement's expiration, notice must be given to consumers. Would the requirement to provide such notice encourage the parties to conclude their negotiations more than 30 days before the expiration of the existing agreement, and thus help avoid the station deletions that deprive MVPD customers of local broadcast stations? Should we require notice to be given by any particular means? How should the Commission avoid imposing notice requirements that become so frequent that MVPD customers discount the notices? We have observed that the notices of impending impasses that generally have been provided by broadcasters and MVPDs alike are often little more than ad hominem attacks on the other party. We seek comment on what steps the Commission could take to ensure, to the extent possible, that required notifications provide useful information to consumers instead of merely serving as a further front in the retransmission consent war. For example, LIN objects to notices in which MVPDs "discount the possibility of a carriage interruption." If the parties to a retransmission consent agreement begin giving notice, and subsequently agree to an extension pending further negotiations, should new notice be required of the extension agreement, and when should that notice be given? Where the parties enter into multiple extensions of their existing agreement, should notice be given of each extension? Would multiple notices be confusing to consumers? We also seek comment on extending the notice requirements with respect to deletions associated with retransmission consent disputes to non-cable MVPDs and broadcasters. What sources of authority does the Commission possess to support imposing notice requirements on non-cable MVPDs and broadcasters? *See, e.g.,* 47 U.S.C. 154(i), 301, 303(r), 303(v), 307, 309, 335(a). Would the benefits of advance notice to subscribers, particularly in allowing customers to switch providers in order to avoid service disruptions and possibly reducing their likelihood, exceed the costs to subscribers, particularly in encouraging unnecessary switching of MVPDs when service disruptions do not occur?

### *D. Application of the "Sweeps" Prohibition to Retransmission Consent Disputes*

38. We seek comment on whether we should extend the Commission's "sweeps" prohibition to non-cable MVPDs. Section 614(b)(9) of the Act states:

> A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

47 U.S.C. 534(b)(9). Note 1 to § 76.1601 of the Commission's rules states:

> No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods—generally including February, May, July and November—commonly known as audience sweeps.

47 CFR 76.1601, Note 1. Commenters have expressed differing views about the scope of this provision.

39. We note that the record evidences some confusion about whether, despite the prohibition on deletion during the sweeps period, a broadcaster may require a cable operator to delete the broadcaster's signal when the retransmission consent agreement expires during sweeps and the parties do not reach an extension or renewal agreement. The sweeps prohibition, found in section 614(b)(9) of the Act, states that "No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations." 47 U.S.C. 534(b)(9). The provision is contained within Section 614 which imposes carriage obligations on cable operators. 47 U.S.C. 534(a). Although the language of the statute is broadly worded, there is nothing in section 614(b)(9) to suggest that Congress intended to impose a reciprocal obligation on broadcasters during sweeps. To the contrary, the legislative history explains that "A cable operator may not drop or reposition any such station during a 'sweeps' period when ratings services measure local television audiences." *See* S. Rep. No. 92, 102nd Cong., 1st Sess. 1991, at 86, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1219. Moreover, this reading of the statute would eliminate any tension with the retransmission consent provisions, which provide that "No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except with the express authority of the originating station." 47 U.S.C. 325(b)(1)(A). Interpreting section 614(b)(9) to prohibit broadcasters from withholding retransmission consent during sweeps would run counter to section 325(b)(1)(A)'s express limitation on broadcast carriage without a broadcaster's consent. 47 U.S.C. 534(b)(9), 325(b)(1)(A). While DirecTV

and DISH have stated that permitting broadcasters to withhold programming during sweeps would be contrary to precedent (*citing Northland Cable TV, Inc.,* 23 FCC Rcd 7865 (MB 2008), which cites *Time Warner Cable,* 15 FCC Rcd 7882 (CSB 2006)), we note that neither of those bureau-level decisions involved a retransmission consent agreement expiring during sweeps and the broadcaster requesting deletion of its own signal. In any event, to the extent that language in any prior cases could be read as precluding a broadcaster from requiring a cable operator to delete its signal during sweeps, staff-level decisions are not binding on the Commission. *See Comcast Corp.* v. *FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008). We seek comment on the above analysis.

40. Likewise, it does not appear that section 335(a) grants the Commission authority to impose a sweeps limitation on broadcasters. Section 335(a) directs the Commission to "initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming." 47 U.S.C. 335(a). Thus, while section 335 would arguably grant the Commission authority to extend the sweeps rule to DBS providers, it does not appear to confer authority to extend the sweeps rule to broadcasters. We invite comment on this view.

41. The sweeps prohibition generally prevents a cable operator from deleting a station during the sweeps period if the retransmission consent agreement expires during sweeps. We do not believe that the existing prohibition on deleting or repositioning a local commercial television station during sweeps periods applies to non-cable MVPDs, such as DBS, given that the provision appears within section 614, a section that focuses on the carriage obligations of cable operators. *See* 47 U.S.C. 534(b)(9). We further note that the prohibition on deleting a local station during sweeps periods appears inextricably intertwined with the prior sentence expressly requiring a "cable operator" to provide at least 30 days notice to a local station prior to deletion of that station. *Id.* We see nothing in the legislative history of the statute to suggest that Congress intended section 614(b)(9) to apply to non-cable MVPDs. Consistent with the statute, § 76.1601 of the Commission's rules expressly applies to cable operators only. *See* 47 CFR 76.1601. A different provision of the Act, section 338, governs satellite carriage of local broadcast stations, and it does not include a prohibition on deletion or repositioning during sweeps. *See* 47 U.S.C. 338. Accordingly, to achieve regulatory parity between cable systems and other MVPDs, we seek comment on whether we should extend the Commission's "sweeps rule" to non-cable MVPDs. Does the Commission have authority to extend the prohibition to DBS and other non-cable MVPDs, such as through sections 154(i), 303(r), 303(v), and 335(a) of the Act? 47 U.S.C. 154(i), 303(r), 303(v), 335(a).

*E. Elimination of the Network Non-Duplication and Syndicated Exclusivity Rules*

42. We seek comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity. *See* 47 CFR 76.92 *et seq.,* 76.101 *et seq.,* 76.122, 76.123. The network non-duplication rules permit a station with exclusive rights to network programming, as granted by the network, to assert those rights by using notification procedures in the Commission's rules. *See* 47 CFR 76.92 through 76.94. The rules, in turn, prohibit the cable system from carrying the network programming as broadcast by any other station within the "geographic zone" to which the contractual rights and rules apply. *See* 47 CFR 76.92. (The size of the geographic zone depends upon the size of the market in which the station is located. *See* 47 CFR 76.92(b).) Thus, a cable system negotiating retransmission consent with a local network affiliate may face greater pressure to reach agreement by virtue of the cable system's inability to carry another affiliate of the same network if the retransmission consent negotiations fail. Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station. *See* 47 CFR 76.101 *et seq.* These rules are collectively referred to as the "exclusivity rules." They are grounded in the private contractual arrangements that exist between a station and the provider of network or syndicated programming. The Commission's rules do not create these rights but rather provide a means for the parties to the exclusive contracts to enforce them through the Commission rather than through the courts. In fact, the Commission's rules limit the circumstances in which the private contracts can be enforced by, for example, limiting the geographic area in which the exclusivity applies or exempting small cable systems and significantly viewed stations. *See, e.g.,* 47 CFR 76.92(b) and (f), 76.95(a); *see also* 47 CFR 76.93 ("Television broadcast station licensees shall be entitled to exercise non-duplication rights * * * in accordance with the contractual provisions of the network-affiliate agreement.").

43. The Petition argued that the Commission's rules provide broadcasters with a "one-sided level of protection" that is no longer justified, including through the network non-duplication and syndicated exclusivity rules. Petition at 12–15. Commenters also argued that the exclusivity rules provide broadcasters with artificially inflated bargaining leverage in retransmission consent negotiations. In addition, ACA filed a Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 on March 2, 2005 (ACA's 2005 Petition), asserting that competition and consumers are harmed when broadcasters use exclusivity and network affiliation agreements to extract "supracompetitive prices" for retransmission consent from small cable companies. *See Public Notice,* Report No. 2696, RM–11203 (Mar. 17, 2005). We hereby incorporate in this proceeding by reference ACA's 2005 Petition, as well as the comments filed in response thereto. In contrast, other commenters have asserted that network non-duplication and syndicated exclusivity provisions are important to foster localism. Some commenters have also suggested that eliminating the Commission's exclusivity rules may have little effect on retransmission consent negotiations, because private exclusive contracts between broadcasters and programming suppliers would remain in place.

44. We seek comment on whether eliminating the Commission's network non-duplication and syndicated exclusivity rules, without abrogating any private contractual provisions, would have a beneficial impact on retransmission consent negotiations. Would eliminating these rules help to minimize regulatory intrusion in the market, thus better enabling free market negotiations to set the terms for retransmission consent? The Commission previously stated in discussing its exclusivity rules, "By requiring MVPDs to black out duplicative programming carried on any distant signals they may import into a local market, the Commission's network non-duplication and syndicated exclusivity rules provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights." *See Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite*

*Home Viewer Extension and Reauthorization Act of 2004,* para. 17 (Sept. 8, 2005), *available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–260936A1.pdf.* Are these rules still necessary, or is any benefit of these rules outweighed by a negative impact on retransmission consent negotiations? Do these rules serve a useful purpose in today's marketplace? Should exclusivity in this area be left entirely to the private marketplace, without providing any means of enforcement through the Commission? Would there be a beneficial impact to removing these rules if the contractual provisions that the rules enforce stay in place? Would the elimination of the network non-duplication and syndicated exclusivity rules have a negative impact on localism? We seek comment on the impact of our network non-duplication and syndicated exclusivity rules on the distribution of programming by television stations. Do these rules provide stations and networks with any rights that cannot be secured through a combination of network-affiliate contracts and retransmission consent? Under the existing exclusivity rules, the in-market television station has the right to assert network non-duplication and syndicated exclusivity protection based on its contractual relationship with the network, regardless of whether it is actually carried by the cable system. *See Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries,* Report and Order, 3 FCC Rcd 5299, 5313–14, 5320, para. 92, 95, 122 (1988). As an alternative to eliminating the network non-duplication rule completely as discussed above, we seek comment on revising the network non-duplication rule so that it does not apply to a television station that has not granted retransmission consent. Thus, a television station would only be permitted to assert network non-duplication protection if it is actually carried on the cable system. We seek comment on this proposal.

45. We note that in SHVIA Congress extended the network non-duplication and syndicated exclusivity rules to DBS but only in extremely limited situations that are not equivalent to their application to cable systems. *See* 47 U.S.C. 339(b)(1) (applying network non-duplication protection and syndicated exclusivity protection only to "nationally distributed superstations," which are defined so that they are limited to six stations); 47 U.S.C. 339(d)(2). *See also Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals,* 65 FR 68082, November 14, 2000 (*SHVIA Exclusivity Rules Order*). In contrast, the cable network non-duplication rules may apply to any station broadcasting network programming. *See* 47 CFR 76.92(a) and 76.93 (subject to geographic limitations and exemptions based on the cable system's size or a station's "significantly viewed" status, §§ 76.92(f) and 76.95(a) of the Commission's rules). *See also* 47 CFR 76.101 and 76.106 (governing syndicated exclusivity). As specified in SHVIA, the Commission's rules apply the exclusivity requirements only to "nationally distributed superstations." *See SHVIA Exclusivity Rules Order.* We do not propose to eliminate or revise these statutorily mandated rules. In SHVERA, Congress permitted DBS to carry out-of-market significantly viewed stations (currently, 17 U.S.C. 122(a)(2) and 47 U.S.C. 340) and applied the exclusivity rules insofar as local stations could challenge the significantly viewed status of the out-of-market station and thus prevent its carriage, just as in the cable context. *See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act,* 70 FR 76504, December 27, 2005 (*SHVERA Significantly Viewed Report and Order*). (SV status is an exception to the network non-duplication rules. 47 CFR 76.92(f). SHVERA provided that if a station was to be carried out-of-market as a SV station, it would be subject to the rules allowing an in-market station to assert network non-duplication to prevent carriage of the SV station if it demonstrated that the SV status was no longer valid. *See SHVERA Significantly Viewed Report and Order.* Thus, for DBS, if a station is demonstrated to no longer be significantly viewed, it is not eligible for carriage as an out-of-market SV station. We do not propose to change this result.) We seek comment on whether and, if so, how, this limited application of the exclusivity rules would apply to DBS if we eliminate the rules as they apply to cable and whether eliminating rules as to cable systems would create undue disparities or unintended consequences for DBS. We also seek comment on whether new rules would be needed to permit local stations to challenge the significantly viewed status of an out-of-market station if the network non-duplication rules are revised or eliminated.

*F. Other Proposals*

46. We seek comment on whether there are other actions the Commission should take either to revise its existing rules or adopt new rules in order to protect consumers from harm as a result of impasses or threatened impasses in retransmission consent negotiations. Commenters advocating rule revisions or additions should address the Commission's authority to adopt their proposals.

## IV. Conclusion

47. In conclusion, in this NPRM, we seek comment on proposed changes to our rules to provide greater certainty to parties engaged in retransmission consent negotiations and to better protect consumers from the uncertainty and disruption that they may experience when such negotiations fail to yield an agreement.

## V. Procedural Matters

*A. Initial Regulatory Flexibility Act Analysis*

48. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM). *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). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed in accordance with the same filing deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). *See* 5 U.S.C. 603(a). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register.** *See id.*

Need for, and Objectives of, the Proposed Rule Changes

49. The NPRM seeks comment on a series of proposals to streamline and clarify the Commission's rules concerning or affecting retransmission consent negotiations. The Commission's primary objective is to assess whether and how the Commission rules in this arena are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and,

to the extent possible, minimize video programming service disruptions to consumers.

50. Since Congress enacted the retransmission consent regime in 1992, there have been significant changes in the video programming marketplace. One such change is the form of compensation sought by broadcasters. Historically, cable operators typically compensated broadcasters for consent to retransmit the broadcasters' signals through in-kind compensation, which might include, for example, carriage of additional channels of the broadcaster's programming on the cable system or advertising time. *See, e.g., General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee,* Memorandum Opinion and Order, 19 FCC Rcd 473, 503, para. 56 (2004). Today, however, broadcasters are increasingly seeking and receiving monetary compensation from multichannel video programming distributors (MVPDs) in exchange for consent to the retransmission of their signals. Another important change concerns the rise of competitive video programming providers. In 1992, the only option for many local broadcast television stations seeking to reach MVPD customers in a particular Designated Market Area (DMA) was a single local cable provider. Today, in contrast, many consumers have additional options for receiving programming, including two national direct broadcast satellite (DBS) providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet. One result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.

51. Accordingly, we have concluded that it is appropriate for us to reexamine our rules relating to retransmission consent. In the NPRM, we consider revisions to the retransmission consent and related rules that we believe could allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. Accordingly, the NPRM seeks comment on rule changes that would:

- Provide more guidance under the good faith negotiation requirements to the negotiating parties by:
  - Specifying additional examples of per se violations in § 76.65(b)(1) of the Commission's rules; and
  - Further clarifying the totality of the circumstances standard of § 76.65(b)(2) of the Commission's rules;
- Improve notice to consumers in advance of possible service disruptions by extending the coverage of our notice rules to non-cable MVPDs and broadcasters as well as cable operators, and specifying that, if a renewal or extension agreement has not been executed 30 days in advance of a retransmission consent agreement's expiration, notice of potential deletion of a broadcaster's signal must be given to consumers regardless of whether the signal is ultimately deleted;
- Extend to non-cable MVPDs the prohibition now applicable to cable operators on deleting or repositioning a local commercial television station during ratings "sweeps" periods; and
- Allow MVPDs to negotiate for alternative access to network programming by eliminating the Commission's network non-duplication and syndicated exclusivity rules.

We also seek comment on any other revisions or additions to our rules within the scope of our authority that would improve the retransmission consent negotiation process and help protect consumers from programming disruptions.

Legal Basis

52. The proposed action is authorized pursuant to sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 534.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

53. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. 5 U.S.C. 603(b)(3). The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." 5 U.S.C. 601(6). In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 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**." 5 U.S.C. 601(3). 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 SBA. 15 U.S.C. 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

54. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (NAICS) defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.* The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers." 13 CFR 121.201 (NAICS code 517110). Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or

more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

55. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

56. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide. 47 CFR 76.901(e). Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. 47 CFR 76.901(c). 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. Thus, under this standard, most cable systems are small.

57. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3. 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. 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). Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. 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, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

58. *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" (*see* 13 CFR 121.201, NAICS code 517110 (2007)), 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. 13 CFR 121.201, NAICS code 517110 (2007). Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.* 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). Each currently offers subscription services. DIRECTV and EchoStar 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.

59. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers," (*see* 13 CFR 121.201, NAICS code 517110 (2007)) 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. 13 CFR 121.201, NAICS code 517110 (2007). Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

60. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers. 13 CFR 121.201, NAICS code 517110 (2007). The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or

fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

61. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. 47 CFR 21.961(b)(1). The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

62. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4) through (6). We do not collect annual revenue data on EBS licensees. Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution 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." U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.* The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

63. *Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. *See* 47 CFR 101.533 and 101.1017. At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons. 13 CFR 121.201, NAICS code 517210. Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS). For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year. U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.* Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note

that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

64. *Open Video Systems.* 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. 47 U.S.C. 571(a)(3) through (4). The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers." U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.* The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.* In addition, we note that the Commission has certified some OVS operators, with some now providing service. A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.* Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. 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, at least some of the OVS operators may qualify as small entities.

65. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. * * * These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers." U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; *http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.* To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, which supersedes data from the 2002 Census, there were 396 firms that in 2007 were engaged in production of Cable and Other Subscription Programming. Of these, 386 operated with less than 1,000 employees, and 10 operated with more than 1,000 employees. However, as to the latter 10 there is no data available that shows how many operated with more than 1,500 employees. Thus, under this category and associated small business size standard, the majority of firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

66. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." 15 U.S.C. 632. The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

67. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 13 CFR 121.201 (2007 NAICS code 517110). Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

68. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs),* "*Shared-Tenant Service Providers,*" *and* "*Other Local Service Providers.*" Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 13 CFR 121.201 (2007 NAICS code 517110). Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small. *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.* Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

69. *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. *See* 13 CFR 121.201, NAICS Code 515120 (2007). Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound." *Id.* The Commission has estimated the number of licensed commercial television stations to be 1,392. *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.* 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 (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. *See Broadcast Station Totals, supra.* We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations 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.

70. 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.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

71. Certain proposed rule changes discussed in the NPRM would affect reporting, recordkeeping or other compliance requirements. Specifically, a potential rule change would (1) revise the Commission's notice rules to specify that, if a renewal or extension agreement has not been executed 30 days in advance of a retransmission consent agreement's expiration, notice of potential deletion of a broadcaster's signal must be given to consumers regardless of whether the signal is ultimately deleted; and (2) extend the coverage of this notice rule to non-cable MVPDs and broadcasters.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

72. 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. 5 U.S.C. 603(c)(1) through (c)(4).

73. As discussed in the NPRM, our goal in this proceeding is to take appropriate action, within our existing authority, to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services. The specific changes on which we seek comment are intended to allow the market-based negotiations contemplated by the statute to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. The improved successful completion of retransmission consent negotiations would benefit both broadcasters and MVPDs, including those that are smaller entities, as well as MVPD subscribers. Thus, the proposed rules would benefit smaller entities as well as larger entities. For this reason, an analysis of alternatives to the proposed rules is unnecessary. Further, we note that in its discussion of whether there are any additional actions or practices that should be deemed to constitute per se violations of a negotiating entity's duty to negotiate retransmission consent agreements in good faith, the Commission specifically references a proposal to permit small and mid-size MVPDs to "pool their resources, appoint an agent, and negotiate as a group." Such a proposal would provide particular benefit to small entities. The NPRM further considers the impact of retransmission consent on small entities by asking whether small and new entrant MVPDs are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so, whether this is fair.

74. We invite comment on whether there are any alternatives we should consider to our proposed modifications to rules that apply to or affect retransmission consent negotiations that would minimize any adverse impact on small businesses, but which maintain the benefits of our proposals.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

75. None.

*B. Ex Parte Rules*

76. *Permit-But-Disclose.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under § 1.1206(b) of the Commission's rules. *See* 47 CFR 1.1206(b); *see also id.* §§ 1.1202 and 1.1203 of the Commission's rules. 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. *See id.* § 1.1206(b)(2) of the Commission's rules. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules.

*C. Filing Requirements*

77. *Comments and Replies.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated in the DATES section of this document. To the extent any filings in response to this NPRM relate to issues pending in MB Docket No. 07–198, where the Commission sought comment on the issue of tying of an MVPD's rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks, they must also be filed in MB Docket No. 07–198. 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, May 1, 1998.

• *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* 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.

○ 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.

78. *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., 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.

79. *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.*

80. *Additional Information.* For additional information on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–2120.

## VI. Ordering Clauses

81. Accordingly, *it is ordered* that pursuant to the authority contained in sections 4(i), 4(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 614 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(r), 303(v), 307, 309, 325, 335, and 534, this Notice of Proposed Rulemaking *is adopted.*

82. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *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 in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Political candidates, and Reporting and recordkeeping requirements.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

## Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 76 as follows:

## PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for part 76 continues to read as follows:

**Authority:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.65 by revising paragraph (b)(1)(iv) and by adding paragraphs (b)(1)(viii) through (x) to read as follows:

### § 76.65 Good faith and exclusive retransmission consent complaints.

* * * * *

(b) * * *

(1) * * *

(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal, or to provide a bona fide proposal on an important issue;

* * * * *

(viii) Agreement by a broadcast television station Negotiating Entity to provide a network with which it is affiliated the right to approve the station's retransmission consent agreement with an MVPD;

(ix) Agreement by a broadcast television station Negotiating Entity to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned; and

(x) Refusal by a Negotiating Entity to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement.

* * * * *

3. Revise § 76.1601 to read as follows:

### § 76.1601 Deletion or repositioning of broadcast signals.

(a) Effective April 2, 1993, a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

**Note 1 to § 76.1601(a):** No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods—generally including February, May, July and November—commonly known as audience sweeps.

(b) Broadcast television stations and multichannel video programming distributors shall notify affected subscribers of the potential deletion of a broadcaster's signal a minimum of 30 days in advance of a retransmission consent agreement's expiration, unless a renewal or extension agreement has been executed.

[FR Doc. 2011–7250 Filed 3–25–11; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 680

**[Docket No. 0910301387–91390–01]**

**RIN 0648–AY33**

## Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement Amendment 34 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs. Amendment 34 would amend the Bering Sea and Aleutian Islands Crab Rationalization Program to exempt additional recipients of crab quota share from Gulf of Alaska Pacific cod and pollock harvest limits, called sideboards, which apply to some vessels and license limitation program licenses that are used to participate in these fisheries. The North Pacific Fishery Management Council determined that these recipients demonstrated a sufficient level of historical participation in Gulf of Alaska Pacific cod or pollock fisheries and should be exempt from the Gulf of Alaska Pacific cod and pollock sideboards. This action is necessary to give these recipients an opportunity to participate in the Gulf of Alaska Pacific cod and pollock fisheries at historical levels. To implement Amendment 34, NMFS would revise regulations governing exemptions from and calculations of sideboard harvest limits in the Gulf of Alaska Pacific cod and pollock fisheries, and reissue Federal fisheries permits and license limitation program licenses to all participants that are affected by the proposed action. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs, and other applicable law.

**DATES:** Comments must be received no later than April 27, 2011.

**ADDRESSES:** Send comments to Dr. James Balsiger, Regional Administrator, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by "RIN 0648–AY33," by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal Web site 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 and will generally be posted to *http://www.regulations.gov* 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.

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 portable document file (pdf) formats only.

Electronic copies of Amendment 34 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs, the Environmental Assessment (EA), the Regulatory Impact Review (RIR), and the Initial Regulatory Flexibility Analysis (IRFA) prepared for this action are available from *http://www.regulations.gov* or from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.* The Environmental Impact Statement, RIR, Final Regulatory Flexibility Analysis, and Social Impact Assessment prepared for the Crab Rationalization Program are available from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Rachel Baker, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** The King and Tanner crab fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands (BSAI) are managed under the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (Crab FMP). Groundfish fisheries in the Gulf of Alaska (GOA) are managed under the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA FMP). The North Pacific Fishery Management Council (Council) prepared, and NMFS approved, the Crab FMP and the GOA FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Amendments 18 and 19 to the Crab FMP implemented the BSAI Crab Rationalization Program (CR Program). Regulations implementing Amendments 18 and 19 were published on March 2, 2005 (70 FR 10174), and are located at 50 CFR part 680. Regulations implementing the GOA FMP are at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600.

## Background

The CR Program allocates BSAI crab resources among harvesters, processors, and coastal communities. The CR Program is a limited access privilege program (LAPP) for nine BSAI crab fisheries. Participants receive exclusive harvesting and processing privileges for a portion of the total allowable catch (TAC) established for each crab fishery in the CR Program.

Under the CR Program, persons received quota share (QS) based on their historical participation in one or more of the CR Program crab fisheries during a specific time period. Quota share represents an exclusive but revocable privilege that gives the QS holder an annual allocation to harvest a specific percentage of the TAC from a CR Program crab fishery. NMFS allocated QS to eligible harvesters in 2005, prior to the first year of crab fishing under the CR Program. After the initial allocation of QS, persons can only acquire QS if they are eligible to receive it by transfer.

A person's allocation of crab QS was based on a qualifying harvest history in a CR Program fishery. Each QS allocation is the harvester's average annual portion of the total catch of that crab species during the qualifying period as specified for each CR Program fishery in Table 7 of the CR Program regulations at 50 CFR part 680. Each year, a person who holds QS and submits a timely and complete crab permit application to NMFS receives an exclusive harvest privilege for a portion of the TAC for the CR Program fisheries. This harvest privilege, called individual fishing quota (IFQ), is the annual allocation of pounds (lbs) of crab for harvest that represent a QS holder's percentage of the TAC.

Under the CR Program, crab QS holders may form voluntary crab harvesting cooperatives to combine and cooperatively manage their aggregate QS holdings. Each cooperative that is approved by NMFS receives the amount of crab harvesting cooperative IFQ yielded by the aggregate QS holdings of all of the members of the cooperative. The regulations at § 680.21 govern the formation and operation of crab harvesting cooperatives. Most harvesters in the CR Program assign their IFQ allocations to cooperatives. In the 2008/2009 crab fishing year, more than 90 percent of the IFQ issued in each CR Program fishery was assigned to cooperatives.

## Current GOA Groundfish Sideboards

The Council and NMFS commonly establish catch limits and other fishery participation restrictions, called sideboards, when implementing LAPPs to prevent participants who benefit from receiving exclusive harvesting privileges from shifting effort into fisheries that are not managed with a LAPP. In developing the CR Program, the Council anticipated that crab harvesting cooperatives would greatly increase operating flexibility for BSAI crab vessel

operators because they could choose when and where to fish for IFQ. Crab fishermen in cooperatives also could potentially reduce costs by harvesting crab IFQs on fewer vessels during an extended season. The Council was particularly concerned that increased flexibility for recipients of Bering Sea snow crab (*Chionoecetes opilio*) QS could give them an incentive to increase effort in GOA groundfish fisheries. Most GOA groundfish fisheries are not allocated among gear types (sectors) or under a quota share program, and increased effort by new entrants in these fisheries could economically disadvantage traditional participants in these fisheries.

Historically, the Bering Sea snow crab fishery and many economically valuable GOA groundfish fisheries were conducted concurrently from January through March. Owners of most vessels annually elected to fully participate in either the Bering Sea snow crab fishery or the GOA groundfish fisheries. However, owners of some vessels participated in both fisheries over a number of years. The Council realized that increased flexibility from the CR Program could allow owners of BSAI crab vessels to increase fishing effort in GOA groundfish fisheries, especially in the Pacific cod fishery, because it is one of a limited number of groundfish species in which pots can be effectively used for harvest. Pots are the only legal gear type in BSAI crab fisheries, and most vessels that fish for crab can be configured to catch Pacific cod using groundfish pot gear. The Council determined that the CR Program should include sideboards for most GOA groundfish fisheries to prevent Bering Sea snow crab QS recipients from increasing their participation in GOA groundfish fisheries. However, because some Bering Sea snow crab QS recipients had significant historical participation in the GOA Pacific cod fishery, the Council also developed criteria that would exempt those Bering Sea snow crab QS recipients with significant participation in, or dependence on, the GOA Pacific cod fishery.

The CR Program's GOA groundfish sideboards were implemented in 2006. Under current regulations, CR Program sideboard limits apply to vessels that: (1) Harvest any species of GOA groundfish with the exception of sablefish harvested with fixed gear; (2) are not authorized to conduct directed fishing for pollock under the American Fisheries Act (AFA) of 1998 (Public Law 105–277, Title II of Division C); and (3) meet one or both of the following criteria: (a) made a legal landing of Bering Sea snow crab between January 1, 1996, and December 31, 2000, that generated any amount of Bering Sea snow crab QS; or (b) are named on a GOA groundfish license limitation program (LLP) license that was generated by the fishing history of a vessel that also generated Bering Sea snow crab QS. Vessels that meet these criteria subsequently will be referred to as "non-AFA crab vessels." The CR Program did not establish sideboard limits for AFA vessels with historical participation in the Bering Sea snow crab fishery because these vessels are subject to GOA harvesting and processing restrictions under the AFA and in implementing regulations for the AFA (§ 679.64(b)). Similarly, non-AFA crab vessels are not restricted by sideboard limits in the GOA fixed-gear sablefish fisheries because these fisheries are managed under a LAPP. Sideboard limits are intended to protect participants in non-LAPP fisheries, who may be disadvantaged by increased fishing effort from participants who benefit from a LAPP.

A non-AFA crab vessel's GOA groundfish sideboard is specified on the Federal Fisheries Permit (FFP) issued by NMFS to the owner of the vessel. An FFP authorizes a vessel owner to deploy the vessel named on the FFP to conduct directed fishing for groundfish in Federal waters of the GOA or BSAI. An FFP is not transferable and is valid only for the vessel for which it is issued. Although the Council primarily intended for the CR Program GOA groundfish sideboard limits to restrict vessels with Bering Sea snow crab catch history, the Council determined that GOA sideboard limits should apply to FFPs and certain LLP licenses. Because LLP licenses are transferable, GOA groundfish sideboard limits apply to those groundfish LLP licenses that are endorsed for the GOA and that derived from a vessel with catch history that also generated Bering Sea snow crab QS. The LLP was implemented in 2000 to limit the number, size, and operation type (gear designation) of vessels that may be deployed in the groundfish fisheries in the exclusive economic zone of the BSAI and GOA, and in the crab fisheries in the BSAI. The LLP requires, with limited exceptions, that a vessel must be named on a legible copy of a valid LLP license that is on board the vessel in order to participate in directed fisheries for LLP species. NMFS issued LLP licenses based on the catch history of a vessel in specific fisheries. The CR Program GOA groundfish sideboards apply to groundfish LLP licenses derived from the catch history of a vessel that also generated Bering Sea snow crab QS to prevent crab QS recipients from circumventing the GOA groundfish sideboards by transferring an LLP license for use on a vessel that is not subject to the sideboards. Thus, any vessel named on a GOA-endorsed groundfish LLP license that was generated by the groundfish catch history of a non-AFA vessel that also generated Bering Sea crab QS is subject to the GOA groundfish sideboards, even if the vessel named on the LLP license did not have historical landings that generated Bering Sea snow crab QS.

The CR Program's GOA groundfish sideboards apply to non-AFA crab vessels that participate in Federal fisheries and State of Alaska (State) parallel groundfish fisheries in the GOA (§ 680.22(f)). State parallel fisheries occur in State waters but are opened at the same time as Federal fisheries in Federal waters. State parallel fishery harvests are considered part of the overall TAC, and Federally-permitted vessels move between State and Federal waters during the concurrent Federal and State parallel fisheries. Applying sideboards to non-AFA crab vessels using an FFP, an LLP, or both, to participate in Federal GOA groundfish fisheries prevents these vessels from using the flexibility of the CR Program to increase participation in GOA groundfish fisheries by fishing in State waters to circumvent fishing closures in Federal waters.

Each year, NMFS calculates the non-AFA crab vessel sideboard limits for GOA groundfish sideboard fisheries. A sideboard limit is calculated as a ratio of the amount of a groundfish species retained by non-AFA crab vessels from 1996 to 2000, relative to the total retained catch of that species by all vessels during the same period. This calculation yields a fixed ratio, or percentage, that is multiplied by the annual TAC for a GOA groundfish sideboard species to determine the non-AFA crab vessel sideboard limit in metric tons (§ 680.22(d)). The sideboard limits are published in the **Federal Register** in the proposed and final harvest specifications for GOA groundfish and posted on the NMFS Alaska Region Web site (*see* **ADDRESSES**). The CR Program sideboard limits constrain the aggregate catch of each sideboard species by non-AFA crab vessels.

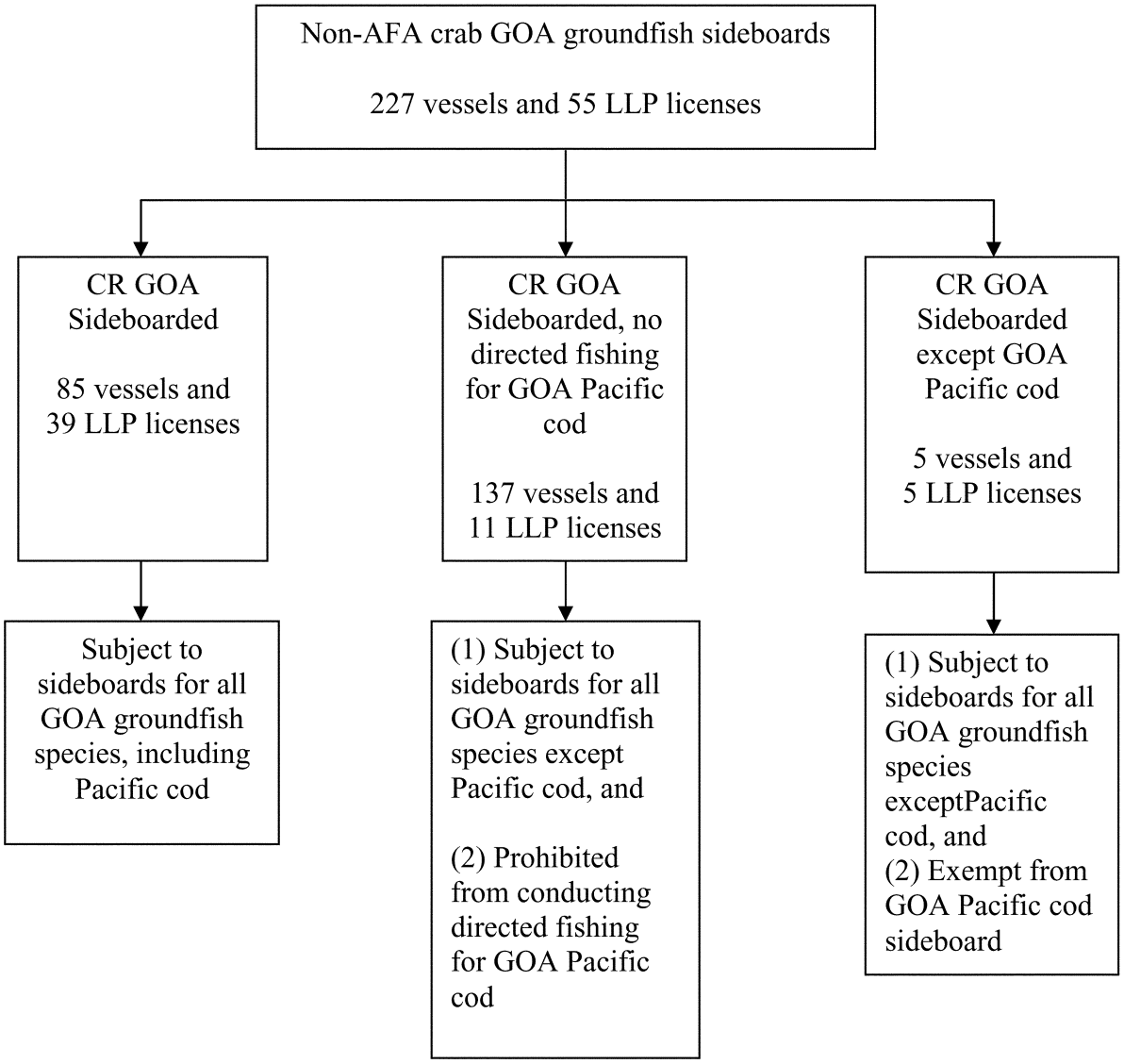
When developing the CR Program sideboard limits, the Council recognized that individual non-AFA crab vessels had varying levels of historical participation in the GOA Pacific cod fishery. To recognize these different participation patterns, the Council

added two exceptions to the GOA Pacific cod sideboard limits for vessels and LLP licenses that met certain criteria: (1) a prohibition on directed fishing for GOA Pacific cod, and (2) an exemption from the GOA Pacific cod sideboard limits. For the first exception, the Council determined that vessels and groundfish LLP licenses with a catch history of less than 50 metric tons (mt) of GOA groundfish from 1996 through 2000 had extremely limited participation in, and therefore likely were not dependent on, the GOA Pacific cod fishery. The Council recommended that these vessels—and vessels named on these LLP licenses—should be prohibited from conducting directed fishing for GOA Pacific cod to prevent their participation in a GOA Pacific cod directed fishery. In current regulations, a non-AFA crab vessel is prohibited from conducting directed fishing for GOA Pacific cod if it meets either or both of the following criteria: (1) the vessel landed less than 50 mt (110,231 lbs) of GOA groundfish from 1996 through 2000, and the vessel's catch history generated Bering Sea snow crab QS; or (2) the vessel is named on a GOA groundfish LLP license that was generated by the catch history of a vessel that landed less than 50 mt (110,231 lbs) of GOA groundfish from 1996 through 2000, and the vessel's catch history generated Bering Sea snow crab QS.

For the second exception to the sideboard limits, the Council determined that vessels and groundfish LLP licenses with catch history from 1996 through 2000 that demonstrated minimal dependence on the Bering Sea snow crab fishery and sufficient dependence on the GOA Pacific cod fishery should be exempt from the GOA Pacific cod sideboard limits in order to allow these vessels to participate in the GOA Pacific cod fishery unrestricted by the sideboard. In current regulations, a non-AFA crab vessel qualifies for an exemption from the GOA Pacific cod sideboard limit if it meets either or both of the following criteria: (1) The vessel landed less than 100,000 lbs (45.4 mt) of Bering Sea snow crab and more than 500 mt (1,102,311 lbs) of GOA Pacific cod from 1996 through 2000, and the vessel's catch history generated Bering Sea snow crab QS; or (2) the vessel is named on a GOA groundfish LLP license that was generated by the catch history of a vessel that landed less than 100,000 lbs (45.4 mt) of Bering Sea snow crab and more than 500 mt (1,102,311 lbs) of GOA Pacific cod from 1996 through 2000, and the vessel's catch history generated Bering Sea snow crab QS. The exempt non-AFA crab vessels do not have to stop fishing when the GOA Pacific cod sideboard limit is reached and may continue to fish as long as directed fishing for GOA Pacific cod is open. The GOA Pacific cod catch history of the exempt vessels and groundfish LLP licenses is not included in the non-AFA crab vessel sideboard limit ratio calculations, and NMFS does not count the GOA Pacific cod catch of exempt non-AFA crab vessels toward the sideboard limit.

Prior to the first year of fishing under the CR Program, NMFS determined which non-AFA crab vessel sideboard category applied to each vessel with catch history that generated Bering Sea snow crab QS and each GOA groundfish LLP license that was generated by the catch history of a vessel that also generated Bering Sea snow crab QS. The three sideboard categories are: (1) Subject to sideboard limits for all GOA groundfish fisheries (CR GOA Sideboarded); (2) prohibited from directed fishing for GOA Pacific cod and subject to sideboard limits for all other GOA groundfish fisheries (CR GOA Sideboarded, no directed fishing for GOA Pacific cod); and (3) exempt from Pacific cod sideboard limits, and subject to sideboard limits for all other GOA groundfish fisheries (CR GOA Sideboarded except Pacific cod). Figure 1 shows a diagram of the current non-AFA crab GOA groundfish sideboard categories and the number of vessels and LLP licenses subject to each category. Some vessels with catch history that generated Bering Sea snow crab QS did not have groundfish catch histories that resulted in LLP licenses authorizing participation in GOA groundfish fisheries. Hence, the number of vessels is larger than the number of LLP licenses in two of the three sideboard categories.

Figure 1. Current Non-AFA Crab GOA Groundfish Sideboard Categories and the Number of Vessels and LLP Licenses Subject to Each Category




NMFS opens directed fishing for a GOA groundfish sideboard species when it determines that all catch, both directed and incidental, of that species by non-AFA crab vessels would not exceed the sideboard limit for that species. If directed fishing for a GOA groundfish sideboard species is open to non-AFA crab vessels, NMFS deducts all directed and incidental catch of that GOA groundfish sideboard species by non-AFA crab vessels subject to the sideboard from the annual sideboard limit for that species. When NMFS determines that the non-AFA crab vessel sideboard catch limit is reached or the remainder of the sideboard is needed for incidental catch in other fisheries, NMFS closes directed fishing for that species to non-AFA crab vessels that are subject to the sideboard.

The annual non-AFA crab vessel sideboard limit for a GOA groundfish species is an amount that is smaller than the overall TAC for the groundfish fishery because the sideboard limit is calculated as a ratio of the amount of each groundfish species retained by non-AFA crab vessels from 1996 to 2000, relative to the total retained catch of that species by all vessels during the same period. This calculation yields a fixed ratio, or percentage, that is multiplied by the overall TACs for each GOA groundfish sideboard species to determine the non-AFA crab vessel sideboard limit in metric tons. Since 2006, NMFS has determined that only the Pacific cod sideboard limits in two GOA management areas were of a sufficient amount to open directed fishing for non-AFA crab vessels. NMFS has closed all other GOA groundfish sideboard species, including pollock, to directed fishing by non-AFA crab vessels since 2006 because the sideboard limits were of insufficient amounts to provide for both directed fishing and incidental catch in other target fisheries by non-AFA crab vessels.

Most sideboard limits are apportioned by regulatory area or district because most GOA groundfish TACs are apportioned to separate fisheries in the

western GOA, central GOA, and eastern GOA. The TACs and sideboard limits for GOA Pacific cod also are allocated between sectors that process Pacific cod inshore (90 percent) and offshore (10 percent), and the western GOA and central GOA Pacific cod TACs are further split into two seasonal apportionments. The GOA pollock TACs and sideboard limits are assigned completely to the inshore sector, and the GOA pollock TACs in three areas, Shumagin (610), Chirikof (620), and Kodiak (630), are split into four seasonal apportionments.

Table 1 shows the GOA Pacific cod and pollock sideboard ratios and sideboard limits that applied to non-AFA crab vessels in 2010.

TABLE 1—2010 NON-AFA CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS IN METRIC TONS FOR GOA POLLOCK AND PACIFIC COD

| Species | Season/gear | Area/component | Ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest | 2010 TAC | 2010 non-AFA crab vessel sideboard limit |
|---|---|---|---|---|---|
| Pollock | A Season: January 20–March 10. | Shumagin (610) | 0.0098 | 5,551 | 54 |
| | | Chirikof (620) | 0.0031 | 8,414 | 26 |
| | | Kodiak (630) | 0.002 | 4,403 | 1 |
| | B Season: March 10–May 31 | Shumagin (610) | 0.0098 | 5,551 | 54 |
| | | Chirikof (620) | 0.0031 | 9,925 | 31 |
| | | Kodiak (630) | 0.002 | 2,891 | 1 |
| | C Season: August 25–October 1. | Shumagin (610) | 0.0098 | 7,577 | 74 |
| | | Chirikof (620) | 0.0031 | 4,878 | 15 |
| | | Kodiak (630) | 0.002 | 5,912 | 1 |
| | D Season: October 1–November 1. | Shumagin (610) | 0.0098 | 7,577 | 74 |
| | | Chirikof (620) | 0.0031 | 4,878 | 15 |
| | | Kodiak (630) | 0.002 | 5,912 | 1 |
| | Annual | WYK (640) | 0.0000 | 2,031 | 0 |
| | | SEO (650) | 0.0000 | 9,245 | 0 |
| Pacific cod | A Season[1]: January 1–June 10. | W inshore | 0.0902 | 11,212 | 1,011 |
| | | W offshore | 0.2046 | 1,246 | 255 |
| | | C inshore | 0.0383 | 19,862 | 761 |
| | | C offshore | 0.2074 | 2,207 | 458 |
| | B Season[2]: September 1–December 31. | W inshore | 0.0902 | 7,475 | 674 |
| | | W offshore | 0.2046 | 831 | 170 |
| | | C inshore | 0.0383 | 13,242 | 507 |
| | | C offshore | 0.2074 | 1,471 | 305 |
| | Annual | E inshore | 0.0110 | 1,815 | 20 |
| | | E offshore | 0.0000 | 202 | 0 |

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

**The Proposed Actions**

After the CR Program was implemented in 2005, some non-AFA crab vessel operators testified to the Council that the GOA Pacific cod and pollock sideboard limits were too restrictive. These operators indicated that they were unable to maintain historical groundfish catch levels in the GOA and should qualify for an exemption from the sideboard limits. Some operators testified that although their vessel's catch history was more than 100,000 lbs of Bering Sea snow crab from 1996 through 2000, which is the maximum allowable amount to qualify for the exemption from the Pacific cod sideboard limits, they had significant history in, and dependence on, GOA Pacific cod and pollock fisheries. Based on this public testimony and a review of the effects of the sideboard limits in the first 2 years of the CR Program (2005/2006 and 2006/2007 crab fishing years), the Council determined that the existing criteria for exemption from the sideboard limits in GOA Pacific cod and pollock fisheries should be examined to consider inclusion of additional vessels and LLP licenses with historical participation in and sufficient dependence on these fisheries. The Council initiated an analysis in December 2007 to examine alternatives that would expand the criteria for non-AFA crab vessels to qualify for an exemption from the Pacific cod sideboard limits and that would extend a similar exemption to the pollock sideboard limits. In October 2008, the Council recommended Amendment 34 to the Crab FMP to exempt additional vessels and groundfish LLP licenses from the GOA Pacific cod and pollock sideboard limits. The Council also clarified that it did not intend for Amendment 34 to disqualify any vessels or groundfish LLP licenses that are currently exempt from non-AFA crab vessel Pacific cod sideboard limits in the GOA.

This proposed rule would implement two actions. Action 1 would revise the GOA Pacific cod sideboard limit exemption criteria for non-AFA crab vessels. Action 2 would establish new GOA pollock sideboard limit exemption criteria for non-AFA crab vessels. The rationale for, and effects of, the proposed actions follow.

*Action 1: Revise GOA Pacific Cod Sideboard Limit Exemption Criteria*

The Council considered two alternatives for this action. Alternative 1, or status quo, would continue the current exemption criteria. Under the status quo, any non-AFA crab vessel that was used to land less than 100,000 lbs (45.4 mt) of Bering Sea snow crab and more than 500 mt (1,102,311 lbs) of GOA Pacific cod between January 1, 1996, and December 31, 2000, is exempt from sideboard directed fishing closures

for Pacific cod in the GOA. Alternative 2 would modify the exemption criteria. The Council developed five different catch threshold options for Alternative 2 based on input from affected non-AFA crab vessel owners. These participants provided Bering Sea snow crab and GOA Pacific cod catch history information for their operations to the Council and suggested specific threshold amounts based on these data. Each option included a maximum amount of Bering Sea snow crab landings and a minimum amount of GOA Pacific cod landings, and a non-AFA crab vessel would have to meet both of these landing thresholds to qualify for an exemption from the Pacific cod sideboard limits. One option included an exemption qualification criterion that would have required a non-AFA crab vessel to have a minimum of 20 landings of pollock harvested from the GOA from 1996 through 2000, in addition to meeting a maximum Bering Sea snow crab catch threshold and a minimum GOA Pacific cod catch threshold.

Under the five options considered in Alternative 2, the maximum amount of Bering Sea snow crab landings were 500,000 lbs (226.8 mt), 750,000 lbs (353.8 mt),and 1,212,673 lbs (550 mt), or 0.22 percent of all Bering Sea snow crab landings from 1996 through 2000. The minimum amount of Pacific cod harvested from the GOA Federal and State parallel fisheries were the status quo alternative amount of 500 mt (1,102,311 lbs), 680 mt (1,499,143 lbs),and 2,500 mt (5,511,557 lbs). Under these minimum and maximum threshold combinations, a range of zero additional vessels and LLP licenses to six additional vessels and LLP licenses would qualify for an exemption.

To evaluate dependence on GOA Pacific cod sufficient to warrant an exemption from the GOA Pacific cod sideboard, the Council primarily focused on the level of participation in the GOA Pacific cod fishery prior to the implementation of the CR Program as well as the level of participation in the GOA Pacific cod sideboard fishery after implementation of the CR Program by vessels estimated to qualify under each option. The Council recognized that any vessel with GOA Pacific cod landings in excess of 2,500 mt prior to implementation of the CR Program clearly demonstrated dependence on and sufficient participation in the GOA Pacific cod fishery. However, the Council determined that dependence on the GOA Pacific cod fishery also was demonstrated at the next lower landings threshold being considered by the Council of 680 mt, as evidenced by the Council's original threshold of 500 mt. NMFS agrees that vessels with catch history meeting the Council's recommended threshold of 680 mt of GOA Pacific cod harvested between 1996 and 2000 would demonstrate significant participation in, and dependence on, the GOA Pacific cod fishery because NMFS estimates that the average landings of GOA Pacific cod per non-AFA crab vessel from 1996 through 2000 totaled approximately 329 mt per vessel. The Council's recommended threshold of a minimum harvest of 680 mt is slightly more than twice this average.

The Council also emphasized that continued participation in the fishery over time was a clear demonstration of dependence. The estimated three vessels and LLP licenses that would qualify for exemption under the Council's preferred option had GOA Pacific cod landings in excess of 680 mt between 1996 and 2000, and also participated in the GOA Pacific cod fishery each year from 1998 through 2007. In considering continued participation, the Council declined to adopt the least restrictive option, which would have exempted the three vessels and LLP licenses that qualified under the preferred option as well as an additional three vessels and LLP licenses for a total of six vessels and LLP licenses. The Council concluded that the additional three vessels that would be exempt under this option failed to demonstrate sufficient dependence on the GOA Pacific cod fishery because these vessels had very limited participation in the fishery in recent years. As shown in Table 1–23 of the EA/RIR/IRFA (*see* **ADDRESSES**), from 1995 through 2007, all six non-AFA crab vessels that would be exempt under the least restrictive option were active in the GOA Pacific cod fishery in 1998 and 2000, but only the three non-AFA crab vessels that also would qualify under the preferred option participated in the fishery each year since 1998. Additional discussion of the options considered by the Council is provided in the EA/RIR/IRFA prepared for this action and in the Classification section of the preamble to this proposed rule.

Under the Council's preferred option, the maximum threshold for landings of Bering Sea snow crab would increase to 750,000 lbs. While the proposed 750,000 lbs maximum threshold is a significant increase relative to the original maximum threshold of 100,000 lbs, the Council decided that a higher Bering Sea snow crab threshold was justified given the demonstrated dependence on the GOA Pacific cod fishery by the vessels that are estimated to qualify for exemption under the Council's preferred alternative. NMFS agrees that vessels with Bering Sea snow crab catch history that is less than the Council's recommended threshold of 750,000 lbs would demonstrate minimal participation in, and dependence on, the Bering Sea snow crab fishery because NMFS estimates that the average landings of Bering Sea snow crab from 1996 through 2000 for all vessels with catch history that generated Bering Sea snow crab QS totaled approximately 2,366,000 lbs per vessel. The Council's recommended threshold of a maximum harvest of 750,000 lbs is less than one third of this average.

The Council also considered the effects of additional exempt vessels on participants in the GOA Pacific cod fishery and concluded that three additional vessels and LLP licenses would not be likely to negatively impact other participants. According to Table 1–23 and section 1.4.2.2 in the EA/RIR/IRFA, 254 vessels participated in the GOA Pacific cod fishery in 2009; the estimated three vessels that would be exempt from the GOA Pacific cod sideboard under this action represent approximately one percent of the number of participating vessels with combined past harvests of Pacific cod from 1995 through 2009 of less than 2 percent of the total catch of GOA Pacific cod.

Based on the public testimony provided to the Council, the information and analysis provided in the EA/RIR/IRFA, and the reasons explained above, the Council determined and NMFS agrees that the non-AFA crab GOA Pacific cod sideboard exemption criteria should be changed to exempt any non-AFA crab vessel that was used to land less than 750,000 lbs (340.2 mt) of Bering Sea snow crab and more than 680 mt of GOA Pacific cod between January 1, 1996, and December 31, 2000, from sideboard directed fishing closures for Pacific cod in the GOA. Vessels meeting these criteria have been determined to demonstrate minimal dependence on the Bering Sea snow crab fishery and sufficient dependence on the GOA Pacific cod, and should be relieved from restrictions imposed by the current exemption criteria.

The EA/RIR/IRFA estimates that, in addition to the five vessels and five LLP licenses that are currently exempt from the sideboard limits, the Council's recommended catch criteria would result in three additional vessels and the groundfish LLP licenses that named these vessels at the time of Council final action as qualifying for an exemption from the GOA Pacific cod sideboard

limits. Table 2 shows the current criteria for exemption from the non-AFA crab vessel GOA Pacific cod sideboard and the proposed criteria for exemption from the non-AFA crab vessel GOA Pacific cod sideboard. Table 3 shows the number of non-AFA crab vessels and LLP licenses under the current and proposed criteria for exemption from the non-AFA crab vessel GOA Pacific cod sideboard.

TABLE 2—CURRENT AND PROPOSED CRITERIA FOR EXEMPTION FROM THE NON-AFA CRAB VESSEL GOA PACIFIC COD SIDEBOARD

| Catch threshold | Current exemption criteria | Proposed exemption criteria |
|---|---|---|
| Catch history of Bering Sea snow crab from 1996–2000 was less than | 100,000 lbs | 750,000 lbs. |
| AND. | | |
| Catch history of GOA Pacific cod from 1996–2000 was more than | 500 mt | 680 mt. |

TABLE 3—NUMBER OF NON-AFA CRAB VESSELS AND LLP LICENSES EXEMPT FROM THE NON-AFA CRAB VESSEL GOA PACIFIC COD SIDEBOARD UNDER CURRENT AND PROPOSED CRITERIA

| | Current exemption criteria | Proposed exemption criteria |
|---|---|---|
| Vessels exempt from sideboard | 5 | 8 (estimated). |
| LLP licenses exempt from sideboard | 5 | 8 (estimated). |

Under the proposed action, eight vessels and eight groundfish LLP licenses (five vessels and groundfish LLP licenses currently exempt and three vessels and groundfish LLP licenses estimated to be exempt under proposed Action 1) would be exempt from the GOA Pacific cod sideboard limits under the Council's preferred alternative. The eight vessels, and any vessel named on one of the eight groundfish LLP licenses exempt from the sideboard limits, would be allowed to conduct directed fishing for GOA Pacific cod if: (1) Directed fishing for Pacific cod is open in the GOA; and (2) the vessel is not subject to a more restrictive sideboard, such as the non-AFA crab vessel sideboard prohibiting a vessel from conducting directed fishing for GOA Pacific cod. In addition, GOA Pacific cod catch by non-AFA crab vessels exempt from the sideboard limits would not count toward the Pacific cod non-AFA crab vessel sideboard limits. Finally, the eight non-AFA crab vessels and eight LLP licenses that would qualify for an exemption from the non-AFA crab GOA Pacific cod sideboard limit under the proposed action would continue to be subject to non-AFA crab GOA groundfish sideboards for other species, unless the vessel or LLP license also would qualify for an exemption from the non-AFA crab GOA pollock sideboard limit under Action 2 of this proposed rule.

As described above under "Current GOA Groundfish Sideboards," the GOA groundfish catch history of vessels exempt from the non-AFA crab vessel Pacific cod sideboard limits is not included in the sideboard limit ratio calculations. To implement Action 1, NMFS would reduce the non-AFA crab vessel sideboard limits in the GOA inshore component Pacific cod fishery proportional to the 1996 to 2000 catch history of the non-AFA crab vessels that would qualify for exemption from the GOA Pacific cod sideboard under proposed Amendment 34. This adjustment to the sideboard limits is discussed in more detail below under "Implementation of Amendment 34." Management of the GOA non-AFA crab vessel Pacific cod sideboard limits likely would not change under proposed Action 1, because a maximum of three additional vessels would be exempt from the non-AFA crab vessel GOA Pacific cod sideboard limit and potentially would shift from the GOA Pacific cod sideboard fishery to the GOA Pacific cod fishery limited by the overall TAC. Three additional vessels would be approximately 1 percent of the 258 vessels that participated in the GOA Pacific cod fishery in 2009, and this limited number of additional vessels under the proposed action would not be expected to affect the timing or overall harvest of GOA Pacific cod in a manner that would change NMFS's management of the fishery. NMFS would continue to set an overall TAC for the GOA Pacific cod fishery, deduct GOA Pacific cod catch from the overall TAC, and close the fishery when the overall TAC was reached. NMFS also would continue to calculate the non-AFA crab vessel sideboard limit for each GOA Pacific cod fishery (*see* Table 1). If the sideboard limit is of a sufficient amount to open directed fishing, NMFS would open directed fishing for the Pacific cod sideboard limit to all non-AFA crab vessels subject to the sideboard limit at the beginning of each season. All targeted or incidental catch of Pacific cod made by these non-AFA crab vessels would be deducted from the Pacific cod sideboard limit. NMFS would close directed fishing for the GOA Pacific cod sideboard limit when the catch in that fishery and projected incidental Pacific cod catch by non-AFA crab vessels in other target fisheries reaches the sideboard limit. NMFS would not open directed fishing for the GOA Pacific cod sideboard limit if the sideboard limit is of an insufficient amount to support directed fishing (§ 680.22(e)).

*Action 2: Establish GOA Pollock Sideboard Limit Exemption Criteria*

The Council heard testimony that some non-AFA crab vessels with historical dependence on GOA pollock fisheries have been prevented from maintaining their historical participation levels in those fisheries under the CR Program. Under the CR Program, all non-AFA crab vessels are subject to sideboard limits in GOA pollock fisheries. Although some non-AFA crab vessels historically participated in GOA pollock fisheries, the aggregate catch history of GOA pollock by non-AFA crab vessels from 1996 to 2000 yielded sideboard limits that NMFS determined were of an insufficient amount to support directed fishing. Since 2006, NMFS has closed the GOA pollock sideboard fishery to directed fishing by non-AFA crab vessels. NMFS determined that the GOA pollock sideboard limits were

insufficient to provide for both directed fishing and incidental catch of pollock by non-AFA crab vessels in other target fisheries. With the likelihood of no directed fishing for pollock sideboard limits for the foreseeable future, a GOA pollock-dependent non-AFA crab vessel could not maintain its historical level of participation in GOA pollock fisheries and likely would be negatively impacted under the status quo.

The Council considered two alternatives for this action. Alternative 1, or status quo, would not provide for an exemption from the GOA pollock sideboard. Alternative 2 would add an exemption to GOA pollock sideboard limits, and the Council developed three different catch threshold options to qualify for an exemption based on input from affected non-AFA crab vessel owners. Each option required a non-AFA crab vessel to have been used to land less than 1,212,673 lbs (550 mt), or 0.22 percent of all Bering Sea snow crab landings from 1996 through 2000. The options differed by requiring a non-AFA crab vessel to have been used to make a minimum of five, ten or twenty landings of pollock harvested from the GOA from 1996 through 2000.

Under the options considered in Alternative 2, one to four vessels and groundfish LLP licenses would be exempt. The EA/RIR/IRFA estimates that four vessels landed less than 1,212,673 lbs (550 mt) of all Bering Sea snow crab landings from 1996 to 2000 and made at least five pollock landings during the 1996 through 2000 period. The same four vessels would qualify if 10 landings of GOA pollock were required for a sideboard limit exemption. Only one of the four vessels would qualify for the GOA pollock sideboard limit exemption if 20 pollock landings were required.

The Council had limited historical catch data available for Action 2 because the data were confidential for two of the three options being considered. Confidentiality restrictions prevent disclosure of catch data for fewer than four vessels on an aggregated basis. However, the owner of the vessel that would qualify under all of the options waived his right to confidentiality in order for the Council to have some GOA pollock catch data for its decision.

To evaluate dependence on GOA pollock sufficient to warrant an exemption from the sideboard limits, the Council considered a vessel's level of participation in the GOA pollock fisheries prior to the implementation of the CR Program, as well as the effects of exempt vessels on participants in the GOA pollock fisheries. Unlike Action 1, the Council was unable to consider levels of participation in the GOA pollock sideboard fishery since implementation of the CR Program because the sideboard fishery has been closed to directed fishing since 2006.

After receiving public testimony and reviewing the available Bering Sea snow crab and GOA pollock catch information, the Council determined that a non-AFA crab vessel that was used to land less than 0.22 percent of all Bering Sea snow crab landings from 1996 to 2000 (1,212,673 lbs or 550 mt), and made 20 landings of pollock harvested from the GOA from 1996 to 2000, was minimally dependent on the Bering Sea snow crab fishery and sufficiently dependent on the GOA pollock fisheries to qualify for an exemption from the pollock sideboard limits. In reaching this decision, the Council determined that the 20-landings minimum threshold for an exemption from the GOA pollock sideboard limit was the minimum level of participation by non-AFA crab vessels that would demonstrate significant participation in, and dependence on, the GOA pollock fishery. Table 1–31 in the EA/RIR/IRFA shows the amount of pollock harvested from the GOA from 1995 through 2007 by the non-AFA crab vessel that would qualify under the Council's preferred alternative. Pollock comprised approximately 80 percent of the vessel's catch in the GOA in most years from 1995 through 2000. Additionally, this vessel was used to make at least twice as many landings of pollock (20) harvested from the GOA from 1996 through 2000 than the three other vessel operations that would qualify under the 5 and 10 landings options. The Council determined, and NMFS agrees, that this catch information clearly demonstrated the operator's dependence on the GOA pollock fishery. The level of dependence for participants qualifying under the 5 or 10 pollock landings options was less clear to the Council; the Council noted during its deliberations that it had received no testimony advocating a lower pollock landing threshold. NMFS also agrees with the Council that vessels meeting the proposed threshold for Bering Sea snow crab landings would demonstrate minimal participation in, and dependence on, this fishery because it represents a very low level of harvest relative to other participants in the Bering Sea snow crab fishery. NMFS estimates that the average landings of Bering Sea snow crab per vessel from 1996 through 2000 for all vessels with catch history that generated Bering Sea snow crab QS totaled approximately 2,366,000 lbs per vessel. The Council's recommended threshold of a maximum harvest of 1,212,673 lbs is approximately half of this average.

In considering the effects of exempting vessels on participants in the GOA pollock fishery, the Council determined that the exemption of one vessel and one LLP license that clearly demonstrated past dependence on the pollock fishery would not negatively affect other participants in the fishery. However, the Council determined that the exemption of four vessels, three of which had questionable past dependence on the fishery, would negatively affect other GOA pollock fishery participants.

To implement Action 2, NMFS proposes to use the poundage equivalent of the Council's recommended 0.22 percent of all Bering Sea snow crab landings from 1996 to 2000 in the proposed regulations at § 680.22(a)(4)(i). The Council recommended that a non-AFA crab vessel that landed less than 0.22 percent of all Bering Sea snow crab landings from 1996 to 2000, and made 20 landings of pollock harvested from the GOA from 1996 to 2000, should qualify for an exemption from the sideboard limits. The poundage equivalent of 0.22 percent of all Bering Sea Snow crab landings from 1996 through 2000 is 1,212,673 lbs (550 mt). This approach to use equivalent pounds instead of the percentage of all Bering Sea snow crab landings from 1996 to 2000, as recommended by the Council, is proposed to maintain consistency with other non-AFA crab vessel sideboard regulatory text at §§ 680.22(a)(2)(i) and (a)(3)(i).

Management of the GOA non-AFA pollock sideboard limits likely would not change under proposed Action 2. NMFS would continue to set a non-AFA crab vessel sideboard limit for each GOA pollock fishery (*see* Table 1). NMFS likely would continue to find the recalculated GOA pollock sideboard limits are insufficient amounts for directed fishing. No adjustment to the non-AFA crab vessel pollock sideboard limits is proposed under Amendment 34, as described under "Implementation of Amendment 34." As under Action 1, GOA pollock harvest by the non-AFA crab vessel that would qualify for the exemption would not be counted toward the GOA pollock sideboard limit. The vessel also would not be required to stop fishing when the sideboard limit is reached if directed fishing for GOA pollock is open. Finally, the non-AFA crab vessel and LLP license that would qualify for an exemption from the GOA pollock

sideboard under the proposed action would continue to be subject to non-AFA crab GOA groundfish sideboards for other species, unless the vessel or LLP license also would qualify for an exemption from the non-AFA crab GOA Pacific cod sideboard limit under Action 1 of this proposed rule.

**Summary of Effects of the Proposed Actions**

Action 1 and Action 2 would have the overall effect of exempting additional non-AFA crab vessels from GOA Pacific cod and pollock sideboard limits. The Council determined that these participants were unduly restricted by the GOA groundfish sideboard limits in fisheries on which they had historical dependence and should be exempt from the sideboard limits. This rationale is consistent with the Council's intent in establishing the GOA sideboard limits, as described above under "Current GOA Groundfish Sideboards."

The proposed actions could potentially increase participation in directed fishing for GOA Pacific cod and pollock. Any increase in catch over their current history by the vessel operations that would be exempt from the sideboard limits under the proposed actions would leave less GOA Pacific cod and pollock for other participants, and could result in some economic loss for those participants. As discussed earlier, the EA/RIR/IRFA (*see* **ADDRESSES**) estimated that the non-AFA crab vessels that would be exempt from GOA sideboard limits by Action 1 and Action 2 harvested less than 2 percent of the total amount of Pacific cod and pollock harvested from the GOA from 1995 through 2009. Based on this information, the Council determined that potential increased participation by these participants would be unlikely to have a significant impact on other participants in the GOA Pacific cod and pollock fisheries, which in 2009, numbered 254 and 184, respectively.

**Implementation of Amendment 34**

To give effect to the Council's recommendations for Action 1 and Action 2, NMFS would: (1) Modify regulatory text at § 680.22; (2) adjust the non-AFA crab vessel GOA inshore component Pacific cod sideboard limits to remove the catch history of the vessels that would qualify for exemption from the sideboard limits under proposed Amendment 34; and (3) reissue Federal Fisheries Permits (FFPs) and LLP licenses after determining the appropriate non-AFA crab vessel GOA groundfish sideboard category for all affected vessels and groundfish LLP licenses.

*Adjust Sideboard Limits*

As discussed above under "Current GOA Groundfish Sideboards," the non-AFA crab vessel groundfish sideboard limits constrain the aggregate catch of vessels subject to the sideboard limits to the historical groundfish catch of these vessels from 1996 through 2000. To implement proposed Amendment 34, NMFS would revise non-AFA crab vessel sideboard limit ratios that are specified in the final 2011 and 2012 harvest specifications for the GOA. Each year, NMFS develops GOA groundfish harvest specifications in consultation with the Council. The Council recommended the final 2011 and 2012 GOA harvest specifications to NMFS in December 2010. After considering the Council recommendations and public comment received on the proposed 2011 and 2012 harvest specifications (75 FR 76352, December 8, 2010), NMFS will publish the final harvest specifications for 2011 and 2012 as a final rule in the **Federal Register**. If approved, Amendment 34 would revise the 2011 and 2012 non-AFA crab vessel GOA Pacific cod and pollock sideboard limits.

For Action 1, NMFS would remove from the inshore component GOA Pacific cod sideboard limits the amount of retained catch of Pacific cod harvested in the GOA from 1996 through 2000 by the non-AFA crab vessels that would qualify for a sideboard limit exemption under Amendment 34. The recalculated ratio would represent the remaining non-AFA crab vessel Pacific cod catch history from 1996 to 2000 of vessels subject to the sideboard, relative to the total retained catch of Pacific cod by all vessels during the same period. The recalculated ratio would be multiplied by the 2011 and 2012 GOA Pacific cod TACs and apportioned by area and season to determine the recalculated sideboard limits in metric tons. For Action 2, no change is proposed under Amendment 34 to the non-AFA crab vessel pollock sideboard limits from the current ratios that are implemented in the final 2011 and 2012 GOA harvest specifications. The 2011 and 2012 non-AFA crab vessel Pacific cod and pollock sideboard limit ratio calculations will already exclude the retained catch of these species harvested from the GOA from 1996 through 2000 by non-AFA crab vessels whose owners took advantage of an agency administrative appeals process to challenge implementation of the sideboard limits on their vessels in 2006 because NMFS removed this catch history during the appeals process. Thus, the 1996 through 2000 catch history of some of the vessels that likely would qualify for an exemption from GOA sideboard limits under Amendment 34 is not currently included in the sideboard limit calculations. As a result, the sideboard limit adjustments necessary to implement Amendment 34 already will be partially reflected in the 2011 and 2012 harvest specifications.

Table 4 and Table 5 present the proposed 2011 and 2012 non-AFA crab vessel sideboard limits for GOA Pacific cod and pollock harvest under Amendment 34 based on the Council's recommended final harvest specifications for these species. If the final 2011 and 2012 harvest specifications as recommended by the Council are approved and implemented by NMFS, the GOA Pacific cod and pollock sideboard limit ratios proposed under Amendment 34 would be as shown in Table 4 and Table 5. NMFS is proposing changes to the GOA inshore component Pacific cod sideboard limits and soliciting public comment as part of the proposed rule to implement Amendment 34. If Amendment 34 is approved after considering comments received in the public comment period, NMFS would publish revised final 2011 and 2012 sideboard limits for GOA pollock and Pacific cod in the final rule to implement Amendment 34.

TABLE 4—PROPOSED 2011 GOA POLLOCK AND PACIFIC COD NON-AFA CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS IN METRIC TONS UNDER AMENDMENT 34 BASED ON FINAL HARVEST SPECIFICATIONS RECOMMENDED BY THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL IN DECEMBER 2010

| Species | Season/gear | Area/component | Proposed ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest | 2011 TAC recommended by the Council | 2011 non-AFA crab vessel sideboard limit based on Council TAC recommendation |
|---|---|---|---|---|---|
| Pollock | A Season: January 20–March 10. | Shumagin (610) | 0.0098 | 4,787 | 47 |
| | | Chirikof (620) | 0.0031 | 11,896 | 37 |
| | | Kodiak (630) | 0.0002 | 4,475 | 1 |
| | B Season: March 10–May 31. | Shumagin (610) | 0.0098 | 4,787 | 47 |
| | | Chirikof (620) | 0.0031 | 14,232 | 44 |
| | | Kodiak (630) | 0.0002 | 2,139 | 0 |
| | C Season: August 25–October 1. | Shumagin (610) | 0.0098 | 8,729 | 86 |
| | | Chirikof (620) | 0.0031 | 5,618 | 17 |
| | | Kodiak (630) | 0.0002 | 6,811 | 1 |
| | D Season: October 1–November 1. | Shumagin (610) | 0.0098 | 8,729 | 86 |
| | | Chirikof (620) | 0.0031 | 5,618 | 17 |
| | | Kodiak (630) | 0.0002 | 6,811 | 1 |
| | Annual | WYK (640) | 0.0000 | 2,339 | 0 |
| | | SEO (650) | 0.0000 | 9,245 | 0 |
| Pacific cod | A Season[1]: January 1–June 10. | W inshore | 0.0852 | 12,303 | 1,048 |
| | | W offshore | 0.3376 | 1,367 | 461 |
| | | C inshore | 0.0475 | 21,795 | 1,035 |
| | | C offshore | 0.2076 | 2,422 | 503 |
| | B Season[2]: September 1–December 31. | W inshore | 0.0852 | 8,202 | 699 |
| | | W offshore | 0.3376 | 911 | 308 |
| | | C inshore | 0.0475 | 14,530 | 690 |
| | | C offshore | 0.2076 | 1,614 | 335 |
| | Annual | E inshore | 0.0110 | 1,758 | 19 |
| | | E offshore | 0.0000 | 195 | 0 |

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

TABLE 5—PROPOSED 2012 GOA POLLOCK AND PACIFIC COD NON-AFA CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS IN METRIC TONS UNDER AMENDMENT 34 BASED ON FINAL HARVEST SPECIFICATIONS RECOMMENDED BY THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL IN DECEMBER 2010

| Species | Season/gear | Area/component | Proposed ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest | 2012 TAC recommended by the Council | 2012 Non-AFA crab vessel sideboard limit based on Council TAC recommendation |
|---|---|---|---|---|---|
| Pollock | A Season: January 20–March 10. | Shumagin (610) | 0.0098 | 7,342 | 72 |
| | | Chirikof (620) | 0.0031 | 11,129 | 34 |
| | | Kodiak (630) | 0.0002 | 5,823 | 1 |
| | B Season: March 10–May 31. | Shumagin (610) | 0.0098 | 7,342 | 72 |
| | | Chirikof (620) | 0.0031 | 13,128 | 41 |
| | | Kodiak (630) | 0.0002 | 3,824 | 1 |
| | C Season: August 25–October 1. | Shumagin (610) | 0.0098 | 10,022 | 98 |
| | | Chirikof (620) | 0.0031 | 6,451 | 20 |
| | | Kodiak (630) | 0.0002 | 7,820 | 2 |
| | D Season: October 1–November 1. | Shumagin (610) | 0.0098 | 10,022 | 98 |
| | | Chirikof (620) | 0.0031 | 6,451 | 20 |
| | | Kodiak (630) | 0.0002 | 7,820 | 2 |
| | Annual | WYK (640) | 0.0000 | 2,686 | 0 |
| | | SEO (650) | 0.0000 | 9,245 | 0 |
| Pacific cod | A Season[1]: January 1–June 10. | W inshore | 0.0852 | 13,877 | 1,182 |
| | | W offshore | 0.3376 | 1,542 | 521 |
| | | C inshore | 0.0475 | 24,583 | 1,168 |
| | | C offshore | 0.2076 | 2,731 | 567 |
| | B Season[2]: September 1–December 31. | W inshore | 0.0852 | 9,252 | 788 |
| | | W offshore | 0.3376 | 1,028 | 347 |
| | | C inshore | 0.0475 | 16,389 | 778 |
| | | C offshore | 0.2076 | 1,821 | 378 |
| | Annual | E inshore | 0.0110 | 2,246 | 25 |
| | | E offshore | 0.0000 | 250 | 0 |

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

*Reissue Federal Fisheries Permits and LLP Licenses*

The proposed actions would affect owners of non-AFA vessels with catch history that generated Bering Sea snow crab QS and also would qualify for a sideboard exemption under proposed Action 1 or Action 2, or both. These vessel owners hold unique FFPs. Federal Fisheries Permits are required on all vessels participating in groundfish fisheries in Federal waters in Alaska. NMFS designates vessel sideboard limitations, or exemptions, on a vessel's FFP. The proposed actions would also affect holders of a groundfish LLP license derived from catch history that was generated by a vessel that would qualify for a sideboard exemption under proposed Action 1 or Action 2, or both.

In June 2008, the Council clarified the process that NMFS should follow when determining which vessels and LLP licenses qualify for an exemption from the non-AFA crab vessel GOA Pacific cod and pollock sideboard limits (EA/RIR/IRFA, Section 1.4.1) (*see* **ADDRESSES**). First, a vessel must meet the catch threshold criteria currently proposed at § 680.22(a) to qualify for an exemption from non-AFA crab vessel Pacific cod or pollock sideboard limits. Once a vessel is determined to qualify for an exemption from sideboard limits, the Council recommended that NMFS determine whether the GOA groundfish LLP license that was generated by that exempt vessel's catch history would also qualify for the exemption. An LLP license would be deemed to qualify for a GOA Pacific cod or pollock sideboard limit exemption if the vessel with catch history that generated the groundfish LLP license: (1) Would qualify for an exemption under proposed § 680.22(a); and (2) is the only vessel that contributed GOA Pacific cod or pollock catch history to generate the LLP license. This approach would prevent a groundfish LLP license that drew its catch history from multiple vessels from qualifying for the sideboard exemption under Amendment 34. NMFS would follow this process when determining the non-AFA crab vessel GOA Pacific cod and pollock sideboard limit exemptions that apply to FFPs and groundfish LLP licenses affected by the proposed actions.

NMFS would create an official record with all relevant information necessary to assign landings to specific vessels and LLP licenses. The official record created by NMFS would contain vessel landings data and the LLP licenses to which those landings would be attributed. Evidence of the number and amount of landings would be based only on legally submitted NMFS weekly production reports for catcher/processors and State of Alaska fish tickets for catcher vessels. Historically, NMFS has used only these two data sources to determine the specific amount and location of landings, and NMFS proposes to continue to do this under the proposed actions. The official record also would include the records of the specific LLP licenses assigned to vessels and other relevant information necessary to attribute landings to specific LLP licenses.

NMFS would presume the official record is correct and would notify each affected FFP and LLP license holder of the effect of Amendment 34 on their FFP or LLP license. NMFS would mail a notification to the address on record for each FFP and LLP license holder at the time the notification is sent. The notification would indicate which non-AFA crab vessel sideboard category would be applicable to the FFP or LLP license based on the official record: (1) CR GOA Sideboarded for all groundfish species; (2) CR GOA Sideboarded for all groundfish species and no GOA Pacific cod fishing; (3) CR GOA Sideboarded for all groundfish species except Pacific cod; (4) CR GOA Sideboarded for all groundfish species except pollock; or (5) CR GOA Sideboarded for all groundfish species except Pacific cod and pollock. NMFS would include information concerning any changes to the non-AFA crab vessel sideboard restrictions applicable to the FFP or LLP license in the GOA and offer a single 30-day evidentiary period from the date that notification is sent for an FFP or LLP license holder to submit any supporting information, or evidence, to verify that the information contained in the official record is inconsistent with his or her records.

An FFP or LLP license holder who submits claims that are inconsistent with information in the official record would have the burden of proving that the submitted claims are correct. NMFS would not accept inconsistent claims unless verified by clear written documentation. NMFS would evaluate additional information or evidence to support an FFP or LLP license holder's inconsistent claims submitted prior to or within the 30-day evidentiary period. If NMFS determines that the additional information or evidence proves that the FFP or LLP license holder's inconsistent claims were indeed correct, NMFS would act in accordance with that information or evidence. However, if after the 30-day evidentiary period, NMFS were to determine that the additional information or evidence did not show that the FFP or LLP license holder's inconsistent claims were correct, NMFS would deny the claim. NMFS would notify the applicant through an initial administrative determination (IAD) that the additional information or evidence did not meet the burden of proof to overcome the official record.

NMFS's IAD would indicate the deficiencies and discrepancies in the information or the evidence submitted in support of the claim. NMFS's IAD would indicate which claims could not be approved based on the available information or evidence, and include information on how an applicant could appeal the IAD. The appeals process is described under § 679.43. A person who appeals an IAD would be eligible to use the disputed FFP or LLP license until final agency action by NMFS on the appeal. The non-AFA crab vessel sideboard limitation, or exemption, designated on an FFP or LLP license would continue to be effective unless modified by a successful appeal. NMFS would reissue any FFP or LLP licenses pending final action by NMFS as interim FFP or LLP licenses. Once final action has been taken, NMFS would reissue the FFP or LLP license as a non-interim license. Interim LLP licenses would be non-transferable to ensure that a person would not receive an LLP license by transfer and have the non-AFA crab vessel sideboard category changed through an appeals process that was initiated and conducted by the previous LLP license holder, a process that a transferee could not control, and which could substantially affect the value and utility of an LLP license. (FFPs are not transferable.)

If a person does not dispute the notification of changes to their FFP or LLP license, or upon the resolution of any inconsistent claims, a revised non-interim FFP or LLP license with the appropriate non-AFA crab vessel sideboard category would be reissued to the FFP or LLP license holder, unless the FFP or LLP license is interim for another reason.

## Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this proposed rule is consistent with Amendment 34 to the Crab FMP, the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

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

An RIR was prepared for proposed Action 1 and Action 2 that assesses all costs and benefits of available regulatory

alternatives. The RIR describes the potential size, distribution, and magnitude of the economic impacts that these actions may be expected to have. Additionally, an IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act, which describes the impact this proposed rule would have on small entities. Copies of the RIR/IRFA prepared for this proposed rule are available from NMFS (*see* **ADDRESSES**). The RIR/IRFA prepared for this proposed rule incorporates by reference an extensive RIR and Final Regulatory Flexibility Analysis prepared for the CR Program that detailed its impacts on small entities.

The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A detailed description of the actions, the reasons why they are being considered, and a statement of the objectives of, and the legal basis for, these actions are contained in the preamble of this proposed rule and are not repeated here. The IRFA prepared for these actions describes in detail why the actions are being proposed; describes the objectives and legal basis for the proposed rule; describes and estimates the number of small entities to which the proposed rule would apply; describes any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; identifies no overlapping, duplicative, or conflicting Federal rules; and describes any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. A summary of that analysis follows. A discussion of the analysis is also found in the preamble to this proposed rule.

The principal objective of the proposed rule is to rectify an economic burden that was unintentionally imposed on a small group of non-AFA crab vessels by implementation of the sideboard limit provisions of the CR Program. Proposed Action 1 and Action 2 would relieve catch restrictions that apply to certain non-AFA crab vessels in GOA Pacific cod and pollock fisheries. NMFS expects the relief from sideboard limit restrictions would enable these vessels to increase participation in these fisheries as compared to their participation in these fisheries while subject to the sideboard restrictions, thus potentially increasing gross revenues for the vessels exempted by the proposed actions.

The entities directly regulated by the proposed actions are those non-AFA crab vessels that target Pacific cod and pollock in Federal and State parallel fisheries in the GOA. For purposes of an IRFA, the Small Business Administration (SBA) has established that a business involved in fish harvesting is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates), and if it has combined annual gross receipts not in excess of $4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. Because the SBA does not have a size criterion for businesses that are involved in both the harvesting and processing of seafood products, NMFS has in the past applied and continues to apply SBA's fish harvesting criterion for these businesses because catcher/processors are first and foremost harvesting businesses. Therefore, a business involved in both the harvesting and processing of seafood products is a small business if it meets the $4.0 million criterion for fish harvesting operations. NMFS is currently reviewing its small entity size classification for all catcher/processors in the United States. However, until new guidance is adopted, NMFS will continue to use the annual receipts standard for catcher/processors.

The Council analyzed two alternatives for Action 1 and two alternatives for Action 2. Alternative 1 for each action was the status quo. Alternative 2 for each action included different catch threshold options for vessels and groundfish LLP licenses to qualify for an exemption from non-AFA crab vessel GOA Pacific cod and pollock sideboard limits. Alternative 2 for Action 1 included five options. The 1996 through 2000 catch thresholds for the five options were: (1) Option 2.1—a maximum of 0.22 percent (1,212,673 lbs or 550 mt) of total Bering Sea snow crab catch and a minimum of 500 mt of GOA Pacific cod; (2) Option 2.2—a maximum of 500,000 lbs of Bering Sea snow crab and a minimum of 2,500 mt of GOA Pacific cod; (3) Option 2.3—a maximum of 500,000 lbs of Bering Sea snow crab and a minimum of 680 mt of GOA Pacific cod; (4) Option 2.3.1—a maximum of 500,000 lbs of Bering Sea snow crab, a minimum of 680 mt of GOA Pacific cod, and a minimum of 20 GOA pollock landings; and (5) Option 2.4 (preferred alternative)—a maximum of 750,000 lbs of Bering Sea snow crab and a minimum of 680 mt of GOA Pacific cod. Alternative 2 for Action 2 included three options. Each option had a maximum catch threshold of 0.22 percent (1,212,673 lbs or 550 mt) of total Bering Sea snow crab catch from 1996 through 2000. The minimum GOA pollock landing thresholds from 1996 through 2000 for each option were: (1) Option 2.1—5 pollock landings; (2) Option 2.2—10 pollock landings; and (3) Option 2.3—20 pollock landings. The Council and NMFS determined that the status quo alternatives do not contain exemption criteria that includes all non-AFA crab vessels with demonstrated dependence on GOA Pacific cod and pollock fisheries. This outcome is inconsistent with the Council's intent in establishing the non-AFA crab vessel GOA sideboards, which was to enable non-AFA crab vessels with relatively small amounts of Bering Sea snow crab QS, but with relatively significant participation in GOA groundfish fisheries, to continue fishing in GOA groundfish fisheries without being subject to the sideboard limit restrictions. Compared with the status quo, the alternatives recommended by the Council and NMFS are the alternatives that would most benefit non-AFA crab vessels that the Council deemed are dependent on GOA Pacific cod and pollock fisheries. The recommended alternatives also would have a low likelihood of negatively impacting other participants in these GOA fisheries.

The IRFA prepared for the proposed actions matched earnings from all fisheries in and off Alaska for 2007 with the non-AFA crab vessels that participated in the GOA Pacific cod and pollock fisheries for that year. For all of the options considered by the Council, a total of six vessel operators could be directly regulated by Action 1 to revise the criteria for exemption from non-AFA Pacific cod sideboard limits in the GOA. Of these six vessel operations, five operate catcher vessels and each produced gross earnings less than $4 million, thus categorizing them as small entities. The remaining operation, a catcher/processor, produced gross earnings greater than $4 million, categorizing the operation as a large entity. Of the four vessel operations that could be directly regulated by all options the Council considered under Action 2 to establish criteria for exemption from the non-AFA pollock sideboard limits in the GOA, NMFS estimates that all four entities operate catcher vessels and are small entities. One small entity would qualify for an exemption under Action 1 and Action 2.

NMFS estimates—under all options that the Council considered under Action 1 and Action 2—a maximum of nine entities could be directly regulated under Action 1 and Action 2, and eight of these entities are small entities.

Under the Council's preferred alternative for Action 1, three operations would be directly regulated by the proposed action, and all of these are estimated to be small entities. Under the Council's preferred alternative for Action 2, one operation would be directly regulated by the proposed action and is estimated to be a small entity. This small entity would qualify for exemptions under Action 1 and Action 2. NMFS estimates that under the Council's preferred alternatives and this proposed rule, a maximum of three small entities would be directly regulated under Action 1 and Action 2. All of the entities that would be directly regulated under the proposed actions would be expected to benefit from the actions relative to the status quo alternative because the proposed actions would relieve restrictions that limit their ability to conduct directed fishing for GOA Pacific cod and pollock. The proposed action would not be expected to have adverse impacts on any of the directly regulated small entities.

Other options considered by the Council for both Action 1 and Action 2 would have potentially benefited up to five additional small entities, for a total of eight small entities under both actions. However, based on landings and participation data, the Council and NMFS determined that these five vessel operations were not sufficiently dependent on the GOA Pacific cod and pollock fisheries, and should not qualify for exemption from the non-AFA crab vessel sideboard limits in the GOA under Amendment 34. Exempting these entities from the GOA sideboard limits would not be consistent with the Council's objective for these actions, which was to exempt from the sideboard limits only those vessel operations that demonstrated significant participation in, and dependence on, GOA Pacific cod and pollock fisheries. The Council and NMFS also concluded that exempting nine entities from the sideboard limits under the least restrictive options considered for Action 1 and Action 2 would almost double the current number of exempt non-AFA crab vessels (five), and potentially have a negative impact on the ability of other participants in the GOA Pacific cod and pollock fisheries to maintain their historical levels of participation. Two small entities that would have qualified under each of the other four options for Action 1 would be able to continue to participate in the GOA Pacific cod sideboard fishery under Amendment 34. Three small entities that would have qualified under each of the other two options for Action 2 would continue to be subject to the GOA pollock sideboards under Amendment 34. These small entities likely would not be able to participate in the GOA pollock fishery because NMFS likely would continue to find the GOA pollock sideboard limits are insufficient amounts for directed fishing.

The proposed rule would not change existing reporting, recordkeeping, and other compliance requirements. The analysis revealed no Federal rules that would conflict with, overlap, or be duplicated by the alternatives under consideration.

**List of Subjects in 50 CFR Part 680**

Alaska, Fisheries.

Dated: March 22, 2011.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 680 is proposed to be amended as follows:

## PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 680 continues to read as follows:

**Authority:** 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

2. In § 680.22:

a. Revise paragraph (a)(3)

b. Add paragraph (a)(4).

c. Revise the introductory text of paragraph (d).

d. Redesignate paragraph (d)(2) as (d)(3), and revise redesignated paragraph (d)(3).

e. Add paragraph (d)(2).

### § 680.22 Sideboard protections for GOA groundfish fisheries.

* * * * *

(a) * * *

(3) *Vessels and LLP licenses exempt from Pacific cod sideboard closures in the GOA.* Any vessel or LLP license that NMFS has determined meets either of the following criteria is exempt from sideboard directed fishing closures for Pacific cod in the GOA:

(i) Any vessel subject to GOA groundfish closures under paragraph (a)(1)(i) of this section that landed less than 750,000 lb (340.2 mt), in raw weight equivalents, of Bering Sea snow crab and more than 680 mt (1,499,143 lb), in round weight equivalents, of Pacific cod harvested from the GOA between January 1, 1996, and December 31, 2000; and

(ii) Any LLP license that:

(A) Was initially issued based on the catch history of a vessel meeting the criteria in paragraph (a)(3)(i) of this section; and

(B) Did not generate crab QS based on legal landings from any vessel other than the vessel meeting the criteria in paragraph (a)(3)(i) of this section.

(4) *Vessels and LLP licenses exempt from pollock sideboard closures in the GOA.* Any vessel or LLP license that NMFS has determined meets either of the following criteria is exempt from sideboard directed fishing closures for pollock in the GOA:

(i) Any vessel subject to GOA groundfish closures under paragraph (a)(1)(i) of this section that landed less than 1,212,673 lb (550 mt), in raw weight equivalents, of Bering Sea snow crab, and had 20 or more legal landings of pollock harvested from the GOA between January 1, 1996, and December 31, 2000; and

(ii) Any LLP license that:

(A) Was initially issued based on the catch history of a vessel meeting the criteria in paragraph (a)(4)(i) of this section; and

(B) Did not generate crab QS based on legal landings from any vessel other than the vessel meeting the criteria in paragraph (a)(4)(i) of this section.

* * * * *

(d) *Determination of GOA groundfish sideboard ratios.* Except for fixed-gear sablefish, sideboard ratios for each GOA groundfish species, species group, season, and area for which annual specifications are made are established according to the following formulas:

* * * * *

(2) *Pollock.* The sideboard ratios for pollock are calculated by dividing the aggregate retained catch of pollock by vessels that are subject to sideboard directed fishing closures under paragraph (a)(1) of this section and that do not meet the criteria in paragraph (a)(4) of this section by the total retained catch of pollock by all groundfish vessels between 1996 and 2000.

(3) *Groundfish other than Pacific cod and pollock.* The sideboard ratios for groundfish species and species groups other than Pacific cod and pollock are calculated by dividing the aggregate landed catch by vessels subject to sideboard directed fishing closures under paragraph (a)(1) of this section by the total landed catch of that species by

all groundfish vessels between 1996 and 2000.

* * * * *

[FR Doc. 2011–7249 Filed 3–25–11; 8:45 am]

**BILLING CODE 3510–22–P**

# Notices

Federal Register
Vol. 76, No. 59
Monday, March 28, 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 22, 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 Utilities Service**

*Title:* 7 CFR Part 1744, Subpart B, Lien Accommodations and Subordination Policy.

*OMB Control Number:* 0572–0126.

*Summary of Collection:* The Rural Utilities Service (RUS) is a credit agency of the U.S. Department of Agriculture (USDA). It makes mortgage loans and loan guarantees to finance electric, telecommunications, and water and waste facilities in rural areas. The Telecommunications Act of 1996 mandates that universally available and affordable telecommunications services, including advanced services, be made available to all U.S. citizens—whether in rural areas or city centers, affluent, or poor communities. In support of this mandate, RUS is amending its regulation to ensure that, with the assistance of advanced telecommunications technology, rural citizens be provided the same economic, educational, and health care benefits available in the large metropolitan areas.

*Need and Use of The Information:* This regulation will help RUS facilitate funding from non-RUS sources in order to meet the growing capital needs of rural Local Exchange Carriers and enable the providers to compete in an expanding number of telecommunications services. RUS will use the information to provide "*automatic*" approval for borrowers requesting lien accommodations that meet the required financial tests. These tests are designed to ensure that the financial strength of the borrower is more than sufficient to protect the government's loan security interests; hence, the lien accommodations will not adversely affect the government's financial interests.

*Description of Respondents:* Business or other for-profit; Not-for-profit institutions.

*Number of Respondents:* 30.

*Frequency of Responses:* Reporting: On occasion

*Total Burden Hours:* 23.

**Rural Utilities Service**

*Title:* 7 CFR 1783, Revolving Fund Program.

*OMB Control Number:* 0572–0138.

*Summary of Collection:* Section 6002 of the Farm Security and Rural Investment Act of 2002 amended the Consolidated Farm and Rural Development Act by adding a grant program that established the Revolving Fund Program (RFP) to assist communities with water or wastewater systems. Qualified private non-profit organizations will receive RFP grant funds to establish a lending program for eligible entities.

*Need and Use of The Information:* Non-profit organizations applying for the RFP grant(s) must submit an application package that includes an application form, narrative proposal (work plan), various other forms, certifications, and supplemental information. The Rural Development State Offices and the Rural Utilities Service National Office staff will use the information collected to determine applicant eligibility, project feasibility, and the applicant's ability to meet the grant and regulatory requirements. Grant recipients will set up a revolving loan fund to provide loans to finance predevelopment costs of water or wastewater projects, or short-term small capital projects not part of the regular operation and maintenance of current water and wastewater systems.

*Description of Respondents:* Not-for-profit institutions.

*Number of Respondents:* 5.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 313.

**Rural Utilities Service**

*Title:* 7 CFR 1776, Household Water Well System Grant Program.

*OMB Control Number:* 0572–0139.

*Summary of Collection:* The Rural Utilities Service (RUS) is authorized by Section 306E of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926e) to administer and make grants to qualified private non-profit organizations which will use the funds to establish lending programs for household water wells from which individuals may borrow money systems under the Household Water Well System program.

*Need and Use of The Information:* The grant applicants will provide information to be collected as part of the application and grant process through certain documentation, certifications, and completed forms. Grant applicants must show that the project will provide technical and financial assistance to eligible individuals to remedy

household well problems. The grant recipients will establish a revolving loan fund lending program to provide water well loans to individuals who own or will own private wells in rural areas. The individual loan recipients may use the funds to construct, refurbish, and service their household well systems for an existing home.

*Description of Respondents:* Not-for-profit institutions.

*Number of Respondents:* 10.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 1,033.

**Rural Utilities Service**

*Title:* Electric System Emergency Restoration Plan.

*OMB Control Number:* 0572–0140.

*Summary of Collection:* Electric power systems have been identified in Presidential Decision Directive 63, May 1998, as one of the critical infrastructures of the United States. The term "critical infrastructure" is defined in section 1016(e) of the USA Patriot Act of 2001 (42 U.S.C. 5195c(e)). To ensure that the electric infrastructure in rural America is adequately protected, Rural Utilities Service requires that all current electric borrowers enhance an existing Emergency Restoration Plan (ERP) or, if none exists, develop and maintain an ERP.

*Need and Use of The Information:* Rural Development Utilities Programs (RDUP) requires that all current electric borrowers conduct a Vulnerability and Risk Assessment (VRA) of its respective systems and utilize the results of this assessment to enhance an existing ERP or create an ERP if none exists. The ERP provides written procedures detailing response and restoration efforts in the event of a major system outage resulting from a natural or man made disaster. RDUP requires each electric borrower to provide annually a self-certification, in writing, that an ERP exists and that an initial VRA has been performed. If this information were not collected, vulnerabilities may exist in the electric system infrastructure. The result would be increased risk to public safety and may affect the Government loan security.

*Description of Respondents:* Not-for-profit institutions; Business or other for-profit.

*Number of Respondents:* 676.

*Frequency of Responses:* Reporting: Annually.

*Total Burden Hours:* 338.

**Charlene Parker,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2011–7160 Filed 3–25–11; 8:45 am]

**BILLING CODE 3410–15–P**

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

March 22, 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.

**Animal and Plant Health Inspection Service**

*Title:* Lacey Act Declaration Requirements; Plants and Plant Products.

*OMB Control Number:* 0579–0349.

*Summary of Collection:* The Lacey Act, enacted in 1900 and significantly amended in 1988, is the United States' oldest Wildlife Protection Statute. The Act combats trafficking in "illegal" wildlife, fish, or plants. The Food, Conservation and Energy Act of 2008, which took effect May 22, 2008, amended the Lacey Act by expanding its protection to a broader range of plants and plant products (Section 8204, Prevention of Illegal Logging Practices).

*Need and Use of the Information:* Under the amended Lacey Act, importers are required to submit a declaration form (PPQ–505) for certain plants and plant products and PPQ–(505B) supplemental form to provide the declarer additional space to enter the required information, if needed. The declaration must contain, among other things, the scientific name of the plant, value of the importation, quantity of the plant, and name of the country from which the plant was harvested. If species varies or is unknown, importers will have to declare the name of each species that may have been used to produce the product. This information will be used to support investigations into illegal logging practices by the Justice Department and also acts as a deterrent to illegal logging practices worldwide.

*Description of Respondents:* Business or other for-profit.

*Number of Respondents:* 20,352.

*Frequency of Responses:* Recordkeeping; Reporting: On occasion.

*Total Burden Hours:* 203,846.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2011–7164 Filed 3–25–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Wrangell-Petersburg Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Wrangell-Petersburg Resource Advisory Committee will meet by video-teleconference. 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 review project proposals and make project funding recommendations.

**DATES:** The meeting will be held on Saturday, April 9, 2011 from 8 a.m. to Noon.

**ADDRESSES:** Committee members will meet at the Wrangell Ranger District office at 525 Bennett Street in Wrangell, Alaska and at the Tongass National

Forest Supervisor's Office at 123 Scow Bay Loop Road in Petersburg, Alaska. Written comments should be sent to Christopher Savage, Petersburg District Ranger, P.O. Box 1328, Petersburg, Alaska 99833, or Robert Dalrymple, Wrangell District Ranger, P.O. Box 51, Wrangell, AK 99929. Comments may also be sent via e-mail to *csavage@fs.fed.us,* or via facsimile to 907–772–5995.

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 Petersburg Ranger District office at 12 North Nordic Drive or the Wrangell Ranger District office at 525 Bennett Street during regular office hours (Monday through Friday 8 a.m.–4:30 p.m.).

**FOR FURTHER INFORMATION CONTACT:** Christopher Savage, Petersburg District Ranger, P.O. Box 1328, Petersburg, Alaska, 99833, phone (907) 772–3871, e-mail *csavage@fs.fed.us,* or Robert Dalrymple, Wrangell District Ranger, P.O. Box 51, Wrangell, AK 99929, phone (907) 874–2323, e-mail *rdalrymple@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: evaluation of project proposals and recommendation of projects for funding. 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. A one-hour public input session will be provided beginning at 9 a.m. on April 9. Persons who wish to make public comment in person may do so at either the Wrangell or Petersburg locations.

Dated: March 21, 2011.

**Christopher S. Savage,**

*District Ranger.*

[FR Doc. 2011–7184 Filed 3–25–11; 8:45 am]

BILLING CODE 3410–11–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Delta-Bienville Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Delta-Bienville Resource Advisory Committee will meet in Forest, Mississippi. 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 review and approve project proposals.

**DATES:** The meeting will be held on April 11, 2011, and will begin at 6 p.m.

**ADDRESSES:** The meeting will be held at the Bienville Ranger District Work Center, Hwy 501 South, 935A South Raleigh St., Forest, Mississippi 39074. Written comments should be sent to Michael T. Esters, Bienville Ranger District Office, 3473 Hwy 35 South, Forest, Mississippi 39074. Comments may also be sent via e-mail to *mesters@fs.fed.us,* or via facsimile to 601 469–2513.

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 Bienville Ranger District Office, 3473 Hwy 35 South, Forest, Mississippi 39074. Visitors are encouraged to call ahead to 601 469–3811 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Nefisia Kittrell, RAC coordinator, USDA, Bienville Ranger District Office, 3473 Hwy 35 South, Forest, Mississippi; (601) 469–3811; E-mail *nkittrell@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 project proposals and recommendations. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: March 18, 2011.

**Michael T. Esters,**

*Designated Federal Officer.*

[FR Doc. 2011–7205 Filed 3–25–11; 8:45 am]

BILLING CODE 3410–11–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Coconino Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Coconino Resource Advisory Committee will meet in Flagstaff, Arizona, to hear project proposals, review submissions and make decisions on which proposals will be recommended to the Designated Federal Official.

**DATES:** Project proposals will be heard on May 4, 2011, beginning at 9 a.m. until 4 p.m. The committee will also meet on May 5, 2011 from 9 a.m. to 5 p.m. to review presentations and decide which proposals to recommend, and the committee has also set aside May 6, 2011, from 9 a.m. to 5 p.m., as a day and time to meet in the case that more time is necessary to review projects and make decisions on proposals.

**ADDRESSES:** All of these meetings will be held in the Flagstaff City Hall Chambers, 211 W. Aspen, Flagstaff, Arizona. Send written comments to Brady Smith, RAC Coordinator, Coconino Resource Advisory Committee, c/o Forest Service, USDA, 1824 S. Thompson St., Flagstaff, Arizona 86001 or electronically to *bradysmith@fs.fed.us.*

**FOR FURTHER INFORMATION CONTACT:** Brady Smith, (928) 527–3490.

Dated: March 22, 2011.

**Kristin Bail,**

*Acting Forest Supervisor, Coconino National Forest.*

[FR Doc. 2011–7208 Filed 3–25–11; 8:45 am]

BILLING CODE 3410–11–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Sitka Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Sitka Resource Advisory Committee will meet in Sitka, Alaska. 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 this meeting, is to finalize the list of proposed projects.

**DATES:** The meeting will be held on April 14, 2011, and will begin at 4 p.m.

**ADDRESSES:** The meeting will be held at the Forest Service Building, Katlian

Conference Room, 204 Siginaka Way, Sitka, Alaska. Written comments should be sent to Lisa Hirsch, Sitka Ranger District, 204 Siginaka Way, Sitka, Alaska 99835. Comments may also be sent via e-mail to *lisahirsch@fs.fed.us,* or via facsimile to 907–747–4253.

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 Sitka Ranger District, 204 Siginaka Way, Sitka, Alaska. Visitors are encouraged to call ahead to 907–747–4214 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Lisa Hirsch, RAC coordinator, USDA, Tongass NF, Sitka Ranger District, 204 Siginaka Way, Sitka, Alaska 99835; 907–747–4214; E-mail *lisahirsch@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. The following business will be conducted: (1) Introductions of all committee members, replacement members and Forest Service personnel; (2) Selection of a chairperson by the committee members; (3) Receive materials explaining the process for considering and recommending Title II projects; and (4) Public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: March 18, 2011.

**Carol A. Goularte,**

*Designated Federal Officer.*

[FR Doc. 2011–7187 Filed 3–25–11; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Ashley Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Ashley Resource Advisory Committee will meet in Vernal, Utah. 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 conduct introductions, approve meeting minutes, develop and finalize evaluation criteria for the ranking of recommended projects, set the next meeting date, time and location and receive public comment on the meeting subjects and proceedings.

**DATES:** The meetings will be held April 19, 2011, from 6 to 9 p.m. and on May 11, 2011 from 6 to 9 p.m.

**ADDRESSES:** The meeting will be held in the Interagency Fire Dispatch Center conference room at the Ashley National Forest Supervisor's Office, 355 North Vernal Avenue in Vernal, Utah. Written comments should be sent to Ashley National Forest, 355 North Vernal Avenue, Vernal, UT 84078. Comments may also be sent via e-mail to *ljhaynes@fs.fed.us.* or via facsimile to 435–781–5142. 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 Ashley National Forest, 355 North Vernal Avenue, Vernal, UT.

**FOR FURTHER INFORMATION CONTACT:** Louis Haynes, RAC Coordinator, Ashley National Forest, (435) 781–5105; e-mail: *ljhaynes@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) Welcome and roll call; (2) Approval of meeting minutes; (3) Roll call voting on projects; (4) Development of a prioritized recommendation for project funding; (5) review of future meeting purpose, location, and date; (6) Receive public comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by April 6, 2011 will have the opportunity to address the committee at these meetings.

Dated: March 21, 2011.

**Kevin B. Elliott,**

*Forest Supervisor.*

[FR Doc. 2011–7080 Filed 3–25–11; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Secure Rural Schools Resource Advisory Committee (RAC) Meeting

**AGENCY:** Forest Service, U.S.D.A.

**ACTION:** Announcement of Meeting; Federal Advisory Committee meeting to be held authorized under the Secure Rural Schools Act and Community Self-Determination Act, Public Law 110–343.

**SUMMARY:** On April 14, 2011, the U.S Forest Service will host a meeting of the federally designated Secure Rural Schools Resource Advisory Committee (RAC). The public is invited to attend the meeting and provide input. A Secure Rural Schools RAC provides advice and recommendations to the Forest Service on the development and implementation of special projects as authorized under the Secure Rural Schools and Community Self-Determination Act, Public Law 110–343.

**DATES:** The meeting will be held on April 14, 2011 from 12–4.

**ADDRESSES:** The meeting location is U.S. Forest Service, Osceola Ranger District, 24874 U.S. Highway 90, Olustee, Florida 32072.

**FOR FURTHER INFORMATION CONTACT:** Denise Rains, Public Services Staff Officer, 850–523–8568, e-mail *drains@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:** Florida's RAC consists of 15 people selected to serve on the committee by Secretary of Agriculture Tom Vilsack. Members are from throughout the state and represent varied interests and areas of expertise. They will work collaboratively to improve working relationships among community members and national forest personnel.

Five Florida counties, Liberty, Wakulla, Columbia, Baker and Marion, elected to set aside a percentage of their Secure Rural Schools payment. Counties receive a payment annually for having National Forest lands within their boundaries. The RAC will ultimately review and recommend projects to be funded from this money. Projects approved must benefit National Forests lands and can maintain infrastructure, improve the health of watersheds and ecosystems, protect communities, and strengthen local economies.

Dated: March 21, 2011.

**Susan Jeheber-Matthews,**

*Forest Supervisor.*

[FR Doc. 2011–7217 Filed 3–25–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Coconino Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Coconino Resource Advisory Committee will meet in

Flagstaff, Arizona, to conduct an initial review of project proposals in preparation for the proposal presentations in May. No proposals will be heard at this meeting.

**DATES:** The meeting will be held April 28, 2011, beginning at 12 p.m. to 5 p.m.

**ADDRESSES:** The meeting will be held in the Ponderosa Room of the Coconino County Health Department, 2625 N. King St., Flagstaff, Arizona, 86004. Send written comments to Brady Smith, RAC Coordinator, Coconino Resource Advisory Committee, c/o Forest Service, USDA, 1824 S. Thompson St., Flagstaff, Arizona 86001 or electronically to *bradysmith@fs.fed.us.*

**FOR FURTHER INFORMATION CONTACT:** Brady Smith, Coconino National Forest, (928) 527–3490.

Dated: March 22, 2011.

**Kristin Bail,**

*Acting Forest Supervisor, Coconino National Forest.*

[FR Doc. 2011–7209 Filed 3–25–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–928]**

### Uncovered Innerspring Units From the People's Republic of China: Extension of Preliminary Results of Antidumping Duty New Shipper Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the "Department") is extending the time limit for the preliminary results of the new shipper review of uncovered innerspring units ("innersprings") from the People's Republic of China ("PRC"). The period of review for this review is February 1, 2010–July 31, 2010.

**DATES:** *Effective Date:* March 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Paul Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0413.

**Background**

On October 7, 2010 the Department published a notice of initiation of the new shipper review in the antidumping duty order on innersprings from the PRC for Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory ("Quan Li") and Foshan Yongnuo Import & Export Co., Ltd. ("Yongnuo"). *See Uncovered Innerspring Units From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review,* 75 FR 62107 (October 7, 2010). The preliminary results of this review are currently due no later than March 28, 2011.

**Statutory Time Limits**

Section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the "Act"), and 19 CFR 351.214(i)(1) require the Department to issue the preliminary results of a new shipper review within 180 days after the date on which the new shipper review was initiated and final results within 90 days after the date on which the preliminary results are issued. However, the Department may extend the deadline for completion of the preliminary results of a new shipper review to 300 days if it determines that the case is extraordinarily complicated. *See* section 751(a)(2)(B)(iv) of the Act; *see also* 19 CFR 351.214(i)(2)

**Extension of Time Limit for Preliminary Results of Review**

The Department has determined that the review is extraordinarily complicated as the Department must issue, and analyze the responses to, additional supplemental questionnaires concerning Quan Li's and Yongnuo's sales practices and factors of production. Moreover, the Department needs additional time to analyze the *bona fide* nature of Quan Li's and Yongnuo's sales, which includes gathering data from U.S. Customs and Border Protection. Based on the timing of the case and the additional information that must be gathered, the preliminary results of this new shipper review cannot be completed within 180 days.

Therefore, the Department is extending the time limit for completion of the preliminary results of this new shipper review by 65 days from the original March 28, 2011, deadline. As a result, the preliminary results will now be due no later than June 1, 2011. The final results continue to be due 90 days after the issuance of the preliminary results.

We are issuing and publishing this notice in accordance with sections 751(a)(2)(B)(iv) and 777(i) of the Act.

Dated: March 17, 2011.

**Christian Marsh,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2011–7227 Filed 3–25–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA295**

### Fisheries of the Exclusive Economic Zone Off Alaska; Application for an Exempted Fishing Permit

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

**ACTION:** Notice; public comment on an application for exempted fishing permit.

**SUMMARY:** This notice announces receipt of an application and the public comment period for an exempted fishing permit (EFP) from Mr. John Gauvin of Gauvin and Associates, LLC. If granted, this permit would allow the applicant to continue the development and testing of a salmon excluder device for the Bering Sea pollock trawl fishery. This activity is intended to promote the objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) by reducing salmon bycatch in the Bering Sea pollock trawl fishery.

**DATES:** Written comments must be received by 5 p.m. A.l.t. April 27, 2011. Interested persons may comment on the EFP application and on the environmental assessment during the North Pacific Fishery Management Council (Council) March 28 through April 5, 2011, meeting in Anchorage, AK.

**ADDRESSES:** The Council meeting will be held at the Hilton Hotel, 500 West Third Ave., Anchorage, AK. Send comments to Galen Tromble, Acting Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by "RIN 0648–XA295," by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal Web site 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 and will generally be posted to *http://www.regulations.gov* 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.

Copies of the EFP application and the environmental assessment (EA) are available from the Alaska Region, NMFS Web site at *http://www.alaskafisheries.noaa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mary Grady, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the domestic groundfish fisheries in the Bering Sea and Aleutian Islands Management Area (BSAI) under the FMP. The Council prepared the FMP under the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing the groundfish fisheries of the BSAI appear at 50 CFR parts 600 and 679. The FMP and the implementing regulations at §§ 600.745(b) and 679.6 authorize issuance of EFPs to allow fishing that would otherwise be prohibited. Procedures for issuing EFPs are contained in the implementing regulations.

NMFS received an application for an EFP from Mr. Gauvin in November 2010. The purposes of the EFP project would be to improve the performance of the salmon excluder device developed under EFP 08–02 from 2008 to 2010, and to validate the performance of this device for pollock trawl gear used in the BSAI. Focused efforts of the EFP project would be on using an excluder device to reduce chum salmon bycatch and refinement to the Chinook salmon excluder device. The goal is to develop a device for pollock trawl gear that reduces salmon bycatch without significantly lowering catch rates of pollock.

The EFP would allow for development and testing of the salmon excluder device from August 2011 through November 2012, for several weeks in each pollock A and B season. Testing in each season would allow the device to be used under salmon occurrence and pollock fishing practices specific to each season. Testing in the A season would catch primarily Chinook salmon and roe-bearing pollock, while testing in the B season would catch Chinook and chum salmon and pollock that are not likely to be roe-bearing. EFP fishing would be conducted by one to two vessels in each season.

To test the salmon excluder device, exemptions would be necessary from regulations for salmon bycatch management, observer requirements, closure areas, and total allowable catch amounts (TACs) for groundfish. The taking of salmon during the experiment is crucial for determining the effectiveness of the device. Salmon taken during the experiment would not be counted toward the Chinook and chum salmon bycatch limits under § 679.21(e)(1)(vii) and f(2). The amount of chum salmon bycatch by the pollock trawl industry during the EFP period could potentially approach or exceed the chum salmon bycatch limits under § 679.21(e). If the EFP chum salmon were counted toward the chum salmon bycatch limits, the EFP salmon may create an additional burden on the pollock trawl fishermen not participating in the intercooperative agreement for chum salmon bycatch reduction by causing earlier closures of the Chum Salmon Savings Area. More information regarding the intercooperative agreement for salmon bycatch reduction is at 72 FR 61070 (October 29, 2007). Information regarding Amendment 91 for Bering Sea Chinook salmon bycatch management is at 75 FR 53026, August 30, 2010.

Approximately 2,500 chum salmon and 125 Chinook salmon for each B season and 125 chum salmon and 600 Chinook salmon for one A season would be required to support the project. In total, the applicant would be limited to harvesting 5,125 chum salmon and 850 Chinook salmon for the time period of the EFP. The experimental design requires this quantity of salmon to ensure statistically valid results.

The applicant also has requested an exemption from the Chum Salmon Savings Area (§§ 679.21(e)(7)(vii) and 679.22(a)(10)), the Bering Sea Pollock Restriction Area (§ 679.22(a)(7)(ii)), and the Steller Sea Lion Conservation Area (§ 679.22(a)(7)(vii)). These overlapping areas occur in locations of salmon concentration. The experiment must be conducted in areas of salmon concentration sufficient to ensure a statistically adequate sample size. These locations are ideal for conducting the experiment and ensuring that the vessel encounters sufficient concentrations of salmon and pollock for meeting the experimental design.

Groundfish taken under the EFP would be exempt from the TACs specified in the annual harvest specifications (§ 679.20). A total of 2,500 metric tons (mt) of groundfish (primarily pollock) would be taken during each season of the EFP for a total of 7,500 mt over the duration of the EFP. Approximately 98 percent of the groundfish harvested is expected to be pollock. The experimental design requires this quantity of pollock to ensure a statistically adequate sample size for measuring pollock escapement through the salmon excluder device. The EFP pollock harvest would not be included in the harvest applied against the Bering Sea groundfish TACs, including the 2011 pollock TAC of 1,266,400 mt and 2012 pollock TAC of 1,253,658 mt. The acceptable biological catches (ABC) for Bering Sea pollock in 2011 and 2012 are 1,270,000 mt and 1,600,000 mt, respectively. Because of very little groundfish incidental catch in the pollock fishery, the harvest of other fish species during the EFP fishing is expected to be 25 mt to 75 mt per season. The majority of these other species harvested under the EFP likely would be Pacific cod, skates, flatfish, halibut, and jellyfish. The amount of groundfish harvest under the EFP and by the commercial groundfish fisheries is not expected to exceed the ABCs for groundfish species in either 2011 or 2012.

Using a catcher/processor for the EFP study would require exemption from the Catcher Vessel Operating Area (CVOA) restriction (§ 679.22(a)(5)) because of the location of the Chinook salmon concentration in the CVOA. Catcher/processors are prohibited from operating in the CVOA during the B season. The EFP fishing may be done by either a catcher vessel or a catcher/processor. It may be necessary for the EFP applicant to use a catcher/processor to conduct tows in this area to ensure encountering sufficient pollock and salmon concentrations to meet the experimental design.

The EFP would include an exemption from the observer requirements at § 679.50. The applicants would use "sea samplers" who are NMFS-trained observers. They would not be deployed as NMFS observers, however, at the time of the EFP fishing. The "sea samplers" would conduct the EFP data collection and perform other observer duties that normally would be required for vessels directed fishing for pollock.

The activities under the EFP are not expected to have a significant impact on the human environment as analyzed in the EA for this action (*see* **ADDRESSES**). The EFP would be subject to modifications pending any new relevant information regarding the 2012 fishery, including pollock harvest specifications.

In accordance with § 679.6, NMFS has determined that the proposal warrants further consideration and has forwarded the application to the Council to initiate consultation. The Council will consider the EFP application during its March 28 through April 5, 2011 meeting, which will be held at the Hilton Hotel in Anchorage, AK. The applicant has been invited to appear in support of the application.

**Public Comments**

Public comments are being solicited on the application and the EA through the end of the comment period stated in this notice. To be considered, comments must be received by 5 p.m. A.L.T. on the last day of the comment period; that does not mean postmarked or otherwise transmitted by that date. Copies of the application and EA are available for review from NMFS (*see* **ADDRESSES**). Interested persons also may comment on the application and on the EA at the March/April 2011 Council meeting during public testimony.

Information regarding the meeting is available at the Council's Web site at *http://www.alaskafisheries.noaa.gov/npfmc/.*

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

Dated: March 23, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–7240 Filed 3–25–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA285**

### Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Extension for Exempted Fishing Permit

**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, has made a preliminary determination that the subject exempted fishing permit (EFP) application contains all the required information and warrants further consideration. This EFP extension would exempt four commercial fishing vessels from the restriction on fishing for, catching, possessing, landing, and selling female red crabs in excess of one standard tote for the purpose of research on an experimental female red crab fishery that is being conducted in conjunction with the Bigelow Laboratory for Ocean Sciences.

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 12, 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 Red Crab EFP Extension."
- *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 Red Crab EFP Extension."
- *Fax:* (978) 281–9135.

**FOR FURTHER INFORMATION CONTACT:** Carly Knoell, Fisheries Management Specialist, 978–281–9224, *Carly.Knoell@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** An application for an EFP extension was submitted on February 28, 2011, by Dr. Richard Wahle of the Bigelow Laboratory for Ocean Sciences; Dr. Yong Chen of the School of Marine Sciences, University of Maine; and Mr. Jon Williams of the New England Red Crab Harvesters' Association to conduct commercial fishing activities that the regulations would otherwise restrict. The EFP would authorize four vessels to catch, possess, land, and sell female red crabs in excess of one standard tote of female red crab, as specified at 50 CFR 648.263(a)(3). Vessels would remain subject to all other commercial fishing regulations, including red crab possession limits and days-at-sea restrictions.

The primary goal of the experimental fishery is to harvest non-egg-bearing females to expand the red crab market and increase efficiency in the harvesting process. In addition, an experimental fishery that includes non-egg-bearing females has provided an opportunity to conduct at-sea sampling, renewed tagging, and model development to better evaluate the growth and reproductive performance of the population, as well as the impact of current and proposed harvesting on yields and egg production. This aspect of the project is conducted by an onboard researcher under the direction of Dr. Wahle.

The EFP was initially issued July 23, 2009, for 1 year, expiring July 22, 2010. An extension was granted July 26, 2010, through the end of the fishing year (February 28, 2011). A subsequent extension is now being requested due to initial logistical delays and additional time to complete research and funding components of this study. No additional exemptions will be included in the extension of this EFP and the activities of the study remain consistent with the Atlantic Deep-Sea Red Crab Fishery Management Plan.

If approved, the applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. 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 23, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–7239 Filed 3–25–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Availability of Seats for the Monterey Bay National Marine Sanctuary Advisory Council

**AGENCY:** Office of National Marine Sanctuaries (ONMS) National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice and request for applications.

**SUMMARY:** The ONMS is seeking applications for the following vacant seats on the Monterey Bay National Marine Sanctuary Advisory Council: Diving, Education (alternate), Research (alternate), Tourism (alternate) and Agriculture (alternate). Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary.

Applicants who are chosen should expect to serve until February 2014. The Research alternate and Agriculture alternate should expect to serve until February 2013 because the seats were vacated prematurely.

**DATES:** Applications are due by April 15, 2010.

**ADDRESSES:** Application kits may be obtained from 299 Foam Street, Monterey, CA, 93940 or online at *http://montereybay.noaa.gov/.*

Completed applications should be sent to the same address.

**FOR FURTHER INFORMATION CONTACT:** Nicole Capps, 299 Foam Street, Monterey, CA, 93940, (831) 647–4206, *nicole.capps@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The MBNMS Advisory Council was established in March 1994 to assure continued public participation in the management of the Sanctuary. Since its establishment, the Advisory Council has played a vital role in decisions affecting the Sanctuary along the central California coast.

The Advisory Council's twenty voting members represent a variety of local user groups, as well as the general public, plus seven local, state and federal governmental jurisdictions. In addition, the respective managers or superintendents for the four California National Marine Sanctuaries (Channel Islands National Marine Sanctuary, Cordell Bank National Marine Sanctuary, Gulf of the Farallones National Marine Sanctuary and the Monterey Bay National Marine Sanctuary) and the Elkhorn Slough National Estuarine Research Reserve sit as non-voting members.

Four working groups support the Advisory Council: The Research Activity Panel ("RAP") chaired by the Research Representative, the Sanctuary Education Panel ("SEP") chaired by the Education Representative, the Conservation Working Group ("CWG") chaired by the Conservation Representative, and the Business and Tourism Activity Panel ("BTAP") chaired by the Business/Industry Representative, each dealing with matters concerning research, education, conservation and human use. The working groups are composed of experts from the appropriate fields of interest and meet monthly, or bi-monthly, serving as invaluable advisors to the Advisory Council and the Sanctuary Superintendent.

The Advisory Council represents the coordination link between the Sanctuary and the state and federal management agencies, user groups, researchers, educators, policy makers, and other various groups that help to focus efforts and attention on the central California coastal and marine ecosystems.

The Advisory Council functions in an advisory capacity to the Sanctuary Superintendent and is instrumental in helping develop policies, program goals, and identify education, outreach, research, long-term monitoring, resource protection, and revenue enhancement priorities. The Advisory Council works in concert with the Sanctuary Superintendent by keeping him or her informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Superintendent in achieving the goals of the Sanctuary program within the context of California's marine programs and policies.

**Authority:** 16 U.S.C. 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: March 16, 2011.

**Daniel J. Basta,**

*Director, Office National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.*

[FR Doc. 2011–6926 Filed 3–25–11; 8:45 am]

**BILLING CODE 3510–NK–M**

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket ID: DOD–2011–OS–0018]**

### Proposed Collection; Comment Request

**AGENCY:** Headquarters U.S. Marine Corps, Division of Public Affairs, Community Relations Office, DoD.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Headquarters U.S. Marine Corps, Division of Public Affairs, Community Relations Branch announces a proposed new public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by May 27, 2011.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

• *Federal eRulemaking 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, docket number and title 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:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Headquarters U.S. Marine Corps, Division of Public Affairs, Community Relations Branch, Attn: Maj Stewart Upton, 3000 Pentagon, Room 4A532, Washington, DC 20350–3000, e-mail *stewart.upton@usmc.mil,* or call the Headquarters U.S. Marine Corps, Division of Public Affairs, Community Relations Branch at (703) 614–1034.

*Title and OMB Number:* Marine Week St. Louis Awareness Measurement Survey; OMB Number 0703–TBD.

*Needs and Uses:* The information collection requirement is necessary to obtain and record the official feedback of attendees for statistical use in order to evaluate the effectiveness and impact of the Marine Week program.

*Affected Public:* Individuals or households.

*Annual Burden Hours:* 125.

*Number of Respondents:* 1,500.

*Responses per Respondent:* 1.

*Average Burden per Response:* 5 Minutes.

*Frequency:* Annually.

**SUPPLEMENTARY INFORMATION:**

### Summary of Information Collection

Respondents are patrons of the St. Louis, MO, community who are presently attending all events and programs during Marine Week St. Louis, 20–26 Jun 2011. The event locations defined under OMB number 0703–TBD where public information collection will take place are the Gateway Arch grounds at Jefferson National Expansion Memorial Park, Ballpark Village Field at Busch Stadium, and the Soldiers' Military Memorial Museum.

Dated: March 23, 2011.

**Morgan F. Park,**

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

[FR Doc. 2011–7174 Filed 3–25–11; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal Nos. 11–10]**

### 36(b)(1) Arms Sales Notification

**AGENCY:** Department of Defense, Defense Security Cooperation Agency.

**ACTION:** Notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

**SUPPLEMENTARY INFORMATION:** The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 11–10 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: March 16, 2011.

**Morgan F. Park,**

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

**BILLING CODE 5001–06–P**

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

MAR 11 2011

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 11-10, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Australia for defense articles and services. On March 9, 2011 we notified this sale with an estimated value of $300 million. Subsequently, we discovered an error in the transmittals and the letters addressed to the Speaker of the House, U.S. House of Representatives and to the Chairman, Committee on Foreign Relations of the Senate. The enclosed revised transmittals supersede the transmittals dated March 9, 2010, which contained an incorrect date on the documentation. We regret the error.

Sincerely,

Vanessa Allen Murray
Office Director
Legislative and Public Affairs

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

MAR 09 2010

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 11-10, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Australia for defense articles and services estimated to cost $300 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

William E. Landay III
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 11-10

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) Prospective Purchaser: Australia

(ii) Total Estimated Value:

| | |
|---|---|
| Major Defense Equipment* | $ 225 million |
| Other | $ 75 million |
| TOTAL | $ 300 million |

(iii) Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: one C-17 GLOBEMASTER III aircraft, up to four Pratt & Whitney F117-PW-100 engines, one AN/AAQ-24V(13) Large Aircraft Infrared Countermeasures (LAIRCM) System, spare and repair parts, supply and test equipment, personnel training and training equipment, publications and technical documentation, United States Government and contractor engineering, logistics, and technical support services, and other related elements of logistics support.

(iv) Military Department: Air Force (SGT)

(v) Prior Related Cases, if any: FMS case SEN-$1.2B-19May06

(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None

(vii) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Attached Annex

(viii) Date Report Delivered to Congress: 9 March 2011

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Australia – C-17 GLOBEMASTER III Aircraft

The Government of Australia has requested a possible sale of one C-17 GLOBEMASTER III aircraft, up to four Pratt & Whitney F117-PW-100 engines, one AN/AAQ-24V(13) Large Aircraft Infrared Countermeasures (LAIRCM) System, spare and repair parts, supply and test equipment, personnel training and training equipment, publications and technical documentation, United States Government and contractor engineering, logistics, and technical support services, and other related elements of logistics support. The estimated cost is $300 million.

Australia is one of our most important allies in the Western Pacific. The strategic location of this political and economic power contributes significantly to ensuring peace and economic stability in the region. Australia's efforts in operations Iraqi and Enduring Freedom, peacekeeping, and humanitarian operations have made a significant impact on regional, political, and economic stability and have served U.S. national security interests. This proposed sale is consistent with those objectives and facilitates burden sharing with our allies.

Australia currently has a heavy airlift capability comprised of four C-17As. This additional C-17 will further improve Australia's capability to rapidly deploy in support of global coalition operations and will also greatly enhance its ability to lead regional humanitarian/peacekeeping operations such as its current response to the Queensland flooding, cyclone aftermath and the New Zealand Earthquake.

Australia has the ability to absorb and employ the additional C-17. The C-17 fleet is based at Royal Australian Air Force (RAAF) Base Amberley. RAAF Base Amberley is the primary base for airlift and tanker aircraft and is currently undergoing the infrastructure upgrades required to support the C-17 and other large aircraft Australia already received or is under contract to purchase.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be the Boeing Company in Long Beach, California. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Australia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 11-10

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The Boeing C-17 GLOBEMASTER III military airlift aircraft is the newest, most flexible cargo aircraft to enter the U. S. Air Force fleet. The C-17 is capable of rapid strategic delivery of up to 170,900 pounds of personnel and equipment to main operating bases or to forward operating bases. The aircraft is also capable of short field landings with a full cargo load. Finally, the aircraft can perform tactical airlift and airdrop missions and can also transport litters and ambulatory patients during aeromedical evacuation when required. A fully integrated electronic cockpit and advanced cargo systems allow a crew of three: the pilot, copilot and loadmaster, to operate the aircraft on any type of mission.

2. The AN/AAQ-24V(13) Large Aircraft Infrared Countermeasure (LAIRCM) is an active countermeasure system designed to defeat guidance systems of man-portable, shoulder-fired, and vehicle-launched infrared guided missiles by directing a high-intensity modulated laser beam into the missile seeker. This aircraft's self-protection suite will provide fast and accurate threat detection, processing, tracking, and countermeasures to defeat current and future generation infrared missile threats. LAIRCM is designed for installation on a wide range of fixed-wing aircraft.

3. The AN/ALE-47 Counter-Measures Dispensing System (CMDS) is an integrated, threat-adaptive, software-programmable dispensing system capable of dispensing chaff, flares and active radio frequency expendables. The threats countered by the CMDS include radar-directed anti-aircraft artillery (AAA), radar command-guided missiles, radar homing guided missiles, and infrared (IR) guided missiles. The system is internally mounted and may be operated as a stand-alone system or may be integrated with other on-board electronic warfare and avionics systems. The AN/ALE-47 uses threat data received over the aircraft interfaces to assess the threat situation and to determine a response. Expendable routines tailored to the immediate aircraft and threat environment may be dispensed using one of four operational modes. The hardware, technical data, and documentation to be provided are Unclassified.

4. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures or equivalent systems which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2011–7052 Filed 3–25–11; 8:45 am]
**BILLING CODE 5001–06–C**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before May 27, 2011.

**ADDRESSES:** Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested

parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 23, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

### Federal Student Aid

*Type of Review:* Extension.

*Title of Collection:* Experimental Sites Initiative—Data Collection Instrument.

*OMB Control Number:* 1845–0066.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

*Total Estimated Number of Annual Responses:* 85.

*Total Estimated Number of Annual Burden Hours:* 935.

*Abstract:* This data collection instrument will be used to collect specific information and performance data for analysis of seven experiments. This effort will assist the Department in obtaining and compiling information to help determine change in the administration and delivery of Title IV programs. Institutions volunteer to become an experimental site to provide recommendations on the impact and effectiveness of proposed regulations or new management initiatives.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4524. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–7228 Filed 3–25–11; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before April 27, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: March 22, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

### Institute of Education Sciences

*Type of Review:* Revision.

*Title of Collection:* Early Childhood Longitudinal Study Kindergarten Class of 2010–11 (ECLS–K:2011) Fall First Grade Data Collection.

*OMB Control Number:* 1850–0750.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* Individuals or households.

*Total Estimated Number of Annual Responses:* 106,042.

*Total Estimated Annual Burden Hours:* 29,318.

*Abstract:* The Early Childhood Longitudinal Study, Kindergarten Class of 2010–11 (ECLS–K:2011) is a survey that focuses on children's early school experiences beginning with kindergarten and continuing through the fifth grade. It includes interviews with parents, teachers, school administrators, and non-parental care providers, as well as direct child assessments. This submission updates the active record for ECLS–K:2011 and seeks clearance for (1) recruitment materials and burden of recruitment for the Fall 2011 and Spring 2012 first grade data collections to (i) contact schools, school staff, and parents to remind them of the next waves of the ECLS–K 2011 study and (ii) recruit new schools to which ECLS–K 2011 kindergarteners have transferred; (2) track students for the Fall 2011 and Spring 2012 first grade data collections and the Spring 2013 and the optional Fall 2012 second grade data collections; and (3) conduct the Fall 2011 first grade national data collection. The National Center for Educational Statistics will use the recruitment materials already cleared for the kindergarten collection on 3/20/09, only updating them for the first grade collections, as well as the tracking methods described in the cleared Kindergarten package. Similarly, the instruments for the Fall 2011 first grade collection have been updated from the instruments used in the kindergarten 2010 round as well as the ECLS–K (1998–99) Fall first grade collection so as to assure that the items are grade-appropriate and capture information on summer learning.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 4552. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–7229 Filed 3–25–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board Chairs

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB) Chairs. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:**

Wednesday, April 13, 2011, 8 a.m.–5:30 p.m.

Thursday, April 14, 2011, 8 a.m.–12:30 p.m.

**ADDRESSES:** Green Valley Ranch Resort, 2300 Paseo Verde Parkway, Henderson, Nevada.

**FOR FURTHER INFORMATION CONTACT:** Catherine Alexander Brennan, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; Phone: (202) 586–7711.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda Topics:

**Wednesday, April 13, 2011**

- EM Program Update
- EM SSAB Chairs' Round Robin: Top Three Site-Specific Issues, EM SSAB Accomplishments, and Major Board Activities
- EM Headquarters Budget and American Recovery and Reinvestment Act Updates
- Environmental Management Advisory Board Overview
- EM Headquarters Waste Disposition Update
- EM SSAB Chairs' Roundtable Discussion: Day One Presentations and Product Development

**Thursday, April 14, 2011**

- EM Headquarters Groundwater Update
- EM SSAB Chairs' Roundtable Discussion: Day Two Presentations and Product Development

*Public Participation:* The EM SSAB Chairs welcome the attendance of the public at their advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Catherine Alexander Brennan at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed either before or after the meeting with the Designated Federal Officer, Catherine Alexander Brennan, at the address or telephone listed above. Individuals who wish to make oral statements pertaining to agenda items should also contact Catherine Alexander Brennan. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Catherine Alexander Brennan at the address or phone number listed above. Minutes will also be available at the following Web site: *http://www.em.doe.gov/stakepages/ssabchairs.aspx.*

Issued at Washington, DC, on March 23, 2011.

**LaTanya Butler,**

*Acting Deputy Committee Management Officer.*

[FR Doc. 2011–7243 Filed 3–25–11; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC11–52–000
*Applicants:* AES Huntington Beach, LLC
*Description:* Application of AES Huntington Beach, LLC.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5133
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–2578–004
*Applicants:* Fox Energy Company, LLC
*Description:* Fox Energy Company, LLC submits tariff filing per 35: MBR Tariff Compliance Filing to be effective 9/10/2010.
*Filed Date:* 02/22/2011
*Accession Number:* 20110222–5191
*Comment Date:* 5 p.m. Eastern Time on Friday, March 25, 2011

*Docket Numbers:* ER10–3357–001
*Applicants:* Entergy Arkansas, Inc.
*Description:* Entergy Arkansas, Inc. submits tariff filing per 35.17(b): Errata to 676–E Compliance Filing to be effective 4/1/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5090
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–2434–001
*Applicants:* Wisconsin Electric Power Company
*Description:* Wisconsin Electric Power Company submits tariff filing per 35: FERC Rate Schedule 115 Amended Service Agreement Compliance Filing to be effective 9/9/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5103
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3119–000
*Applicants:* Northeast Utilities Service Company
*Description:* Application for Limited Waiver, Shortened Notice Period and Expedited Decision of Northeast Utilities Service Company.
*Filed Date:* 03/16/2011
*Accession Number:* 20110316–5114
*Comment Date:* 5 p.m. Eastern Time on Wednesday, April 06, 2011

*Docket Numbers:* ER11–3126–000
*Applicants:* Orange and Rockland Utilities, Inc.

*Description:* Orange and Rockland Utilities, Inc. submits tariff filing per 35.13(a)(2)(iii: O&R underground filing 2011 to be effective 4/1/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5020
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3126–000
*Applicants:* Orange and Rockland Utilities, Inc.
*Description:* Orange and Rockland Utilities, Inc. submits tariff filing per: Supplement to O&R Underground filing to be effective N/A.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5051
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3127–000
*Applicants:* PJM Interconnection, L.L.C.
*Description:* PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: No PJM Queue No.—Original Service Agreement No. 2790 to be effective 2/15/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5036
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3128–000
*Applicants:* Public Service Company of Colorado
*Description:* Public Service Company of Colorado submits tariff filing per 35.13(a)(2)(iii: 2011–3–17_Ext_NERC_Std_MOD_029 to be effective 4/1/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5041
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3130–000
*Applicants:* Southwest Power Pool, Inc.
*Description:* Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: Revisions to Attachment G, section 8.1—Metering to be effective 5/17/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5067
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3131–000
*Applicants:* Midwest Independent Transmission System Operator, Inc.
*Description:* Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): MidAmerican-Lehigh-Webster to be effective 3/18/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5068
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3132–000
*Applicants:* Midwest Independent Transmission System Operator, Inc.
*Description:* Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): MidAmerican Neal 3 to be effective 3/18/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5069
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3133–000
*Applicants:* Southwest Power Pool, Inc.
*Description:* Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii): Westar Revised Formula Rate Template to be effective 1/1/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5070
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3134–000
*Applicants:* Entergy Services, Inc.
*Description:* Notice of Cancellation of Entergy Services, Inc.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5089
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3135–000
*Applicants:* Florida Power & Light Company
*Description:* Florida Power & Light Company submits tariff filing per 35.12: FPL and FKEC Service Agreement No. 293 to be effective 12/31/9998.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5091
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3136–000
*Applicants:* Merchant's Plaza Energy, LLC
*Description:* Merchant's Plaza Energy, LLC submits tariff filing per 35.1: Merchants Plaza FERC Electric Tariff to be effective 3/17/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5109
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3137–000
*Applicants:* Golden Spread Electric Cooperative, Inc.
*Description:* Golden Spread Electric Cooperative, Inc. submits tariff filing per 35.13(a)(2)(iii): Revised Wholesale Power Contracts Filing to be effective 5/16/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5110
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3138–000
*Applicants:* MidAmerican Energy Company
*Description:* MidAmerican Energy Company submits tariff filing per 35.13(a)(2)(iii): First Revised Service Agreement 385—CB4 Transmission to be effective 3/17/2011.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5115
*Comment Date:* 5 p.m. Eastern Time on Thursday, April 07, 2011

*Docket Numbers:* ER11–3140–000
*Applicants:* Hydrogen Energy California LLC
*Description:* Petition for Waiver from CAISO Tariff Provisions and Request for Expedited Ruling of Hydrogen Energy California LLC.
*Filed Date:* 03/17/2011
*Accession Number:* 20110317–5132
*Comment Date:* 5 p.m. Eastern Time on Thursday, March 31, 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 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 18, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011–7148 Filed 3–25–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER11–3117–000]**

### Lively Grove Energy Partners, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Lively Grove Energy Partners, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is April 7, 2011.

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 Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding 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 18, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011–7150 Filed 3–25–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Supplemental Notice Requesting Comments

| | 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 |
| Peetz Logan Interconnect, LLC | ER11–2970–000 |

On March 15, 2011, Federal Energy Regulatory Commission staff (Staff) held a technical conference to obtain further information to aid the Commission in considering issues related to the ownership of and priority access rights to new participant-funded transmission projects.

In particular, Staff sought to explore issues related to priority rights to use transmission infrastructure developed under various new business models in two specific contexts: independent and/or merchant transmission, and generator lead lines. In both contexts, participants were encouraged to identify and discuss the appropriate balance between the Commission's requirements for open access and the needs of project developers. Participants were also encouraged to propose and discuss specific regulatory alternatives that are consistent with the Commission's open access policies and its statutory responsibility to ensure that rates, terms, and conditions of service are just and reasonable and not unduly discriminatory or preferential.

Persons wishing to comment on these issues should submit written comments to the Commission no later than April 21, 2011.

Dated: March 18, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011–7149 Filed 3–25–11; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9286–7; Docket ID No. EPA–HQ–ORD–2011–0050]**

## Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants

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

**ACTION:** Notice of extension of public comment.

**SUMMARY:** EPA is announcing an extension of the public comment period for the first external review draft of a document titled, "First External Review Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants" (EPA/600/R–10/076A). The original **Federal Register** notice announcing the public comment period was published on February 28, 2011 (76 FR 10893). This assessment document was developed by the National Center for Environmental Assessment (NCEA) within EPA's Office of Research and Development as part of the review of the national ambient air quality standards (NAAQS) for ozone.

**DATES:** The public comment period began on February 28, 2011, and ends May 5, 2011. Comments must be received by EPA by May 5, 2011.

**ADDRESSES:** The "First External Review Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants" will be available primarily via the Web page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea.* A limited number of CD–ROM or paper copies will be available. Contact Ms. Debbie Wales by phone (919–541–4731), facsimile (919–541–5078), or e-mail (*wales.deborah@epa.gov*) to request either of these, and please provide your name, your mailing address, and the document title, "First External Review Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants" (EPA/600/R–10/076A) to facilitate processing of your request.

**FOR FURTHER INFORMATION CONTACT:** For technical information, contact Dr. James Brown, NCEA; telephone: 919–541–0765; facsimile: 919–541–1818; or e-mail: *Brown.James@epa.gov.*

Comments may be submitted electronically via *http://www.regulations.gov,* by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of **Federal Register** Notice (76 FR 10893).

For information on submitting comments to the docket, please contact the Office of Environmental Information Docket; telephone: 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov.*

Dated: March 22, 2011.

**Darrell A. Winner,**

*Acting Director, National Center for Environmental Assessment.*

[FR Doc. 2011–7219 Filed 3–25–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–ORD–2011–0124; FRL–9287–1]**

## Human Studies Review Board (HSRB); Notification of a Public Meeting

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

**ACTION:** Notice.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) Office of the Science Advisor (OSA) announces a public meeting of the HSRB to advise the Agency on EPA's scientific and ethical reviews of research with human subjects.

**DATES:** This public meeting will be held on April 13–14, 2011, from approximately 8:30 a.m. to approximately 5 p.m. Eastern Time.

**ADDRESSES:** Submit your written comments, identified by Docket ID No. EPA–HQ–ORD–2011–0124, by one of the following methods:

*Internet: http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

*E-mail: ORD.Docket@epa.gov.*

*Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), ORD Docket, Mailcode: 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

*Hand Delivery:* The EPA/DC Public Reading Room is located in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Avenue NW., Washington, DC 20460. The hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Time, Monday through Friday, excluding Federal holidays. Please call (202) 566–1744 or e-mail the ORD Docket at *ord.docket@epa.gov* for instructions. Updates to Public Reading Room access are available on the Web site (*http://www.epa.gov/epahome/dockets.htm*).

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–ORD–2011–0124. 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 the disclosure of which is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to

technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

**FOR FURTHER INFORMATION CONTACT:** Any member of the public who wishes to receive further information should contact Jim Downing at telephone number: (202) 564–2468; fax: (202) 564–2070; e-mail address: *downing.jim@epa.gov,* or Lu-Ann Kleibacker at telephone number: (202) 564–7189; fax: 202–564–2070; e-mail address: *kleibacker.lu-ann@epa.gov;* mailing address: Environmental Protection Agency, Office of the Science Advisor (8105R), 1200 Pennsylvania Avenue NW., Washington, DC 20460. General information concerning the EPA HSRB can be found on the EPA Web site at *http://www.epa.gov/osa/hsrb/.*

**SUPPLEMENTARY INFORMATION:**

*Location:* Holiday Inn National Airport, 2650 Jefferson Davis Highway, Arlington, VA 22202.

*Meeting access:* Seating at the meeting will be on a first-come basis. To request accommodation of a disability, please contact the persons listed under **FOR FURTHER INFORMATION CONTACT** at least ten business days prior to the meeting using the information under **FOR FURTHER INFORMATION CONTACT,** so that appropriate arrangements can be made.

*Procedures for providing public input:* Interested members of the public may submit relevant written or oral comments for the HSRB to consider during the advisory process. Additional information concerning submission of relevant written or oral comments is provided in section I. "Public Meeting," under subsection D. "How May I Participate in this Meeting?" of this notice.

## I. Public Meeting

### *A. Does this action apply to me?*

This action is directed to the public in general. This action may, however, be of particular interest to persons who conduct or assess human studies, especially studies on substances regulated by EPA, or to persons who are, or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult Jim Downing or Lu-Ann Kleibacker listed under **FOR FURTHER INFORMATION CONTACT.**

### *B. How can I access electronic copies of this document and other related information?*

In addition to using regulations.gov, you may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/.*

*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 ORD Docket, EPA/DC, Public Reading Room. The EPA/DC Public Reading Room is located in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Avenue NW., Washington, DC 20460. The hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Time, Monday through Friday, excluding Federal holidays. Please call (202) 566–1744 or e-mail the ORD Docket at *ord.docket@epa.gov* for instructions. Updates to Public Reading Room access are available on the Web site (*http://www.epa.gov/epahome/dockets.htm*). EPA's position paper(s), charge/questions to the HSRB, and the meeting agenda will be available by the end of March 2011. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, from the regulations.gov Web site and the EPA HSRB Web site at *http://www.epa.gov/osa/hsrb/.* For questions on document availability, or if you do not have access to the Internet, consult either Jim Downing or Lu-Ann Kleibacker listed under **FOR FURTHER INFORMATION CONTACT.**

### *C. What should I consider as I prepare my comments for EPA?*

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data that you used to support your views.
4. Provide specific examples to illustrate your concerns and suggest alternatives.
5. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

### *D. How may I participate in this meeting?*

You may participate in this meeting by following the instructions in this section. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–ORD–2011–0124 in the subject line on the first page of your request.

*1. Oral comments.* Requests to present oral comments will be accepted up to Wednesday, April 6, 2011. To the extent that time permits, interested persons who have not pre-registered may be permitted by the Chair of the HSRB to present oral comments at the meeting. Each individual or group wishing to make brief oral comments to the HSRB is strongly advised to submit their request (preferably via email) to Jim Downing or Lu-Ann Kleibacker, under **FOR FURTHER INFORMATION CONTACT,** no later than noon, Eastern Time, Wednesday, April 6, 2011, in order to be included on the meeting agenda and to provide sufficient time for the HSRB Chair and HSRB Designated Federal Official (DFO) to review the meeting agenda to provide an appropriate public comment period. The request should identify the name of the individual making the presentation and the organization (if any) the individual will represent. Oral comments before the HSRB are generally limited to five minutes per individual or organization. Please note that this includes all individuals appearing either as part of, or on behalf of, an organization. While it is our intent to hear a full range of oral comments on the science and ethics issues under discussion, it is not our intent to permit organizations to expand the time limitations by having numerous individuals sign up separately to speak on their behalf. If additional time is available, further public comments may be possible.

*2. Written comments.* Submit your written comments prior to the meeting. For the HSRB to have the best opportunity to review and consider your comments as it deliberates on its report, you should submit your comments at least five business days prior to the beginning of this meeting. If you submit

comments after this date, those comments will be provided to the Board members, but you should recognize that the Board members may not have adequate time to consider those comments prior to making a decision. Thus, if you plan to submit written comments, the Agency strongly encourages you to submit such comments no later than noon, Eastern Time, Wednesday, April 6, 2011. You should submit your comments using the instructions in section I., under subsection C., "What Should I Consider as I Prepare My Comments for EPA?" In addition, the Agency also requests that persons submitting comments directly to the docket also provide a copy of their comments to Jim Downing or Lu-Ann Kleibacker listed under **FOR FURTHER INFORMATION CONTACT.** There is no limit on the length of written comments for consideration by the HSRB.

*E. Background*

The HSRB is a Federal advisory committee operating in accordance with the Federal Advisory Committee Act (FACA) 5 U.S.C. App.2 § 9. The HSRB provides advice, information, and recommendations to EPA on issues related to scientific and ethical aspects of human subjects research. The major objectives of the HSRB are to provide advice and recommendations on: (1) Research proposals and protocols; (2) reports of completed research with human subjects; and (3) how to strengthen EPA's programs for protection of human subjects of research. The HSRB reports to the EPA Administrator through EPA's Science Advisor.

1. *Topics for discussion.* At its meeting on April 13 and 14, 2011, EPA's Human Studies Review Board will consider scientific and ethical issues surrounding these topics:

a. The report of a completed scenario monograph and study reports from the Agricultural Handler Exposure Task Force (AHETF) measuring the dermal and inhalation exposure of professional agricultural workers applying liquid spray pesticides to tree or trellis crops using open cab airblast equipment.

b. The report of a completed scenario monograph and study report from the Antimicrobial Exposure Assessment Task Force II (AEATF) in which the dermal and inhalation exposure of professional janitorial workers was monitored as they applied a liquid antimicrobial product to indoor surfaces using a trigger spray bottle and wipes or ready-to-use wipes.

c. A published report by *Gulson et al* (2010) of an intentional exposure human study measuring dermal absorption of zinc oxides contained in sunscreen.

d. A reevaluation of an intentional human dosing study with chlorpyrifos (Kisicki) previously reviewed by the HSRB; pertinent new information from the sponsor has been made available.

2. *Meeting minutes and reports.* Minutes of the meeting, summarizing the matters discussed and recommendations, if any, made by the advisory committee regarding such matters, will be released within 90 calendar days of the meeting. Such minutes will be available at *http://www.epa.gov/osa/hsrb/* and *http://www.regulations.gov.* In addition, information concerning a Board meeting report, if applicable, can be found at *http://www.epa.gov/osa/hsrb/* or from the person listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: March 23, 2011.

**Paul T. Anastas,**

*EPA Science Advisor.*

[FR Doc. 2011–7198 Filed 3–25–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL- 9287–2]**

## Science Advisory Board Staff Office; Notification of a Public Meeting of the Advisory Council on Clean Air Compliance Analysis Augmented for Review of the Report to Congress on Black Carbon

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

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB) Staff Office announces a public face-to-face meeting of the Black Carbon Review Panel.

**DATES:** The meeting will be held on April 18, 2011 from 9 a.m. to 5 p.m. and April 19, 2011 from 8:30 a.m. to 2:30 p.m. (Eastern Time).

**ADDRESSES:** The Panel meeting will be held at the Omni Shoreham, 2500 Calvert Street NW., Washington, DC 20008.

**FOR FURTHER INFORMATION CONTACT:** Members of the public who wish to obtain further information regarding this meeting must contact Ms. Stephanie Sanzone, Designated Federal Officer (DFO). Ms. Sanzone may be contacted at the EPA Science Advisory Board (1400R), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or by telephone/voice mail at (202) 564–2067; fax at (202) 565–2098; or e-mail at sanzone.stephanie@epa.gov. General information concerning the Council can be found at the EPA Council Web site at *http://www.epa.gov/advisorycouncilcaa.* Any inquiry regarding EPA's *Draft Report to Congress on Black Carbon* should be directed to Erika Sasser, EPA Office of Air Quality Planning and Standards (OAQPS), at *sasser.erika@epa.gov* or (919) 541–3889.

**SUPPLEMENTARY INFORMATION:**

*Background:* The Advisory Council on Clean Air Compliance Analysis (Council) was established pursuant to Section 812 of the Clean Air Act (CAA) Amendments of 1990 (codified as 42 U.S.C. 7612) to provide independent advice to the Administrator on technical and economic aspects of analyses and reports EPA prepares on the impacts of the CAA on the public health, economy, and environment of the United States. The Council is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. Pursuant to FACA and EPA policy, notice is hereby given that the Council augmented with additional experts (hereafter referred to as the Black Carbon Review Panel) will hold a public meeting to review EPA's *Draft Report to Congress on Black Carbon.* The Panel will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

The October 2009 Interior Appropriations bill (Pub. L. 111–88) requires the EPA, in consultation with other Federal agencies, to prepare a comprehensive report to Congress on the climate effects of black carbon. Black carbon, or soot, results from incomplete combustion of organic matter such as fossil fuels and biomass. The report to Congress will evaluate and synthesize available information on sources of black carbon, impacts of black carbon on global and regional climate, and the potential utility and cost-effectiveness of mitigation options for reducing climate and public health impacts of black carbon.

EPA's Office of Air Quality Planning and Standards (OAQPS) requested that the Council review the draft *Report to Congress on Black Carbon* to evaluate the report's scientific rigor, completeness, and technical accuracy. To conduct this review, the Council was augmented with additional experts in climate modeling and black carbon emissions, impacts, and control strategies. Information about formation of the Black Carbon Review Panel can

be found at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/BC%20Report%20to%20Congress?OpenDocument.*

*Availability of Meeting Materials:* The agenda, the EPA *Draft Report to Congress on Black Carbon,* and other meeting materials will be available on the Council Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/BC%20Report%20to%20Congress?OpenDocument* in advance of the meeting.

*Procedures for Providing Public Input:* Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit comments for a federal advisory committee to consider as it develops advice for EPA. Input from the public to the Council will have the most impact if it provides specific scientific or technical information or analysis for Council panels to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should contact the Designated Federal Officer for the relevant advisory committee directly. *Oral Statements:* In general, individuals or groups requesting an oral presentation at this public meeting will be limited to five minutes per speaker. Interested parties should contact Ms. Stephanie Sanzone, DFO, in writing (preferably via e-mail), at the contact information noted above, by April 8, 2011 to be placed on the list of public speakers for the meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by April 8, 2011 so that the information may be made available to the Panel for their consideration. Written statements should be supplied to the DFO in electronic format via e-mail (acceptable file formats: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). It is the SAB Staff Office general policy to post written comments on the Web page for the advisory meeting or teleconference. Submitters are requested to provide an unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

*Accessibility:* For information on access or services for individuals with disabilities, please contact Ms. Stephanie Sanzone at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: March 16, 2011.

**Anthony F. Maciorowski,**

*Deputy Director, EPA Science Advisory Board Staff Office.*

[FR Doc. 2011–7200 Filed 3–25–11; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL ELECTION COMMISSION

**[Notice 2011–04]**

## Filing Dates for the California Special Election in the 36th Congressional District

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of filing dates for special election.

**SUMMARY:** California has scheduled a special general election on May 17, 2011, to fill the U.S. House of Representatives seat in the Thirty-Sixth Congressional District vacated by Representative Jane Harman. Under California law, a majority winner in a special election is declared elected. Should no candidate achieve a majority vote, a special runoff election will be held on July 12, 2011, between the top two vote-getters.

Political committees participating in the California special elections are required to file pre- and post-election reports. Filing deadlines for these reports are affected by whether one or two elections are held.

**FOR FURTHER INFORMATION CONTACT:** CONTACT: Mr. Kevin R. Salley, Information Division, 999 E Street, NW., Washington, DC 20463; *Telephone:* (202) 694–1100; Toll Free (800) 424–9530.

**SUPPLEMENTARY INFORMATION:**

### Principal Campaign Committees

All principal campaign committees of candidates who participate in the California Special General and Special Runoff Elections shall file a 12-day Pre-General Report on May 5, 2011; a Pre-Runoff Report on June 30, 2011; and a Post-Runoff Report on August 11, 2011. (*See* chart below for the closing date for each report).

If only one election is held, all principal campaign committees of candidates in the Special General Election shall file a 12-day Pre-General Report on May 5, 2011; and a Post-General Report on June 16, 2011. (*See* chart below for the closing date for each report).

Note that these reports are in addition to the campaign committee's quarterly filings in July and October. (*See* chart below for the closing date for each report).

### Unauthorized Committees (PACs and Party Committees)

Political committees filing on a semi-annual basis in 2011 are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the California Special General Election and/or Special Runoff Election by the close of books for the applicable report(s). (*See* chart below for the closing date for each report).

Committees filing monthly that make contributions or expenditures in connection with the California Special General or Special Runoff Election will continue to file according to the monthly reporting schedule.

Additional disclosure information in connection with the California Special Election may be found on the FEC Web site at *http://www.fec.gov/info/report_dates_2011.shtml.*

### Disclosure of Lobbyist Bundling Activity

Campaign committees, party committees and Leadership PACs that are otherwise required to file reports in connection with the special elections must simultaneously file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of $16,200 during the special election reporting periods (*see* charts below for closing date of each period). 11 CFR 104.22(a)(5)(v).

CALENDAR OF REPORTING DATES FOR CALIFORNIA SPECIAL ELECTION

| Report | Close of books [1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
|---|---|---|---|
| **IF *ONLY* THE SPECIAL GENERAL IS HELD (05/17/11), QUARTERLY FILING POLITICAL COMMITTEES INVOLVED MUST FILE** | | | |
| Pre-General | 04/27/11 | 05/02/11 | 05/05/11 |
| Post-General | 06/06/11 | 06/16/11 | 06/16/11 |
| July Quarterly | 06/30/11 | 07/15/11 | 07/15/11 |
| Report | Close of books [1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
| **IF *ONLY* THE SPECIAL GENERAL IS HELD (05/17/11), SEMI-ANNUAL FILING POLITICAL COMMITTEES INVOLVED MUST FILE** | | | |
| Pre-General | 04/27/11 | 05/02/11 | 05/05/11 |
| Post-General | 06/06/11 | 06/16/11 | 06/16/11 |
| Mid-Year | 06/30/11 | 07/31/11 | [2] 07/31/11 |
| Report | Close of books [1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
| **IF TWO ELECTIONS ARE HELD, QUARTERLY FILING POLITICAL COMMITTEES INVOLVED *ONLY* IN THE SPECIAL GENERAL (05/17/11) MUST FILE** | | | |
| Pre-General | 04/27/11 | 05/02/11 | 05/05/11 |
| July Quarterly | 06/30/11 | 07/15/11 | 07/15/11 |
| Report | Close of books [1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
| **IF TWO ELECTIONS ARE HELD, SEMI-ANNUAL FILING POLITICAL COMMITTEES INVOLVED *ONLY* IN THE SPECIAL GENERAL (05/17/11) MUST FILE** | | | |
| Pre-General | 04/27/11 | 05/02/11 | 05/05/11 |
| Mid-Year | 06/30/11 | 07/31/11 | [2] 07/31/11 |
| Report | Close of books [1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
| **QUARTERLY FILING POLITICAL COMMITTEES INVOLVED IN THE SPECIAL GENERAL (05/17/11) AND SPECIAL RUNOFF (07/12/11) MUST FILE** | | | |
| Pre-General | 04/27/11 | 05/02/11 | 05/05/11 |
| Pre-Runoff | 06/22/11 | 06/27/11 | 06/30/11 |
| July Quarterly | 06/30/11 | 07/15/11 | 07/15/11 |
| Post-Runoff | 08/01/11 | 08/11/11 | 08/11/11 |
| October Quarterly | 09/30/11 | 10/15/11 | [2] 10/15/11 |
| Report | Close of books [1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
| **SEMI-ANNUAL FILING POLITICAL COMMITTEES INVOLVED IN THE SPECIAL GENERAL (05/17/11) AND SPECIAL RUNOFF (07/12/11) MUST FILE** | | | |
| Pre-General | 04/27/11 | 05/02/11 | 05/05/11 |
| Pre-Runoff | 06/22/11 | 06/27/11 | 06/30/11 |
| Mid-Year | 06/30/11 | 07/31/11 | [2] 07/31/11 |
| Post-Runoff | 08/01/11 | 08/11/11 | 08/11/11 |
| Year-End | 12/31/11 | 01/31/12 | 01/31/12 |
| Report | Close of books [1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
| **QUARTERLY FILING POLITICAL COMMITTEES INVOLVED *ONLY* IN THE SPECIAL RUNOFF (07/12/11) MUST FILE** | | | |
| Pre-Runoff | 06/22/11 | 06/27/11 | 06/30/11 |
| July Quarterly | 06/30/11 | 07/15/11 | 07/15/11 |
| Post-Runoff | 08/01/11 | 08/11/11 | 08/11/11 |
| October Quarterly | 09/30/11 | 10/15/11 | [2] 10/15/11 |

| Report | Close of books [1] | Reg./Cert. & overnight mailing deadline | Filing deadline |
|---|---|---|---|
| **SEMI-ANNUAL FILING POLITICAL COMMITTEES INVOLVED *ONLY* IN THE SPECIAL RUNOFF (07/12/11) MUST FILE** | | | |
| Pre-Runoff | 06/22/11 | 06/27/11 | 06/30/11 |
| Mid-Year | 06/30/11 | 07/31/11 | [2] 07/31/11 |
| Post-Runoff | 08/01/11 | 08/11/11 | 08/11/11 |
| Year-End | 12/31/11 | 01/31/12 | 01/31/12 |

[1] These dates indicate the beginning and the end of the reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered as a political committee with the Commission up through the close of books for the first report due.

[2] Notice that this filing deadline falls on a weekend. Filing deadlines are not extended when they fall on nonworking days. Accordingly, reports filed by methods other than Registered, Certified or Overnight Mail, or electronically, must be received before the Commission's close of business on the last business day before the deadline.

On behalf of the Commission.

Dated: March 21, 2011.

**Cynthia L. Bauerly,**

*Chair, Federal Election Commission.*

[FR Doc. 2011–7155 Filed 3–25–11; 8:45 am]

**BILLING CODE 6715–01–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0047; Docket No. 2011–0079; Sequence 4]**

## Federal Acquisition Regulation; Information Collection; Place of Performance

**AGENCY:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning place of performance.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

**DATES:** Submit comments on or before May 27, 2011.

**ADDRESSES:** Submit comments identified by Information Collection 9000–0047 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "Information Collection 9000–0047" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0047". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0047" on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0047.

*Instructions:* Please submit comments only and cite Information Collection 9000–0047, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael O. Jackson, Procurement Analyst, Contract Policy Branch at (202) 208–4949 or e-mail *michaelo.jackson@gsa.gov.*

### A. Purpose

The information relative to the place of performance and owner of plant or facility, if other than the prospective contractor, is a basic requirement when contracting for supplies or services (including construction). This information is instrumental in determining bidder responsibility, responsiveness, and price reasonableness. A prospective contractor must affirmatively demonstrate its responsibility. Hence, the Government must be apprised of this information prior to award. The contracting officer must know the place of performance and the owner of the plant or facility to (1) determine bidder responsibility; (2) determine price reasonableness; (3) conduct plant or source inspections; and (4) determine whether the prospective contractor is a manufacturer or a regular dealer. The information is used to determine the firm's eligibility for awards and to assure proper preparation of the contract. Contractors can complete the provision electronically in the On-Line Representation and Certifications Application (ORCA); however, because the data being collected could change for a specific solicitation, contractors will still be required to submit place of performance information on an exceptional basis; that is, whenever the place of performance for a specific solicitation is different from the place of performance shown in ORCA.

### B. Annual Reporting Burden

*Respondents:* 79,397.

*Responses Per Respondent:* 14.

*Total Responses:* 1,111,558.

*Hours per Response:* .07.

*Total Burden Hours:* 77,810.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Branch (MVCB), 1275 First Street, NE., Washington, DC 20417 telephone (202) 501–4755. Please cite OMB Control No. 9000–0047, Place of Performance, in all correspondence.

Dated: March 9, 2011.

**Millisa Gary,**

*Acting Director, Office of Governmentwide Acquisition Policy.*

[FR Doc. 2011–7244 Filed 3–25–11; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0134; Docket 2011–0079; Sequence 6]**

## Federal Acquisition Regulation; Information Collection; Environmentally Sound Products

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning environmentally sound products.

**DATES:** Submit comments on or before May 27, 2011.

**ADDRESSES:** Submit comments identified by Information Collection 9000–0134 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "Information Collection 9000–0134" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0134". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0134" on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0134.

*Instructions:* Please submit comments only and cite Information Collection 9000–0134, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Clark, Procurement Analyst, Contract Policy Branch, GSA, (202) 219–1813 or *william.clark@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Purpose

This information collection complies with Section 6002 of the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6962). RCRA requires the Environmental Protection Agency (EPA) to designate items which are or can be produced with recovered materials. RCRA further requires agencies to develop affirmative procurement programs to ensure that items composed of recovered materials will be purchased to the maximum extent practicable. Affirmative procurement programs required under RCRA must contain, as a minimum (1) A recovered materials preference program and an agency promotion program for the preference program; (2) a program for requiring estimates of the total percentage of recovered materials used in the performance of a contract, certification of minimum recovered material content actually used, where appropriate, and reasonable verification procedures for estimates and certifications; and (3) annual review and monitoring of the effectiveness of an agency's affirmative procurement program.

The items for which EPA has designated minimum recovered material content standards are grouped into eight categories: (1) Construction products, (2) landscaping products, (3) nonpaper office products, (4) paper and paper products, (5) park and recreation products, (6) transportation products, (7) vehicular products, and (8) miscellaneous products. The FAR rule also permits agencies to obtain pre-award information from offerors regarding the content of items which the agency has designated as requiring minimum percentages of recovered materials.

In accordance with RCRA, the information collection applies to acquisitions requiring minimum percentages of recovered materials, when the price of the item exceeds $10,000 or when the aggregate amount paid for the item or functionally equivalent items in the preceding fiscal year was $10,000 or more.

Contracting officers use the information to verify offeror/contractor compliance with solicitation and contract requirements regarding the use of recovered materials. Additionally, agencies use the information in the annual review and monitoring of the effectiveness of the affirmative procurement programs required by RCRA.

### B. Annual Reporting Burden

*Respondents:* 64,350.
*Responses per Respondent:* 1.
*Annual Responses:* 64,350.
*Hours per Response:* .325.
*Total Burden Hours:* 20,914.
*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB control No. 9000–0134, Environmentally Sound Products, in all correspondence.

Dated: March 8, 2011.

**Millisa Gary,**

*Acting Director, Office of Governmentwide Acquisition Policy.*

[FR Doc. 2011–7245 Filed 3–25–11; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0937–0191]**

## Agency Information Collection Request; 60-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed

information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60-days.

*Proposed Project:* Application Packets for Real Property for Public Health Purposes—OMB No. 0937–0191—Extension—Office of Assistant Secretary for Administration– Program Support Center/Federal Property Assistance Program.

*Abstract:* These applications are completed and submitted to HHS by State and local governments and nonprofit institutions when applying for acquisition of excess/surplus, underutilized/unutilized, and/or off-site Federal real property. Submitted applications are used to determine if institutions/organizations are eligible to purchase, lease or use property under the provisions of the surplus real property program.

ESTIMATED ANNUALIZED BURDEN TABLE

| Type of respondent | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|
| State, local, or tribal governments, nonprofits | 20 | 1 | 200 | 4,000 |

**Seleda Perryman,**

*Office of the Secretary, Paperwork Reduction Act Clearance Officer.*

[FR Doc. 2011–7168 Filed 3–25–11; 8:45 am]

**BILLING CODE 4151–17–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: 0990–New; 60-Day Notice]**

## Agency Information Collection Request. 60-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, email your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office at (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60-days.

*Proposed Project:* The Children's Health Insurance Program Reauthorization Act (CHIPRA) 10-State Evaluation—OMB No. 0990–NEW—Assistant Secretary Planning and Evaluation (ASPE).

*Abstract:* The Office of the Assistant Secretary for Planning and Evaluation (ASPE) is requesting the Office of Management and Budget (OMB) approval on a new collection to provide the Federal government with new and detailed insights into how the Children's Health Insurance Program (CHIP) has evolved since its early years, what impacts on children's coverage and access to care have occurred, and what new issues have arisen as a result of policy changes related to CHIPRA and the Patient Protection and Affordable Care Act (The Affordable Care Act) of 2010 (Pub. L. 111–148). The evaluation will address numerous key questions regarding the structure and impact of CHIP and Medicaid programs for children. To answer these questions, ASPE will draw on three new primary data collection efforts, including a survey of selected CHIP enrollees and disenrollees in 10 states (and Medicaid enrollees and disenrollees in 3 of these states), qualitative case studies in the 10 states, and a survey of State Program Administrators in all 50 States and the District of Columbia. This current request seeks clearance for the first two information collections; ASPE will seek clearance for the third information collection at a later date. All data collection will take place one time only over a three year period. The survey component includes a sample of children in 10 selected states, recently enrolled or disenrolled in CHIP or Medicaid. Survey data will be collected using computer-assisted telephone interviewing with an in-person follow-up. The qualitative case studies will include site visit interviews with CHIP and Medicaid administrators and public and child health stakeholders, plus focus groups with parents or family members of CHIP enrollees.

ESTIMATED ANNUALIZED BURDEN TABLE

| Forms | Type of respondent | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Survey of CHIP Enrollees and Disenrollees. | CHIP enrollees and disenrollees. | 15,000 | 1 | 30/60 | 7,500 |
| Survey of Medicaid Enrollees and Disenrollees. | Medicaid enrollees and disenrollees. | 4,500 | 1 | 30/60 | 2,250 |
| Site Visits | CHIP and Medicaid personnel—1. | 300 | 1 | 1 | 300 |
| Focus Groups | Parents and other family members of children—2. | 80 | 1 | 2 | 160 |

ESTIMATED ANNUALIZED BURDEN TABLE—Continued

| Forms | Type of respondent | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Total Burden | | | | | 10,210 |

**Seleda Perryman,**

*Office of the Secretary, Paperwork Reduction Act Clearance Officer.*

[FR Doc. 2011–7169 Filed 3–25–11; 8:45 am]

**BILLING CODE 4150–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0990–0371]**

## Agency Information Collection Request. 60-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above email address within 7 days.

*Proposed Project:* Evaluation of SAMHSA Primary and Behavioral Health Care Integration Grant Program. OMB No. 0990–0371—Revision—Assistant Secretary for Planning and Evaluation (ASPE).

*Abstract:* The Assistant Secretary for Planning and Evaluation (ASPE) and the Substance Abuse and Mental Health Services Administration (SAMHSA) are funding an independent evaluation of the Substance Abuse and Mental Health Services Administration/Center for Mental Health Services' (SAMHSA/CMHS) Primary and Behavioral Health Care Integration (PBHCI) grant program. Four-year PBHCI grants for up to $500,000 per year were awarded to thirteen grantees on September 30, 2009. A second group of nine grants and a third group of 34 grants were awarded September 30, 2010, for a total of 56 grants. The purpose of the PBHCI program is to improve the overall wellness and physical health status of people with serious mental illnesses (SMI), including individuals with co-occurring substance use disorders, by supporting communities to coordinate and integrate primary care services into publicly-funded community mental health and other community-based behavioral health settings. The information collected through the 3 year evaluation will assist SAMHSA in assessing whether integrated primary care services produce improvements in the physical and mental health of the SMI population receiving services from community-based behavioral health agencies. Data will be collected from grantee staff at all sites and from clients at up to 10 sites (client exam/survey). An Emergency Clearance Request covering the first six months of data collection starting February 15, 2011 and ending August 14, 2011 was approved February 15, 2011. This submission will cover data collection for the period starting August 15, 2011 and ending October 1, 2013.

ESTIMATED ANNUALIZED BURDEN TABLE

| Type of respondent | Instrument name | Number of respondents | Number responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Grantee Data Staff | Individual Service Utilization Data | 56 | 4 | 8 | 1,792 |
| Grantee Data Staff | TRAC Indicators | 56 | 1,000 | 5/60 | 4,667 |
| Grantee Project Directors | Quarterly Reports | 56 | 4 | 2 | 448 |
| SMI Clients | Client Exam and Survey-Baseline | 1,000 | 1 | 45/60 | 750 |
| SMI Clients | Client Exam and Survey-Follow-up | 1667 | 1 | 45/60 | 1,250 |
| Grantee Leadership | Site Visit Interview | 40 | 1 | 2 | 80 |
| Grantee MH Providers | Site Visit Interview | 40 | 1 | 1 | 40 |
| Grantee PH Providers | Site Visit Interview | 40 | 1 | 1.5 | 60 |
| Grantee Care Coordinators | Site Visit Interview | 20 | 1 | 1.5 | 30 |
| Control Site Leadership | Site Visit Interview | 50 | 1 | 2 | 100 |
| Grantee Key Staff | Web Survey | 560 | 1 | 1.5 | 840 |
| Total | | | | | 10,057 |

**Seleda M. Perryman,**

*Office of the Secretary, Paperwork Reduction Act Clearance Officer.*

[FR Doc. 2011–7171 Filed 3–25–11; 8:45 am]

**BILLING CODE 4150–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0990–New; 60–day Notice]**

### Agency Information Collection Request. 60-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above email address within 60-days.

*Proposed Project:* Wellness Program Study: Assessing the Impact of Workplace Health and Wellness Programs—OMB No. 0990–NEW—Assistant Secretary for Planning Evaluation (ASPE)

*Abstract:* The Office of the Assistant Secretary for Planning and Evaluation (ASPE) and the Employee Benefits Security Administration (EBSA) is requesting Office of Management and Budget (OMB) approval on a new collection to conduct a survey on employers to learn about their experiences and attitudes regarding workplace wellness programs. ASPE will use the employers' experience to assess the effectiveness and impact of workplace wellness programs, as well as identify best practices and lessons learned in program implementation with a particular focus on the use of incentives. As part of the study, a one-time, self-administered survey will be administered to 3,000 employers selected from the Dun & Bradstreet database, a comprehensive listing of private companies and government agencies in the U.S. The survey will assess prevalence and type of wellness programs as well as the use of employee incentives. The survey design and content is informed by a review of the literature on the characteristics, prevalence and impact of workplace wellness programs. Data collection will also include employee focus groups and key informant semi-structured interviews at each of 4 employer sites that will inform in-depth case studies of those employers. The focus groups will consist of 12 employees and will be conducted to get the end-user perspective on the impact and effectiveness of the wellness program. The key informant interviews will be carried out with 5 wellness leaders at each employer, and will gather information on employer background, health insurance and wellness programs offered, and anticipated changes due to the Affordable Care Act. Data collection activities will be completed within 18 months of OMB Clearance.

EXHIBIT 1—ESTIMATE OF ANNUALIZED TIME BURDEN TO RESPONDENTS

| Forms | Type of respondent | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Survey | Human Resource Manager | 3,000 | 1 | 30/60 | 1,500 |
| Focus Group Protocol | Employees in All Occupations | 48 | 1 | 1.5 | 72 |
| Key Informant Interview Script. | Human Resource Manager | 20 | 1 | 45/60 | 15 |
| Total | | | | | 1,587 |

**Seleda Perryman,**

*Office of the Secretary, Paperwork Reduction Act Clearance Officer.*

[FR Doc. 2011–7172 Filed 3–25–11; 8:45 am]

**BILLING CODE 4150–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Office of Planning, Research and Evaluation Advisory Committee on Head Start Research and Evaluation

**AGENCY:** Administration for Children and Families, Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** This notice announces a forthcoming meeting of a public advisory committee of the Administration for Children and Families (ACF). The meeting will be open to the public.

*Name of Committee:* Advisory Committee for Head Start Research and Evaluation.

*General Function of Committee:* The Advisory Committee for Head Start Research and Evaluation will provide feedback on the published final report for the Head Start Impact Study, offering interpretations of the findings, discussing implications for practice and policy, and providing recommendations on follow-up research, including additional analysis of the Head Start Impact Study data. The Committee will

also be asked to provide recommendations to the Secretary regarding how to improve Head Start and other early childhood programs by enhancing the use of research-informed practices in early childhood. Finally, the Committee will be asked to provide recommendations on the overall Head Start research agenda, including—but not limited to—how the Head Start Impact Study fits within this agenda. The Committee will provide advice regarding future research efforts to inform HHS about how to guide the development and implementation of best practices in Head Start and other early childhood programs around the country.

**DATES:** The meeting will be held on April 12th and April 13th, 2011, from 8:30 a.m. to 5 p.m.

**ADDRESSES:** Hyatt Arlington, 1325 Wilson Boulevard, Arlington, VA 22209, Phone: 703–525–1234.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Brooks, Office of Planning, Research, and Evaluation, *e-mail jennifer.brooks@acf.hhs.gov* or call (202) 205–8212.

*Agenda:* The committee will review information on the federal Head Start program and the children and families it serves, hear information about the early Head Start program, and learn about the latest research in the area of quality teaching and learning.

*Procedure:* Interested persons may present data, information or views, in writing, on issues pending before the Committee. Written submissions may be made to the contact person on or before April 1, 2011. All written materials provided to the contact person will be shared with the Committee members.

ACF welcomes the attendance of the public at this advisory committee meeting and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Jennifer Brooks at least seven days in advance of the meeting. Information about the committee and this meeting can be found at the committee Web site, *http://www.acf.hhs.gov/programs/opre/hs/advisory_com/.*

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

**Robert Sargis,**

*Reports Clearance Officer, Administration for Children and Families.*

[FR Doc. 2011–7170 Filed 3–25–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0016]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Recordkeeping and Records Access Requirements for Food Facilities

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by April 27, 2011.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0560. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

### Recordkeeping and Records Access Requirements for Food Facilities—21 CFR 1.337, 1.345, and 1.352 (OMB Control Number 0910–0560)—Extension

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act) added section 414 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 350c), which requires that persons who manufacture, process, pack, hold, receive, distribute, transport, or import food in the United States establish and maintain records identifying the immediate previous sources and immediate subsequent recipients of food. Sections 1.326 through 1.363 of FDA's regulations (21 CFR 1.326 through 1.363) set forth the requirements for recordkeeping and records access. The requirement to establish and maintain records improves FDA's ability to respond to, and further contain, threats of serious adverse health consequences or death to humans or animals from accidental or deliberate contamination of food.

*Description of Respondents:* Persons that manufacture, process, pack, hold, receive, distribute, transport, or import food in the United States are required to establish and maintain records, including persons that engage in both interstate and intrastate commerce.

FDA's regulations require that records for non-transporters include the name and full contact information of sources, recipients, and transporters, an adequate description of the food including the quantity and packaging, and the receipt and shipping dates (§§ 1.337 and 1.345). Required records for transporters include the names of consignor and consignee, points of origin and destination, date of shipment, number of packages, description of freight, route of movement and name of each carrier participating in the transportation, and transfer points through which shipment moved (§ 1.352). Existing records may be used if they contain all of the required information and are retained for the required time period.

In the **Federal Register** of January 13, 2011 (76 FR 2396), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received one letter containing multiple comments in response to the notice.

*(Comment 1)* One comment was generally supportive of the necessity of the information collection and its practical utility.

*(Response)* FDA agrees. As discussed previously in this document, the requirement to establish and maintain records improves FDA's ability to respond to, and further contain, threats of serious adverse health consequences or death to humans or animals from accidental or deliberate contamination of food.

*(Comment 2)* Another comment stated that accurate recordkeeping is integral to the effective and timely tracing of food products through the supply chain and, to support effective product tracing, suggested that industry should determine the Critical Tracking Events (CTEs) and the Key Data Elements (KDEs) necessary for product tracing; FDA should encourage the adoption of standard ways to express this

information as well as the adoption of electronic recordkeeping and electronic submission of data to the agency; and, review of product tracing procedures should be part of standard audits.

*(Response)* FDA agrees that recordkeeping is key to effective product tracing. However, to the extent that the comments suggest changes to the requirements of the recordkeeping regulations in sections 1.326 through 1.363, such requests are outside the scope of the four collection of information topics on which the notice solicits comments. Such changes to the current recordkeeping requirements can only be accomplished by notice and comment rulemaking.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

| 21 CFR Section | Number of recordkeepers | Annual frequency per recordkeeping | Total annual records | Hours per record | Total hours |
|---|---|---|---|---|---|
| 1.337, 1.345, and 1.352 (Records maintenance) | 379,493 | 1 | 379,493 | 13.228 | 5,020,000 |
| 1.337, 1.345, and 1.352 (Learning for new firms) | 18,975 | 1 | 18,975 | 4.790 | 90,890 |
| Total | | | | | 5,110,890 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

This estimate is based on FDA's estimate of the number of facilities affected by the final rule entitled "Establishment and Maintenance of Records Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002," published in the **Federal Register** of December 9, 2004 (69 FR 71562 at 71630). With regard to records maintenance, FDA estimates that approximately 379,493 facilities will spend 13.228 hours collecting, recording, and checking for accuracy of the limited amount of additional information required by the regulations, for a total of 5,020,000 hours annually. In addition, FDA estimates that new firms entering the affected businesses will incur a burden from learning the regulatory requirements and understanding the records required for compliance. In this regard, the Agency estimates the number of new firms entering the affected businesses to be 5 percent of 379,493, or 18,975 firms. Thus, FDA estimates that approximately 18,975 facilities will spend 4.790 hours learning about the recordkeeping and records access requirements, for a total of 90,890 hours annually. Therefore, the total annual recordkeeping burden is estimated to be 5,110,890 hours.

Dated: March 23, 2011.

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2011–7188 Filed 3–25–11; 8:45 am]

BILLING CODE 4160–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0017]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Voluntary National Retail Food Regulatory Program Standards

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

**DATES:** Fax written comments on the collection of information by April 27, 2011.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0621. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

### Voluntary National Retail Food Regulatory Program Standards—(OMB Control Number 0910–0621)—Extension

The Program Standards define nine essential elements of an effective regulatory program for retail food establishments, establish basic quality control criteria for each element, and provide a means of recognition for those state, local, and tribal regulatory programs that meet the Program Standards. The program elements addressed by the Program Standards are as follows: (1) Regulatory foundation, (2) trained regulatory staff, (3) inspection program based on Hazard Analysis and Critical Control Point (HACCP) principles, (4) uniform inspection program, (5) foodborne illness and food defense preparedness and response, (6) compliance and enforcement, (7) industry and community relations, (8) program support and resources, and (9) program assessment. Each standard includes a list of records needed to document compliance with the standard (referred to in the Program Standards document as "quality records") and has one or more corresponding appendices that contain forms and worksheets to facilitate the collection of information needed to assess the retail food regulatory program against that standard. The respondents are State, local and tribal government Agencies. Regulatory Agencies may use existing, available records or may choose to develop and use alternate forms and worksheets that capture the same information.

In the course of their normal activities, state, local, and tribal

regulatory Agencies already collect and keep on file many of the records needed as quality records to document compliance with each of the Program Standards. Although the detail and format in which this information is collected and recorded may vary by jurisdiction, records that are kept as a usual and customary part of normal Agency activities include inspection records, written quality assurance procedures and records of quality assurance checks, staff training certificates and other training records, a log or database of food-related illness or injury complaints, records of investigations resulting from such complaints, an inventory of inspection equipment, records of outside audits, and records of outreach efforts (*e.g.,* meeting agendas and minutes, documentation of food safety education activities). No new recordkeeping burden is associated with these existing records, which are already a part of usual and customary program recordkeeping activities by state, local, and tribal regulatory Agencies, and which can serve as quality records under the Program Standards.

State, local, and tribal regulatory Agencies that enroll in the Program Standards and seek listing in the FDA National Registry are required to report to FDA on the completion of the following three management tasks outlined in the Program Standards: (1) Conducting a program self assessment, (2) conducting a baseline survey of the regulated industry, and (3) obtaining an independent outside audit (verification audit). The results are reported to FDA on Form FDA 3519, "FDA National Registry Report" and Form FDA 3520, "Permission to Publish in National Registry." These forms are located in Appendix I of the Program Standards document. If a regulatory Agency follows all the recordkeeping recommendations in the individual standards and their appendices, it will have all the information needed to complete the forms.

In April 2010, the Conference for Food Protection approved changes to the Program Standards. The changes have been incorporated into a draft 2011 revision, which will be available at: *http://www.fda.gov/retailfoodprotection.* One change was to provide an extension of time for completion of the three management tasks. Another change was the inclusion of clarifying language in Standard 9 that a jurisdiction may use its inspection data to conduct its study of risk factor occurrence. Although this was always the intent in Standard 9, it was not clear to jurisdictions that this was a viable option.

FDA analyzed whether incorporation of these changes alters its estimate of the recordkeeping and reporting burdens. FDA concluded that the changes will lessen the annual recordkeeping burden estimate because the management tasks will be conducted on a less frequent basis annually. Thus, based on its experience with the Program Standards over the past 3 years, FDA has reduced its estimate of the hours per record to 94.29, from the previously estimated 157 hours per record in 2008. The reduced recordkeeping burden hour estimates are shown in table 1 of this document. FDA notes that jurisdictions that choose to analyze their inspection data per the Standard 9 criteria will enjoy a less resource intensive method for tracking risk factor trends over time. However, the Agency has not reduced its estimate of 333 hours for Standard 9 shown in table 2 of this document. The Agency will consider reducing this estimate in a future information collection request based on supporting data it expects to receive in the future from participating jurisdictions. The two noted changes had no effect on the reporting burden hour estimates shown in table 2 of this document.

**Recordkeeping**

FDA's recordkeeping burden estimate includes time required for a State, local, or tribal Agency to review the instructions in the Program Standards, compile information from existing sources, and create any records recommended in the Program Standards that are not already kept in the normal course of the Agency's usual and customary activities. Worksheets (Appendices) are provided to assist in this compilation. In estimating the time needed for the program self-assessment (Program Standards 1–8, shown in table 1 of this document), FDA considered responses from four state and three local jurisdictions that participated in an FDA Program Standards Pilot study. Table 2 of this document shows the estimated recordkeeping burden for the completion of the baseline data collection and table 3 of this document shows the estimated recordkeeping burden for the verification audit.

In the **Federal Register** of January 12, 2011 (76 FR 2124), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received six comment letters in response to the notice. One comment was generally supportive of the necessity of the information collection and its practical utility. Five letters contained comments outside the scope of the four collections of information topics on which the notice solicits comments and thus, will not be addressed here.

FDA estimates the burden for this collection of information as follows:

TABLE 1—SELF ASSESSMENT

| Standard | Recordkeeping activity | Hours per record |
|---|---|---|
| No. 1. Regulatory Foundation | Self Assessment: (Appendix A) Completion of worksheet recording results of evaluations and comparison on worksheets [1]. | 16 |
| No. 2. Trained Regulatory Staff. | Self Assessment: (Appendix B–2 and B–4)[1] Completion of the Center for Food Protection Field Training Manual and Documentation of Successful Completion—Field Training Process; completion of summary worksheet of each employee training records [2]. | 19.3 |
| No. 3. Hazard Analysis and Critical Control Point. | Self Assessment: (Appendix C [1]) Completion of worksheet documentation | 4 |
| No. 4. Uniform Inspection Program. | Self Assessment: (Appendix D [1]) Completion of worksheet documentation of jurisdiction's quality assurance procedures [2]. | 19 |
| No. 5. Foodborne Illness Investigation. | Self Assessment: (Appendix E [1]) Completion of worksheet documentation | 5 |
| No. 6. Compliance Enforcement. | Self Assessment: (Appendix F [1]) Selection and review of 20 to 70 establishment files @ 25 minutes per file. Estimate is based on a mean number of 45. Completion of worksheet. | 19 |
| No. 7. Industry & Community Relations. | Self Assessment: (Appendix G [1]) Completion of worksheet | 2 |

TABLE 1—SELF ASSESSMENT—Continued

| Standard | Recordkeeping activity | Hours per record |
|---|---|---|
| No. 8. Program Support and Resources. | Self Assessment: (Appendix H [1]) Selection and review of establishment files | 8 |
| Subtotal | | 92.3 |

[1] Or comparable documentation.
[2] Estimates will vary depending on number of regulated food establishments and the number of inspectors employed by the jurisdiction.

TABLE 2—BASELINE DATA COLLECTION

| Standard | Recordkeeping activity | Hours per record |
|---|---|---|
| No. 9. Program Assessment | Baseline Data Collection (Appendices I & J) Selection and inspection of randomly selected statistical sample of 9 to 87 establishments from each of 9 facility types [1]. | 333 |

[1] Calculation based on mean sample size of 39 and average FDA inspection time for each establishment type. Estimates will vary depending on number of regulated food establishments within a jurisdiction and the number of inspectors employed by the jurisdiction.

TABLE 3—VERIFICATION AUDIT

| Standard | Recordkeeping activity | Hours per record |
|---|---|---|
| No. 9 | Verification Audit (Appendices I & J) [1] | 46.15 |

[1] We estimate that no more than 50% of time spent to complete self assessment of all 9 Standards is spent completing verification audit worksheets. Time will be considerably less if less than 9 standards require verification audits.

Thus, FDA estimates the recordkeeping burden for this collection of information as follows:

TABLE 4—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

| FDA Worksheets [2] | Number of recordkeepers | Number of records per recordkeeper | Total annual records | Average burden per recordkeeping (in hours) | Total hours |
|---|---|---|---|---|---|
| Appendices A–J | 500 | 1 | 500 | 94.29 | 47,145 |
| Total | | | | | 47,145 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Or comparable documentation.

FDA bases its estimates of the number of recordkeepers and the hours per record on its experience with the Program Standards over the past 3 years. FDA estimates that approximately 500 regulatory jurisdictions will participate in the Program Standards. There are approximately 3,000 jurisdictions in the United States and its territories that have retail food regulatory programs. Enrollment in the Program Standards is voluntary and, therefore, FDA does not expect all jurisdictions to participate.

FDA bases its estimate of the hours per record on the recordkeeping estimates for the management tasks of self assessment, baseline data collection, and verification audit (tables 1, 2, and 3 of this document) that enrolled jurisdictions must perform, a total of 471.45 hours (92.3 + 333 + 46.15 = 471.45). As noted, based on its experience with the Program Standards over the past 3 years, FDA has reduced its estimate of the number of recordkeeping hours that enrolled jurisdictions will perform annually to 94.29, from the previously estimated 157 hours per record in 2008. FDA estimates that, annually, 500 recordkeepers will spend 94.29 hours performing the required recordkeeping for a total of 47,145 hours.

**Reporting**

FDA requires regulatory jurisdictions that participate in the Program Standards to submit two forms annually: Form FDA 3519, "FDA National Registry Report," and Form FDA 3520, "Permission to Publish in National Registry." Form FDA 3519 requires the name and address of the jurisdiction; completion dates for the self assessment, baseline survey (original and update), and verification audit; names of the person(s) who completed the self-assessment, verification audit, baseline survey, baseline survey update, and action plan; signature of the program manager; and date the form was completed. Form FDA 3520 requires the name of the jurisdiction, completion date of the self assessment, date of the verification audit report, name of the auditor, signature and title of the official completing the form, and date the form was completed.

The reporting burden in table 5 of this document includes only the time necessary to fill out and send the forms, as compiling the underlying information (including self-assessment reports, baseline surveys, outside audits, and supporting documentation) is accounted for under the recordkeeping estimates in table 1 of this document.

FDA estimates the reporting burden for this collection of information as follows:

TABLE 5—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Form FDA No. | Number of respondents | Number of responses per respondent | Total annual respondents | Average burden per response (in Hours) [2] | Total hours |
|---|---|---|---|---|---|
| 3519 | 500 | 1 | 500 | 1/60 | 50 |
| 3520 | 500 | 1 | 500 | 1/60 | 50 |
| *CFP Training Plan and Log* | 500 | 3 | 1,500 | 1/60 | 150 |
| Total | | | | | 250 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Burden estimates of less than 1 hour are expressed as a fraction of an hour in the format "[number of minutes per response]/60".

FDA bases its estimates of the number of respondents and the hours per response on its experience with the Program Standards over the past 3 years. As explained previously in this document, FDA estimates that 500 regulatory jurisdictions will enroll in the Program Standards. FDA estimates a total of 12 minutes annually for each enrolled jurisdiction to complete both forms. FDA bases its estimate on the small number of data elements on the two forms and the ease of availability of the information. FDA estimates that, annually, 500 regulatory jurisdictions will submit one Form FDA 3519 for a total of 500 annual responses. Each submission is estimated to take 0.1 hour per response for a total of 50 hours. FDA estimates that, annually, 500 regulatory jurisdictions will submit one Form FDA 3520 for a total of 500 annual responses. Each of these submissions is estimated to take 0.1 hour per response for a total of 50 hours. FDA estimates that, annually, 500 regulatory jurisdictions will submit three requests for documentation of successful completion of staff training using the *CFP Training Plan and Log* for a total of 1,500 annual responses. Each submission is estimated to take 0.1 hour per response for a total of 150 hours. Thus, the total reporting burden for this information collection is 250 hours.

Dated: *March 23, 2011.*

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2011–7191 Filed 3–25–11; 8:45 am]

BILLING CODE 4160–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0148]**

### Clarifying Edits to Existing Special Controls Guidance Documents; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of updated special controls guidance documents for class II devices, which contain edits that reflect the Agency's effort to clarify questions and confusion regarding its position on the binding nature of special controls guidance documents. The revised language does not change the Agency's position or view, but rather is intended to clarify its position and remedy any possible confusion or misunderstanding.

**DATES:** Submit either electronic or written comments on this document at any time. General comments on Agency guidance documents are welcome at any time.

**ADDRESSES:** See the **SUPPLEMENTARY INFORMATION** section for electronic access to affected documents.

Submit electronic comments on this document to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Philip Desjardins, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5452, Silver Spring, MD 20993–0002, 301–796–5678; or Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852, 301–827–6210.

**SUPPLEMENTARY INFORMATION:**

### I. Background

In December 2008, FDA revised the cover sheet and standard language in newly issued special controls guidance documents to clarify the effect of a guidance that has been established as a special control ("special controls guidance"). In order to comply with the special controls guidance, manufacturers must address each identified risk to health presented in the guidance for the class II device by either meeting the recommendations of the guidance or by some other means that provides equivalent assurances of safety and effectiveness.

FDA is now updating all pre-December 2008 special controls guidance documents with the revised standard language. Revisions to the special controls guidance documents include clarifying the statement of the special controls guidance document's effect by replacing the standard language with the following statement: "The firm must show that its device addresses the issues of safety and effectiveness identified in this guidance, either by meeting the recommendations of this guidance or by some other means that provides equivalent assurances of safety and effectiveness."

Special controls guidance documents on the following topics have been affected: [1]

1. Acute Upper Airway Obstruction Devices,
2. Clitoral Engorgement Devices,
3. Anti-*Saccharomyces cerevisiae* (*S. cerevisiae*) Antibody (ASCA) Premarket Notifications,
4. Shoulder Joint Metal/Polymer/Metal Nonconstrained or Semi-Constrained Porous-Coated Uncemented Prosthesis,
5. B-Type Natriuretic Peptide Premarket Notifications,
6. Home Uterine Activity Monitors,
7. Pharmacy Compounding Systems,
8. Tissue Culture Media for Human ex vivo Tissue and Cell Culture Processing Applications,
9. Indwelling Blood Gas Analyzers,
10. Ingestible Telemetric Gastrointestinal Capsule Imaging System,
11. Premarket Notifications for Automated Differential Cell Counter for Immature or Abnormal Blood Cells,
12. Medical Washers and Medical Washer-Disinfectors,

[1] All guidance titles throughout this document reflect the style of the published versions.

13. Endolymphatic Shunt Tube with Valve,
14. Hip Joint Metal/Polymer Constrained Cemented or Uncemented Prosthesis,
15. Apnea Monitors,
16. Polymethylmethacrylate (PMMA) Bone Cement,
17. Cyclosporine and Tacrolimus Assays,
18. Transcutaneous Air Conduction Hearing Aid System (TACHAS),
19. Intraoral Devices for Snoring and/or Obstructive Sleep Apnea,
20. Cutaneous Carbon Dioxide and Oxygen Monitors,
21. Knee Joint Patellofemorotibial and Femorotibial Metal/Polymer Porous-Coated Uncemented Prostheses,
22. Optical Impression Systems for Computer Assisted Design and Manufacturing (CAD/CAM) of Dental Restorations,
23. Resorbable Calcium Salt Bone Void Filler Device,
24. Surgical Sutures,
25. Breath Nitric Oxide Test,
26. Breast Lesion Documentation System,
27. Arrhythmia Detector and Alarm,
28. Serological Reagents for the Laboratory Diagnosis of West Nile Virus,
29. Endotoxin Assay,
30. Dental Sonography and Jaw Tracking Devices,
31. Human Dura Mater (applicable to dura mater recovered before May 25, 2005),
32. Hepatitis A Virus Serological Assays,
33. Factor V Leiden DNA Mutation Detection Systems,
34. Immunomagnetic Circulating Cancer Cell Selection and Enumeration System,
35. Root-form Dental Implants and Endosseous Dental Implant Abutments,
36. Dental Base Metal Alloys,
37. Dental Noble Metal Alloys,
38. Serological Assays for the Detection of Beta-Glucan,
39. Sirolimus Test Systems,
40. Newborn Screening Test Systems for Amino Acids, Free Carnitine, and Acylcarnitines Using Tandem Mass Spectrometry,
41. Implantable Radiofrequency Transponder System for Patient Identification and Health Information,
42. External Penile Rigidity Devices,
43. Assisted Reproduction Laser Systems,
44. Vascular and Neurovascular Embolization Devices,
45. Drug Metabolizing Enzyme Genotyping System,
46. Instrumentation for Clinical Multiplex Test Systems,
47. Automated Fluorescence in situ Hybridization (FISH) Enumeration Systems,
48. Dental Bone Grafting Material Devices,
49. RNA Preanalytical Systems (RNA Collection, Stabilization and Purification Systems for RT–PCR used in Molecular Diagnostic Testing),
50. Oral Rinse to Reduce the Adhesion of Dental Plaque,
51. AFP–L3% Immunological Test Systems,
52. CFTR Gene Mutation Detection System,
53. Low Energy Ultrasound Wound Cleaner,
54. Tinnitus Masker Devices,
55. Labeling for Male Condoms Made of Natural Rubber Latex,
56. Implantable Intra-Aneurysm Pressure Measurement System,
57. Reagents for Detection of Specific Novel Influenza A Viruses,
58. Topical Oxygen Chamber for Extremities,
59. Olfactory Test Device,
60. Fecal Calprotectin Immunological Test Systems,
61. Absorbable Hemostatic Device,
62. Quality Control Material for Cystic Fibrosis Nucleic Acid Assays,
63. Oxygen Pressure Regulators and Oxygen Conserving Devices,
64. Herpes Simplex Virus Types 1 and 2 Serological Assays,
65. Computerized Labor Monitoring Systems,
66. Gene Expression Profiling Test System for Breast Cancer Prognosis,
67. Intervertebral Body Fusion Device,
68. Filtering Facepiece Respirator for Use by the General Public in Public Health Medical Emergencies,
69. Absorbable Poly(hydroxybutyrate) Surgical Suture Produced by Recombinant DNA Technology,
70. In Vitro Human Immunodeficiency Virus (HIV) Drug Resistance Genotype Assay,
71. Electrocardiograph Electrodes,
72. Remote Medication Management System,
73. Automated Blood Cell Separator Device Operating by Centrifugal or Filtration Separation Principle,
74. Plasmodium Species Antigen Detection Assays,
75. Full Field Digital Mammography System,
76. Certain Percutaneous Transluminal Coronary Angioplasty (PTCA) Catheters,
77. Tissue Adhesive for the Topical Approximation of Skin,
78. Bone Sonometers,
79. Tissue Expander,
80. Cord Blood Processing System and Storage Container.

## II. Electronic Access

Persons interested in obtaining a copy of any revised special controls guidance document may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. To receive any affected CDRH guidance you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy.

For CBER guidances, you may send a request to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. In addition, CBER guidance documents are available at *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm*.

## III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

**Authority:** 21 U.S.C. 371(h).

Dated: March 23, 2011.

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2011–7211 Filed 3–25–11; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket Nos. FDA–2010–M–0519, FDA–2010–M–0556, FDA–2010–M–0558, FDA–2010–M–0557, and FDA–2010–M–0591]**

### Medical Devices; Availability of Safety and Effectiveness Summaries for Premarket Approval Applications

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is publishing a list of premarket approval applications

(PMAs) to inform the public of the availability of safety and effectiveness summaries of approved PMAs through the Internet and the Agency's Division of Dockets Management.

**ADDRESSES:** Submit written requests for copies of summaries of safety and effectiveness data to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Please cite the appropriate docket number as listed in table 1 of this document when submitting a written request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the summaries of safety and effectiveness.

**FOR FURTHER INFORMATION CONTACT:** Nicole Wolanski, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1650, Silver Spring, MD 20993, 301–796–6570.

**SUPPLEMENTARY INFORMATION:**

## I. Background

In the **Federal Register** of January 30, 1998 (63 FR 4571), FDA published a final rule that revised 21 CFR 814.44(d) and 814.45(d) to discontinue individual publication of PMA approvals and denials in the **Federal Register**. Instead, the Agency now posts this information on the Internet on FDA's home page at *http://www.fda.gov.* FDA believes that this procedure expedites public notification of these actions because announcements can be placed on the Internet more quickly than they can be published in the **Federal Register**, and FDA believes that the Internet is accessible to more people than the **Federal Register**.

In accordance with section 515(d)(4) and (e)(2) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360e(d)(4) and (e)(2)), notification of an order approving, denying, or withdrawing approval of a PMA will continue to include a notice of opportunity to request review of the order under section 515(g) of the FD&C Act. The 30-day period for requesting reconsideration of an FDA action under § 10.33(b) (21 CFR 10.33(b)) for notices announcing approval of a PMA begins on the day the notice is placed on the Internet. Section 10.33(b) provides that FDA may, for good cause, extend this 30-day period. Reconsideration of a denial or withdrawal of approval of a PMA may be sought only by the applicant; in these cases, the 30-day period will begin when the applicant is notified by FDA in writing of its decision.

The regulations provide that FDA publish a quarterly list of available safety and effectiveness summaries of PMA approvals and denials that were announced during that quarter. The following is a list of approved PMAs for which summaries of safety and effectiveness were placed on the Internet from October 1, 2010, through December 31, 2010, and includes one denial action during this period. The list provides the manufacturer's name, the product's generic name or the trade name, and the date of action.

TABLE 1—LIST OF PMA ACTIVITY FROM OCTOBER 1, 2010, THROUGH DECEMBER 31, 2010

| PMA No. | Docket No. | Applicant | Trade name | Date of action |
|---|---|---|---|---|
| P100016 | FDA–2010–M–0556 | Aaren Scientific, Inc | EC–3 intraocular lens (IOL) and EC–3 precision aspheric lens (PAL) IOL. | Approved October 19, 2010. |
| P040005 (S005) | FDA–2010–M–0558 | Dako Denmark A/S | *HER* 2 FISH PharmDx kit | Approved October 20, 2010. |
| P980018 (S010) | FDA–2010–M–0557 | Dako Denmark A/S | HercepTest kit | Approved October 20, 2010. |
| P080009 | | Ethicon Endo-Surgery, Inc. | SEDASYS computer-assisted personalized sedation system. | Denied October 27, 2010. |
| P080018 | FDA–2010–M–0591 | Carestream Health, Inc. | Kodak DirectView CR mammography system. | Approved November 3, 2010. |

## II. Electronic Access

Persons with access to the Internet may obtain the documents at *http://www.fda.gov/cdrh/pmapage.html.*

Dated: March 23, 2011.

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2011–7212 Filed 3–25–11; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0002]**

### Pregnancy and Prescription Medication Use Symposium

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of meeting.

The Food and Drug Administration (FDA) is announcing the following meeting: Pregnancy and Prescription Medication Use Symposium. The topic to be discussed is "Prescription Drug Use in Pregnancy."

*Date and Time:* The meeting will be held on May 17, 2011, from 8 a.m. to 4:30 p.m.

*Location:* The meeting will be held at FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993–0002.

*Contact:* Monica Yu, Office of Women's Health (OWH), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 2313, 301–796–9449, e-mail: *monica.yu@fda.hhs.gov.*

*Registration:* There is no registration fee, but seating is limited to 100. Send registration information (including name, title, firm name, address, telephone number, and e-mail address), to the following registration link by May 10, 2011: *http://www.accessdata.fda.gov/scripts/email/oc/pregnancysymposium.cfm.*

If you need special accommodations due to a disability, please contact Monica Yu at least 7 days in advance.

*Visitor parking:* Please see *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

**SUPPLEMENTARY INFORMATION:**

*Transcripts:* There will not be any transcripts; however, the speakers' Power Point presentations will be posted on the FDA/OWH Web site after the meeting at: *http://www.fda.gov/ForConsumers/byAudience/ForWomen/default.htm.*

Dated: *March 23, 2011.*

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2011–7215 Filed 3–25–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0002]**

### Food and Drug Administration Clinical Trial Requirements, Regulations, Compliance, and Good Clinical Practice; Public Workshop

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of public workshop.

The Food and Drug Administration (FDA) Denver District Office, in co-sponsorship with the Society of Clinical Research Associates (SoCRA), is announcing a public workshop. The public workshop on FDA's clinical trial requirements is designed to aid the clinical research professional's understanding of the mission, responsibilities, and authority of FDA and to facilitate interaction with FDA representatives. The program will focus on the relationships among FDA and clinical trial staff, investigators, and institutional review boards (IRBs). Individual FDA representatives will discuss the informed consent process and informed consent documents; regulations relating to drugs, devices, and biologics; as well as inspections of clinical investigators, IRBs, and research sponsors.

*Date and Time:* The public workshop will be held on May 4 and 5, 2011, from 8 a.m. to 5 p.m.

*Location:* The public workshop will be held at The Curtis Hotel, 1405 Curtis St., Denver, CO 80202, 1–303–571–0300.

Attendees are responsible for their own accommodations. Please mention SoCRA to receive the hotel room rate of $119 plus applicable taxes (available until the SoCRA room block is filled).

*Contact:* David Arvelo, Office of Regulatory Affairs, Food and Drug Administration, 4040 N. Central Expressway, suite 900, Dallas, Texas 75204, 214–253–4952, FAX 214–253–4970, e-mail *david.arvelo@fda.hhs.gov;* or

Society of Clinical Research Associates (SoCRA), 530 West Butler Ave., suite 109, Chalfont, PA 18914, 800–762–7292, FAX: 215–822–8633, e-mail: *SoCRAmail@aol.com*, Web site: *http://www.SoCRA.org*.

*Registration:* The registration fee covers the cost of actual expenses, including refreshments, lunch, materials, and speaker expenses. Seats are limited; please submit your registration as soon as possible. Workshop space will be filled in order of receipt of registration. Those accepted into the public workshop will receive confirmation. The cost of registration follows:

COST OF REGISTRATION

| | |
|---|---|
| SoCRA member | $575.00 |
| SoCRA nonmember (includes membership). | $650.00 |
| Federal Government SoCRA member. | $450.00 |
| Federal Government SoCRA nonmember. | $525.00 |
| FDA Employee | Fee Waived |

If you need special accommodations due to a disability, please contact SoCRA (see *Contact*) at least 21 days in advance.

Extended periods of question and answer and discussion have been included in the program schedule. SoCRA designates this educational activity for a maximum of 13.3 Continuing Education (CE) Credits for SoCRA CE and Nurse CNE. SoCRA designates this educational activity for a maximum of 13.3 American Medical Association Physician's Recognition Award *Category 1 Credit(s)*™. Physicians should claim credit commensurate with the extent of their participation. SoCRA is accredited by the Accreditation Council for Continuing Medical Education to provide continuing medical education for physicians. SoCRA is an approved provider of continuing nursing education by the Pennsylvania State Nurses Association (PSNA), an accredited approver by the American Nurses Credentialing Center's Commission on Accreditation (ANCC). ANCC/PSNA Provider Reference Number: 205–3–A–09.

*Registration instructions:* To register, please submit a registration form with your name, affiliation, mailing address, telephone, fax number, and email, along with a check or money order payable to "SoCRA." Mail to: SoCRA (see *Contact* for address). To register on the Internet, go to *http://www.socra.org/html/FDA_Conference.htm.* (FDA has verified the Web site addresses throughout this document, but we are not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**.)

Payment by major credit card is accepted (Visa/MasterCard/AMEX only). For more information on the meeting registration, or for questions on the public workshop, contact SoCRA (see *Contact*).

**SUPPLEMENTARY INFORMATION:** The public workshop helps fulfill the Department of Health and Human Services' and FDA's important mission to protect the public health. The public workshop will provide those engaged in FDA-regulated (human) clinical trials with information on a number of topics concerning FDA requirements related to informed consent, clinical investigation requirements, IRB inspections, electronic record requirements, and investigator initiated research. Topics for discussion include the following: (1) What FDA Expects in a Pharmaceutical Clinical Trial; (2) Adverse Event Reporting—Science, Regulation, Error, and Safety; (3) Part 11 Compliance—Electronic Signatures; (4) Informed Consent Regulations; (5) IRB Regulations and FDA Inspections; (6) Keeping Informed and Working Together; (7) FDA Conduct of Clinical Investigator Inspections; (8) Meetings With FDA: Why, When, and How; (9) Investigator Initiated Research; (10) Medical Device Aspects of Clinical Research; (11) Working With FDA's Center for Biologics Evaluation and Research; (12) The Inspection Is Over—What Happens Next? Possible FDA Compliance Actions; (13) Ethical Issues in Subject Enrollment; (14) Medical Device Aspects of Clinical Research; and (15) Are We There Yet? An Overview of the FDA Good Clinical Practice Program.

FDA has made education of the drug and device manufacturing community a high priority to help ensure the quality of FDA-regulated drugs and devices. The public workshop helps to achieve objectives set forth in section 406 of the FDA Modernization Act of 1997 (21 U.S.C. 393) which includes working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. The public workshop also is consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) as outreach activities by Government Agencies to small businesses.

Dated: *March 23, 2011.*

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2011–7192 Filed 3–25–11; 8:45 am]

BILLING CODE 4160–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). To request a copy of the clearance requests submitted to OMB for review, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

**Proposed Project: Ryan White HIV/AIDS Program Part F Dental Services Report (OMB No. 0915–0151)—Extension**

The Dental Reimbursement Program (DRP) and the Community Based Dental Partnership Program, under Part F of the Ryan White HIV/AIDS Program, offer funding to accredited dental education programs to support the provision of oral health services for HIV-positive individuals. Institutions eligible for these programs are accredited schools of dentistry, post-doctoral dental education programs and dental hygiene programs.

The DRP Application is the Dental Services Report that schools and programs use to apply for funding of non-reimbursed costs, incurred in providing oral health care to patients with HIV, or to report annual program data. Awards are authorized under section 2692(b) of the Public Health Service Act (42 U.S.C. 300ff–111(b). The Dental Services Report collects data in four different areas: program information, patient demographics and services, funding, and training. The report also requests applicants to provide narrative descriptions of their services and facilities, as well as their links and collaboration with community-based providers of oral health services.

The primary purpose of collecting this information annually is to verify eligibility and determine reimbursement amounts for DRP applicants, as well as to document the program accomplishments of Community-Based Dental Partnership Program grant recipients. This information also allows HRSA to learn about (1) The extent of the involvement of dental schools and programs in treating patients with HIV, (2) the number and characteristics of clients who receive HIV/AIDS program-supported oral health services, (3) the types and frequency of the provision of these services, (4) the non-reimbursed costs of oral health care provided to patients with HIV, and (5) the scope of grant recipients' community-based collaborations and training of providers. In addition to meeting the goal of accountability to Congress, clients, advocacy groups, and the general public, information collected in the Dental Services Report is critical for HRSA, state and local grantees, and individual providers, to help assess the status of existing HIV-related health service delivery systems.

The annual estimate of burden is as follows:

| Instrument | Number of respondents | Responses per respondent | Total responses | Hours per response | Total burden hours |
|---|---|---|---|---|---|
| Dental Services Report | 70 | 1 | 70 | 20 | 1,400 |
| Total | 70 | 1 | 70 | 20 | 1,400 |

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the "attention of the desk officer for HRSA."

Dated: March 22, 2011.

**Wendy Ponton,**

*Director, Office of Management.*

[FR Doc. 2011–7165 Filed 3–25–11; 8:45 am]

BILLING CODE 4165–15–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Health Center Program

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice of Noncompetitive Replacement Awards to Sunset Park Health Council, Inc.

**SUMMARY:** The Health Resources and Services Administration (HRSA) will transfer the remaining American Recovery and Reinvestment Act (ARRA) Capital Improvement Project (CIP) from Saint Vincent's Catholic Medical Centers (SVCMC) of New York, current grantee of record, to Sunset Park Health Council (SPHC), Inc. in order to continue primary health care services to low-income, underserved homeless patients in New York City.

**SUPPLEMENTARY INFORMATION:**

*Former Grantee of Record:* Saint Vincent's Catholic Medical Centers of New York.

*Original Period of Grant Support:* ARRA CIP Funds—June 29, 2009, to June 28, 2011.

*Replacement Awardee:* Sunset Park Health Council, Inc.

*Amount of Replacement Award:* $515,385

*Period of Replacement Award:* The period of support for this award is February 18, 2011, to June 28, 2011.

*Authority:* Section 330(h) of the Public Health Service Act, 42 U.S.C. 245b.

*CDFA Number:* 93.703

*Justification for the Exception to Competition:* The former grantee, Saint Vincent's Catholic Medical Centers of New York, relinquished all grants due to financial difficulties resulting in bankruptcy and closure of facilities and programs. HRSA announced a fiscal year 2011 Service Area Competition (SAC) opportunity for the Section 330(h) project and funds. Sunset Park Health Council, Inc. has been awarded the Section 330(h) project and funds resulting from the fiscal year 2011 SAC opportunity. SPHC will be awarded the remaining CIP funds, and will implement and carry out grant activities originally proposed under SVCMC funded ARRA grant applications. These activities include installation and upgrade of computer equipment, a roll

out of an electronic medical record, and the purchase and use of a mobile medical van.

SPHC is an experienced provider of care and has a demonstrated record of compliance with Health Center Program statutory and regulatory requirements and is located in the same geographical area. The transfer of the ARRA Capital Improvement Project funds will ensure that critical primary health care services continue and remain available to the low-income, underserved homeless patients with no interruption in services to the target population.

**FOR FURTHER INFORMATION CONTACT:** Marquita Cullom-Scott via e-mail at *MCullom-Scott@hrsa.gov* or 301–594–4300.

Dated: March 23, 2011.

**Mary K. Wakefield,**

*Administrator.*

[FR Doc. 2011–7248 Filed 3–25–11; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Secretary's Advisory Committee on Heritable Disorders in Newborns and Children; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

*Name:* Secretary's Advisory Committee on Heritable Disorders in Newborns and Children.

*Dates and Times:* May 5, 2011, 9:30 a.m. to 5 p.m., May 6, 2011, 8:30 a.m. to 3:30 p.m.

*Place:* Renaissance Washington, DC, Dupont Circle Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

*Status:* The meeting will be open to the public with attendance limited to space availability. Participants are asked to register for the meeting by going to the registration Web site at *http://altarum.cvent.com/event/SACHDNC052011.* The registration deadline is Tuesday, May 3, 2011. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations should indicate their needs on the registration Web site. The deadline for special accommodation requests is Friday, April 29, 2011. If there are technical problems gaining access to the Web site, please contact Maureen Ball, Meetings Coordinator at *conferences@altarum.org.*

*Purpose:* The Secretary's Advisory Committee on Heritable Disorders in Newborns and Children (Advisory Committee) was established to advise and guide the Secretary regarding the most appropriate application of universal newborn screening tests, technologies, policies, guidelines and programs for effectively reducing morbidity and mortality in newborns and children having or at risk for heritable disorders. The Advisory Committee as authorized under the Public Health Service Act 42 U.S.C. 300b–10, and amended in the Newborn Screening Saves Lives Act of 2008, also provides advice and recommendations concerning the grants and projects authorized under the Public Health Service Act, 42 U.S.C. 300b–8, (Heritable Disorders Program) as amended in the Newborn Screening Saves Lives Act of 2008.

*Agenda:* The meeting will include: (1) A presentation of the External Review Workgroup's final report on the nomination of Hyperbilirubinemia to the Advisory Committee's recommended uniform screening panel; (2) an update from the Evidence Evaluation Methods workgroup; and (3) presentations on the continued work and reports of the Advisory Committee's subcommittees on laboratory standards and procedures, follow-up and treatment, and education and training. Proposed agenda items are subject to change as priorities dictate. You can locate the Agenda, Committee Roster and Charter, presentations, and meeting materials at the home page of the Advisory Committee's Web site at *http://www.hrsa.gov/heritabledisorderscommittee/.*

*Public Comments:* Members of the public can submit written comments and/or present oral comments during the public comment periods of the meeting, which are scheduled for both days of the meeting. Those individuals who want to make oral comments are requested to register online by Tuesday, May 3, 2011 at *http://altarum.cvent.com/event/SACHDNC052011.* Requests should contain the name, address, telephone number, and any professional or business affiliation of the person desiring to make an oral presentation. Groups having similar interests are requested to combine their comments and present them through a single representative. Written comments should be emailed no later than Tuesday, May 3, 2011, for consideration. Written comments should contain the name, address, telephone number, and any professional or business affiliation of the author. Submit written comments to Maureen Ball, Meetings Coordinator, Conference and Meetings Management, Altarum Institute, 1200 18th Street, NW., Suite 700, Washington, DC 20036, telephone: 202 828–5100; fax: 202 785–3083, or e-mail: *conferences@altarum.org.*

*Contact Person:* Anyone interested in obtaining other relevant information should write or contact Alaina M. Harris, Maternal and Child Health Bureau, Health Resources and Services Administration, Room 18A–19, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–0721, *aharris@hrsa.gov.* More information on the Advisory Committee is available at *http://mchb.hrsa.gov/heritabledisorderscommittee.*

Dated: March 22, 2011.

**Wendy Ponton,**

*Director, Office of Management.*

[FR Doc. 2011–7166 Filed 3–25–11; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Center for Complementary & Alternative Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Center for Complementary and Alternative Medicine Special Emphasis Panel; Neurophysiological and Pain Management with CAM Treatments.

*Date:* April 5, 2011.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call)

*Contact Person:* Hungyi Shau, PhD, Scientific Review Officer, National Center for Complementary and Alternative Medicine, National Institutes of Health, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20892, 301–402–1030, *Hungyi.Shau@nih.gov.*

This meeting is being published less than 15 days prior to the meeting date due to scheduling conflicts.

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: March 21, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7199 Filed 3–25–11; 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; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; RFA–AA–11–02 Alcohol Induced Metabolic and Hepatic Injury (AIMHI) (R01)

*Date:* April 20, 2011.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Philippe Marmillot, PhD, Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2017, Bethesda, MD 20852, 301–443–2861, *marmillotp@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: March 22, 2011.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7196 Filed 3–25–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Neurological Disorders and Stroke Special Emphasis Panel, Translational Stroke SEP.

*Date:* April 4, 2011.

*Time:* 12:30 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Shanta Rajaram, PhD, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–435–6033, *rajarams@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(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 21, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7195 Filed 3–25–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; GMH Collaborative Hubs.

*Date:* April 13, 2011.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

*Contact Person:* Marina Broitman, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6153, MSC 9608, Bethesda, MD 20892–9608, 301–402–8152, *mbroitma@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: March 21, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7194 Filed 3–25–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflicts: Immunobiology.

*Date:* April 8, 2011.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting)

*Contact Person:* Stephen M. Nigida, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4212, MSC 7812, Bethesda, MD 20892, 301–435–1222, *nigidas@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Cell Biology.

*Date:* April 18, 2011.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call)

*Contact Person:* John Burch, PhD, Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3213, MSC 7808, Bethesda, MD 20892, 301–408–9519, *burchjb@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Dysregulation in Development and Disease.

*Date:* April 27, 2011.

*Time:* 9 a.m. to 9:30 a.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call)

*Contact Person:* Steven F Nothwehr, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5183, MSC 7840, Bethesda, MD 20892, 301.408.9435, *nothwehrs@mail.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Ovarian Cancer Genetics.

*Date:* April 27, 2011.

*Time:* 10 a.m. to 11 a.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call)

*Contact Person:* Steven F Nothwehr, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5183, MSC 7840, Bethesda, MD 20892, 301.408.9435, *nothwehrs@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 22, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7193 Filed 3–25–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

**Project: Disaster Technical Assistance Center Disaster Mental Health Needs Assessment and Customer Satisfaction Survey—NEW**

SAMHSA created the SAMHSA Disaster Technical Assistance Center (SAMHSA DTAC) in 2002. SAMHSA DTAC provides technical assistance (TA) to States, Territories, and Federally recognized tribes (hereafter referred to as 'States'), as well as any behavioral health worker, in response to, and in preparation for, behavioral health (mental health and substance abuse) needs associated with catastrophic events and emergencies, such as natural disasters, bioterrorism, mass criminal victimization, and environmental disasters. In the aftermath of a disaster or other traumatic event, State and local behavioral health agencies can contact SAMHSA DTAC for assistance with the resulting mental health and substance abuse needs. SAMHSA DTAC TA specialists respond by identifying suitable publications and other materials, arranging for the deployment of expert consultants, or coordinating other support services. For Presidentially declared disasters, SAMHSA DTAC assists States that are eligible for a Crisis Counseling Assistance and Training Program (CCP) grant by providing TA related to completing applications, developing a plan of services, and identifying staff needs for the CCP.

SAMHSA is proposing two new data collection efforts: the Disaster Behavioral Health Needs Assessment (DBHNA) and the Customer Satisfaction Survey. The DBHNA will assess the current gaps and needs at the State and local provider levels in disaster behavioral health (DBH) planning and response efforts. The Customer Satisfaction Survey is being conducted to ensure that the TA SAMHSA DTAC provides is on track, applicable, useful, and well received. Both of these proposed data collection efforts will provide feedback on the ongoing needs at the national, State, and local levels and identify areas in which State and local providers require enhanced TA services.

SAMHSA DTAC will be responsible for administering the two data collection instruments and analyzing the data. SAMHSA DTAC will use data from both instruments to inform current and future TA activities and to ensure these activities continue to align with State and local needs.

The components of the data collection are listed and described below, and a summary table of the number of respondents and respondent burden has also been included.

*Disaster Behavior Health Needs Assessment.* The DBHNA will assist SAMHSA DTAC in identifying jurisdictions that need assistance with integrating behavioral health (which includes both mental health and substance abuse services) into their preparedness plans. SAMHSA DTAC will use the DBHNA to identify gaps and trends in crisis counseling planning across the country and to inform future TA and training for State and local behavioral health authorities so that these gaps can be addressed at the State and local levels. The DBHNA will be administered annually. The information collected will inform the DBH training and TA that SAMHSA DTAC provides. With improved training and TA, SAMHSA DTAC will be better positioned to support States, local providers, and other organizations in their efforts to integrate DBH into "all-hazards" disaster preparedness and response.

There are two versions of the DBHNA: The State/Territory Coordinator Disaster Behavioral Health Needs Assessment and the Local Provider Disaster Behavioral Health Needs Assessment. These DBHNAs will collect information on the current needs and challenges that State coordinators and local providers face when integrating DBH preparedness and response into all-hazards plans. Both versions of the survey will be administered online and will be programmed to include simplified screens and intuitive navigational controls, and both will use branching so that each respondent will be presented with only those questions relevant to his or her State or program.

The State/Territory Coordinator version will be administered to all disaster mental health coordinators, disaster substance abuse coordinators, and DBH coordinators (coordinators responsible for both mental health and

substance abuse disaster services) in the 50 States, the U.S. Territories, and the District of Columbia, for a total of 77 participants. Coordinators from the 10 States that have experienced the most federally declared disasters and those from the 10 States that have experienced the fewest federally declared disasters will be asked to provide contact information for up to five local DBH service providers. The local providers from these 20 States will be invited to participate in the Local Provider version (up to a total of 100 local provider participants).

*Customer Satisfaction Survey.* The Customer Satisfaction Survey will collect data from SAMHSA DTAC customers to ensure that the assistance SAMHSA DTAC provides is effective. Specifically, the Customer Satisfaction Survey will collect the experiences and perspectives of (1) Those who have requested TA (*e.g.,* behavioral health coordinators, project coordinators, local providers) and (2) those who subscribe to SAMHSA DTAC e-communications. The Customer Satisfaction Survey will assess the following: (1) General familiarity with SAMHSA DTAC services and resources; (2) usage of SAMHSA DTAC services and resources; (3) customer satisfaction with SAMHSA DTAC TA, the SAMHSA DTAC Web site, SAMHSA DBHIS resources, and SAMHSA DTAC e-communication resources; and (4) areas for improvement and enhancement of SAMHSA DTAC services and resources.

Participation in the Customer Satisfaction Survey will be solicited from all 50 States, the U.S. Territories, and the District of Columbia. The initial survey administration will include individuals who have contacted SAMHSA DTAC for TA from March 2006 through the month prior to the initial data collection initiation. In addition to identifying SAMHSA DTAC TA requestors from March 2006 to the present, SAMHSA DTAC will identify potential participants from the subscription lists for the e-communications *DTAC Bulletin and The Dialogue.* Respondents for subsequent administrations of the SAMHSA DTAC Customer Satisfaction Survey will include those who have requested TA in the 3 months prior to administration and those who are subscribed to the *DTAC Bulletin or The Dialogue* at the time of administration. Internet-based technology will be used to collect data via Web-based surveys and for data entry and management. The average annual respondent burden is estimated below. The DBHNA is an annual data collection. The Customer Satisfaction Survey will be administered once initially, with subsequent quarterly administrations. Table 1 represents the initial data collection and the burden in the following years. These estimates reflect the average annual number of respondents, the average annual number of responses, the time required for each response, and the average annual burden in hours.

TABLE 1—ANNUALIZED ESTIMATE OF RESPONDENT BURDEN

| Type of respondent | Instrument | Number of respondents | Number of responses per respondent | Total number of responses | Hours per response per respondent | Total burden hours |
|---|---|---|---|---|---|---|
| State DBH Coordinator. | DBHNA (State/Territory Version) ..... | 77 | 1 | 77 | 1.00 | 77.0 |
| Local Provider ..... | DBHNA (Local Provider Version) ..... | 100 | 1 | 100 | 0.50 | 50.0 |
| TA Requestor ..... | DTAC Customer Satisfaction Survey | 250 | 1 | 250 | 0.25 | 62.5 |
| e-Communications Recipient. | DTAC Customer Satisfaction Survey | 250 | 1 | 250 | 0.25 | 62.5 |
| Total ..... | ..... | 677 | ..... | 677 | ..... | 252 |

Written comments and recommendations concerning the proposed information collection should be sent by April 27, 2011 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–7285.

Dated: March 22, 2011.

**Elaine Parry,**

*Director, Office of Management, Technology and Operations.*

[FR Doc. 2011–7185 Filed 3–25–11; 8:45 am]

BILLING CODE 4162–20–P

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. USCBP–2011–0009]**

## Advisory Committee on Commercial Operations of Customs and Border Protection (COAC)

**AGENCY:** U.S. Customs and Border Protection.

**ACTION:** Committee Management; Notice of Federal Advisory Committee Meeting.

**SUMMARY:** The Advisory Committee on Commercial Operations of Customs and Border Protection (COAC) will meet on April 12, 2011 in Washington, DC. The meeting will be open to the public.

**DATES:** COAC will meet on Tuesday, April 12, 2011, from 1 p.m. to 5 p.m. Please note that the meeting may close early if the committee has completed its business. If you plan on attending, please register either online at *https://apps.cbp.gov/te_registration/?w=47*, or by e-mail to *tradeevents@dhs.gov* by close-of-business on April 6, 2011.

**ADDRESSES:** The meeting will be held at the Ronald Reagan Building in the Polaris Room, at 1300 Pennsylvania Avenue, NW., Washington, DC 20229. All visitors to the Ronald Reagan Building must show a state-issued ID or Passport to proceed through the security checkpoint to be admitted to the building.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Ms. Wanda Tate as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the "Summary" section below. Comments must be submitted in writing no later than April 6, 2011 and must be identified by USCBP–2011–0009 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *E-mail: Tradeevents@dhs.gov.* Include the docket number in the subject line of the message.
• *Fax:* 202–325–4290.
• *Mail:* Ms. Wanda Tate, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 5.2A, Washington, DC 20229.

*Instructions:* All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received by the COAC, go to *http://www.regulations.gov.*

A public comment period will be held during the meeting on April 12, 2011 from 4:25 pm to 4:55 pm, and speakers are requested to limit their comments to 3 minutes. Please note that the public comment period may end before the time indicated, following the last call for comments. Contact the individual listed below to register as a speaker.

**FOR FURTHER INFORMATION CONTACT:** Ms. Wanda Tate, Office of Trade Relations, U.S. Customs and Border Protection, Department of Homeland Security, 1300 Pennsylvania Avenue, NW., Room 5.2A, Washington, DC 20229; telephone 202–344–1440; facsimile 202–325–4290.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463). The COAC provides advice to the Secretary of Homeland Security, the Secretary of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within DHS or the Department of the Treasury.

## Agenda

The COAC will meet to review and discuss next steps on the following issues:

1. Managing by Account: Center of Excellence and Expertise (CEE) and Account Executive Pilots
2. The Role of the Broker, A Broker Revision Project
3. One U.S. Government at the Border—Interagency Issues
4. Automation/International Trade Data System
5. Enhancing Air Cargo Security
6. National Strategy Global Supply Chain Security and the Secretary's work to foster international standards and cooperation
7. Enhancing Intellectual Property Rights Enforcement Efforts
8. Risk Based Bonding and Risk Factors

Dated: March 22, 2011.

**Maria Luisa O'Connell,**

*Senior Advisor for Trade and Public Engagement, Office of Trade Relations.*

[FR Doc. 2011–7163 Filed 3–25–11; 8:45 am]

**BILLING CODE 9111–14–P**

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## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

### Agency Information Collection Activities: Form N–300; Extension of an Existing Information Collection; Comment Request.

**ACTION:** 60-Day Notice of Information Collection Under Review; Form N–300, Application to File Declaration of Intention; OMB Control No. 1615–0078.

The Department Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until May 27, 2011.

During this 60 day period, USCIS will be evaluating whether to revise the Form N–300. Should USCIS decide to revise Form N–300 we will advise the public when we publish the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to the Form N–300.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, Office of the Executive Secretariat, Clearance Officer, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail, please make sure to add OMB Control No. 1615–0078 in the subject box.

**Note:** The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check "My Case Status" online at: *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

### Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application to File Declaration of Intention.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–300; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form N–300 will be used by permanent residents to file a declaration of intention to become a citizen of the United States. This collection is also used to satisfy documentary requirements for those seeking to work in certain occupations or professions, or to obtain various licenses.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 45 responses at 45 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 34 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/*

We may also be contacted at: USCIS, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020, Telephone number 202–272–8377.

Dated: March 23, 2011.

**Stephen Tarragon,**

*Senior Analyst, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2011–7224 Filed 3–25–11; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

### Agency Information Collection Activities: Business Transformation—Automated Integrated Operating Environment (IOE), New Information Collection; Comment Request

**ACTION:** 60-Day Notice of Information Collection Under Review: Business Transformation—Integrated Operating Environment (IOE); OMB Control No. 1615–NEW.

**SUMMARY:** USCIS is developing an automated Integrated Operating Environment (IOE) to process benefit applications. The IOE will collect information by asking sequential questions using "wizard" technology. The IOE will allow immigration benefit requests to be filed directly via the internet or "e-filed." In accordance with the Paperwork Reduction Act of 1995 (PRA) this notice provides the general public and Federal agencies with notice that USCIS will be submitting this information collection request to OMB and the public will have an opportunity to review and comment.

**DATES:** Interested persons are invited to submit comments on or before May 27, 2011.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail, please be sure to add "Automated IOE" in the subject box. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check "My Case Status" online at: *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283. If you need a copy of this information collection instrument, please visit the Web site at: *http://www.regulations.gov/* or call the Regulatory Products Division at (202) 272–8377.

*Background:* U.S. Citizenship and Immigration Services (USCIS) is transforming its business processes and systems to improve operational efficiency and customer service, and to strengthen the security and integrity of the immigration system. As part of this effort, USCIS may modify its data collection practices to eventually convert all data collections to e-filing in the IOE. The intent of this change is to improve the consistency and timeliness of its immigration benefit adjudications, as well as to support identity management, evaluate benefit eligibility, promote customer service, and manage national security and benefit risk. This change will also serve to bring USCIS into compliance with the Government Paperwork Elimination Act (GPEA), Public Law 105–277, tit. XVII, section 1703, 112 Stat. 2681, 2681–749 (Oct. 21, 1998), 44 U.S.C. 3504 *note,* and the E–Government Act of 2002 (Pub. L. 107–347, 116 Stat. 2899, 44 U.S.C. 3601 *note*). GPEA provides that Federal agencies use electronic forms, electronic filing, and electronic submissions, when possible, to conduct agency business with the public. The E–Government Act sought to promote the use of the Internet by Federal Agencies through efforts like USCIS' Business Transformation initiative.

The IOE will be implemented by USCIS and made available for the public to submit requests over the next few years in increments that USCIS has termed as "releases" and "phases." As each phase is implemented, DHS will announce each request that has been converted to the IOE, if the IOE will be the sole filing option available, or if the option of filing a paper form will remain available for that benefit for all or certain groups that may seek to submit the applicable request. In general, the IOE will follow the immigration "lifecycle" to first include nonimmigrant benefits, proceeding eventually to applications for naturalization.

The first benefit type available in the automated IOE under Release A, Phase 1, will be the Application to Extend/Change Nonimmigrant Status. Beginning in December 2011, USCIS customers will be able to apply for an extension or change of their nonimmigrant status using the IOE or continue to use the current paper Form I–539 (OMB Control No. 1615–0003). In the future, however, USCIS may allow the current paper Form I–539 to expire, eliminate the option of filing on a paper form, and instead require this benefit application to be filed through the automated IOE. USCIS is very interested in receiving comments concerning mandatory e–filing of this benefit and any future benefits that are added to the automated IOE. USCIS also welcomes comments on which groups, individuals, or businesses for which it would be the most appropriate for USCIS to require (or not require) electronic filing of all benefit requests.

The supporting statement for this information collection contains a more detailed description of the USCIS Business Transformation initiative and wizard technology. The supporting statement can be viewed at: *http://www.regulations.gov/.*

USCIS is also interested in public comment addressing the following issues:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

**Overview of This Information Collection**

(1) *Type of Information Collection:* New information collection.

(2) *Title of the Form/Collection:* Business Transformation—Automated Integrated Operating Environment (IOE).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security*

*sponsoring the collection:* No form number; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. As part of the Business Transformation initiative, USCIS is developing an automated Integrated Operating Environment (IOE). The IOE will use wizard technology and will allow e-filing. Wizard technology gives USCIS the ability to electronically interact with its customers by guiding them through the application process and assisting them to file complete and accurate benefit requests.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 58,500 responses at an average of 2 hours and 15 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 131,625 annual burden hours.

The information collection request contains selected screen shots that demonstrate the look and feel of the automated IOE, and a decision tree to show the sequence of questions that the public will be asked by the wizard and the order in which the questions will be asked. For example, when the user answers the question "What is your First Name?" then he or she will be prompted with the question: "What is your Given Name?" If you need to review this information collection instrument, please visit the Web site at: *http://www.regulations.gov/*.

Dated: March 23, 2011.

**Sunday Aigbe,**

*Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2011–7186 Filed 3–25–11; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–ES–2011–N067; 92220–1113–0000–C3]**

### Information Collection Sent to the Office of Management and Budget (OMB) for Approval; Endangered and Threatened Wildlife, Experimental Populations

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** We (U.S. Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This information collection is scheduled to expire on March 31, 2011. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

**DATES:** You must submit comments on or before April 27, 2011.

**ADDRESSES:** Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 2042–PDM, 4401 North Fairfax Drive, Arlington, VA 22203 (mail), or *INFOCOL@fws.gov* (e-mail). Please include 1018–0095 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Hope Grey at *INFOCOL@fws.gov* (e-mail) or 703–358–2482 (telephone). You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 1018–0095.

*Title:* Endangered and Threatened Wildlife, Experimental Populations, 50 CFR 17.84.

*Service Form Number(s):* None.

*Type of Request:* Extension of a currently approved collection.

*Description of Respondents:* Individuals and households, private sector, and State/local/Tribal governments.

*Respondent's Obligation:* Voluntary.

*Frequency of Collection:* On occasion.

*Estimated Annual Number of Respondents:* 101.

*Estimated Annual Number of Responses:* 101.

*Completion Time per Response:* 15 minutes.

*Total Annual Burden Hours:* 27.

*Abstract:* Section 10(j) of the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*), authorizes the Secretary of the Interior to establish experimental populations of endangered or threatened species. Because individuals of experimental populations are categorically protected under the ESA, the information we collect is important for monitoring the success of reintroduction efforts and recovery efforts in general. This is a nonform collection. Information collection requirements for experimental populations of endangered and threatened species are in 50 CFR 17.84. We collect three categories of information:

(1) General take or removal. Relates to human-related mortality including unintentional taking incidental to otherwise lawful activities (*e.g.,* highway mortalities); animal husbandry actions authorized to manage the population (*e.g.,* translocation or providing aid to sick, injured, or orphaned individuals); take in defense of human life; take related to defense of property (if authorized); or take in the form of authorized harassment.

(2) Depredation-related take. Involves take for management purposes where livestock depredation is documented, and may include authorized harassment or authorized lethal take of experimental animals in the act of attacking livestock.

(3) Specimen collection, recovery, or reporting of dead individuals. This information documents incidental or authorized scientific collection. Most of the contacts with the public deal primarily with the reporting of sightings of experimental population animals or the inadvertent discovery of an injured or dead individual.

The information that we collect includes:

- Name, address, and phone number of reporting party.
- Species involved.
- Type of incident.
- Take (quantity).
- Location and time of the reported incident.
- Description of the circumstances related to the incident.

This information helps us to assess the effectiveness of control activities and to develop better means to reduce problems with livestock for those species where depredation is a problem. Service recovery specialists use the information to determine the success of reintroductions in relation to established recovery plan goals for the threatened and endangered species involved.

*Comments:* On November 3, 2010, we published in the **Federal Register** (75 FR 67761) a notice of our intent to request that OMB renew approval for this information collection. In that notice, we solicited comments for 60 days, ending on January 3, 2011. We received information from two commenters in response to this notice.

The first commenter objected to the authorization of depredation-related take. We note the concerns raised by this individual, but the comment did not address issues surrounding the proposed collection of information or the cost and hour burden estimates.

The second commenter provided the following comments:

*Comment:* The estimated burden for collection of information is severely underestimated. The commenter agreed that the actual reporting time is probably only 15 minutes per respondent, but stated that gathering data necessary to compile the reported information requires far more time, and may require a field investigation or followup phone call to verify the report.

*Response:* We believe our estimates are within reason because they represent the average amount of time it will take to provide the requested information via making a telephone call or sending a facsimile. This ICR covers multiple experimental populations, multiple species (which may have more than one experimental population), multiple types of activities, multiple geographic locations across the United States, and multiple Service Regions. We estimate that the time required to provide the notification will vary substantially from 1 to 45 minutes. We acknowledge that it may take some respondents, such as State fish and wildlife agencies, longer than others to gather and compile the data prior to notifying us. State fish and wildlife agencies may provide information to us on multiple species, experimental populations, and incidents in a single notification (thereby requiring more than 15 minutes for them to provide us with the information). In contrast to State fish and wildlife agencies, the general public usually provides information on a single species, experimental population, and incident in one notification (thereby requiring substantially less than 15 minutes for them to provide us with the information). Given the variety of potential situations requiring notification, as well as the variety of potential respondents, we believe 15 minutes per response is a reasonable estimate of the average burden.

*Comment:* General sighting reports do not appear to be included in the three categories of information collection.

*Response:* General sightings are included in the description of the information collection for specimen collection.

*Comment:* The Service should design a standard data input form and evaluation descriptors for the reporting of visual information, allowing for adjustments in the form for each population as needed.

*Response:* We collect the information by means of telephone calls or facsimiles from the public. The actual details of the information we collect are unique to each species and experimental population, based on the specific information needed for that species and experimental population. The types of incidents that must be reported also vary by species. For example, under our wolf experimental populations, livestock depredation under a permit must be reported within 24 hours. We do not ask for this same information under our whooping crane experimental populations because whooping cranes are not predators, and, therefore, depredation permits are not needed. This ICR covers multiple experimental populations, multiple species (which may have more than one experimental population), multiple types of activities, multiple geographic locations across the United States, and multiple Service Regions. Given these complexities and variability in the detail of the information needed, it is not feasible to develop a standard data input form for each experimental population.

*Comment:* Sharing the data in summary form would increase the utility of the data.

*Response:* State wildlife agencies are our primary conservation partners, and we routinely share data with them (and vice versa), including the data gathered under this information collection.

*Comment:* Reporting take (quantity) could be burdensome for species that produce large numbers of young at a time (*e.g.,* fish, amphibians, and butterflies). The commenter suggests standardizing the reporting of take (quantity) as a way to reduce the reporting burden for these species.

*Response:* We will coordinate with our Regional Offices and respondents to see if we can simplify and standardize the reporting of take (quantity) for species with large numbers of young.

We have not made any changes to our information collection requirements as a result of the above comments.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. 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 OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: March 22, 2011.

**Tina A. Campbell,**

*Chief, Division of Policy and Directives Management, U.S. Fish and Wildlife Service.*

[FR Doc. 2011–7190 Filed 3–25–11; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R1–MB–2011–NXXX; 10154–1231–0000–D3]**

### Proposed Information Collection; Monitoring Recovered Species After Delisting—American Peregrine Falcon

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** We (U.S. Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on July 31, 2011. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**DATES:** To ensure that we are able to consider your comments on this IC, we must receive them by May 27, 2011.

**ADDRESSES:** Send your comments on the IC to the Service Information Collection Clearance Officer, Fish and Wildlife Service, MS 2042–PDM, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); or *INFOCOL@fws.gov* (e-mail). Please include 1018–0101 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this IC, contact Hope Grey at the e-mail address in **ADDRESSES** or at 703–358–2482 (telephone).

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

This IC implements requirements of the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA). There are no corresponding Service regulations for the ESA's post-delisting monitoring requirement. This IC also implements the Migratory Bird Treaty Act (16 U.S.C. 704) and Service regulations in Chapter I, subchapter B of title 50 of the Code of Federal Regulations (CFR).

The American peregrine falcon was removed from the List of Endangered and Threatened Wildlife on August 25, 1999 (64 FR 46542). Section 4(g) of the ESA requires that all species that are recovered and removed from the List of Endangered and Threatened Wildlife (delisted) be monitored in cooperation with the States for a period of not less than 5 years. The purpose of this requirement is to detect any failure of a recovered species to sustain itself without the protections of the ESA. We work with relevant State agencies and other species experts to develop appropriate plans and procedures for systematically monitoring recovered wildlife and plants.

The American peregrine falcon has a large geographic distribution that includes a substantial amount of non-Federal land. Although the ESA requires that monitoring of recovered species be conducted for not less than 5 years, the life history of American peregrine falcons is such that it is appropriate to monitor this species for a longer period of time in order to meaningfully evaluate whether or not the recovered species continues to maintain its recovered status. The Monitoring Plan for the American Peregrine Falcon is available on our Web site at *http://library.fws.gov/pubs1/peregrine03.pdf.* Formal collection of monitoring data commenced in 2003. Rangewide population monitoring of American peregrine falcons under the Monitoring Plan will take place every 3 years through 2015.

We will use the information supplied on FWS Forms 3–2307, 3–2308, and 3–2309 to review the status of the American peregrine falcon in the United States and determine if it remains recovered and, therefore, does not require the protections of the ESA:

(1) FWS Form 3–2307 (Peregrine Falcon Monitoring Form) addresses the reporting requirements to record observations on the nesting pair, and the numbers of eggs and young during each nest visit. Each territory will be visited two (or more) times.

(2) FWS Form 3–2308 (Peregrine Falcon Egg Contaminants Data Sheet) addresses the reporting requirements to record data on eggs collected opportunistically during a nest visit.

(3) FWS Form 3–2309 (Peregrine Falcon Feather Contaminants Data Sheet) addresses the reporting requirements to record data on feathers collected opportunistically during a nest visit. Once collected, the eggs and feathers are archived in a deep freeze for analysis at a later time.

## II. Data

*OMB Control Number:* 1018–0101.

*Title:* Monitoring Recovered Species After Delisting—American Peregrine Falcon.

*Service Form Number(s):* FWS Forms 3–2307, 3–2308, and 3–2309.

*Type of Request:* Extension of currently approved collection.

*Description of Respondents:* Professional biologists employed by State agencies and other organizations, and volunteers that have been involved in past peregrine falcon conservation efforts.

*Respondent's Obligation:* Voluntary.

*Frequency of Collection:* On occasion. Monitoring is conducted every 3 years. For eggs and feathers, 15 to 20 of each are collected over a period of no more than 5 years.

*Estimated Nonhour Cost Burden:* We estimate the total nonhour burden cost to be $156.00 for expenses incurred when contaminants samples must be shipped to designated labs for analysis and storage.

| Activity | Number of respondents | Number of responses | Completion time per response (hours) | Total annual burden hours |
|---|---|---|---|---|
| FWS Form 3–2307 | 214 | 638 | 2.5 | 1,595 |
| FWS Form 3–2308 | 8 | 8 | 2.5 | 20 |
| FWS Form 3–2309 | 8 | 8 | 2.5 | 20 |
| Totals | 230 | 654 | ..... | 1,635 |

## III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 22, 2011.

**Tina A. Campbell,**

*Chief, Division of Policy and Directives Management, U.S. Fish and Wildlife Service.*

[FR Doc. 2011–7189 Filed 3–25–11; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### U.S. Geological Survey

**[USGS 11 GX11BC009RU0100]**

### Agency Information Collection Activities: Comment Request for North American Reporting Center for Amphibian Malformations (NARCAM)

**AGENCY:** U.S. Geological Survey (USGS), Interior.

**ACTION:** Notice of extension of an existing information collection (1028–0056).

**SUMMARY:** To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to the Office of Management and Budget (OMB) an information collection request (ICR) for the extension of the currently approved paperwork requirements for the USGS North American Reporting Center for Amphibian Malformations (NARCAM). This notice provides the public and other Federal agencies an opportunity to comment on the paperwork burden of this information collection request.

**DATES:** Submit written comments by April 27, 2011.

**ADDRESSES:** Please submit written comments on this information collection directly to the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior via e-mail to *OIRA_DOCKET@omb.eop.gov* or fax at 202–395–5806; and identify your submission as 1028–0056. Please also submit a copy of your written comments to Phadrea Ponds, USGS Information Collection Clearance Officer, U.S. Geological Survey, 2150–C, Centre Avenue, Fort Collins, CO 80526–8118 (mail); 970–226–9230 (fax); or pondsp@usgs.gov (e-mail). Please reference Information Collection 1028–0056 in the subject line.

**FOR FURTHER INFORMATION CONTACT:** Lisa Zolly at 703–648–4277 or by mail at U.S. Geological Survey, Biological Informatics Office, 12201 Sunrise Valley Drive, MS 302, Reston, VA 20192. To see a copy of the entire ICR submitted to OMB, go to http://www.reginfo.gov (Information Collection Review, Currently under Review).

**SUPPLEMENTARY INFORMATION:**

*Abstract:* Beginning in 1997, the U.S. Geological Survey has collected voluntary data regarding amphibian malformations. Sightings are reported via an electronic form. The form is sent to the USGS National Biological Information Infrastructure (NBII) program, which manages the North American Reporting Center for Amphibian Malformations (NARCAM). Each malformation occurrence submitted is carefully reviewed by trained professional herpetologists for quality and accuracy. Data associated with the validated reports, including species, malformation type, and geospatial information, are made accessible to the public via the NARCAM Web site. Information may be used by scientists and resource managers within Federal, State, and local agencies, as well as the general public, to identify areas where malformed amphibians have been reported, and the rates of occurrence. The NARCAM dataset is the only publicly available, national dataset on amphibian malformations.

We will be requesting OMB approval for an extension of the current form used for the NARCAM data collection efforts.

### II. Data

*OMB Control Number:* 1028–0056.

*Title:* North American Reporting Center for Amphibian Malformations (NARCAM).

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* General public, individual households, state/local government agencies.

*Respondent Obligation:* Voluntary.

*Frequency of Collection:* On occasion, one-time.

*Estimated Number Annual Respondents:* 300.

*Annual Burden Hours:* 150 hours. We estimate the public reporting burden averages 30 minutes per response.

*Estimated Reporting and Recordkeeping "Non-Hour Cost" Burden:* We have not identified any "non-hour cost" burdens associated with this collection of information.

### III. Request for Comments

On December 22, 2010 we published a **Federal Register** notice (75 FR 80525) announcing that we would submit this ICR to OMB for approval and soliciting comments. The comment period closed on February 22, 2011. We did not receive any comments in response to that notice.

We again invite comments concerning this ICR on: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (d) ways to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. 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 anytime. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: March 11, 2011.

**Kevin T. Gallagher,**

*Associate Director for Core Science Systems, U.S. Geological Survey.*

[FR Doc. 2011–7183 Filed 3–25–11; 8:45 am]

BILLING CODE 4311–AM–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLWO320000 L13300000.PO0000]**

### Renewal of OMB Control Number 1004–0103

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** 60-Day Notice and Request for Comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) is announcing its intention to request approval to continue and revise the collection of information from applicants for authorization to purchase mineral materials from public lands. The Office of Management and Budget (OMB) previously approved this information collection activity, and assigned it control number 1004–0103.

**DATES:** Please submit comments on the proposed information collection by May 27, 2011.

**ADDRESSES:** Comments may be submitted by mail, fax, or electronic mail. Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C St., NW., Washington, DC 20240. Fax: to Jean Sonneman at 202–912–7102. Electronic mail: *Jean_Sonneman@blm.gov.* Please indicate "Attn: 1004–0103" regardless of the form of your comments.

**FOR FURTHER INFORMATION CONTACT:** George Brown, Division of Solid

Minerals, at 202–912–7118. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, to leave a message for Mr. Brown.

**SUPPLEMENTARY INFORMATION:** The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR part 1320 provide 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. 44 U.S.C. 3506 and 3507. In order to obtain or renew an OMB control number, Federal agencies are required to seek public comment on information collection and recordkeeping activities (*see* 5 CFR 1320.8(d) and 1320.12(a)).

The BLM will request a 3-year term of approval for this information collection. For this control number, the BLM requests comments on the following subjects: (1) Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility; (2) The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used; (3) The quality, utility and clarity of the information to be collected; and (4) How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments as directed under **ADDRESSES** and **DATES**. Please refer to OMB control number 1004–0103 in your correspondence. 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.

The following information is provided for the information collection:

*Title:* Sale of Mineral Materials (43 CFR part 3600).

*Forms:* Form 3600–9, Contract for the Exclusive Sale of Mineral Materials.

*OMB Control Number:* 1004–0103.

*Abstract:* The Mineral Materials Act, 30 U.S.C. 601 and 602, authorizes disposals of mineral materials (such as sand, gravel, and petrified wood) from public lands. This information collection request pertains to mineral sales contracts in accordance with regulations at 43 CFR part 3600. Form 3600–9 (Contract for the Sale of Mineral Materials) is the only form currently approved by OMB under control number 1004–0103. The BLM proposes to change the title of Form 3600–9 to "Contract for the Exclusive Sale of Mineral Materials."

*Frequency of Collection:* The BLM collects the information on occasion. Responses are required in order to obtain or retain a benefit.

*Estimated Number and Description of Respondents:* An estimated 400 businesses annually submit applications to purchase or use mineral materials from public lands.

*Estimated Reporting and Recordkeeping "Hour" Burden:* 2,305 responses and 9,808 hours annually. The following table details the individual components and respective hour burdens of this information collection request:

| Type of response<br>A | Number of responses<br>B | Time per response<br>C | Total hours (B x C)<br>D |
|---|---|---|---|
| Pre-Application Sampling and Testing—43 CFR 3601.30 | 15 | 30 minutes | 8 |
| Request for Sale—43 CFR 3602.11 | 400 | 30 minutes | 200 |
| Contract for the Sale of Mineral Materials—43 CFR subpart 3602, Form 3600–9 | 400 | 1 hour | 400 |
| Mining and Reclamation Plans (Complex)—43 CFR 3601.40 | 90 | 40 hours | 3,600 |
| Mining and Reclamation Plans (Simple)—43 CFR 3601.40 | 200 | 2 hours | 400 |
| Performance Bond—43 CFR 3602.14 | 400 | 1 hour | 400 |
| Payments—43 CFR 3602.21 | 400 | 6 hours | 2,400 |
| Records Maintenance—43 CFR 3602.28 | 400 | 6 hours | 2,400 |
| Totals | 2,305 | | 9,808 |

*Other Burdens:* In addition to the burdens listed above, BLM regulations at 43 CFR 3000.11, 3602.11(c), 3602.31(b), 3602.43(a), and 3602.44(f) require processing fees. This estimated annual burden is $135,716. The amount of each processing fee is determined on a case-by-case basis, and can vary widely, depending on the magnitude and nature of the application, the complexity of the mining plan proposed, the duration proposed, the location of the proposed removal area, the associated environmental effects at that location, and the BLM's related processing costs for that application, including the travel time to the site.

**Jean Sonneman,**

*Bureau of Land Management, Information Collection Clearance Officer.*

[FR Doc. 2011–7176 Filed 3–25–11; 8:45 am]

**BILLING CODE 4310–84–P**

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

### Notice of Proposed Information Collection for 1029–0067

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed authority for the collection of information for 30 CFR part 705 and the Form OSM–23, Restriction on financial interests of State employees.

**DATES:** Comments on the proposed information collection must be received by May 27, 2011, to be assured of consideration.

**ADDRESSES:** Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement,

1951 Constitution Ave., NW., Room 202—SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

**FOR FURTHER INFORMATION CONTACT:** To receive a copy of the information collection request contact John A. Trelease at (202) 208–2783 or electronically at *jtrelease@osmre.gov.*

**SUPPLEMENTARY INFORMATION:** The Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [*see* 5 CFR 1320.8(d)]. This notice identifies an information collection that OSM will be submitting to OMB for approval. This collection is contained in 30 CFR part 705 and the Form OSM–23, Restriction on financial interests of State employees. OSM will request a 3-year term of approval for this information collection activity.

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 number for Part 705 is 1029–0067. Responses are mandatory in accordance with 517(g) of the Surface Mining Control and Reclamation Act of 1977.

*Comments are invited on:* (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

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.

The following information is provided for the information collection: (1) Title of the information collection; (2) OMB control number; (3) summary of the information collection activity; and (4) frequency of collection, description of the respondents, estimated total annual responses, and the total annual reporting and recordkeeping burden for the collection of information.

*Title:* Restrictions on financial interests of State employees, 30 CFR 705.

*OMB Control Number:* 1029–0067.

**SUMMARY:** Respondents supply information on employment and financial interests. The purpose of the collection is to ensure compliance with section 517(g) of the Surface Mining Control and Reclamation Act of 1977, which places an absolute prohibition on having a direct or indirect financial interest in underground or surface coal mining operations.

*Bureau Form Number:* OSM–23.

*Frequency of Collection:* Entrance on duty and annually.

*Description of Respondents:* Any State regulatory authority employee or member of advisory boards or commissions established in accordance with State law or regulation to represent multiple interests who performs any function or duty under the Surface Mining Control and Reclamation Act.

*Total Annual Responses:* 3,642.

*Total Annual Burden Hours:* 1,218.

Dated: March 23, 2011.

**Stephen M. Sheffield,**

*Acting Chief, Division of Regulatory Support.*

[FR Doc. 2011–7197 Filed 3–25–11; 8:45 am]

**BILLING CODE 4310–05–M**

## DEPARTMENT OF JUSTICE

**[OMB Number 1103–NEW]**

## Agency Information Collection Activities: Proposed Collection; Comments Requested

**ACTION:** 60-Day Notice of Information Collection Under Review: COPS Police and Communities Together (PACT) 360 Needs Assessment Survey.

The Department of Justice (DOJ) Office of Community Oriented Policing Services (COPS) 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.

The purpose of this notice is to allow for 60 days for public comment until May 27, 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 Ashley Hoornstra, Department of Justice Office of Community Oriented Policing Services, 145 N St., NE., Washington, DC 20530.

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 e-mail 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 Ashley Hoornstra at 616–1314 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 agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

### Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* COPS Police and Communities Together (PACT) 360 Needs Assessment Survey.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief*

*abstract:* Primary: Law enforcement agencies; Secondary: Substance abuse prevention and treatment providers.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that approximately 300 respondents will complete the form within 15 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 75 total burden hours.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Room 2E–808, Washington, DC 20530.

Date March 22, 2011.

**Lynn Murray,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. 2011–7162 Filed 3–25–11; 8:45 am]

**BILLING CODE 4410–AT–P**

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## DEPARTMENT OF JUSTICE

### Foreign Claims Settlement Commission

**[F.C.S.C. Meeting Notice No. 1–11]**

### Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR part 504) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of Commission business and other matters specified, as follows:

**DATE AND TIME:** Thursday, April 7, 2011, at 10 a.m.

**SUBJECT MATTER:** Issuance of Proposed Decisions in claims against Albania and Libya.

**STATUS:** Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Executive Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Room 6002, Washington, DC 20579. Telephone: (202) 616–6975.

**Judith H. Lock,**

*Executive Officer.*

[FR Doc. 2011–7271 Filed 3–24–11; 11:15 am]

**BILLING CODE 4410–BA–P**

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## DEPARTMENT OF JUSTICE

### Office of Justice Programs

**[OMB Number 1121–0064]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**ACTION:** 60-day notice of information collection under review: Extension of a currently approved collection: Annual Parole Survey and Annual Probation Survey

The Department of Justice (DOJ), Office of Justice Programs (OJP), Bureau of Justice Statistics (BJS) 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 for "sixty days" until May 27, 2011. This process is 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 Tom Bonczar, Statistician, (202) 616–3615, Bureau of Justice Statistics, 810 Seventh St., NW., Washington, DC 20531.

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 e-mail 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 Tom Bonczar, Statistician at 202 616–3615 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 should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

**Overview of This Information Collection**

(1) *Type of information collection:* Extension of currently approved collection.

(2) *The title of the Form/Collection:* Annual Parole Survey, Annual Probation Survey, and Annual Probation Survey (Short Form).

(3) *The agency form number, if any,* and the applicable component of the Department sponsoring the collection: Forms: CJ–7 Annual Parole Survey; CJ–8 Annual Probation Survey; and CJ–8A Annual Probation Survey (Short Form). Corrections Statistics Program, Bureau of Justice Statistics, Office of Justice Programs, United States Department of Justice.

(4) *Affected public who will be asked to respond, as well as a brief abstract: Primary:* state departments of corrections or state probation and parole authorities. *Others:* The Federal Bureau of Prisons, city and county courts and probation offices for which a central reporting authority does not exist.

For the CJ–7 form, the affected public consists of 55 respondents including 50 central reporters (two state respondents in California and Pennsylvania, and one each from the remaining states; the District of Columbia; the Federal Bureau of Prisons; and one local authority) responsible for keeping records on parolees. For the CJ–8 form, the affected public includes 306 reporters including 50 state respondents, the District of Columbia, and the Federal Bureau of Prisons; and 254 from local authorities) responsible for keeping records on probationers. For the CJ–8A form, the affected public includes 160 reporters (from local authorities) responsible for keeping records on probationers.

The Annual Parole Survey and Annual Probation surveys have been used since 1977 to collect annual yearend counts and yearly movements of community corrections populations; characteristics of the community supervision population, such as gender, racial composition, ethnicity, conviction

status, offense, supervision status; outcomes including the number of revocations and the re-incarceration rate of parolees (*i.e.,* recidivism measures); and numbers of probationers and parolees who had their location tracked through a Global Positioning System (GPS). The Bureau of Justice Statistics uses this information in published reports and for the U.S. Congress, Executive Office of the President, practitioners, researchers, students, the media, and others interested in criminal justice statistics.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 521 respondents each taking an average of 1.19 hours to respond.

(6) An estimate of the total public burden (in hours) associated with the collection: 622 annual burden hours.

If additional information is required, contact: Mrs. Lynn Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N. Street, NE., Suite 2E–808, Washington, DC 20530.

Dated: March 22, 2011.

**Lynn Murray,**

*Department Clearance Officer, PRA, United States Department of Justice.*

[FR Doc. 2011–7161 Filed 3–25–11; 8:45 am]

**BILLING CODE 4410–18–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Recordkeeping and Reporting Occupational Injuries and Illnesses

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, "Recordkeeping and Reporting Occupational Injuries and Illnesses," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

**DATES:** Submit comments on or before April 27, 2011.

**ADDRESSES:** A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** The OSHAct and regulations 29 CFR part 1904 prescribe that certain employers maintain records of job related injuries and illnesses. The data are needed by the OSHA to carry out intervention and enforcement activities to guarantee workers safe and healthful workplaces. The data are also needed by Bureau of Labor Statistics to produce national statistics on occupational injuries and illnesses.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1218–0176. The current OMB approval is scheduled to expire on March 31, 2011; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on January 13, 2011 (76 FR 2418).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1218–0176. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Agency:* Occupational Safety and Health Administration (OSHA).

*Title of Collection:* Recordkeeping and Reporting Occupational Injuries and Illnesses.

*OMB Control Number:* 1218–0176.

*Affected Public:* Private sector—Businesses or other for-profits.

*Total Estimated Number of Respondents:* 1,585,374.

*Total Estimated Number of Responses:* 6,782,248.

*Total Estimated Annual Burden Hours:* 2,967,237.

*Total Estimated Annual Costs Burden:* $0.

Dated: March 23, 2011.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2011–7234 Filed 3–25–11; 8:45 am]

**BILLING CODE 4510–26–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Proposed Evaluation of the Aging Worker Initiative Grants

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the proposed Employment and Training

Administration (ETA) sponsored information collection request (ICR) titled, "Evaluation of the Aging Worker Initiative Grants," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

**DATES:** Submit comments on or before April 27, 2011.

**ADDRESSES:** A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Employment and Training Administration (ETA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** The ETA is seeking OMB authorization for a new information collection to evaluate ten grants to test aging worker job attachment initiatives. This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. For additional information, see the related notice published in the **Federal Register** on November 19, 2010 (75 FR 70949).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference ICR Number 201101–1205–002. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Agency:* Employment and Training Administration (ETA).

*Title of Collection:* Evaluation of the Aging Worker Initiative Grants.

*OMB ICR Number:* 201101–1205–002.

*Affected Public:* Private sector—not-for-profit institutions.

*Total Estimated Number of Respondents:* 10.

*Total Estimated Number of Responses:* 7300.

*Total Estimated Annual Burden Hours:* 4351.

*Total Estimated Annual Costs Burden:* $0.

Dated: March 22, 2011.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2011–7235 Filed 3–25–11; 8:45 am]

**BILLING CODE 4510–FN–P**

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## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of February 7, 2011 through February 11, 2011.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

**Affirmative Determinations for Worker Adjustment Assistance**

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,432 | D–Tech USA LLC | Plano, TX | July 23, 2009. |
| 74,652 | Gentry Mills, Inc | Albemarle, NC | August 28, 2010. |
| 74,730 | Roseburg Forest Products, Sawmill Division | Dillard, OR | September 30, 2009. |
| 74,783 | Louisville Bedding Company | Munfordville, KY | October 18, 2009. |
| 74,783A | Louisville Bedding Company | Ontario, CA | October 18, 2009. |
| 74,783B | Louisville Bedding Company | Louisville, KY | October 18, 2009. |
| 74,919 | Severstal International, Leased Workers Echelon Service Company, Sun Associated Industries, Inc.; etc. | Sparrows Point, MD | November 22, 2009. |
| 74,998 | Temple-Inland | Scranton, PA | December 3, 2009. |

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,437 | Deloitte Services, LP, A Subsidiary of Deloitte LLP; Leased Workers Appleone and Adecco. | Wilton, CT | July 28, 2009. |
| 74,650 | Probuild Company, LLC, Probuild Holdings LLC; North East Division; NJ/PA Outside Sales, etc. | Cherry Hill, NJ | September 22, 2009. |
| 74,809 | Diversey Equipment/Beta Technology, Diversey, Inc.; Leased Workers of Manpower. | Santa Cruz, CA | October 20, 2009. |
| 74,847 | Dell Healthcare Services, Blue Cross Blue Shield Rhode Island Account; Leased Workers, etc. | Providence, RI | October 20, 2009. |
| 74,950 | Navistar, Inc., Navistar International Corporation, Including Leased Workers. | Springfield, OH | November 29, 2009. |
| 74,968 | Brady Corporation, Leased Workers from Aerotek | Brooklyn Park, MN | December 6, 2009. |

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,994 | The Travelers Indemnity Company, Personal Insurance Operations Division. | Houston, TX | December 14, 2009. |
| 74,995 | Bush Industries, Inc., Leased Workers from Express Employment Professionals. | Erie, PA | December 10, 2009. |
| 74,999 | Central Maine Healthcare Corporation, Medical Transcriptionist Working from their Homes In Maine. | Lewiston, ME | November 30, 2009. |
| 75,009 | The UBS Group, a Div. of UBS AG, Corp. Center Div., Group Tech, etc. | Stamford, CT | December 15, 2009. |
| 75,009A | The UBS Group, a Div. of UBS AG, Corp. Center Div., Group Tech, etc. | Chicago, IL | December 15, 2009. |
| 75,009B | The UBS Group, a Div. of UBS AG, Corp. Center Div., Group Tech, etc. | New York, NY | December 15, 2009. |
| 75,051 | American Express Company, Sales Settlement Reconciliation Team, Leased Workers Kelly Services, etc. | Salt Lake City, UT | December 28, 2009. |
| 75,095 | InterMetro Industries Corporation, Emerson Electric Corporation; Leased Workers Onesource Staffing, etc. | Wilkes-Barre, PA | January 12, 2010. |
| 75,100 | STEC, Inc., Manufacturing Division | Santa Ana, CA | November 26, 2010. |
| 75,115 | Accenture LLP, Corporate Functions Finance; Chicago Metro Locations. | Chicago, IL | January 18, 2010. |
| 75,134 | Veyance Technologies, Inc | Lincoln, NE | February 10, 2011. |
| 75,134A | Leased Workers From Adecco Employment Services, etc., Working On-Site at Veyance Technologies, Inc. | Lincoln, NE | February 10, 2011. |
| 75,139 | Somanetics Corporation, Covidien; Leased Workers of Aerotek and Critech Research. | Troy, MI | January 24, 2010. |
| 75,139A | Somanetics Corporation, Covidien; Leased Workers of Aerotek and Critech Research. | Gainsville, FL | January 24, 2010. |

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,755 | Oak Level Furnishing and Repair | Martinsville, VA | September 25, 2009. |
| 74,908 | Continental Structural Plastics, Leased Workers from Time Staffing and Kelly Services. | North Baltimore, OH | January 1, 2011. |

**Negative Determinations for Worker Adjustment Assistance**

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1) (employment decline or threat of separation) of section 222 has not been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,835 | Euchre Mountain Logging, Inc. | Condon, MT. | |

The investigation revealed that the criteria under paragraphs (a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,182 | Chicago Packaging Company, Now known as 1855 LLC, DBA Chicago Packaging Company. | Chicago, IL. | |
| 74,315 | Rich Products Corporation, R E Rich Family Holding Corporation | Buffalo, NY. | |
| 74,868 | Ameritech Publishing, Inc., AT&T, Inc. | Livonia, MI. | |
| 74,936 | Teleperformance USA | Akron, OH. | |
| 75,000 | Harley-Davidson Motor Company Operations, Inc., Powertrain Operations Division, Corporate Office—Juneau Avenue. | Milwaukee, WI. | |
| 75,000A | Harley-Davidson Motor Company Operations, Inc., Powertrain Operations Division, Corporate Office, Franklin Distribution. | Franklin, WI. | |
| 75,000B | Harley-Davidson Motor Company Operations, Inc., Powertrain Operations Division, Corporate Office, Pilgrim Road. | Menomonee Falls, WI. | |
| 75,000C | Harley-Davidson Motor Company Operations, Inc., Powertrain Operations Division, Corporate Office, etc. | Wauwatosa, WI. | |
| 75,034 | East Jefferson General Hospital, Home Medical Transcriptionist From Mississippi and Louisiana. | Metairie, LA. | |

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 75,072 | New NGC, Inc. DBA National Gypsum Company, Headquarters | Charlotte, NC. | |
| 75,072A | NGC Shared Services, Headquarters | Charlotte, NC. | |
| 75,090 | Wausau Daily Herald, Advertising Production Division, Gannett Co., Inc. | Wausau, WI. | |
| 75,091 | Hotels.com, Finance | Dallas, TX. | |
| 75,160 | ITR Concession Company, LLC, Leased Workers from Express Employment Professionals. | Granger, IN. | |

**Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance**

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 73,898 | General Electric Company, Transportation Division | Erie, PA. | |
| 74,469 | Deloitte Services, LP, A Subsidiary of Deloitte LLP | Boston, MA . | |

The following determinations terminating investigations were issued because the petitions are the subject of ongoing investigations under petitions filed earlier covering the same petitioners.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 75,170 | Somanentics | Troy, MI. | |
| 75,170A | Somanentics | Gainsville, FL. | |

I hereby certify that the aforementioned determinations were issued during the period of February 7, 2011 through February 11, 2011. Copies of these determinations may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or *tofoiarequest@dol.gov.* These determinations also are available on the Department's Web site at *http://www.doleta.gov/tradeact* under the searchable listing of determinations.

Dated: February 17, 2011.

**Elliott S. Kushner,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2011–7154 Filed 3–25–11; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of an Open Meeting of the Advisory Committee on Apprenticeship (ACA)

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Announcement of meeting.

**SUMMARY:** Pursuant to section 10 of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. 2), notice is hereby given to announce an open meeting of the Advisory Committee on Apprenticeship (ACA) being held on May 16–17, 2011, in Washington, DC.

The ACA, an advisory board to the Secretary of Labor, is a discretionary Committee established by the Secretary of Labor, in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended 5 U.S.C., App. 2, and it's implementing regulations (41 CFR parts 101–6 and 102–3). All meetings of the ACA are open to the public.

*Time and Date:* The meeting will begin at approximately 12:30 p.m. Eastern Standard Time on Monday, May 16, 2011, and continue until approximately 5 p.m. The meeting will reconvene on Tuesday, May 17, 2011, at approximately 8:30 a.m. Eastern Standard Time and adjourn at approximately 5 p.m.

**ADDRESSES:** The meeting location is the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** The Designated Federal Official, Mr. John V. Ladd, Administrator, Office of Apprenticeship, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5311, Washington, DC 20210. Telephone: (202) 693–2796, (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** This meeting is open to the public and members of the public are invited to attend the proceedings. If individuals have special needs and/or disabilities that will require special accommodations, please contact Ms. Kenya Huckaby on (202) 693–3795 no later than Monday, May 9, 2011, to request for arrangements to be made. Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. John V. Ladd, Administrator, Office of Apprenticeship, ETA, U.S. Department of Labor, Room N–5311, 200 Constitution Avenue, NW., Washington, DC 20210. Such submissions must be sent by Monday, May 9, 2011, to be included in the record for the meeting.

The agenda is subject to change due to time constraints and priority items which may come before the ACA between the time of this publication and the scheduled date of the ACA meeting.

**Purpose of the Meeting and Topics To Be Discussed**

The purpose of the meeting is to consider several policy matters affecting Registered Apprenticeship programs.

The agenda will focus on the following topics:

- Workgroup Report-Outs and Open Committee Discussion
- Extended Discussion on Proposed Pre-Apprenticeship Framework
- Review of Available Data Capabilities
- Long-Term Planning
- Apprenticeship Community of Practice
- Public Comment

Any member of the public who wishes to speak at the meeting must indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Official, Mr. John V. Ladd, by Monday, May 9, 2011. The Chairperson will announce at the beginning of the meeting the extent to which time will permit the granting of such requests.

Signed at Washington, DC, this 22nd day of March 2011.

**Jane Oates,**

*Assistant Secretary for the Employment and Training Administration.*

[FR Doc. 2011–7153 Filed 3–25–11; 8:45 am]

**BILLING CODE 4510–FR–P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice: (11–026)]**

### NASA Advisory Council; Science Committee; Meeting

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Science Committee of the NASA Advisory Council (NAC). This Committee reports to the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

**DATES:** Thursday, April 21, 2011, 8:30 a.m. to 4 p.m., and Friday, April 22, 2011, 8:30 a.m. to 2 p.m., Local Time.

**ADDRESSES:** NASA Headquarters, 300 E Street, SW., Room 5H45, Washington, DC 20546.

**FOR FURTHER INFORMATION CONTACT:** Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public up to the capacity of the room. This meeting is also available telephonically and by WebEx. Any interested person may call the USA toll free conference call number 888–381–5774, pass code Science Committee, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com/,* meeting number on April 21 is 994 561 164, and password SC_Apr21; the meeting number on April 22 is 992 613 633, and password SC_Apr22. The agenda for the meeting includes the following topics:

—Planetary Science Decadal Survey.
—Fiscal Year 2012 Budget Request.
—Program and Subcommittee Updates.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide a copy of their passport, visa, or resident alien card in addition to providing the following information no less than 10 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: March 22, 2011.

**P. Diane Rausch,**

*Advisory Committee Management Officer, National Aeronautics and Space Administration.*

[FR Doc. 2011–7138 Filed 3–25–11; 8:45 am]

**BILLING CODE 7510–13–P**

## NATIONAL SCIENCE FOUNDATION

### Assumption Buster Workshop: Distributed Data Schemes Provide Security

**AGENCY:** The National Coordination Office (NCO) for the Networking and Information Technology Research and Development (NITRD) Program.

**ACTION:** Call for participation.

**FOR FURTHER INFORMATION CONTACT:** *assumptionbusters@nitrd.gov.*

**DATES:** Workshop: May 17, 2011; Deadline: April 15, 2011. Apply via e-mail to *assumptionbusters@nitrd.gov.* Travel expenses will be paid for selected participants who live more than 50 miles from Washington, DC, up to the limits established by Federal Government travel regulations and restrictions.

**SUMMARY:** The NCO, on behalf of the Special Cyber Operations Research and Engineering (SCORE) Committee, an interagency working group that coordinates cyber security research activities in support of national security systems, is seeking expert participants in a day-long workshop on the pros and cons of the Security of Distributed Data Schemes. The workshop will be held May 17, 2011 in Gaithersburg, MD. Applications will be accepted until 5 p.m. EST April 15, 2011. Accepted participants will be notified by April 27, 2011.

**SUPPLEMENTARY INFORMATION:**

*Overview:* This notice is issued by the National Coordination Office for the Networking and Information Technology Research and Development (NITRD) Program on behalf of the SCORE Committee.

*Background:* There is a strong and often repeated call for research to provide novel cyber security solutions. The rhetoric of this call is to elicit new solutions that are radically different from existing solutions. Continuing research that achieves only incremental improvements is a losing proposition.

We are lagging behind and need technological leaps to get, and keep, ahead of adversaries who are themselves rapidly improving attack technology. To answer this call, we must examine the key assumptions that underlie current security architectures. Challenging those assumptions both opens up the possibilities for novel solutions that are rooted in a fundamentally different understanding of the problem and provides an even stronger basis for moving forward on those assumptions that are well-founded. The SCORE Committee is conducting a series of four workshops to begin the assumption buster process. The assumptions that underlie this series are that cyber space is an adversarial domain, that the adversary is tenacious, clever, and capable, and that re-examining cyber security solutions in the context of these assumptions will result in key insights that will lead to the novel solutions we desperately need. To ensure that our discussion has the requisite adversarial flavor, we are inviting researchers who

develop solutions of the type under discussion, and researchers who exploit these solutions. The goal is to engage in robust debate of topics generally believed to be true to determine to what extent that claim is warranted. The adversarial nature of these debates is meant to ensure the threat environment is reflected in the discussion in order to elicit innovative research concepts that will have a greater chance of having a sustained positive impact on our cyber security posture.

The third topic to be explored in this series is "Distributed Data Schemes Provide Security." The workshop on this topic will be held in Gaitherburg, MD on May 17, 2011.

*Assertion:* "Distributed Data Schemes Provide Security".

Distributed data architectures, such as cloud computing, offer very attractive cost savings and provide new means of large scale analysis and information sharing. There has been much discussion about securing such architectures, and it is generally felt that distribution, and the replication that is usually associated with it, provides some inherent protection; adversaries will have difficulty locating your data in the cloud, and by breaking it up and replicating different segments throughout the platform we send the adversary on a wild goose chase to find and reassemble all the relevant bits. It is also felt that cryptographic mechanisms like bound tags, encryption, and keyed access control can be used to develop distributed platforms with a high level of assurance. There are several applications of distributed architectures that offer non-sensitive peer to peer TV services. Applications are also offered for potentially sensitive uses like document collaboration. Yet it is unclear whether these applications can safely be extended to highly sensitive uses. Could we readily support a distributed electronic health care system that securely supports ad hoc consultations or remote surgery with full access to patient history while protecting patient privacy, for example?

To answer this question we need to take a closer look at the protection provided inherently and cryptographically. With respect to the former, we must think about how the architecture can be designed to provide secure availability to friend and not foe. We must examine the impact of the design for security, resilience, and availability and understand the trades we are implicitly making among these attributes. We must consider whether the data about data that is required by these architectures introduces a new data risk. We must think about the multiplicity of paths provide by these architectures. We must figure how to do risk analysis on a system when key information like data location is unavailable by design. With respect to the latter, we must consider whether the key management strategy is robust enough to operate in a distributed architecture. We have to think about the assurance of tag binding and access update and revocation. We must consider the vulnerabilities of the platforms that host the cryptographic mechanisms and the distribution of those functions in the architecture.

In this workshop, we will explore the implications of distributed data on security. We will consider what effect the introduction of the notion of a determined adversary has on our analysis of data security requirements. In the first session, we will discuss the properties of distributed platforms that are thought to make such architectures inherently more secure. In the second, we will discuss the issue of cryptography and distributed platforms.

## How To Apply

If you would like to participate in this workshop, please submit (1) a resume or curriculum vita of no more than two pages which highlights your expertise in this area and (2) a one-page paper stating your opinion of the assertion and outlining your key thoughts on the topic. The workshop will accommodate no more than 60 participants, so these brief documents need to make a compelling case for your participation.

Applications should be submitted to *assumptionbusters@nitrd.gov* no later than 5 p.m. EST on April 15, 2011.

*Selection and Notification:* The SCORE committee will select an expert group that reflects a broad range of opinions on the assertion. Accepted participants will be notified by e-mail no later than April 27, 2011. We cannot guarantee that we will contact individuals who are not selected, though we will attempt to do so unless the volume of responses is overwhelming.

Submitted by the National Science Foundation for the National Coordination Office (NCO) for Networking and Information Technology Research and Development (NITRD) on March 18, 2011.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2011–7173 Filed 3–25–11; 8:45 am]

BILLING CODE 7555–01–P

## NATIONAL SCIENCE FOUNDATION

### Advisory Committee for Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

*Name:* Advisory Committee for Engineering Meeting, #1170.

*Date/Time:* April 13, 2011: 12 p.m. to 6 p.m., April 14, 2011: 8 a.m. to 12 p.m.

*Place:* National Science Foundation, 4201 Wilson Boulevard, Suite 1235, Arlington, Virginia 22230.

*Type of Meeting:* Open.

*Contact Person:* Deborah Young, National Science Foundation, 4201 Wilson Boulevard, Suite 505, Arlington, Virginia 22230.

*Purpose of Meeting:* To provide advice, recommendations and counsel on major goals and policies pertaining to engineering programs and activities.

*Agenda:* The principal focus of the meeting on both days will be to discuss emerging issues and opportunities for the Directorate for Engineering and its divisions and review Committee of Visitors Reports.

Dated: March 23, 2011.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 2011–7175 Filed 3–25–11; 8:45 am]

BILLING CODE 7555–01–P

## NUCLEAR REGULATORY COMMISSION

**[NRC–2009–0476; DC/COL–ISG–018]**

### Office of New Reactors; Final Interim Staff Guidance on Standard Review Plan, Section 17.4, "Reliability Assurance Program"

**AGENCY:** Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of availability.

**SUMMARY:** The NRC staff is issuing its Final Interim Staff Guidance (ISG) DC/COL–ISG–018 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML103010113). The purpose of this ISG is to clarify the NRC staff guidance on the design reliability assurance program (RAP). This ISG updates the guidance provided to the staff in Standard Review Plan (SRP), Section 17.4, "Reliability Assurance Program," of NUREG–0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants," March 2007. This ISG revises the NRC staff's review responsibilities and further clarifies the acceptance criteria and evaluation findings contained in the SRP Section 17.4 in support of the NRC reviews of

the design certification (DC) and combined license (COL) applications. The NRC staff issues DC/COL–ISGs to facilitate timely implementation of current staff guidance and to facilitate activities associated with NRC review of applications for DCs and COLs. The NRC staff intends to incorporate the final approved DC/COL–ISG–018 into the next revisions of NUREG–0800, SRP Section 17.4 and Regulatory Guide (RG) 1.206, "Combined License Applications for Nuclear Power Plants (LWR Edition)," June 2007.

*Disposition:* On October 30, 2009, the NRC staff issued proposed DC/COL–ISG–018 on "Reliability Assurance Program," ADAMS Accession No. ML092290791. The staff received only editorial comments which were incorporated. However, the ISG was further discussed at public meetings held at the NRC during 2010. These public meetings primarily focused on the Tier 1 inspections, tests, analyses, and acceptance criteria for the COL RAP during the design stage, which is specified in the ISG. This final issuance incorporates clarifications that resulted from these public meetings. A document comparing the version of the ISG that was issued for public comments and the final version of the ISG can be found under ADAMS Accession No. ML103010361.

**ADDRESSES:** The NRC maintains ADAMS, which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by e-mail at *pdr.resource@nrc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Todd A. Hilsmeier, Project Manager, PRA and Severe Accidents Branch, Division of Safety Systems & Risk Assessment, U.S. Nuclear Regulatory Commission, Washington, DC, 20555–0001; telephone: 301–415–0525 or e-mail: *Todd.Hilsmeier@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** The agency posts its issued staff guidance in the agency external Web page (*http://www.nrc.gov/reading-rm/doc-collections/isg/*).

Dated at Rockville, Maryland, this 22nd day of March 2011.

For the Nuclear Regulatory Commission,

**William F. Burton,**

*Chief, Rulemaking and Guidance Development Branch, Division of New Reactor Licensing, Office of New Reactor.*

[FR Doc. 2011–7204 Filed 3–25–11; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

**[NRC–2010–0033; DC/COL–ISG–021]**

### Office of New Reactors; Final Interim Staff Guidance on the Review of Nuclear Power Plant Designs Using a Gas Turbine Driven Standby Emergency Alternating Current Power System

**AGENCY:** Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of availability.

**SUMMARY:** The NRC staff is issuing its Final Interim Staff Guidance (ISG) DC/COL–ISG–021 titled "Interim Staff Guidance on the Review of Nuclear Power Plant Designs Using a Gas Turbine Driven Standby Emergency Alternating Current Power System," Agencywide Documents Access and Management System (ADAMS) Accession No. ML102510119 for DC/COL–ISG–021 and ADAMS Accession No. ML102510164 for Attachment 1 to DC/COL–ISG–021. This ISG provides new guidance for applicants submitting a combined license (COL) or design certification (DC) application for new nuclear power reactors under Title 10 of the Code of Federal Regulations, part 52. In addition, it supplements the guidance provided to the NRC staff in NUREG–0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants," March 2007, Standard Review Plan (SRP), Section 8.3.1 and Sections 9.5.4 through 9.5.8. The NRC staff issues DC/COL–ISGs to facilitate activities associated with NRC review of applications for DCs and COLs. The NRC staff intends to incorporate DC/COL–ISG–021 into the next revision of SRP Section 8.3.1 and Sections 9.5.4 through 9.5.8 and Regulatory Guide 1.206, "Combined License Applications for Nuclear Power Plants (LWR Edition)," June 2007.

*Disposition:* On February 3, 2010, the NRC staff issued proposed DC/COL–ISG–021 on "Review of Nuclear Power Plant Designs Using a Gas Turbine Driven Standby Emergency Alternating Current Power System," ADAMS Accession No. ML092640035. The NRC staff received comments on the proposed guidance. This final issuance resolves the majority of the comments. The NRC staff responses to these comments can be found in ADAMS Accession No. ML102510176.

**ADDRESSES:** The NRC maintains ADAMS, which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by e-mail at *pdr.resource@nrc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Samuel S. Lee, Chief, Balance of Plant Branch 2, Division of Safety Systems & Risk Assessment, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone at 301–415–0155 or e-mail at *samuel.lee@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** The agency posts its issued staff guidance in the agency external Web page (*http://www.nrc.gov/reading-rm/doc-collections/isg/*).

Dated at Rockville, Maryland, this 22nd day of March 2011.

For the Nuclear Regulatory Commission,

**William F. Burton,**

*Chief, Rulemaking and Guidance Development Branch, Division of New Reactor Licensing, Office of New Reactor.*

[FR Doc. 2011–7206 Filed 3–25–11; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–391; NRC–2008–0369]**

### Notice of Finding of No Significant Antitrust Changes and Time for Filing Requests for Reevaluation for Tennessee Valley Authority, Watts Bar Nuclear Plant, Unit 2, Spring City, TN

**AGENCY:** Nuclear Regulatory Commission (NRC).

**ACTION:** Tennessee Valley Authority, Watts Bar Nuclear Plant, Unit 2; Notice of No Significant Antitrust Changes and Time for Filing Requests for Reevaluation.

**FOR FURTHER INFORMATION CONTACT:** Aaron Szabo, Financial Analyst, Financial Analysis and International Projects Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: 301–415–1985; fax number: 301–415–2102; e-mail: *Aaron.Szabo@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The Director of the Office of Nuclear Reactor Regulation (NRR) has made a finding in accordance with Section 105c(2) of the Atomic Energy Act, as amended, that no significant (antitrust) changes in the applicant's activities or proposed activities have occurred subsequent to the antitrust construction permit review of Unit 2 of the Watts Bar Nuclear Plant (WBN) by the U.S. Attorney General and the Commission.

Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides for an antitrust review of an operating license application, filed before August 8, 2005, if the Commission determines that significant changes in the applicant's activities or proposed activities have occurred subsequent to the previous construction permit review. The Commission has delegated the authority to make the "significant change" determination to the Director, NRR.

Tennessee Valley Authority's (TVA) application for construction permits and operating licenses for the WBN Units 1 and 2 have been the subject of 4 previous antitrust reviews. In connection with the construction permit review in 1972, the Acting Assistant Attorney General for Antitrust of the U.S. Department of Justice (DOJ) found no antitrust problems that would require a hearing. In subsequent operating license reviews in 1979, 1983 and 1991, the NRC staff found "no significant changes" that would warrant an operating license antitrust review.

Based upon an examination of the events since the previous operating license review of TVA's activities conducted in 1991, the NRC staff has concluded, after consulting with the Department of Justice, that the changes that have occurred since the construction permit review are not of the nature to require a formal antitrust review at the operating license stage of the application.

## II. Summary of Staff Analysis and Recommendation

In reaching this conclusion, the NRC staff considered the structure of the utility industry in the Tennessee Valley and adjacent areas, the events relevant to the construction permit review and the previous operating license reviews for WBN. Due to construction delays at the WBN facility, the staff reviewed TVA's activities in 1979, 1983, 1990, and again in 2010 to determine whether there have been changes in TVA's activities since the completion on the construction permit antitrust review in 1972 that would create or maintain a situation inconsistent with the antitrust laws. Several types of changes were identified in each of the earlier post construction permit reviews; however, it was determined that none of the changes resulted from abuse of TVA's market power.

In its review of TVA's activities in the 2010 operating license review, the staff again found no evidence of changed activity associated with abuse of its market power. In relation to TVA's customers, TVA projected a capacity shortfall based on previous long-term agreements, with or without the operation of WBN Unit 2, which would be inconsistent with a utility using anticompetitive behavior. In relation to building transmission, rate schedules and capacity additions other than from operation of WBN Unit 2, all of the developments were not atypical of a large utility and did not raise significant antitrust issues.

Further, in 1997, TVA reached a settlement agreement that defined the counterparties and arrangements under which TVA can only make exchange power arrangements with other power generating companies consistent with the provisions of the Tennessee Valley Authority Act of 1933, as amended (TVA Act). The region that TVA is allowed to supply and sell power is still dictated by Section 15d(a) of the TVA Act. But, TVA may now only engage in construction of generating capacity or purchase of generating capacity as it needs to supply power demands in its own service area and may not knowingly exchange power if the purchaser is procuring power for the purpose of reselling such power at wholesale to any third party not authorized to exchange power with the TVA.

As a result, the NRC staff does not believe that any changed activity attributed to TVA since the 1979 operating license review is "significant" in terms of the Commission's V.C. Summer decision (see Commission Memorandum and Order CLI–80–28, dated June 30, 1980, at 11 NRC 817). The staff recommended that the Director of the Office of Nuclear Reactor Regulation find that "no significant changes" have occurred in TVA's activities since the previous antitrust operating license review completed in 1991.

## III. Finding of No Significant Changes

On the basis of the staff's analysis and recommendation, the Director of NRR has concluded in his decision dated March 21, 2011, that there have been no "significant changes" in the applicant's activities or proposed activities since the completion of the previous antitrust review.

## IV. Further Information

Documents related to this action, including the application for an operating license and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are:

| Accession No. | Document description |
|---|---|
| ML073130086 | NRC letter to DOJ, dated August 23, 1971, forwarding antitrust review. |
| ML073130092 | DOJ letter dated December 11, 1972, with no antitrust problems. |
| ML073380454 | NRC letter dated September 20, 1991, No Significant Change Finding. |
| ML090700378 | TVA updated application for WBN Unit 2 operating license, dated March 4, 2009. |
| ML101400184 | TVA letter of May 13, 2010, Update Antitrust Review. |
| ML102160085 | TVA letter of July 29, 2010, Response to request for additional information. |
| ML110691059 | DOJ letter dated December 16, 2010, with no antitrust problems. |
| ML110550652 | TVA letter of February 22, 2011, response to antitrust clarification questions. |

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O1 F21, One White Flint North, 11555 Rockville Pike Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Any person whose interest may be affected by this finding, may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555 within 30 days of the initial publication of this notice for the **Federal Register**. Request for reevaluation of the no significant change determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date or information that could not reasonably have been admitted prior to that date.

A copy of the director's decision will be filed with the Secretary of the Commission for the Commission's review. The director's decision will constitute the final action of the Commission 30 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 22nd day of March 2011.

For the Nuclear Regulatory Commission.

**Stephen J. Campbell,**

*Chief, Watts Bar Special Projects Branch, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–7213 Filed 3–25–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–271; NRC–2011–0067]**

### Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Notice of Issuance of Renewed Facility Operating License No. DPR–28 for an Additional 20-Year Period; Record of Decision

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC of the Commission) has issued Renewed Facility Operating License No. DPR–28 to Entergy Nuclear Vermont Yankee, LLC (Entergy VY), and Entergy Nuclear Operations, Inc. (ENO), (licensee), the operator of the Vermont Yankee Nuclear Power Station (VYNPS). Renewed Facility Operating License No. DPR–28 authorizes operation of VYNPS by the licensee at reactor core power levels not in excess of 1912 megawatts thermal (650 megawatts electric), in accordance with the provisions of the VYNPS renewed license and its technical specifications.

The notice also serves as the record of decision for the renewal of Facility Operating License No. DPR–28, consistent with Title 10 of the Code of Federal Regulations Section 51.103 (10 CFR 51.103). As discussed in the final supplemental environmental impact statement for VYNPS, dated August 2007, the Commission has considered a range of reasonable alternatives that included the no-action alternative. The factors considered in the record of decision can be found in the supplemental environmental impact statement (SEIS) for VYNPS.

VYNPS is a boiling water reactor located five miles south of Brattleboro, Vermont. The application for the renewed license complied with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. As required by the Act and the Commission's regulations in 10 CFR chapter 1, the Commission has made appropriate findings, which are set forth in the renewed license. Prior public notice of the Commission considering the license renewal application (LRA) and of an opportunity for a hearing regarding the LRA was published in the **Federal Register** on March 27, 2006 (71 FR 15220).

For further details with respect to this action, see: (1) Entergy VY and ENO, LRA for VYNPS dated January 25, 2006, as supplemented by letters dated through February 21, 2008; (2) the Commission's safety evaluation report (SER) (NUREG–1907), published in May 2008; (3) Supplements 1 and 2 to the SER, published in September 2009 and March 2011; (4) the licensee's updated safety analysis report; and (5) the Commission's final environmental impact statement (NUREG–1437, Supplement 30), for VYNPS, published on August 1, 2007. These documents are available at the NRC's Public Document Room, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, and can be viewed from the NRC Public Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*.

Copies of the Renewed Facility Operating License No. DPR–28, may be obtained by writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Director, Division of License Renewal. Copies of the VYNPS SER (NUREG–1907), supplemental SER, and the final environmental impact statement (NUREG–1437, Supplement 30) may be purchased from the National Technical Information Service, U.S. Department of Commerce, Springfield, Virginia 22161 (*http://www.ntis.gov*), 703–605–6000, or Attention: Superintendent of Documents, U.S. Government Printing Office, P.O. Box 371954, Pittsburgh, Pennsylvania 15250–7954 (*http://www.gpoaccess.gov*), 202–512–1800. All orders should clearly identify the NRC publication number and the requestor's Government Printing Office deposit account number or VISA or MasterCard number and expiration date.

Dated at Rockville, Maryland, this 21st day of March, 2011.

For the Nuclear Regulatory Commission.

**Bo M. Pham,**

*Chief, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–7218 Filed 3–25–11; 8:45 am]

**BILLING CODE 7590–01–P**

## OVERSEAS PRIVATE INVESTMENT CORPORATION

### Submission of OMB Review; Comments Request

**AGENCY:** Overseas Private Investment Corporation (OPIC)

**ACTION:** Request for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that the Agency has prepared an information collection request for OMB review and approval and has requested public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the Agency's burden estimate; the quality, practical utility and clarity of the information to be collected; and ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form under review, OPIC form 115, is summarized below, OMB–3240–1115.

**DATES:** Comments must be received by May 27, 2011.

**ADDRESSES:** Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency Submitting Officer. Comments on the form should be submitted to the Agency Submitting Officer.

**FOR FURTHER INFORMATION CONTACT:** Agency Submitting Officer: Essie Bryant, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

*Summary of Form Under Review:*

*Type of Request:* Revised Form.

*Title:* Application for Financing.

*Form Number:* OPIC–115.

*Frequency of Use:* One per investor per project.

*Type of Respondents:* Business or other institution (except farms); individuals.

*Standard Industrial Classification Codes:* All.

*Description of Affected Public:* U.S. companies or citizens investing overseas.

*Reporting Hours:* 9 hours per originator.

*Number of Responses:* 190 per year.

*Federal Cost:* $12,754.

*Authority for Information Collection:* Section 231 and 234(b) and (c) of the Foreign Assistance Act of 1961, as amended.

*Abstract (Needs and Uses):* The OPIC form 115 is the principal document used by OPIC to determine soundness of proposed project, applicant's qualifications for receiving OPIC financial assistance, assess the environmental impact, developmental effects of the project, and to measure the economic effects for the U.S. and the host country's economy.

Dated: March 18, 2011.

**Nichole Cadiente,**

*Administrative Counsel, Department of Legal Affairs.*

[FR Doc. 2011–6925 Filed 3–25–11; 8:45 am]

BILLING CODE M

## OVERSEAS PRIVATE INVESTMENT CORPORATION

### Submission for OMB Review—Comment Request

**AGENCY:** Overseas Private Investment Corporation (OPIC).

**ACTION:** Request for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that the Agency is preparing an information collection request for OMB review and approval and to request public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the Agency's burden estimate, practical utility and clarity of the information to be collected; and on ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form, OMB control number 3420–0011, under review is summarized below.

**DATES:** This is the 60-day notice for OPIC Form-52; OMB–3420–0011 (Application for Political Risk Insurance) is to inform the public, that this collection is being submitted to OMB for approval. Any Comments must be forwarded to the Office of Information/Regulatory Affairs, Office of Management & Budget, 725 17th Street, NW., Washington, DC 20503.

**ADDRESSES:** Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency submitting officer. Comments on the form should be submitted to the Agency Submitting Officer.

**FOR FURTHER INFORMATION CONTACT:** OPIC Agency Submitting Officer: Essie Bryant, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

**Summary Form Under Review**

*Type of Request:* Revised form.

*Title:* Application for Political Risk Insurance.

*Form Number:* OPIC–52.

*Frequency of Use:* Once per investor per project.

*Type of Respondents:* Business or other institution (except farms);

individuals.

*Standard Industrial Classification Codes:* All.

*Description of Affected Public:* U.S. companies or citizens investing overseas.

*Reporting Hours:* 9 hours per project.

*Number of Responses:* 100 per year.

*Federal Cost:* $24,300.00.

*Authority for Information Collection:* Sections 231, 234(a), 239(d), and 240A of the Foreign Assistance Act of 1961, as amended.

*Abstract (Needs and Uses):* The application is the principal document used by OPIC to determine the investor's and the project's eligibility for political risk insurance, assess the environmental impact and developmental effects of the project, measure the economic effects for the U.S. and the host country economy, and collect information for insurance underwriting analysis.

Dated: March 18, 2011.

**Nichole Cadiente,**

*Administrative Counsel, Department of Legal Affairs.*

[FR Doc. 2011–6927 Filed 3–25–11; 8:45 am]

BILLING CODE M

## OVERSEAS PRIVATE INVESTMENT CORPORATION

### Submission of OMB Review; Comments Request

**AGENCY:** Overseas Private Investment Corporation (OPIC)

**ACTION:** Request for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that the Agency has prepared an information collection request for OMB review and approval and has requested public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the Agency's burden estimate; the quality, practical utility and clarity of the information to be collected; and ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form under review, OPIC form 247, is summarized below: this is a new collection.

**DATES:** Comments must be received by May 27, 2011.

**ADDRESSES:** Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency Submitting Officer. Comments on the form should be submitted to the Agency Submitting Officer.

**FOR FURTHER INFORMATION CONTACT:** Agency Submitting Officer: Essie Bryant, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

Summary of Form Under Review:

*Type of Request:* New Form.

*Title:* Application for Political Risk Insurance.

*Form Number:* OPIC–247.

*Frequency of Use:* Once per investor per project.

*Type of Respondents:* Business or other institution (except farms); individuals.

*Standard Industrial Classification Code:* All.

*Description of Affected Public:* U.S. companies or citizens investing overseas.

*Reporting Hours:* 2 hours per project.
*Number of Responses:* 50 per year.
*Federal Cost:* $5,000.
*Authority for Information Collection:* Section 231 and 234(b) and (c) of the Foreign Assistance Act of 1961, as amended.
*Abstract (Needs and Uses):* The OPIC form-247 is the document used by OPIC to determine investor's and project eligibility for political risk insurance when used in conjunction with a complete application for OPIC financing.

Dated: March 18, 2011.

**Nichole Cadiente,**

*Administrative Counsel, Department of Legal Affairs.*

[FR Doc. 2011–6928 Filed 3–25–11; 8:45 am]

BILLING CODE M

## OVERSEAS PRIVATE INVESTMENT CORPORATION

### Submission of OMB Review; Comments Request

**AGENCY:** Overseas Private Investment Corporation (OPIC).

**ACTION:** Request for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that the Agency has prepared an information collection request for OMB review and approval and has requested public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the Agency's burden estimate; the quality, practical utility and clarity of the information to be collected; and ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form under review, OPIC form-168 A & B, is summarized below, OMB–3420–0020.

**DATES:** Comments must be received by May 27, 2011.

**ADDRESSES:** Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency Submitting Officer. Comments on the form should be submitted to the Agency Submitting Officer.

**FOR FURTHER INFORMATION CONTACT:** Agency Submitting Officer: Essie Bryant, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

**SUMMARY OF FORM UNDER REVIEW:**
*Type of Request:* Revised Form.
*Title:* Expedited Screening Questionnaire (ESQ).
*Form Number:* OPIC–168 A & B.
*Frequency of Use:* OPIC-supported financial intermediaries will complete Form 168A and 168B for each company in which they propose to invest. Form could be used by any given OPIC-supported financial intermediary between 3–4 times per year depending on the number investments the financial intermediary intends to consummate in a given year.
*Type of Respondents:* Business or other for-profit institution.
*Standard Industrial Classification Codes:* All.
*Description of Affected Public:* U.S. companies or citizens investing overseas
*Reporting Hours:* 1 hour per project.
*Number of Responses:* 63 per year.
*Federal Cost:* $1,280.
*Authority for Information Collection:* Section 231 and 234(b) and (c) of the Foreign Assistance Act of 1961, as amended.
*Abstract (Needs and Uses):* Form 168A and 168B is the principal document used by OPIC to determine OPIC-supported financial intermediaries' compliance with OPIC economic, environmental, labor rights, and human rights policies.

Dated: March 18, 2011.

**Nichole Cadiente,**

*Administrative Counsel, Department of Legal Affairs.*

[FR Doc. 2011–6929 Filed 3–25–11; 8:45 am]

BILLING CODE M

## OVERSEAS PRIVATE INVESTMENT CORPORATION

### Submission of OMB Review; Comments Request

**AGENCY:** Overseas Private Investment Corporation (OPIC).

**ACTION:** Request for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that the Agency has prepared an information collection request for OMB review and approval and has requested public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the Agency's burden estimate; the quality, practical utility and clarity of the information to be collected; and ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form under review, OPIC form-162, is summarized below, OMB–3420–0019.

**DATES:** Comments must be received by May 27, 2011.

**ADDRESSES:** Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency Submitting Officer. Comments on the form should be submitted to the Agency Submitting Officer.

**FOR FURTHER INFORMATION CONTACT:** Agency Submitting Officer: Essie Bryant, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

*Summary of Form Under Review*

*Type of Request:* Revised Form.
*Title:* Application for Political Risk Insurance.
*Form Number:* OPIC–162.
*Frequency of Use:* Once per respondent.
*Type of Respondents:* Business or other institution (except farms); individuals.
*Description of Affected Public:* U.S. companies or citizens investing overseas.
*Reporting Hours:* 6.5 hours per project.
*Number of Responses:* 350 per year.
*Federal Cost:* $35,000.
*Authority for Information Collection:* Section 231 and 234(b) and (c) of the Foreign Assistance Act of 1961, as amended.
*Abstract (Needs and Uses):* The OPIC form-162 is completed by the OPIC-assisted investors annually. The questionnaire allows OPIC to assess the effects of OPIC-assisted projects on the U. S. economy and employment, as well as on the environment and economic development abroad.

Dated: March 18, 2011.

**Nichole Cadiente,**

*Administrative Counsel, Department of Legal Affairs.*

[FR Doc. 2011–6923 Filed 3–25–11; 8:45 am]

BILLING CODE M

## PEACE CORPS

### Notice of Request for a Revision of a Currently Approved Information Collection and Request for a New OMB Control Number

**ACTION:** 60-day notice and request for comments.

**SUMMARY:** The Peace Corps will be submitting the following information collection requests to the Office of Management and Budget (OMB) for Revision of a currently approved information collection. In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Peace Corps invites the general public to comment on the extension, with change, of currently approved information collection, Peace Corps Volunter Medical Application Health Status Review (OMB 0420–0510) which consists of three forms: The Health Status Review form (PC 1789); the Report of Medical Exam (PC 1790 S); and, Dental Exam (PC 1790). The Peace Corps wants to remove the Dental Exam (PC 1790) from OMB 0420–0510 and request a new OMB Control Number for Dental Exam (PC 1790). This process is conducted in accordance with 5 CFR 1320.10.

**DATES:** Comments must be submitted on or before May 27, 2011.

**ADDRESSES:** Comments should be addressed to Denora Miller, Freedom of Information Act Officer. Denora Miller can be contacted by telephone at 202–692–1236 or e-mail at *pcfr@peacecorps.gov*. E-mail comments must be made in text and not in attachments.

**FOR FURTHER INFORMATION CONTACT:** Denora Miller at Peace Corps address above.

**SUPPLEMENTARY INFORMATION:**

*Title:* Peace Corps Volunter Medical Application Health Status Review which consists of three forms: the Health Status Review form (PC 1789); the Report of Medical Exam (PC 1790 S); and, the Dental Exam (PC 1790).

*OMB Control Number:* 0420–0510.

*Type of Request:* Revision of a currently approved information collection. Peace Corps seeks to remove the Dental Exam (PC 1790) from this collection.

*Respondents:* Potential and current volunteers.

| | Health status review (PC 1789) | Report of medical evaluation (PC 1790 S) | Report of dental evaluation (PC 1790) |
|---|---|---|---|
| a. Estimated number of respondents | 9,700 | 5,000 | 5,000. |
| b. Estimated average burden per response | 45 minutes | 45 minutes | 45 minutes. |
| c. Frequency of response | One time | One time | One time. |
| d. Annual reporting burden | 7,275 hours | 3,750 hours | 3,750 hours. |
| e. Estimated annual cost to respondents | $175,546 | $90,488 | $90,488. |

*General description of collection:* The Peace Corps Act requires that Volunteers receive health examinations prior to their service. The information collected is required for consideration for Peace Corps Volunteer service. The Health Status Review is used to review the medical history of individual applicants. The Report of Medical Exam and the Report of Dental Exam are used by the examining physician and dentist both for applicants and for currently serving Volunteers. The results of these examinations are used to ensure that applicants for Volunteer service will, with reasonable accommodation, be able to serve in the Peace Corps without jeopardizing their health.

*Request for Comment:* Peace Corps invites comments on whether the proposed collections of information are necessary for proper performance of the functions of the Peace Corps, including whether the information will have practical use; the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the information to be collected; and, ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

This notice is issued in Washington, DC on March 21, 2011.

**Garry W. Stanberry,**

*Deputy Associate Director, Management.*

[FR Doc. 2011–7201 Filed 3–25–11; 8:45 am]

**BILLING CODE 6051–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comments Requested

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549.

*Extension:*

Rule 17a–3, SEC File No. 270–026, OMB Control No. 3235–0033.

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 Code of Federal Regulation citation to this collection of information is the following rule: 17 CFR 240.17a–3.

Rule 17a–3 under the Securities Exchange Act of 1934 establishes minimum standards with respect to business records that broker-dealers registered with the Commission must make and keep current. These records are maintained by the broker-dealer (in accordance with a separate rule), so they can be used by the broker-dealer and reviewed by Commission examiners, as well as other regulatory authority examiners, during inspections of the broker-dealer.

The collections of information included in Rule 17a–3 is necessary to provide Commission, self-regulatory organization and State examiners to conduct effective and efficient examinations to determine whether broker-dealers are complying with relevant laws, rules, and regulations. If broker-dealers were not required to create these baseline, standardized records, Commission, self-regulatory organization and State examiners could be unable to determine whether broker-dealers are in compliance with the Commission's antifraud and anti-manipulation rules, financial responsibility program, and other Commission, SRO, and State laws, rules, and regulations.

As of October 1, 2010, there were 5,057 broker-dealers registered with the Commission. The Commission estimates that these broker-dealer respondents incur a total burden of 2,723,970 hours per year to comply with Rule 17a–3. Approximately 1,464,777 of those hours are attributable to paragraph 17a–3(a)(17), and about 1,259,193 hours are attributable to the rest of Rule 17a–3.

In addition, Rule 17a–3 contains ongoing operation and maintenance costs for broker-dealers including the cost of postage to provide customers with account information, and costs for equipment and systems development. The Commission estimates that under Rule 17a–3(a)(17), approximately 35,627,958 customers will need to be provided with information regarding their account on a yearly basis. The Commission estimates that the postage costs associated with providing those customers with copies of their account record information would be approximately $10,688,387 per year (35,627,958 × $0.30). The staff believes that the ongoing equipment and systems development costs relating to Rule 17a–3 for the industry would be about $23,514,452 per year. Consequently, the total cost burden associated with Rule 17a–3 would be approximately $34,202,839 per year.

Rule 17a–3 does not contain record retention requirements. Compliance with the rule is mandatory. The required records are available only to the staffs of the Commission, self-regulatory organizations of which the broker-dealer is a member, and the States during examination, inspections and investigations.

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.

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 thirty days of this notice.

Dated: March 22, 2011.

**Cathy H. Ahn,**

*Deputy Secretary.*

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**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Rel. No. IC–29600; File No. 812–13791]**

## TIAA–CREF Life Insurance Company, et al.

March 22, 2011.

**AGENCY:** U.S. Securities and Exchange Commission ("Commission").

**ACTION:** Notice of application for an order under Section 26(c) of the Investment Company Act of 1940, as amended (the "1940 Act").

**APPLICANTS:** TIAA–CREF Life Insurance Company ("TC LIFE"), TIAA–CREF Life Separate Account VA–1 ("Separate Account VA–1"), and TIAA–CREF Life Separate Account VLI–1 ("Separate Account VLI–1") (together with, Separate Account VA–1, the "Separate Accounts") (all foregoing parties collectively referred to herein as the "Applicants").

**SUMMARY OF APPLICATION:** Applicants request an order of the Commission, pursuant to Section 26(c) of the Act, approving the substitution of shares of the Commodity Return Strategy Portfolio of the Credit Suisse Trust (the "Substituted Portfolio") for Class II shares of the Natural Resources Portfolio of The Prudential Series Fund (the "Replacement Portfolio") under certain variable life insurance policies and variable annuity contracts (the "Contracts"), each issued through a Separate Account.

**FILING DATE:** The application was filed on July 7, 2010 and amended and restated on November 3, 2010, January 20, 2011, and March 14, 2011.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on April 20, 2011, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants, c/o Ken Reitz, Associate General Counsel, TIAA–CREF Life Insurance Company, 8500 Andrew Carnegie Boulevard, Charlotte, North Carolina 28262–8500.

**FOR FURTHER INFORMATION CONTACT:** Michael L. Kosoff, Branch Chief, at (202) 551–6754 or Harry Eisenstein, Senior Special Counsel, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm*, or by calling (202) 551–8090.

### Applicants' Representations:

1. TC LIFE is a stock life insurance company organized under the laws of the State of New York on November 20, 1996. TC LIFE's executive office mailing address is 730 Third Avenue, New York, New York 10017.

2. TC LIFE established Separate Account VA–1 under New York state law on July 27, 1998. Separate Account VA–1 meets the definition of a "separate account" under the federal securities laws and is registered with the Commission under the Act as a unit investment trust (File No. 811–08963). Separate Account VA–1 consists of 47 subaccounts, each investing in a different investment portfolio and including subaccounts investing in both the Substituted Portfolio and Replacement Portfolio. The subaccount investing in the Substituted Portfolio was closed to additional payments and transfers of contract value on April 12, 2010. The assets of Separate Account VA–1 support Contracts (the "Separate Account VA–1 Contracts") that offer the Substituted Portfolio and the Replacement Portfolio as investment options, and interests in Separate Account VA–1 offered through such Contracts have been registered under the Securities Act of 1933 Act (the "1933 Act") on Form N–4 (File No. 333–145064). Other than the subaccounts investing in the Substituted Portfolio and the two other Credit Suisse portfolios, all of the Separate Account VA–1 subaccounts are currently available under the Separate Account VA–1 Contracts.

3. TC LIFE is the legal owner of the assets in Separate Account VA–1. Pursuant to the Separate Account VA–1 Contracts and prospectuses, TC LIFE reserves the right to substitute shares of one portfolio for shares of another. The terms of the Separate Account VA–1

Contracts and the prospectus for the Separate Account VA–1 Contracts also permit Contract owners to transfer contract value among the subaccounts. TC LIFE does not assess a transfer charge or limit the number of transfers permitted per year, although TC LIFE does have in place market timing policies and procedures that may operate to limit transfers.

4. TC LIFE established Separate Account VLI–1 under New York state law on May 23, 2001. Separate Account VLI–1 meets the definition of a "separate account" under the Federal securities laws and is registered with the Commission under the Act as a unit investment trust (File No. 811–10393). Separate Account VLI–1 consists of 47 subaccounts, each investing in a different investment portfolio and including subaccounts investing in both the Substituted Portfolio and the Replacement Portfolio. The subaccount investing in the Substituted Portfolio was closed to additional payments and transfers of contract value on April 12, 2010. The assets of Separate Account VLI–1 support Contracts (the "Separate Account VLI–1 Contracts") that offer the Substituted Portfolio and the Replacement Portfolio as investment options, and interests in Separate Account VLI–1 offered through such Contracts have been registered under the 1933 Act on Form N–6 (File Nos. 333–128699 and 333–151910). Other than the subaccounts investing in the Substituted Portfolio and the two other Credit Suisse portfolios, all of the Separate Account VLI–1 subaccounts are currently available under the Separate Account VLI–1 Contracts.

5. TC LIFE is the legal owner of the assets in Separate Account VLI–1. Pursuant to the Separate Account VLI–1 Contracts and prospectuses, TC LIFE reserves the right to substitute shares of one portfolio for shares of another. The terms of the Separate Account VLI–1 Contracts and the prospectuses for the Separate Account VLI–1 Contracts also permit Contract owners to transfer contract value among the subaccounts. TC LIFE currently does not assess a transfer charge or limit the number of transfers permitted per year, although TC LIFE does reserve the right to deduct a $25 charge for the thirteenth and each additional transfer during a policy year. Transfers due to dollar cost averaging, automatic account rebalancing, loans, changes in a subaccount's investment policy, or the initial reallocation from a money market subaccount do not count as transfers for the purpose of assessing the transfer charge. Contract owners also must transfer at least $250, or the total value in the allocation option being transferred, if less. TC LIFE also has in place market timing policies and procedures that may operate to limit transfers. TC LIFE also imposes certain restrictions on transfers from the fixed account.

6. Credit Suisse Trust was organized on March 15, 1995 under the laws of the Commonwealth of Massachusetts as a Massachusetts business trust. It is registered under the Act as a open-end management investment company (File No. 811–07261). Credit Suisse Trust currently consists of three portfolios, one of which—the Commodity Return Strategy Portfolio—is the Substituted Portfolio. The Credit Suisse Trust issues a separate series of shares of beneficial interest in connection with each portfolio and has registered such shares under the 1933 Act on Form N–1A (File No. 33–58125). Credit Suisse Asset Management, LLC ("Credit Suisse Management") serves as the investment adviser to each portfolio of the Credit Suisse Trust.

7. Aberdeen Investment Management acquired Credit Suisse Management in December 2009. Applicants state that they are concerned that the acquisition could result in a change in investment style so that the Substituted Portfolio may no longer serve the investment purposes for which it was selected as an investment option in the Contracts.

8. The Prudential Series Fund is organized as a Delaware statutory trust and is registered under the Act as an open-end management investment company (File No. 811–03623). The Prudential Series Fund currently consists of 19 separate portfolios, one of which—the Natural Resources Portfolio—is the Replacement Portfolio. The Prudential Series Fund issues a separate series of shares of beneficial interest in connection with each portfolio and has registered such shares under the 1933 Act on Form N–1A (File No. 2–80896). Prudential Investments LLC ("P.I."), a wholly-owned subsidiary of Prudential Financial, Inc., serves as the investment adviser to each portfolio of The Prudential Series Fund and receives an investment management fee from each portfolio it manages.

9. Prudential Mutual Fund Management, Inc. ("PMFM"), the former investment adviser to funds sponsored by Prudential Financial, Inc. and its affiliates, obtained an order from the Commission pursuant to Section 6(c) of the Act exempting it from Section 15(a) of the Act and Rule 18f–2 under the Act, with respect to subadvisory agreements (the "Manager of Managers Order").[1]

10. The Manager of Managers Order applies not only to the specific applicants but also to any future open-end management investment company advised by PMFM or a person controlling, controlled by, or under common control with PMFM, provided that such investment company operates in substantially the same manner as the applicant investment company and complies with the condition of the Manager of Managers Order. More particularly, Applicants believe that the Manager of Managers Order permits P.I. to enter into and materially amend investment subadvisory agreements with respect to The Prudential Series Fund without obtaining shareholder approval. For this reason, the Applicants believe that the relief granted in the Manager of Managers Order extends to the Natural Resources Portfolio.

11. Neither the Substituted Portfolio nor the Replacement Portfolio nor their investment advisers are affiliated with the Applicants.

12. The following charts set out the investment objective of the Substituted Portfolio and the Replacement Portfolio, as stated in their respective prospectuses dated May 1, 2010.

| Substituted portfolio | Replacement portfolio |
|---|---|
| **Credit Suisse Trust Commodity Return Strategy Portfolio** | **Prudential Series Fund Natural Resources Portfolio (Class II Shares)** |
| **Investment Objective** | **Investment Objective** |
| Seeks total return relative to the performance of the Dow Jones-UBS Commodity Index Total Return ("DJ–UBS Index"). | Seeks long-term growth of capital. |

[1] The Target Portfolio Trust and Prudential Mutual Fund Management, Inc., Act Rel. No. 22215 (Sept. 11, 1996) (Order), File No. 812–10208.

13. The following information sets out the current principal investment strategies of the Substituted Portfolio and the Replacement Portfolio, as stated in their respective prospectuses and/or Statements of Additional Information ("SAI") dated May 1, 2010.

| Substituted portfolio | Replacement portfolio |
|---|---|
| **Credit Suisse Trust Commodity Return Strategy Portfolio** | **Prudential Series Fund Natural Resources Portfolio (Class II Shares)** |
| **Principal Investment Strategies** | **Principal Investment Strategies** |
| The Portfolio is designed to achieve positive total return relative to the performance of the Dow Jones-UBS Commodity Index Total Return ("DJ–UBS Index"). The Portfolio intends to invest its assets in a combination of commodity-linked derivative instruments and fixed income securities. The Portfolio gains exposure to commodities markets by investing in structured notes whose principal and/or coupon payments are linked to the DJ–UBS Index and swap agreements on the DJ–UBS Index. | The Portfolio normally invests at least 80% of its net assets (plus any borrowings made for investment purposes) in common stocks and convertible securities of natural resource companies and securities that are related to the market value of some natural resource. |
| The Portfolio may invest up to 25% of its total assets in a wholly owned subsidiary of the Portfolio formed in the Cayman Islands (the "Subsidiary"), which has the same investment objective as the Portfolio and has a strategy of investing in commodity-linked swap agreements and other commodity-linked derivative instruments, futures contracts on individual commodities, or a subset of commodities and options on commodities. | Natural resource companies are companies that primarily own, explore, mine, process or otherwise develop natural resources, or supply goods and services to such companies. Natural resources generally include agricultural commodities, precious metals, such as gold, silver and platinum, ferrous and nonferrous metals, such as iron, aluminum and copper, strategic metals such as uranium and titanium, hydrocarbons such as coal and oil, timberland and undeveloped real property. |
| | The Portfolio seeks securities with an attractive combination of valuation versus peers, organic reserve and production growth, and competitive unit cost structure. |
| The Portfolio invests in a portfolio of fixed income securities normally having an average duration of one year or less, and emphasizes investment-grade fixed income securities. The Portfolio may invest without limit in U.S. dollar-denominated foreign securities and may invest up to 30% of its assets in non-U.S. dollar-denominated securities. | Up to 20% of the Portfolio's total assets may be invested in securities that are not asset-indexed or natural resource-related, including common stock, convertible stock, debt securities and money market instruments. |
| The Portfolio is a non-diversified mutual fund portfolio, meaning the Portfolio may invest a relatively high percentage of its assets in a small number of issuers[2]. | Up to 50% of the Portfolio's total assets may be invested in foreign equity and equity-related securities. |
| | The Portfolio may also pursue the following types of investment strategies and/or invest in the following types of securities: (i) alternative investment strategies—including derivatives—to try and improve the Portfolio's returns, to protect its assets or for short-term cash management. Derivatives includes options, futures contracts, swaps and swap options; (ii) forward foreign currency exchange contracts; (iii) purchase securities on a when-issued or delayed delivery basis; (iv) short sales against-the-box; (v) repurchase agreements. The Portfolio may participate with certain other portfolios of the Fund in a joint repurchase account under an order obtained from the SEC; and (vi) illiquid securities. |
| | Under normal circumstances, the Portfolio may invest up to 20% of its net assets in money market instruments. |
| | The Portfolio is a non-diversified mutual fund portfolio, meaning the Portfolio may invest a relatively high percentage of its assets in a small number of issuers.[3] The Portfolio will concentrate its investments (i.e., will invest at least 25% of its assets under normal circumstance) in securities of companies in the natural resources group of industries. |

14. The following sets out the principal investment risks of the Substituted Portfolio and the Replacement Portfolio, as stated in their respective prospectuses and/or SAIs dated May 1, 2010.

The Commodity Return Strategy Portfolio is subject to the following principal investment risks:

• *Commodity Risk.* The Portfolio's investment in commodity-linked derivative instruments may subject the Portfolio to greater volatility than investments in traditional securities, particularly if the instruments involve leverage. The value of commodity-linked derivative instruments may be affected by changes in overall market movements, commodity index volatility,

[2] The Commodity Return Strategy Portfolio's investments will be limited, however, in order to qualify as a "regulated investment company" for purposes of the Internal Revenue Code. The Portfolio has obtained a private letter ruling from the Internal Revenue Service confirming that the income produced by certain types of commodity-index linked structured notes constitutes qualifying income for purposes of qualifying as a "regulated investment company." To qualify, the Portfolio complies with certain requirements, including limiting its investments so that at the close of each quarter of the taxable year (i) not more than 25% of the market value of its total assets are invested in the securities of a single issuer, and (ii) with respect to 50% of the market value of its total assets, not more than 5% of the market value of its total assets are invested in the securities of a single issuer and the portfolio does not own more than 10% of the outstanding voting securities of a single issuer.

[3] The Natural Resources Portfolio may not purchase any security (other than obligations of the U.S. government, its agencies or instrumentalities) if, as a result of such purchase, 25% or more of the Portfolio's total assets (determined at the time of investment) would be invested in any one industry; provided, however, that the Portfolio will concentrate its investment in securities of companies in the natural resources group of industries.

changes in interest rates, or factors affecting a particular industry or commodity, such as drought, floods, weather, livestock disease, embargoes, tariffs, and international economic, political, and regulatory developments. Use of leveraged commodity-linked derivatives creates an opportunity for increased return but, at the same time, creates the possibility for greater loss (including the likelihood of greater volatility of the portfolio's net asset value), and there can be no assurance that the portfolio's use of leverage will be successful.

• *Correlation Risk.* Changes in the value of a hedging instrument may not match those of the investment being hedged. In addition, commodity-linked structured notes may be structured in a way that results in the portfolio's performance diverging from the DJ–UBS Index, perhaps materially. For example, a note can be structured to limit the loss or the gain on the investment, which would result in the portfolio not participating in declines or increases in the DJ–UBS Index that exceed the limits.

• *Credit Risk.* The issuer of a security or the counterparty to a contract, including derivatives contracts, may default or otherwise become unable to honor a financial obligation.

• *Derivatives Risk.* Derivatives are financial contracts whose value depends on, or is derived from, the value of an underlying asset, reference rate, or index. The Portfolio typically uses derivatives as a substitute for taking a position in the underlying asset and/or as part of a strategy designed to reduce exposure to other risks, such as interest rate or currency risk. The Portfolio may also use derivatives for leverage. The Portfolio's use of derivative instruments, particularly commodity-linked derivatives, involves risks different from, or possibly greater than, the risks associated with investing directly in securities and other traditional investments. Derivatives are subject to a number of risks, such as commodity risk, correlation risk, liquidity risk, interest-rate risk, market risk, and credit risk. Also, suitable derivative transactions may not be available in all circumstances and there can be no assurance that the portfolio will engage in these transactions to reduce exposure to other risks that would be beneficial.

• *Exposure Risk.* There is a risk associated with investments (such as derivatives) or practices (such as short selling) that increase the amount of money the portfolio could gain or lose on an investment. Exposure risk could multiply losses generated by a derivative or practice used for hedging purposes. Such losses should be substantially offset by gains on the hedged investment. However, while hedging can reduce or eliminate losses, it can also reduce or eliminate gains. To the extent that a derivative or practice is not used as a hedge, the Portfolio is directly exposed to its risks. Gains or losses from speculative positions in a derivative may be much greater than the derivative's original cost. For example, potential losses from writing uncovered call options and from speculative short sales are unlimited.

• *Extension Risk.* An unexpected rise in interest rates may extend the life of a fixed income security beyond the expected payment time, typically reducing the security's value.

• *Focus Risk.* The Portfolio will be exposed to the performance of commodities in the DJ–UBS Index, which may from time to time have a small number of commodity sectors (*e.g.,* energy, metals or agricultural) representing a large portion of the index. As a result, the Portfolio may be subject to greater volatility than if the index were more broadly diversified among commodity sectors.

• *Foreign Securities Risk.* A portfolio that invests outside the United States carries additional risks. Fluctuations in exchange rates between the U.S. dollar and foreign currencies may negatively affect an investment. Adverse changes in exchange rates may erode or reverse any gains produced by foreign-currency denominated investments and may widen any losses. Although the Portfolio may seek to reduce currency risk by hedging part or all of its exposure to various foreign currencies, it is not required to do so. Key information about an issuer, security, or market may be inaccurate or unavailable. Moreover, foreign governments may expropriate assets, impose capital or currency controls, impose punitive taxes, or nationalize a company or industry. Any of these actions could have a severe effect on security prices and impair the Portfolio's ability to bring its capital or income back to the U.S. Other political risks include: economic policy changes, social and political instability, military action and war.

• *Interest Rate Risk.* Changes in interest rates may cause a decline in the market value of an investment. With bonds and other fixed-income securities, a rise in interest rates typically causes a fall in values, while a fall in interest rates typically causes a risk in values.

• *Liquidity Risk.* Certain portfolio securities, such as commodity-linked notes and swaps, may be difficult or impossible to sell at the time and the price that the Portfolio would like. The Portfolio may have to lower the price, sell other securities instead, or forgo an investment opportunity. Any of these could have a negative effect on portfolio management or performance.

• *Market Risk.* The market value of a security may fluctuate, sometimes rapidly and unpredictably. These fluctuations, which are often referred to as "volatility," may cause a security to be worth less than it was worth at an earlier time. Market risk may affect a single issuer, industry, commodity, sector of the economy, or the market as a whole. Market risk is common to most investments, including: stocks, bonds and commodities, and the mutual funds that invest in them.

• *Non-diversified Status.* The Portfolio is considered a non-diversified investment company under the Act and is permitted to invest a greater proportion of its assets in the securities of a smaller number of issuers. As a result, the portfolio may be subject to greater volatility with respect to its portfolio securities than a fund that is diversified.

• *Subsidiary Risk.* By investing in the Credit Suisse Cayman Commodity Fund II, Ltd. (the "Subsidiary"), the Portfolio is indirectly exposed to the risks associated with the Subsidiary's investments. The derivatives and other investments held by the Subsidiary are generally similar to those that are permitted to be held by the Portfolio and are subject to the same risks that apply to similar investments if held directly by the Portfolio. There can be no assurance that the investment objective of the Subsidiary will be achieved. The Subsidiary is not registered under the Act and is not subject to all the investor protections of the Act. However, the Portfolio wholly owns and controls the Subsidiary, and the Portfolio and the Subsidiary are both managed by Credit Suisse Asset Management, LLC, making it unlikely that the Subsidiary will take action contrary to the risks of the Portfolio and its shareholders. Changes in the laws of the United States and/or the Cayman Islands could result in the inability of the Portfolio and/or the Subsidiary to operate as it does currently and could adversely affect the Portfolio.

• *Tax Risk.* Any income the Portfolio derives from direct investments in commodity-linked swaps or certain other commodity-linked derivatives must be limited to a maximum of 10% of the portfolio's gross income in order for the portfolio to maintain its pass through tax status. The Portfolio has obtained a private letter ruling from the

Internal Revenue Service (the "IRS") confirming that the income produced by certain types of structured notes constitutes "qualifying income" under the Internal Revenue Code. In addition, the IRS has issued a private letter ruling to the Portfolio confirming that income derived from the Portfolio's investment in its Subsidiary will also constitute qualifying income to the Portfolio. Based on such rulings, the Portfolio seeks to gain exposure to the commodity markets primarily through investments in commodity index-linked notes and, through investments in the Subsidiary, commodity-linked swaps and commodity futures.

The Natural Resources Portfolio is subject to the following principal investment risks:

• *Derivatives Risk.* The use of derivatives involves a variety of risks. There is a risk that the counterparty on a derivative transaction will be unable to honor its financial obligation to the Portfolio. Certain derivatives and related trading strategies create debt obligations similar to borrowings and, therefore, create leverage which can result in losses to a Portfolio that exceed the amount the Portfolio originally invested. Certain exchange-traded derivatives may be difficult or impossible to buy or sell at the time that the seller would like or at the price that the seller believes the derivative is currently worth. Privately negotiated derivatives may be difficult to terminate or otherwise offset. Derivatives used for hedging may reduce losses but also reduce or eliminate gains and cause losses if the market moves in a manner different from that anticipated by the Portfolio. Furthermore, commodity-linked derivative instruments may be more volatile than the prices of investments in traditional equity and debt securities.

• *Equity Securities Risk.* There is a risk that the value or price of a particular stock or other equity or equity-related security owned by the Portfolio could go down. In addition to an individual stock losing value, the value of the equity markets or a sector of those markets in which the Portfolio invests could go down.

• *Expense Risk.* The actual cost of investing in the Portfolio may be higher than the expenses shown in the Annual Portfolio Operating Expenses.

• *Foreign Investment Risk.* Investment in foreign securities generally involves more risk than investing in securities of U.S. issuers. Changes in currency exchange rates may affect the value of foreign securities held by the Portfolio. Securities of issuers located in emerging markets tend to have volatile prices and may be less liquid than investments in more established markets. Moreover, foreign markets generally are more volatile than U.S. markets, are not subject to regulatory requirements comparable to those in the U.S., and are subject to differing custody and settlement practices. Foreign financial reporting standards usually differ from those in the U.S., and foreign exchanges are smaller and less liquid than the U.S. market. Political developments may adversely affect the value of a Portfolio's foreign securities, and foreign holdings may be subject to special taxation and limitations on repatriating investment proceeds.

• *Industry/Sector Risk.* A portfolio that invests in a single market sector or industry can accumulate larger positions in a single issuer or an industry sector. As a result, the Portfolio's performance may be tied more directly to the success or failure of a small group of portfolio holdings.

• *Liquidity and Valuation Risk.* From time to time, the Portfolio may hold one or more securities for which there are no or few buyers and sellers or which are subject to limitations on transfer. The Portfolio also may have difficulty disposing of those securities at the values determined by the Portfolio for the purpose of determining the Portfolio's net asset value, especially during periods of significant net redemptions of Portfolio shares.

• *Market and Management Risk.* Markets in which the Portfolio invests may experience volatility and go down in value, and possibly sharply and unpredictably. All decisions by an adviser require judgment and are based on imperfect information. Additionally, the investment techniques, risk analysis and investment strategies used by an adviser in making investment decisions for the Portfolio may not produce the desired results.

• *Non-diversification Risk.* As a non-diversified portfolio, the Portfolio may hold larger positions in single issuers than a diversified fund. Because the Portfolio is not required to meet diversification requirements that are applicable to some funds, there is an increased risk that the Portfolio may be adversely affected by the performance of relatively few securities or the securities of a single issuer.

15. The following charts compare the investment management fees and total operating expenses (before and after any waivers and reimbursements) for the year ended December 31, 2010, expressed as an annual percentage of average daily net assets, of the Substituted Portfolio and the Replacement Portfolio.

| | Substituted portfolio | Replacement portfolio |
|---|---|---|
| | Credit Suisse Trust commodity return strategy portfolio | Prudential series fund natural resources portfolio (Class II) |
| Investment Management Fees | 0.50% [4] | 0.45% |
| Distribution and Service (12b–1) Fee | 0.25% | 0.25% |
| Administration Fees | None | None |
| Other Expenses | 0.34% | 0.20% |
| Total Operating Expenses | 1.09% | 0.90% |
| Less Expense Waivers and Reimbursements | 0.14% [5] | N/A |
| Total Net Operating Expenses | 0.95% | 0.90% |

16. The following charts compare the average annual total returns of the Substituted Portfolio and the Replacement Portfolio for the one-year, five-year, and ten-year (or since inception) periods ended December 31, 2010.

[4] Management fee of the Commodity Return Strategy Portfolio and the Credit Suisse Cayman Commodity Fund II, Ltd. (the "Subsidiary").

[5] Credit Suisse Management has voluntarily agreed to waive fees and reimburse expenses so that total operating expenses will not exceed 1.05% of the portfolio's average daily net assets.

| | Substituted portfolio | Replacement portfolio |
|---|---|---|
| | Credit Suisse Trust commodity return strategy portfolio | Prudential fund series natural resources portfolio |
| Average Annual Total Return for One Year | +16.66% | +27.48% |
| Average Annual Total Return for Five Years | N/A | 13.61% |
| Average Annual Total Return for Ten Years or, if less, Since Inception. | 2.99% (Date of Inception: February 28, 2006) | +20.28% (Date of Inception: April 28, 2005) |

17. The following charts compare the levels of net assets (rounded to the nearest thousand) of the Substituted Portfolio and the Replacement Portfolio on December 31, 2010 and the prior four calendar years, as well as the levels of net assets of the Separate Accounts invested in the Substituted Portfolio for the same time period and the percentage of the Substituted Portfolio's total net assets represented by the investments of the Separate Accounts.

| | Substituted portfolio | | | Replacement portfolio |
|---|---|---|---|---|
| | Credit Suisse trust commodity return strategy portfolio | | | Prudential fund series natural resources portfolio |
| | Total separate account assets invested in the portfolio | % of portfolio total net assets represented by separate account investment | Total net assets (in thousands) | Total net assets (in thousands) |
| On 12/31/2010 | $1,671,571 | 1.34% | $124,550 | $1,360,056 |
| On 12/31/2009 | 1,713,589 | 1.58% | 108,211 | 1,079,600 |
| On 12/31/2008 | 424,299 | 0.61% | 69,919 | 677,400 |
| On 12/31/2007 | 21,813 | 0.04% | 56,624 | 1,669,900 |
| On 12/31/2006 | 287 | 0.0002% | 145,907 [6] | 1,193,000 |
| On 12/31/2005 | N/A | N/A | N/A | 1,016,300 |

18. Applicants represent that the Substitution is part of an overall business goal of TC LIFE to make the Contracts more attractive to Contract owners and to assure a consistency in the range of overall investment options provided by the Contracts. Pursuant to this goal, TC LIFE has engaged in a thorough review of the efficiencies and structures of all of the investment options it offers under the Contracts. This review involved an evaluation of the investment objectives and strategies, asset sizes, expense ratios, investment performance, investment process, and investment teams responsible for the management of each investment option, with a view to past performance as well as future expectations. Based on this evaluation, TC LIFE has determined that the Substituted Portfolio warrants replacement. In particular, due to a recent change in the management of the Substituted Portfolio that resulted in changes in the investment strategies of two other Credit Suisse portfolios offered in the Contracts, TC LIFE believes there may be some question regarding the continuity of management, the application of a continuing investment process, and the dedication of resources to the Substituted Portfolio.

19. Applicants represent that TC LIFE reviewed all of the underlying fund options with the goal of ensuring that Contract owners would be provided with investment options under their Contracts following the Substitution that are similar to the investment options under their Contracts before the Substitution. Based in particular on a better performance record and lower total expenses of the Replacement Portfolio, TC LIFE believes that the adviser to the Replacement Portfolio is better positioned overall to provide exposure to the asset classes that were originally selected as well as being able to offer the potential for consistent above-average performance for the Portfolio than is the adviser to the Substituted Portfolio. The Replacement Portfolio also is considerably larger than the Substituted Portfolio, thus offering better economies of scale with a larger asset base over which to spread the various portfolio costs ultimately passed on to Contract owners. As such, TC LIFE believes that effecting the Substitution will provide Contract owners with a Replacement Portfolio that has a comparable investment objective to the Substituted Portfolio but is, overall, less expensive, consistent with the desired asset class exposure, better positioned to provide consistent above-average performance, and with greater expectations for growth. Moreover, TC LIFE maintains that the investment objective and policies of the Replacement Portfolio are sufficiently similar to those of the Substituted Portfolio so that Contract owners will have reasonable continuity in investment expectations.

20. Applicants seek the Commission's approval under Section 26(c) to engage in the substitution transaction described below. Pursuant to its authority under the respective Contracts and the prospectuses describing the same, and subject to the approval of the Commission under Section 26(c) of the Act, TC LIFE proposes to substitute shares of the Commodity Return Strategy Portfolio of the Credit Suisse Trust for Class II Shares of the Natural Resources Portfolio of The Prudential Series Fund.

21. Applicants represent that TC LIFE will effect the Substitution as soon as practicable following the issuance of the requested order as follows. As of the effective date of the Substitution (the "Effective Date"), shares of the Substituted Portfolio will be redeemed for cash and that cash will be used to purchase shares of the Replacement Portfolio. Redemption requests and purchase orders will be placed simultaneously so that contract values will remain fully invested at all times. All redemptions of shares of the Substituted Portfolio and purchases of shares of the Replacement Portfolio will be effected in accordance with Section 22(c) of the Act and Rule 22c–1 thereunder. The Substitution will take place at relative net asset value as of the Effective Date with no change in the

[5] Credit Suisse Management has voluntarily agreed to waive fees and reimburse expenses so that total operating expenses will not exceed 1.05% of the portfolio's average daily net assets.

amount of any Contract owner's contract value or death benefit or in the dollar value of his or her investments in any of the subaccounts.

22. Applicants represent that contract values attributable to investments in the Substituted Portfolio will be transferred to the Replacement Portfolio without charge (including sales charges or surrender charges) and without counting toward the number of transfers that may be permitted without charge. Contract owners will not incur any additional fees or charges as a result of the Substitution, nor will their rights or TC LIFE's obligations under the Contracts be altered in any way, and the Substitution will not change Contract owners' insurance benefits under the Contracts. All expenses incurred in connection with the Substitution, including legal, accounting, transactional, and other fees and expenses, including brokerage commissions, will be paid by TC LIFE. In addition, the Substitution will not impose any tax liability on Contract owners. The Substitution will not cause the Contract fees and charges currently paid by existing Contract owners to be greater after the Substitution than before the Substitution. TC LIFE will not exercise any right it may have under the Contracts to impose a transfer charge or restrictions on transfers under the Contracts for the period beginning on the date the initial application was filed with the Commission through at least thirty (30) days following the Effective Date for transfers of contract value from the subaccount investing in the Substituted Portfolio (before the Substitution) or the Replacement Portfolio (after the Substitution) to one or more other subaccount(s).[7]

23. The Applicants represent that they will not receive, for three years from the date of the Substitution, any direct or indirect benefits from the Replacement Portfolio, its advisors or underwriters (or their affiliates), in connection with assets attributable to Contracts affected by the Substitution, at a higher rate than Applicants have received from the Substituted Portfolio, its advisors or underwriters (or their affiliates), including without limitation Rule 12b–1 fees, shareholder service, administration, or other service fees, revenue sharing, or other arrangements in connection with such assets. Applicants represent that the Substitution and the selection of the Replacement Portfolio were not motivated by any financial consideration paid or to be paid to TC LIFE or its affiliates by the Replacement Portfolio, its advisors, underwriters, or their respective affiliates.

24. The Applicants assert that the procedures to be implemented are sufficient to assure that each Contract owner's cash values immediately after the Substitution shall be equal to the cash value immediately before the Substitution.

25. The Applicants represent that Existing Contract owners as of the date the initial application was filed, and new Contract owners who have purchased or who will purchase a Contract subsequent to that date but prior to the Effective Date, have been or will be notified of the proposed Substitution by means of a prospectus or prospectus supplement for each of the Contracts ("Pre-Substitution Notice"). The Pre-Substitution Notice:

- States that the Applicants filed the application to seek approval of the Substitution;
- Sets forth the anticipated Effective Date;
- Explains that contract values attributable to investments in the Substituted Portfolio would be transferred to the Replacement Portfolio on the Effective Date; and
- States that, from the date the initial application was filed with the Commission through the date thirty (30) days after the Substitution, Contract owners may transfer contract value from the subaccount investing in the Substituted Portfolio (before the Substitution) or the Replacement Portfolio (after the Substitution) to one or more other subaccount(s) without a transfer charge and without that transfer counting against their contractual transfer limitations.

Further, all Contract owners will have received a copy of the most recent prospectus for the Replacement Portfolio prior to the Substitution.

26. Finally, the Applicants represent that within five (5) days following the Substitution, Contract owners affected by the Substitution will be notified in writing that the Substitution was carried out. This notice will restate the information set forth in the Pre-Substitution Notice, and will also explain that the contract values attributable to investments in the Substituted Portfolio were transferred to the Replacement Portfolio without charge (including sales charges or surrender charges) and without counting toward the number of transfers that may be permitted without charge.

27. Applicants represent that Section 26(c) of the Act prohibits any depositor or trustee of a unit investment trust that invests exclusively in the securities of a single issuer from substituting the securities of another issuer without the approval of the Commission. Section 26(c) provides that such approval shall be granted by order of the Commission, if the evidence establishes that the substitution is consistent with the protection of investors and the purposes of the Act. Section 26(c) was intended to provide for Commission scrutiny of proposed substitutions which could, in effect, force shareholders dissatisfied with the substitute security to redeem their shares, thereby possibly incurring a loss of the sales load deducted from initial premium, an additional sales load upon reinvestment of the proceeds of redemption, or both.[8] The section was designed to forestall the ability of a depositor to present holders of interest in a unit investment trust with situations in which a holder's only choice would be to continue an investment in an unsuitable underlying security, or to elect a costly and, in effect, forced redemption. For the reasons described below, the Applicants submit that the Substitution meets the standards set forth in Section 26(c) and that, if implemented, the Substitution would not raise any of the aforementioned concerns that Congress intended to address when the Act was amended to include this provision. In addition, the Applicants submit that the proposed Substitution meets the standards that the Commission and its Staff have applied to substitutions that have been approved in the past.

28. Applicants represent that the replacement of the Substituted Portfolio with the Replacement Portfolio is consistent with the protection of Contract owners and the purposes fairly intended by the policy and provisions of the Act and, thus, meets the standards necessary to support an order pursuant to Section 26(c) of the Act.

29. The Applicants assert that the investment objective and principal investment strategies of the Replacement Portfolio are substantially similar to those of the Substituted Portfolio. The Commodity Return Strategy Portfolio seeks total return relative to the performance of the DJ–UBS Index, and the Natural Resources Portfolio seeks long-term growth of capital. Applicants submit that these are substantially similar investment objectives and, while the Portfolios' principal investment strategies are

[7] One exception to this would be restrictions that TIAA–CREF may impose to prevent or restrict "market timing" activities by Contract owners or their agents.

[8] House Comm. Interstate Commerce, Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong. 2d Session 337 (1966).

somewhat different, there is nonetheless a high correlation between the two sets of investment strategies. The Commodity Return Strategy Portfolio is designed to achieve positive total return relative to the performance of the DJ–UBS Index by investing in commodity-linked derivative instruments and fixed income securities, whereas the Natural Resources Portfolio normally invests at least 80% of its net assets in common stocks and convertible securities of natural resource companies and securities that are related to the market value of some natural resource. However, the companies in which the Natural Resources Portfolio invests derive the vast majority of their respective revenue from commodities. In other words, the valuation of the companies in which the Natural Resources Portfolio invests move directly with the underlying commodities that represent these firms' primary businesses. As such, there is a high correlation between the Natural Resources Portfolio's performance to the price changes in the DJ–UBS Index which underlies the Commodity Return Strategy Portfolio's investment strategy. This high correlation is demonstrated by comparing the performance of investments in natural resources companies (as measured by the S&P North American Natural Resources Index) and commodities (as measured by DJ–UBS Index), for which the correlation (as reported by Morningstar) exceeds 80% over both the trailing three-year and five-year periods. Given the high correlation between the performance of the Natural Resources Portfolio and the Commodity Return Strategy Portfolio, the Applicants believe that the Natural Resources Portfolio is a suitable replacement for the Commodity Return Strategy Portfolio. While the holdings of companies in which the Natural Resources Portfolio invests, with their resultant capital structures, tax exposures, and idiosyncratic risks, do not provide a perfect correlation to a spot commodities index, Applicants believe the same is true with a portfolio comprised of structured notes tied to commodities futures. Accordingly, the Applicants believe that the close approximation of the Natural Resources Portfolio to the commodities sector exposure supports a determination that the Natural Resources Portfolio will provide Contract owners currently invested in the Commodity Return Strategy Portfolio an acceptable level of exposure to the commodities sector and, given the uncertainty posed by the change of control of management of the Commodity Return Strategy Portfolio, is a reasonable substitution for the Commodity Return Strategy Portfolio.

30. The Applicants represent that, although not identical, the principal investment risks of the Natural Resources Portfolio are comparable to those of the Commodity Return Strategy Portfolio. Both Portfolios use derivatives, exposing each Portfolio to a number of specific derivative-related risks such as the possibility that the counterparty to the transaction is unable to honor its financial obligation; using derivatives may also subject each Portfolio to other more general risks including commodity risk, correlation risk, liquidity risk, interest-rate risk, market risk, and credit risk. Because both Portfolios may invest in foreign securities, they also are subject to increased risk relating to currency exchange rate fluctuations, price volatility, adverse political developments, etc. Both Portfolios also are subject to market risk relating to increased and/or unpredictable fluctuations in the market value of the securities in which they invest, as well as to liquidity risk. Finally, both the Natural Resources Portfolio and the Commodity Return Strategy Portfolio are non-diversified investment companies, and therefore may invest in fewer issuers and be more greatly affected by the performance of relatively few securities. Further, the Applicants do not believe that overall the Natural Resources Portfolio is exposed to greater risk than the Commodity Return Strategy Portfolio, despite the fact that certain enumerated risks of the Natural Resources Portfolio are not explicitly detailed as principal investment risks in the prospectus for the Commodity Return Strategy Portfolio. For example, the Applicants believe that the Commodity Return Strategy Portfolio, like the Natural Resources Portfolio, is subject to commodity price risk, expense risk, industry/sector risk, and valuation risk—all typical risks that are generally present for most portfolios that invest in the commodity and natural resources asset categories. Moreover, the Natural Resources Portfolio is not subject to the specific derivative, tax, and focus risks the Commodity Return Strategy Portfolio is exposed to as a result of the latter's primary investment in commodity-linked instruments. Lastly, because the Commodity Return Strategy Portfolio invests in the Credit Suisse Cayman Commodity Fund II, Ltd., the Portfolio also is indirectly exposed to the risks associated with that portfolio's investments.

31. The Applicants represent that the investment management fee of the Natural Resources Portfolio is lower than that of the Commodity Return Strategy Portfolio, and each Portfolio imposes a 12b–1 fee of 0.25%. Moreover, total operating expenses of the Natural Resources Portfolio were lower than those of the Commodity Return Strategy Portfolio as of December 31, 2010.

32. The Applicants represent that the Natural Resources Portfolio outperformed the Commodity Return Strategy Portfolio for the one-year period ending December 31, 2010 and since inception. In addition, the assets of the Natural Resources Portfolio have been consistently (and significantly) higher than those of the Commodity Return Strategy Portfolio as of December 31, 2010 and for each of the prior four calendar years.

33. For purposes of the approval sought pursuant to Section 26(c) of the Act, the Applicants represent that the Substitution will not be completed unless all of the following conditions are met.

- The Commission shall have issued an order approving the Substitution under Section 26(c) of the Act as necessary to carry out the transactions described in the Application.
- Each Contract owner will have been sent (i) prior to the Effective Date, a copy of the effective prospectus for the Replacement Portfolio, (ii) prior to the Effective Date, a Pre-Substitution Notice describing the terms of the Substitution and the rights of the Contract owners in connection with the Substitution, and (iii) within five (5) days after the Substitution occurs, a notice informing Contract owners affected by the Substitution that the Substitution was carried out (this notice will restate the information set forth in the Pre-Substitution Notice, and also explain that the contract values attributable to investments in the Substituted Portfolio were transferred to the Replacement Portfolio without charge (including sales charges or surrender charges) and without counting toward the number of transfers that may be permitted without charge).
- The Applicants have satisfied themselves that (i) The Contracts allow the substitution of the Portfolios in the manner contemplated by the Substitution and related transactions described herein, (ii) the transactions can be consummated as described in the Application under applicable insurance laws, and (iii) any applicable regulatory requirements in each jurisdiction where the Contracts are qualified for sale have

been complied with to the extent necessary to complete the transaction.

34. The Applicants acknowledge that reliance on exemptive relief, if granted, depends upon compliance with all of the representations and conditions set forth in the Application.

*Conclusion:*

Applicants assert that, for all the reasons stated in the Applicant, the Substitution is consistent with the protection of investors and the purposes fairly intended by the policy of the Contracts and provisions of the Act and that the requested order should be granted.

For the Commission, by the Division of Investment Management pursuant to delegated authority.

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7152 Filed 3–25–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold an Open Meeting on March 30, 2011 at 10 a.m., in the Auditorium, Room L–002.

The subject matters of the Open Meeting will be:

Item 1: The Commission will consider whether to propose joint rules with other Agencies to implement Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to credit risk retention by securitizers of asset-backed securities.

Item 2: The Commission will consider whether to propose a new rule and rule amendments to implement Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires the Commission to direct the national securities exchanges and national securities associations to adopt certain listing standards with respect to compensation committees and compensation advisers. Section 952 also requires the Commission to adopt new disclosure rules concerning the use of compensation consultants and conflicts of interest.

Commissioner Casey, as duty officer, determined that no earlier notice thereof was possible.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: March 24, 2011.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–7342 Filed 3–24–11; 4:15 pm]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64108; File No. SR–Phlx–2011–35]**

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC To Extend the FLEX No Minimum Value Pilot Program

March 22, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on March 15, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to extend a pilot program that eliminates minimum value sizes for FLEX index options and FLEX equity options (together known as "FLEX Options").[3]

The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b-4(f)(6)(iii).[4]

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to amend Phlx Rule 1079 (FLEX Index, Equity and Currency Options) to extend a pilot program that eliminates minimum value sizes for FLEX Options (the "Pilot Program" or "Pilot").

Rule 1079 deals with the process of listing and trading FLEX equity, index, and currency options on the Exchange. Rule 1079(a)(8)(A) currently sets the minimum opening transaction value size in the case of a FLEX Option in a newly established (opening) series if there is no open interest in the particular series when an Request-for-Quote ("RFQ") is submitted (except as provided in Commentary .01 to Rule 1079): (i) $10 million underlying equivalent value, respecting FLEX market index options, and $5 million underlying equivalent value respecting FLEX industry index options; [5] (ii) the lesser of 250 contracts or the number of contracts overlying $1 million in the underlying securities, with respect to FLEX equity options (together the "minimum value size").[6]

Presently, Commentary .01 to Rule 1079 states that by virtue of the Pilot Program ending March 28, 2011, there shall be no minimum value size requirements for FLEX Options as noted

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In addition to FLEX Options, FLEX currency options are also traded on the Exchange. These flexible index, equity, and currency options provide investors the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices; and may have expiration dates within five years. *See* Rule 1079. FLEX currency options traded on the Exchange are also known as FLEX World Currency Options ("WCO") or Foreign Currency Options ("FCO"). The pilot program discussed herein does not encompass FLEX currency options.

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] Market index options and industry index options are broad-based index options and narrow-based index options, respectively. *See* Rule 1000A(b)(11) and (12).

[6] Subsection (a)(8)(A) also provides a third alternative: (iii) 50 contracts in the case of FLEX currency options. However, this alternative is not part of the Pilot Program.

in subsections (a)(8)(A)(i) and (a)(8)(A)(ii) above.[7]

The Exchange now proposes to extend the Pilot Program for a period of one year ending March 30, 2012.[8]

The Exchange believes that there is sufficient investor interest and demand in the Pilot Program to warrant extension for an additional year. The Exchange believes that the Pilot Program has provided investors with additional means of managing their risk exposures and carrying out their investment objectives. Extension of the Pilot Program would continue to provide greater opportunities for traders and investors to manage risk through the use of FLEX Options, including investors that may otherwise trade in the unregulated over the counter ("OTC") market where similar size restrictions do not apply.[9]

In support of the proposed extension of the Pilot Program, the Exchange has submitted to the Commission a Pilot Program Report ("Report") that provides an analysis of the Pilot Program covering the period during which the Pilot has been in effect. This Report includes: (i) data and analysis on the open interest and trading volume in (a) FLEX equity options that have an opening transaction with a minimum size of 0 to 249 contracts and less than $1 million in underlying value; (b) FLEX index options that have an opening transaction with a minimum opening size of less than $10 million in underlying equivalent value; and (ii) analysis of the types of investors that initiated opening FLEX Options transactions (*i.e.,* institutional, high net worth, or retail). The Report has been submitted to the Commission on a confidential basis.

If, in the future, the Exchange proposes an additional extension of the Pilot Program, or should the Exchange propose to make the Pilot Program permanent, the Exchange will submit, along with any filing proposing such amendments to the Pilot Program, an additional Pilot Program Report covering the period during which the Pilot Program was in effect and including the details referenced in the prior paragraph. The Exchange will also provide the nominal dollar value of each trade. The Pilot Program Report would be submitted to the Commission at least two months prior to the expiration date of the Pilot Program and would be provided on a confidential basis.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[10] in general, and furthers the objectives of Section 6(b)(5) of the Act[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. Specifically, the Exchange believes that the proposed extension of the Pilot Program, which eliminates the minimum value size applicable to FLEX Options, would provide greater opportunities for investors to manage risk through the use of FLEX Options. The Exchange notes that it has not experienced any adverse market effects with respect to the Pilot Program.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13] Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) (iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[14] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay to permit the current pilot to continue uninterrupted. The Commission finds that waiver of the operative delay is consistent with the protection of investors and the public interest. The Commission notes in waiving the 30-day operative delay that Phlx's original pilot was published for comment in the **Federal Register** and that the Commission did not receive any comments on the proposed rule change.[16]

Further, Phlx is proposing to extend the existing pilots on the same terms and conditions as they were originally approved by the Commission. This includes, as described in more detail above, a representation that Phlx will continue to monitor the pilot and submit certain interim reports during the extended pilot period, as well as a final report covering the pilot period should the Exchange decide to extend or file for permanent approval of the pilot. Finally, the Commission notes that the Exchange has represented that it has not experienced any adverse market effects with respect to the pilot program.

Based on the above, the Commission finds that it is consistent with investor protection and the public interest to waive the 30-day operative delay in accordance with Rule 19b–4(f)(6)(iii) so that the pilot can continue on an uninterrupted basis, and therefore

[7] *See* Securities Exchange Act Release No. 62900 (September 13, 2010), 75 FR 57098 (September 17, 2010)(SR–Phlx–2010–123) (notice of filing and immediate effectiveness of proposal to institute Pilot Program).

[8] The Exchange notes that any positions established under this Pilot would not be impacted by the expiration of the Pilot. For example, a 10-contract FLEX equity option opening position that overlies less than $1 million in the underlying security and expires in January 2015 could be established during the Pilot. If the Pilot Program were not extended, the position would continue to exist and any further trading in the series would be subject to the minimum value size requirements for continued trading in that series.

[9] The Exchange has not experienced any adverse market effects with respect to the Pilot Program.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] *See* note 7, *supra.*

designates the proposal operative upon filing.[17]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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–Phlx–2011–35 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–Phlx–2011–35. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Phlx–2011–35 and should be submitted on or before April 18, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7181 Filed 3–25–11; 8:45 am]

**BILLING CODE 8011–01–P**

[17] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64111; File No. SR–NYSEArca–2011–10)**

## Self-Regulatory Organizations; NYSE Arca Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Option Trading Rules To Extend the Operation of Its Pilot Program Regarding Minimum Value Sizes for Flexible Exchange Options

March 23, 2011.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 11, 2011, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes [sic] its option trading rules to extend the operation of its pilot program ("Pilot Program") regarding minimum value sizes for flexible exchange options ("FLEX Options"), currently scheduled to expire on March 28, 2011, until March 30, 2012. The text of the proposed rule change is available at the Exchange's Web site at *http://www.nyse.com*, on the Commission's Web site at *http://www.sec.gov*, at the Exchange's principal office, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange hereby proposes to amend its option trading rules to extend the operation of its Pilot Program regarding minimum value sizes for FLEX Options, currently scheduled to expire on March 28, 2011,[4] until March 30, 2012. This filing does not propose any substantive changes to the Pilot Program and contemplates that all other terms of FLEX Options will remain the same. The Exchange believes that extending the Pilot Program will benefit public customers and other market participants who will be able to use FLEX Options to manage risk for smaller portfolios.

In support of the proposed extension of the Pilot Program, and as required by the terms of the Pilot Program's implementation,[5] the Exchange has submitted to the Securities and Exchange Commission ("SEC" or "Commission") a Pilot Program Report that provides an analysis of the Pilot Program covering the period during which the Pilot Program has been in effect. This Pilot Program Report includes (i) data and analysis on the open interest and trading volume in (a) FLEX Equity Options that have opening transactions with a minimum size of 0 to 249 contracts and less than $1 million in underlying value; (b) FLEX Index Options that have opening transactions with a minimum opening size of less than $10 million in underlying equivalent value; and (ii) analysis on the

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 62054 (May 6, 2010), 75 FR 27381 (May 14, 2010) (SR–NYSEArca–2010–34).

[5] *Id.*

types of investors that initiated opening FLEX Equity and Index Options transactions (*i.e.*, institutional, high net worth, or retail). The report has been submitted to the Commission on a confidential basis.

The Exchange believes that there is sufficient investor interest and demand in the Pilot Program to warrant extension for an additional year. The Exchange believes that the Pilot Program has provided investors with additional means of managing their risk exposures and carrying out their investment objectives. The Exchange has not experienced any adverse market effects with respect to the Pilot Program.

If, in the future, the Exchange proposes an additional extension of the Pilot Program, or should the Exchange propose to make the Pilot Program permanent, the Exchange will submit, along with any filing proposing such amendments to the Pilot Program, an additional Pilot Program Report covering the period during which the Pilot Program was in effect and including the details referenced above, along with the nominal dollar value of the underlying security of each trade. The Pilot Program Report would be submitted to the Commission at least two months prior to the expiration date of the Pilot Program and would be provided on a confidential basis.

The Exchange notes that any positions established under this Pilot Program would not be impacted by the expiration of the Pilot Program. For example, a 10-contract FLEX Equity Option opening position that overlies less than $1 million in the underlying security and expires in January 2015 could be established during the Pilot Program. If the Pilot Program were not extended, the position would continue to exist and any further trading in the series would be subject to the minimum value size requirements for continued trading in that series.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[6] in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the Exchange believes that the proposed extension of the Pilot Program, which eliminates the minimum value size applicable to FLEX Options, would provide greater opportunities for investors to manage risk through the use of FLEX Options. Further, the Exchange notes that it has not experienced any adverse effects from the operation of the Pilot Program.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) (iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay to permit the current pilot to continue uninterrupted.

The Commission finds that waiver of the operative delay is consistent with the protection of investors and the public interest. The Commission notes in waiving the 30-day operative delay that the Exchange's original pilot was published for comment in the **Federal Register** and the Commission did not receive any comments.[12] Further, the Exchange is proposing to extend the existing Pilot Program on the same terms and conditions as they were originally approved by the Commission. This includes, as described in more detail above, a representation that the Exchange will continue to monitor the Pilot Program and submit certain interim reports during the extended Pilot Program period, as well as a final report covering the Pilot Program period should the Exchange decide to extend or file for permanent approval of the Pilot Program. Finally, the Commission notes that the Exchange has represented that it has not experienced any adverse market effects with respect to the Pilot Program. Based on the above, the Commission finds that it is consistent with investor protection and the public interest to waive the 30-day operative delay in accordance with 19b-4(f)(6)(iii) so that the Pilot Program can continue on an uninterrupted basis, and therefore designates the proposal operative upon filing.[13]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] *See supra* note 4.

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Number SR–NYSEArca–2011–10 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–NYSEArca–2011–10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSEArca–2011–10 and should be submitted on or before April 18, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7231 Filed 3–25–11; 8:45 am]

**BILLING CODE 8011–01–P**

[14] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64107; File No. SR–NYSEAmex–2011–15]**

## Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Operation of Its Pilot Program Regarding Minimum Value Sizes for Flexible Exchange Options

March 22, 2011.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on March 11, 2011, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its option trading rules to extend the operation of its pilot program ("Pilot Program") regarding minimum value sizes for flexible exchange options ("FLEX Options"), currently scheduled to expire on March 28, 2011, until March 30, 2012. The text of the proposed rule change is available at the Exchange; on the Exchange's Web site (*http://www.nyse.com*); on the Commission's Web site at *http://www.sec.gov;* and the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange hereby proposes to amend its option trading rules to extend the operation of its Pilot Program regarding minimum value sizes for FLEX Options, currently scheduled to expire on March 28, 2011,[4] until March 30, 2012. This filing does not propose any substantive changes to the Pilot Program and contemplates that all other terms of FLEX Options will remain the same. The Exchange believes that extending the Pilot Program will benefit public customers and other market participants who will be able to use FLEX Options to manage risk for smaller portfolios.

In support of the proposed extension of the Pilot Program, and as required by the terms of the Pilot Program's implementation,[5] the Exchange has submitted to the Securities and Exchange Commission ("SEC" or "Commission") a Pilot Program Report that provides an analysis of the Pilot Program covering the period during which the Pilot Program has been in effect. This Pilot Program Report includes (i) data and analysis on the open interest and trading volume in (a) FLEX Equity Options that have opening transactions with a minimum size of 0 to 249 contracts and less than $1 million in underlying value; (b) FLEX Index Options that have opening transactions with a minimum opening size of less than $10 million in underlying equivalent value; and (ii) analysis on the types of investors that initiated opening FLEX Equity and Index Options transactions (*i.e.*, institutional, high net worth, or retail). The report has been submitted to the Commission on a confidential basis.

The Exchange believes that there is sufficient investor interest and demand in the Pilot Program to warrant extension for an additional year. The Exchange believes that the Pilot Program has provided investors with additional means of managing their risk exposures and carrying out their investment objectives. The Exchange has not experienced any adverse market effects with respect to the Pilot Program.

If, in the future, the Exchange proposes an additional extension of the Pilot Program, or should the Exchange propose to make the Pilot Program

[4] *See* Securities Exchange Act Release No. 62084 (May 12, 2010), 75 FR 28091 (May 19, 2010) (SR–NYSEAmex–2010–40).

[5] *Id.*

permanent, the Exchange will submit, along with any filing proposing such amendments to the Pilot Program, an additional Pilot Program Report covering the period during which the Pilot Program was in effect and including the details referenced above, along with the nominal dollar value of the underlying security of each trade. The Pilot Program Report would be submitted to the Commission at least two months prior to the expiration date of the Pilot Program and would be provided on a confidential basis.

The Exchange notes that any positions established under this Pilot Program would not be impacted by the expiration of the Pilot Program. For example, a 10-contract FLEX Equity Option opening position that overlies less than $1 million in the underlying security and expires in January 2015 could be established during the Pilot Program. If the Pilot Program were not extended, the position would continue to exist and any further trading in the series would be subject to the minimum value size requirements for continued trading in that series.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[6] in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the Exchange believes that the proposed extension of the Pilot Program, which eliminates the minimum value size applicable to FLEX Options, would provide greater opportunities for investors to manage risk through the use of FLEX Options. Further, the Exchange notes that it has not experienced any adverse effects from the operation of the Pilot Program.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

*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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder. The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change.

The Exchange has requested that the Commission waive the 30-day operative delay to permit the current pilot to continue uninterrupted. The Commission finds that waiver of the operative delay is consistent with the protection of investors and the public interest. The Commission notes in waiving the 30 day operative delay that NYSE Amex's original pilot was published for comment in the **Federal Register** and the Commission did not receive any comments on the proposed rule change.[10]

Further, NYSE Amex is proposing to extend the existing pilot on the same terms and conditions as they were originally approved by the Commission. This includes, as described in more detail above, a representation that NYSE Amex will continue to monitor the pilot and submit certain interim reports during the extended pilot period, as well as a final report covering the pilot period should the Exchange decide to extend or file for permanent approval of the pilot. Finally, the Commission notes that the Exchange has represented that it has not experienced any adverse market effects with respect to the pilot program.

Based on the above, the Commission finds that it is consistent with investor protection and the public interest to waive the 30 day operative delay in accordance with Rule 19b–4(f)(6)(iii) so that the pilot can continue on an uninterrupted basis, and therefore designates the proposal operative upon filing.[11]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2011–15 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–NYSEAmex–2011–15. 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

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] *See* note 4, *supra.*

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the 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–NYSEAmex–2011–15 and should be submitted on or before April 18, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7167 Filed 3–25–11; 8:45 am]

**BILLING CODE 8011–01–P**

[12] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

**[License No. 07/07–0113]**

### C3 Capital Partners II, L.P.; Notice Seeking Exemption Under 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that C3 Capital Partners IT, L.P., 4520 Main Street, Suite 1600, Kansas City, Missouri, 64111–7700, a Federal Licensee under the Small Business Investment Act of 1958, as amended ("the Act"), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and section 107.730, Financings Which Constitute Conflicts of Interest of the Small Business Administration ("SBA") rules and regulations (13 CFR 107.730 (2006)). C3 Capital Partners IL, L.P., proposes to provide financing to Findett LLC, P.O. Box 0960, St. Charles, MO 63302–0960. The financing is contemplated to provide growth capital.

The financing is brought within the purview of Sec. 107.730(a)(1) of the Regulations because C3 Capital Partners, L.P., an Associate of C3 Capital Partners II, L.P., currently owns greater than 10 percent of Findett LLC, and therefore, Findett LLC, is considered an Associate of C3 Capital Partners II, L.P. as defined in Sec. 105.50 of the regulations.

Notice is hereby given that any interested person may submit written comments on the transaction, within 15 days, to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Dated: March 14, 2011.

**Sean J. Greene,**

*Associate Administrator for Investment.*

[FR Doc. 2011–7065 Filed 3–25–11; 8:45 am]

**BILLING CODE 8025–01–M**

## SMALL BUSINESS ADMINISTRATION

**[License No. 04/04–0296]**

### KLH Capital II, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that KLH Capital, L.P., 101 East Kennedy Boulevard, Suite 3925, Tampa, FL, 33602 a Federal Licensee under the Small Business Investment Act of 1958, as amended ("the Act"), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration ("SBA") Rules and Regulations (13 CFR 107.730). KLH Capital, L.P., proposes to purchase securities of Energy Hardware Holdings, LLC, 2730 E. Phillips Road, Greer, SC 29650 from EH Holdings Associates, LLC. The financing is contemplated for growth and general corporate purposes.

The financing is brought within the purview of § 107.730(a)(1) of the Regulations because EH Holdings Associates, LLC, is an Associate of KLH Capital, L.P., due to common ownership and control, and owns more than ten percent of Energy Hardware Holdings, LLC. Therefore, Energy Hardware Holdings, LLC and EH Holdings Associates, LLC, are considered Associates of KLH Capital, L.P., as defined in Sec. 105.50 of the regulations.

Notice is hereby given that any interested person may submit written comments on the transaction to the Associate Administrator for Investment and Innovation, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Dated: March 7, 2011.

**Sean J. Greene,**

*Associate Administrator for Investment and Innovation.*

[FR Doc. 2011–7066 Filed 3–25–11; 8:45 am]

**BILLING CODE 8025–01–M**

## DEPARTMENT OF STATE

**[Public Notice 7327]**

### Advisory Committee on International Economic Policy; Notice of Committee Renewal

Renewal of an Advisory Committee. The Department of State has renewed the Charter of the Advisory Committee on International Economic Policy. The Committee serves in a solely advisory capacity concerning major issues and problems in international economic policy. The Committee provides information and advice on the effective integration of economic interests into overall foreign policy and on the Department of State's role in advancing American economic and commercial interests in a competitive global economy. The Committee also appraises the role and limits of international economic institutions and advises on the formulation of U.S. economic policy and positions.

This Committee includes representatives of American organizations and institutions having an interest in international economic policy, including representatives of American business, state and local government, labor unions, public interest groups, and trade and professional associations. The Committee meets at least annually to advise the Department on the full range of international economic policies and issues.

For further information, please call Tiffany Enoch, Deputy Outreach Coordinator, Office of Economic Policy Analysis and Public Diplomacy, Bureau of Economic, Energy and Business Affairs, U.S. Department of State, at (202) 647–2231.

Dated: March 1, 2011.

**Maryruth Coleman,**

*Director, Office of Economic Policy Analysis and Public Diplomacy, Bureau of Economic, Energy and Business Affairs, U.S. Department of State.*

[FR Doc. 2011–7232 Filed 3–25–11; 8:45 am]

**BILLING CODE 4710–07–P**

## TENNESSEE VALLEY AUTHORITY

### Meeting of the Regional Resource Stewardship Council

**AGENCY:** Tennessee Valley Authority (TVA).

**ACTION:** Notice of meeting.

**SUMMARY:** The TVA Regional Resource Stewardship Council (RRSC) will hold a meeting on Wednesday, April 27 and

Thursday, April 28, 2011, to consider various matters.

The RRSC was established to advise TVA on its natural resource stewardship activities. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

The management of the Tennessee Valley reservoirs and the lands adjacent to them has long been an integral component of TVA's mission. As part of implementing the TVA Environmental Policy, TVA is developing a Natural Resource Plan (NRP) that will help prioritize techniques for the management of TVA's biological and cultural resource management activities, recreation management activities, water resource protection and improvement activities, and lands planning. In accordance with the National Environmental Policy Act, TVA is also developing an accompanying Environmental Impact Statement (EIS) in which TVA will evaluate the preferred strategy for the NRP, as well as other viable alternative strategies. TVA is using the RRSC as a key stakeholder group throughout the development of the NRP to advise TVA on the issues, tradeoffs, and focus of environmental stewardship activities. The draft NRP and accompanying draft EIS were recently released for public comment. At the April 2011 meeting, TVA will be seeking advice from the Council on issues regarding the programs which comprise the draft NRP.

The meeting agenda includes the following:

1. Introductions.
2. NRP Overview; Programs included in the draft NRP for biological, cultural, water, and recreational resources and lands planning; Incorporation of Guiding Principles and advice received from the RRSC at its January 2011 meeting; Public comments received regarding the draft NRP and draft EIS.
3. Tour of Melton Hill Dam Campground; Presentations regarding several specific ongoing or proposed stewardship programs.
4. RRSC Discussion Topic: The scope of the programs included in the resource area components of the draft NRP and the benefits and challenges stemming from such programs.
5. Public Comments.
6. Council Discussion and Advice.

The RRSC will hear opinions and views of citizens by providing a public comment session. The public comment session will be held at 10 a.m., EDT, on Thursday, April 28. Persons wishing to speak are requested to register at the door by 9 a.m. on Thursday, April 28 and will be called on during the public comment period. Handout materials should be limited to one printed page. Written comments are also invited and may be mailed to the Regional Resource Stewardship Council, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 11B, Knoxville, Tennessee 37902.

**DATES:** The meeting will be held on Wednesday, April 27 from 8:30 a.m. to 4:30 p.m., and Thursday, April 28 from 8 a.m. to 12 noon, EDT.

**ADDRESSES:** The meeting will be held at the Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902, and will be open to the public. Anyone needing special access or accommodations should let the contact below know at least a week in advance.

**FOR FURTHER INFORMATION CONTACT:** Beth Keel, 400 West Summit Hill Drive, WT 11B, Knoxville, Tennessee 37902, (865) 632–6113.

Dated: March 22, 2011.

**Anda A. Ray,**

*Senior Vice President, Environment and Technology and Environmental Executive, Tennessee Valley Authority.*

[FR Doc. 2011–7207 Filed 3–25–11; 8:45 am]

BILLING CODE 8120–08–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: SWIFT Customer Satisfaction Survey

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

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. This collection of information is necessary to determine how satisfied applicants are with the automated staffing solution. The information enables the FAA to improve and enhance its automated staffing process.

**DATES:** Written comments should be submitted by May 27, 2011.

**FOR FURTHER INFORMATION CONTACT:** Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 2120–0699.

*Title:* SWIFT Customer Satisfaction Survey.

*Form Numbers:* There are no FAA forms associated with this collection.

*Type of Review:* Renewal of an information collection.

*Background:* The information will be collected via an online form. It is part of the automated SWIFT staffing tool. The data collected is analyzed by Information Systems Division, AHP–100 to determine the quality of our service to our users and customers, to address any problems or issues found as a result of the data analysis.

*Respondents:* Approximately 50,000 applicants.

*Frequency:* Information is collected on occasion.

*Estimated Average Burden per Response:* 3 minutes.

*Estimated Total Annual Burden:* 2,500 hours.

**ADDRESSES:** Send comments to the FAA at the following address: Ms. Carla Scott, Room 712, Federal Aviation Administration, IT Enterprises Business Services Division, AES–200, 800 Independence Ave., SW., Washington, DC 20591.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on March 21, 2011.

**Carla Scott,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. 2011–7177 Filed 3–25–11; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Reduction of Fuel Tank Flammability on Transport Category Airplanes

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

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The FAA's Fuel Tank Flammability Safety rulemaking requires manufacturers to provide a report to the FAA every six months for up to 5 years after the flammability reduction system is incorporated into the fleet. The data collection is needed to assure system performance meets that predicted at the time of certification.

**DATES:** Written comments should be submitted by May 27, 2011.

**FOR FURTHER INFORMATION CONTACT:** Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 2120–0710.

*Title:* Reduction of Fuel Tank Flammability on Transport Category Airplanes.

*Form Numbers:* There are no FAA forms associated with this collection.

*Type of Review:* Renewal of an information collection.

*Background:* Design approval holders use flammability analysis documentation to demonstrate to their FAA Oversight Office that they are compliant with the Fuel Tank Flammability Safety rule (73 FR 42443). Semi-annual reports submitted by design approval holders provide listings of component failures discovered during scheduled or unscheduled maintenance so that the reliability of the flammability reduction means can be verified by the FAA.

*Respondents:* Approximately 5 design approval holders.

*Frequency:* Information is collected on occasion.

*Estimated Average Burden per Response:* 100 hours.

*Estimated Total Annual Burden:* 4,000 hours.

**ADDRESSES:** Send comments to the FAA at the following address: Ms. Carla Scott, Room 712, Federal Aviation Administration, IT Enterprises Business Services Division, AES–200, 800 Independence Ave., SW., Washington, DC 20591.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on March 21, 2011.

**Carla Scott,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. 2011–7178 Filed 3–25–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

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

**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, FAA 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 by April 27, 2011.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.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 the Administration'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 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.

The FAA 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 FAA's projected average 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 Annual Number of activities:* 2.

*Respondents:* 2,813.

*Annual responses:* 2,813.

*Frequency of Response:* Once per request.

*Average minutes per response:* 15.

*Burden hours:* 704.

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.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on March 21, 2011.

**Carla Scott,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. 2011–7179 Filed 3–25–11; 8:45 am]

**BILLING CODE 4910–13–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.

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Aviation Rulemaking Advisory Committee; Transport Airplane and Engine Issues—New Task

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

**ACTION:** Notice of new task assignment for the Aviation Rulemaking Advisory Committee (ARAC).

**SUMMARY:** The FAA assigned ARAC a new task to consider whether changes to part 25 are necessary to address rudder pedal sensitivity and rudder reversals. This notice is to inform the public of this ARAC activity.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Jones, Propulsion/Mechanical Systems Branch, ANM–112, Transport Airplane Directorate, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, Washington 98057, telephone (425) 227–1234, facsimile (425) 227–1149; e-mail *robert.c.jones@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The FAA established the Aviation Rulemaking Advisory Committee (ARAC) to provide advice and recommendations to the FAA Administrator on the FAA's rulemaking activities with respect to aviation-related issues. This includes obtaining advice and recommendations on the FAA's commitments to harmonize Title 14, Code of Federal Regulations (14 CFR), with its partners in Europe, Canada, and Brazil; in this instance, on rudder pedal sensitivity and rudder reversals. The committee will address the task under the ARAC's Transport Airplane and Engine Issues, and will reestablish the Flight Controls Harmonization Working Group, to assist in analysis of this task.

Recent research shows that regardless of training, pilots make inadvertent and erroneous rudder inputs, some of which have resulted in pedal reversals. Accident and incident data show airplanes that have experienced pedal reversals that surpassed the airplane's structural limit load and sometimes ultimate load. One case resulted in loss of the vertical fin, the airplane and 265 lives.

On November 12, 2001, an Airbus A300–600 crashed at Belle Harbor on climb-out resulting in 265 deaths and an airplane hull loss. The National Transportation Safety Board (NTSB) found "that the probable cause of this accident was the in-flight separation of the vertical stabilizer as a result of the loads beyond ultimate design that were created by the first officer's unnecessary and excessive rudder pedal inputs. Contributing to these rudder pedal inputs were characteristics of the Airbus A300–600 rudder system design and elements of the American Airlines Advanced Aircraft Maneuvering Program."

In two additional events, commonly known as the Miami Flight 903 event and the Interflug event, pilot commanded pedal reversals caused A300–600/A310 fins to experience loads greater than their ultimate load level. Both airplanes survived because they possessed greater strength than required by the current standards.

In January 2008, an Airbus 319 encountered a wake vortex. The pilot responded with several pedal reversals. Analysis shows that this caused a fin load exceeding limit load by approximately 29 percent. The pilot eventually stabilized the airplane and safely landed. The Transportation Safety Board (TSB) Canada investigated this event, with the NTSB providing accredited representatives.

On May 27, 2005, a de Havilland DHC–8–100 (Dash 8) airplane (registration C–GZKH, serial number 117) was on a passenger revenue flight from St. John's to Deer Lake, Newfoundland, with 36 passengers and 3 crew on board. During the climb-out from St. John's, the indicated airspeed gradually decreased to the point that the airplane entered an aerodynamic stall. The airplane descended rapidly, out of control, losing 4200 feet before recovery was effected approximately 40 seconds later. The incident occurred during daylight hours in instrument meteorological conditions. There were no injuries and the airplane was not damaged. During this event, the pilot commanded a pedal reversal.

The FAA sponsored studies [1] to understand parameters that affect the way pilots use the rudder. These studies included a survey of transport pilots from all over the world and real time piloted flight simulation. One of the studies found that many experienced pilots misused the rudder after wake vortex encounters. A follow-on study showed that the key parameter leading to excessive pedal use is short pedal travel. The analysis of a survey of large airplane pilots found:

1. Pilots use the rudder more than previously thought and often in ways

[1] 1. DOT/FAA/AM–10/14, The Rudder Survey Technical Report. For a copy, call Sarah Peterson at (405) 954–6840.

2. DOT/FAA/AR–09–5, Pilot Simulations Study to Develop Transport Aircraft Rudder Control System Requirements Phase 1 Simulator Motion System Requirements and Initial Results, Authors Hoh, Desrochers, Niscoll, 18 April 2007.

**Note:** HAI is about to release another report that has additional and more important results (essentially that pilot tendency to over-control correlates very strongly with pedal travel).

3. DOT/FAA/AR–10/17, Piloted Simulation Study to Develop Transport Aircraft Rudder Control System Requirements Phase 2 Develop Criteria for Rudder Overcontrol, Authors Hoh, Desrochers, Niscoll.

not recommended by the design approval holders (DAHs).

2. Pilots make erroneous pedal inputs, and some erroneous pedal inputs include rudder reversals.

3. After years of training, many pilots are not aware that they should not make pedal reversals, even below design maneuvering speed ($V_A$). Note: Over the past 4 years, training and Airplane Flight Manual (AFM) changes have directed the pilot not to make cyclic control inputs, but events occurred despite this effort.

4. Pilots in airplane upset situations (*e.g.,* wake vortex encounters) may revert to prior training and make excessive pedal inputs that they may then counter with pedal reversals.

The current standards in part 25 address large pedal inputs at airspeeds up to the design dive airspeed ($V_D$). This ensures safe structural airplane characteristics throughout the flight envelope from single full rudder inputs. However, the standard does not address the loads imposed by rudder reversals. Additionally, sections of part 25 require that controls operate with ease and smoothness appropriate to their function. However, these standards do not address specific control system parameters such as inceptor travel breakout force or force gradient.

The FAA is partially addressing this condition for new designs by requiring under § 25.601 that applicants for new type certificates show that the design is capable of continued safe flight and landing after experiencing rudder pedal reversals. The applicants have been able to show compliance with this requirement by appropriate rudder controls. These control schemes have been incorporated through software and therefore add no weight or maintenance cost to the airplanes. However, such controls might only be capable of a limited number of pedal reversals before exceeding airframe ultimate loads, and part 25 may need to address this situation.

**The Task**

Excessive use of rudder, beyond its design capabilities, has been identified as a contributing factor in several incidents and accidents. The FAA is tasking ARAC to consider:

1. the need to revise 14 CFR part 25, subpart C, to ensure airplane structural capability in the presence of rudder reversals and associated buildup of sideslip angles through a defined flight envelope (see question 1), or

2. if other sections of the airworthiness standard may more appropriately address this concern, such as certain pedal characteristics that discourage pilots from making pedal reversals (reduce pedal sensitivity).

If ARAC determines new requirements are necessary, it must recommend performance-based standards that allows manufacturers the flexibility to design airplanes to meet their needs while ensuring airplane safety. ARAC would also need to recommend methods of compliance (criteria), such as background simulation or piloted simulation, to support the rule change.

In addition, ARAC must consider the need to revise 14 CFR parts 26, 121, 125, 129, and 135, or to write airworthiness directives to address the safety concerns posed by rudder reversals in the existing transport airplane fleet. Finally, ARAC must recommend criteria that can be used to determine the need for retrofit.

ARAC is expected to provide a report that addresses the following questions regarding new airplane designs, with rationale for their responses. Any disagreement should be documented, including the rationale from each party and the reasons for the disagreement.

*Questions*

*For New Transport Airplanes:*

1. Define what is meant by pilot misuse/use of rudder and rudder pedal sensitivity, and determine the appropriate flight envelope that should be considered.

2. Consider what types of part 25 standards can be developed to prevent unintended or inappropriate rudder usage, or to ensure that unintended usage provides a level of safety commensurate with part 25. The working group should consider the following areas of the existing airworthiness standard:

a. Loads.

b. Maneuverability.

c. System design.

d. Control sensitivity.

e. Warning.

3. What is the best regulatory approach to address rudder usage? For example, is it better to assume certain inputs and provide mitigation to ensure safe flight (envelope protection), or to provide certain standards to ensure that the pilot will not make (inadvertent or inappropriate) inputs?

4. What changes, if any, to part 25—including details for compliance demonstration and guidance—are recommended for new type certification applications to prevent unintended improper rudder usage? Some considerations include use of analysis, desktop or piloted simulation, or actual flight testing.

5. Are there any regulations or guidance material that might conflict with the proposal?

6. Does current technology exist to support implementation of new requirements?

7. What are the effects and implications of any proposed change regarding commonly used system designs? For example, would a new standard cause adverse interaction with currently used fly-by-wire flight control systems, stability augmentation or auto-flight systems, or with current operations?

8. Does the proposed solution present any issues relating to specific flight phases or environmental conditions? If so, what are they, and how should they be addressed?

9. What recommended guidance material is needed?

10. After reviewing airworthiness standard, safety, cost, benefit, and other relevant factors, including recent certification and fleet experience, are there any additional considerations that should be taken into account?

11. Is coordination necessary with other harmonization working groups (e.g., Human Factors, Flight Test)?

*For Existing Transport Airplanes:*

The report must address the following questions while considering existing transport airplane designs, with rationale for the responses. Any disagreements should be documented, including the rationale from each party and the reasons for the disagreement.

1. What factors should be considered to determine if retrofit should be required?

2. For airplanes that require retrofit per the criteria, what differences should be considered from the requirements developed for new transport airplanes?

3. What are the effects and implications of any proposed retrofit standards and guidance for current system designs? For example, would the retrofit cause adverse interaction with currently used fly-by-wire flight control systems, stability augmentation or auto-flight systems, or with current operations?

4. After reviewing airworthiness standards, safety, cost, benefit, and other relevant factors, including recent certification and fleet experience, are there any additional considerations that should be taken into account?

5. If improvements are needed to ensure safe rudder usage, what is the recommended method to mandate retrofit? (Ad hoc airworthiness directives, part 26 rules, etc.) In responding, ARAC should address the factors set forth in "FAA Policy Statement: Safety-A Shared

Responsibility-New Direction for Addressing Airworthiness Issues for Transport Airplanes" (70 FR 40166, July 12, 2005), and the industry's ability to provide the necessary retrofit equipment that might be required.

ARAC should provide information that could lead to requirements in rudder load conditions, and/or system design that can be satisfied with practical design approaches.

The FAA will provide a copy of each DOT report mentioned in this tasking notice.

*Schedule:* The tasks described above are to be accomplished within 18 months of publication of this tasking notice in the **Federal Register**.

**ARAC Acceptance of Task**

ARAC accepted the task and will assign it to the reestablished Flight Controls Harmonization Working Group, under Transport Airplane and Engine Issues. This working group will use task groups to assist in their activities. Nominees should have experience in the areas of flight test, flight controls, loads, or human factors. The working group serves as support to ARAC and assists in the analysis of assigned tasks. ARAC must review and approve the working group's recommendations. If ARAC accepts the working group's recommendations, it will forward them to the FAA.

**Working Group Activity**

The Flight Controls Harmonization Working Group must comply with the procedures adopted by ARAC. As part of the procedures, the working group must:

1. Recommend a work plan for completion of the task, including the rationale supporting such a plan, for consideration at the next ARAC meeting on Transport Airplane and Engine Issues held following publication of this notice.

2. Give a detailed conceptual presentation of the proposed recommendations before proceeding with the work stated in item 3 below.

3. Draft the appropriate documents and required analyses and/or any other related materials or documents.

4. Provide a status report at each ARAC meeting held to consider Transport Airplane and Engine Issues.

**Participation in the Working Group**

The Flight Controls Harmonization Working Group will be composed of technical experts having an interest in the assigned task. A working group member need not be a representative or a member of the full committee.

If you have expertise in the subject matter and wish to become a member of the working group, write to the person listed under the caption **FOR FURTHER INFORMATION CONTACT** expressing that desire. Describe your interest in the task and state the expertise you would bring to the working group. We must receive all requests by April 25, 2011. The assistant chair and the assistant executive director will review the requests and advise you whether or not your request is approved.

If you are chosen for membership on the working group, you must represent your aviation community segment and actively participate in the working group by attending all meetings, and providing written comments when requested to do so. You must devote the resources necessary to support the working group in meeting any assigned deadlines. You must keep your management chain and those you may represent advised of working group activities and decisions to ensure that the proposed technical solutions don't conflict with your sponsoring organization's position when the subject being considered is presented to ARAC for approval. Once the working group has begun deliberations, members will not be added or substituted without the approval of the assistant chair, the assistant executive director and the working group chair.

The Secretary of Transportation determined that the formation and use of ARAC is necessary and in the public interest in connection with the performance of duties imposed on the FAA by law.

ARAC meetings are open to the public. Meetings of the Flight Controls Harmonization Working Group will not be open to the public, except to the extent individuals with an interest and expertise are selected to participate. The FAA will make no public announcement of working group meetings.

Issued in Washington, DC, on March 23, 2011.

**Pamela Hamilton-Powell,**

*Executive Director, Aviation Rulemaking Advisory Committee.*

[FR Doc. 2011–7180 Filed 3–25–11; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Environmental Impact Statement: Cook County, IL

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Intent.

**SUMMARY:** The FHWA is issuing this Notice of Intent to advise the public that an Environmental Impact Statement (EIS) will be prepared for the Grand Crossing Rail Project, which involves new railroad track work, structural work, grading, and signal improvements to provide a new direct route for Amtrak trains from New Orleans, Louisiana or Carbondale, Illinois into Chicago Union Station, and to provide sufficient mainline capacity to accommodate existing and additional Amtrak trains along with freight traffic in the City of Chicago, Cook County, Illinois.

**FOR FURTHER INFORMATION CONTACT:** Norman R. Stoner, P.E., Division Administrator, Federal Highway Administration, 3250 Executive Park Drive, Springfield, Illinois 62703, Phone: (217) 492–4600. Steve McClarty, Acting Bureau Chief, Bureau of Railroads, Illinois Department of Transportation, 100 W. Randolph Street, Suite 6–600, Chicago, Illinois 60601–3229, Phone: (312) 793–3940.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Illinois Department of Transportation, Bureau of Railroads, will prepare an EIS on a proposal to construct a direct rail connection between the Canadian National (CN) and Norfolk Southern (NS) Chicago Line to provide a new, more direct route to Chicago's Union Station for Amtrak trains coming from New Orleans, Louisiana, and Carbondale, Illinois. The proposed project is an element of the overall Chicago Region Environmental and Transportation Efficiency Program (CREATE), a joint effort of the Illinois Department of Transportation, the Chicago Department of Transportation, and the Association of American Railroads to restructure, modernize, and expand freight and passenger rail facilities and highway grade separations in the Chicago metropolitan area. Alternative track configurations will be considered and refined. The no-action alternative will also be evaluated. A preferred alternative and associated potential impacts will be presented at a public hearing. Preliminary measures to minimize harm, construction cost estimates, and estimated right-of-way and relocation requirements will also be developed.

The proposed action will reduce travel time on the Amtrak's Illini-Saluki and City of New Orleans trains by eliminating a time-consuming back-up move into Union Station that these trains currently perform due to the existing track configuration. In addition, the proposed action will provide

additional rail capacity along the existing rail corridor(s) that would be used for the new route. It will also allow for the space currently occupied by the St. Charles Airline tracks and the CN mainline tracks along the Lake Michigan lakefront north of Grand Crossing to be used to serve future public needs.

The project is located principally on existing railroad rights-of-way owned by CN, NS, and the Metra commuter railroad. The project area—bounded by 117th Street on the south, Lake Michigan on the east, Pershing Road on the north, and Halsted Street on the west—consists of urban residential and industrial land uses; no significant natural resource impacts are anticipated. Potential impacts may include residential and commercial relocations, effects on community cohesion and low-income and minority populations, economic impacts, and impacts to publicly owned parks, properties potentially eligible for listing on the National Register of Historic Places, special waste sites, and public facilities and services. There is also the potential for noise and vibration, and air quality impacts.

In an attempt to address the full range of issues related to this proposed action and identify all substantive issues, this project is being developed using the principles of Context Sensitive Solutions per the Illinois Department of Transportation's Policies and Procedures. A Stakeholder Involvement Plan (SIP) will be developed that will detail the public involvement activities that will be conducted as part of this study and will address the Coordination Plan requirements of 23 U.S.C. 139(g) within the context of the National Environmental Policy Act (NEPA) process. Under the SIP, an interdisciplinary Project Study Group will be formed to develop the project, and a Community Advisory Group will be formed to provide input to the study process. As part of the EIS process, a scoping meeting for obtaining input from resource agencies will be held in June 2011 and invitations will be sent to the resource agencies. Public informational meetings, focus meetings with stakeholders, a public hearing, newsletters, a project Web site, and interest group meetings will provide additional opportunities for public involvement. The project's Draft EIS will be available for public and agency review prior to the public hearing. The time and location of the public hearing will be announced in local newspapers. Comments or questions concerning this proposed action and the Draft EIS should be directed to FHWA or the Illinois Department of Transportation at the addresses provided above.

(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 21, 2011.

**Jon-Paul Kohler,**

*Planning and Program Development Manager, Springfield, Illinois.*

[FR Doc. 2011–7203 Filed 3–25–11; 8:45 am]

**BILLING CODE 4910–22–P**

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[U.S. DOT Docket Number NHTSA–2011–0039]**

### Reports, Forms, and Recordkeeping Requirements

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation.

**ACTION:** Request for public comment on an extension of a currently approved collection of information.

**SUMMARY:** Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes a collection of information for which NHTSA intends to seek OMB approval.

**DATES:** Comments must be received on or before May 27, 2011.

**ADDRESSES:** You may submit comments using any of the following methods. All comments must have the applicable DOT docket number (*e.g.,* NHTSA–2011–0039) noted conspicuously on them.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Telephone: 1–800–647–5527.
- *Fax:* 202–493–2251

*Instructions:* All submissions must include the agency name and docket number for this proposed collection of information. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

*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 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov.*

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* or the street address listed above. Follow the online instructions for accessing the dockets.

**FOR FURTHER INFORMATION CONTACT:** Alex Ansley, Recall Management Division (NVS–215), Room W46–412, NHTSA, 1200 New Jersey Ave., Washington, DC 20590. Telephone: (202) 493–0481.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the Federal Register providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation, *see* 5 CFR 1320.8(d), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use

of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following collection of information:

*Title:* Defect and Noncompliance Reporting and Notification.

*Type of Request:* Extension of a currently approved information collection.

*OMB Control Number:* 2127–0004.

*Affected Public:* Businesses or individuals.

*Abstract:* This notice requests comment on NHTSA's proposed extension to approved collection of information OMB No. 2127–0004. This collection covers the information collection requirements found within various statutory sections in the Motor Vehicle Safety Act of 1966 (Act), 49 U.S.C. 30101, *et seq.,* that address and require manufacturer notifications to NHTSA of safety-related defects and failures to comply with Federal Motor Vehicle Safety Standards (FMVSS) in motor vehicles and motor vehicle equipment, as well as the provision of particular information related to the ensuing owner and dealers notifications and free remedy campaigns that follow those notifications. The sections of the Act imposing these requirements include 49 U.S.C. 30118, 30119, 30120, and 30166. Many of these requirements are implemented through, and addressed with more specificity in, 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports* (part 573) and 49 CFR part 577, *Defect and Noncompliance Notification.*

Pursuant to the Act, motor vehicle and motor vehicle equipment manufacturers are obligated to notify, and then provide various information and documents, to NHTSA in the event a safety defect or noncompliance with Federal Motor Vehicle Safety Standards (FMVSS) is identified in products they manufactured. *See* 49 U.S.C. 30118(b) and 49 CFR 573.6 (requiring manufacturers to notify NHTSA, and provide certain information, when they learn of a safety defect or noncompliance). Manufacturers are further required to notify owners, purchasers, dealers and distributors about the safety defect or noncompliance. *See* 49 U.S.C. 30118(b), 30120(a), and 49 CFR 577.7, 577.13. They are required to provide to NHTSA copies of communications pertaining to recall campaigns that they issue to owners, purchasers, dealers, and distributors. *See* 49 U.S.C. 30166(f) and 49 CFR 573.6(c)(10).

Manufacturers are also required to file with NHTSA a plan explaining how they intend to reimburse owners and purchasers who paid to have their products remedied before being notified of the safety defect or noncompliance, and explain that plan in the notifications they issue to owners and purchasers about the safety defect or noncompliance. *See* 49 U.S.C. 30120(d) and 49 CFR 573.13. They are further required to keep lists of the respective owners, purchasers, dealers, distributors, lessors, and lessees of the products determined to be defective or noncompliant and involved in a recall campaign, and are required to provide NHTSA with a minimum of six quarterly reports reporting on the progress of their recall campaigns. *See* 49 CFR 573.8 and 573.7, respectively.

The Act and Part 573 also contain numerous information collection requirements specific to tire recall and remedy campaigns. These requirements relate to the proper disposal of recalled tires, including a requirement that the manufacturer conducting the tire recall submit a plan and provide specific instructions to certain persons (such as dealers and distributors) addressing that disposal, and a requirement that those persons report back to the manufacturer certain deviations from the plan. *See* 49 U.S.C. 30120(d) and 49 CFR 573.6(c)(9). They also require the reporting to NHTSA of intentional and knowing sales or leases of defective or noncompliant tires.

49 U.S.C. 30166(n), and its implementing regulation found at 49 CFR 573.10, mandates that anyone who knowingly and willfully sells or leases for use on a motor vehicle a defective tire or a tire that is not compliant with FMVSS, and with actual knowledge that the tire manufacturer has notified its dealers of the defect or noncompliance as required under the Act, is required to report that sale or lease to NHTSA no more than five working days after the person to whom the tire was sold or leased takes possession of it.

*Estimated Burden:* This collection has an approved burden of 21,370 hours per year.[1] Our review of recall information since we last requested approval of this collection does not demonstrate that this figure requires adjustment. A summary explanation of how this total annual figure was calculated follows.

There continue to be an average of 650 noncompliance or safety defect notifications to NHTSA filed each year by approximately 175 distinct manufacturers, with an estimated 750 quarterly reports filed per quarter (or 3,000 reports per year). Although the average number of recalls filed per year and the average number of manufacturers filing fluctuates each year, we have not seen, nor expect to see, consistent dramatic changes in these averages.

We continue to estimate that it takes a manufacturer an average of 4 hours to complete each notification report to NHTSA, that it takes another 4 hours to complete each quarterly report, and that maintenance of the required owner, purchaser, dealer and distributors lists requires 8 hours. Accordingly, the subtotal estimate of annual burden hours related to the reporting to NHTSA of a safety defect or noncompliance, completion of quarterly reports on the progress of recall campaigns, and maintenance of owner and purchaser lists is 16,000 hours annually ((650 notices × 4 hours/report) + (3,000 quarterly reports × 4 hours/report) + (175 manufacturers × 8 hours)).

In addition, we continue to estimate an additional 2 hours will be needed to add to a manufacturer's information report details relating to the manufacturer's intended schedule for notifying its dealers and distributors, and tailoring its notifications to dealers and distributors in accordance with the requirements of 49 CFR 577.13. This would total to an estimated 1,300 hours annually (650 notices × 2 hours/report).

In the event a manufacturer supplied the defect or noncompliant product to independent dealers through independent distributors, that manufacturer is required to include in its notifications to those distributors an instruction that the distributors are to then provide copies of the manufacturer's notification of the defect or noncompliance to all known distributors or retail outlets further down the distribution chain within five working days. *See* 49 CFR 577.8(c)(2)(iv). As a practical matter, this requirement would only apply to equipment manufacturers since vehicle manufacturers generally sell and lease vehicles through a dealer network, and not through independent distributors. We continue to believe previous estimates of roughly 90 equipment recalls per year are sound. Although the distributors are not technically under any regulatory requirement to follow that instruction, we expect that they will, and have estimated the burden associated with these notifications (identifying retail outlets, making copies of the manufacturer's notice, and

[1] *See* **Federal Register** notices of March 28, 2008 (73 FR 16740) and June 5, 2008 (73 FR 32073) for the analysis and discussion associated with this burden hour estimate.

mailing) to be 5 hours per recall campaign. Assuming an average of 3 distributors per equipment item, (which is a liberal estimate given that many equipment manufacturers do not use independent distributors) the total number of burden hours associated with this third party notification burden is approximately 1,350 hours per year (90 recalls × 3 distributors × 5 hours).

As for the burden linked with a manufacturer's preparation of and notification concerning its reimbursement for pre-notification remedies, consistent with previous estimates (*see* 69 FR 11477 (March 10, 2004)), we continue to estimate that preparing a plan for reimbursement takes approximately 8 hours annually, and that an additional 2 hours per year is spent tailoring the plan to particular defect and noncompliance notifications to NHTSA and adding tailored language about the plan to a particular safety recall's owner notification letters. In sum, these required activities add an additional 2,700 annual burden hours ((175 manufacturers × 8 hours) + (650 recalls × 2 hours)).

In summary, the total burden associated with the defect and noncompliant information collection and reporting requirements we continue to estimate at 21,350 hours per year.

As explained earlier, the Act and part 573 also contain numerous information collection requirements specific to tire recall and remedy campaigns, as well as a statutory and regulatory reporting requirement that anyone that knowingly and intentionally sells or leases a defective or noncompliant tire notify NHTSA of that activity.

Manufacturers are required to include specific information relative to tire disposal in the notifications they provide NHTSA concerning identification of a safety defect or noncompliance with FMVSS in their tires, as well as in the notifications which they issue to their dealers or other tire outlets participating in the recall campaign. *See* 49 CFR 573.6(c)(9). We continue to estimate that there will be about 10 tire recall campaigns per year, and that inclusion of this additional information will require an additional two hours of effort beyond the subtotal above associated with non-tire recall campaigns. This additional effort consists of one hour for the NHTSA notification and one hour for the dealer notification for a total of 20 burden hours (10 tire recalls a year × 2 hours per recall).

Manufacturer owned or controlled dealers are required to notify the manufacturer and provide certain information should they deviate from the manufacturer's disposal plan. Consistent with previous analysis, we continue to ascribe zero burden hours to this requirement since to date no such reports have been provided and our original expectation that dealers would comply with manufacturers' plans has proven true.

Accordingly, we estimate 20 burden hours a year will be spent complying with the tire recall campaign requirements found in 49 CFR 573.6(c)(9).

And, as we have yet to receive a single report of a defective or noncompliant tire being intentionally sold or leased in the fourteen years since this rule was proposed, our previous estimate of zero burden hours remains unchanged with this notice.

In summary, our previous estimate of 21,370 total burden hours associated with this approved information collection stands.

*Estimated Number of Respondents*

NHTSA receives reports of defect or noncompliance from roughly 175 manufacturers per year. Again, this figure fluctuates from year to year, but we do not have a basis at this juncture to suspect this annual figure will change significantly. Accordingly, we estimate that there will continue to be approximately 175 manufacturers per year filing defect or noncompliance reports and completing the other information collection responsibilities associated with those filings.

We discussed above that we have yet to receive a single report filed pursuant to 49 CFR 573.10. This information collection requirement, to reiterate, requires anyone who sells or leases a defective or noncompliant tire, with knowledge of that tire's defectiveness or noncompliance, to report that sale or lease to NHTSA. Given the lack of filing history over many years, we estimate that there will continue to be zero reports filed and therefore zero respondents as to this requirement.

In summary, we estimate that there will be a total of 175 respondents per year associated with OMB No. 2127–0004.

Issued on: March 22, 2011.

**Frank Borris,**

*Director, Office of Defects Investigation.*

[FR Doc. 2011–7182 Filed 3–25–11; 8:45 am]

BILLING CODE 4910–59–P

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Additional Identifying Information Associated With Persons Whose Property and Interests in Property Are Blocked Pursuant to the Executive Order 13566 of February 25, 2011, "Blocking Property and Prohibiting Certain Transactions Related to Libya"

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing additional identifying information associated with the five individuals listed in the Annex to Executive Order 13566 of February 25, 2011, "Blocking Property and Prohibiting Certain Transactions Related to Libya," whose property and interests in property are therefore blocked.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW. (Treasury Annex), Washington, DC 20220, Tel.: 202/622–2490.

**SUPPLEMENTARY INFORMATION:**

### Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

### Background

On February 25, 2011, the President issued Executive Order 13566, "Blocking Property and Prohibiting Certain Transactions Related to Libya," (the "Order") pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (the NEA), and section 301 of title 3, United States Code.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, of persons listed in the Annex to the Order and of persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, to satisfy certain criteria set forth in the Order.

The Annex to the Order lists five individuals whose property and interests in property are blocked pursuant to the Order. OFAC is publishing additional identifying information associated with those individuals.

Listings for those individuals on OFAC's list of Specially Designated Nationals and Blocked Persons, which incorporates this additional identifying information, are as follows:

*INDIVIDUALS*

Dated: February 25, 2011

QADHAFI, Ayesha (a.k.a. AL–GADDAFI, Ayesha; a.k.a. AL–QADHAFI, Aisha; a.k.a. ELKADDAFI, Aisha; a.k.a. EL–QADDAFI, Aisha; a.k.a. GADDAFI, Ayesha; a.k.a. GADHAFI, Aisha; a.k.a. GHADAFFI, Aisha; a.k.a. GHATHAFI, Aisha; a.k.a. GHATHAFI, Aisha Muammer; a.k.a. QADDAFI, Aisha; a.k.a. QADHAFI, Aisha); DOB circa 1977; alt. DOB circa 1976 (individual) [LIBYA2]

QADHAFI, Khamis (a.k.a. AL–GADDAFI, Khamis; a.k.a. AL–QADHAFI; a.k.a. AL–QADHAFI, Khamis; a.k.a. ELKADDAFI, Khamis; a.k.a. EL–QADDAFI, Khamis; a.k.a. GADDAFI, Khamis; a.k.a. GADHAFI, Khamis; a.k.a. GHADAFFI, Khamis; a.k.a. GHATHAFI, Khamis; a.k.a. QADDAFI, Khamis); DOB 1980 (individual) [LIBYA2]

QADHAFI, Muammar (a.k.a. AL–GADDAFI, Muammar; a.k.a. AL–QADHAFI, Muammar; a.k.a. AL–QADHAFI, Muammar Abu Minyar; a.k.a. ELKADDAFI, Muammar; a.k.a. EL–QADDAFI, Muammar; a.k.a. GADDAFI, Mu'ammar; a.k.a. GADDAFI, Muammar; a.k.a. GADHAFI, Muammar; a.k.a. GHADAFFI, Muammar Muhammad; a.k.a. GHATHAFI, Muammar; a.k.a. QADDAFI, Muammar); DOB 1942; POB Sirte, Libya (individual) [LIBYA2]

GADDAFI, Mutassim (a.k.a. AL–GADDAFI, Mutassim; a.k.a. AL–QADHAFI, Mutassim; a.k.a. ELKADDAFI, Mutassim; a.k.a. EL–QADDAFI, Mutassim; a.k.a. GADHAFI, Mutassim Billah; a.k.a. GHADAFFI, Mutassim; a.k.a. GHATHAFI, Mutassim; a.k.a. QADDAFI, Mutassim; a.k.a. QADHAFI, Mutassim); DOB circa 1975 (individual) [LIBYA2]

QADHAFI, Saif al-Islam (a.k.a. AL–GADDAFI, Saif al-Islam; a.k.a. AL–QADHAFI, Saif al-Islam; a.k.a. ELKADDAFI, Saif al-Islam; a.k.a. EL–QADDAFI, Seif al-Islam; a.k.a. GADDAFI, Saif al-Islam; a.k.a. GADHAFI, Saif al-Islam; a.k.a. GHADAFFI, Saif al-Islam; a.k.a. GHATHAFI, Saif al-Islam; a.k.a. QADDAFI, Saif al-Islam); DOB 25 Jun 1972; POB Tripoli, Libya (individual) [LIBYA2]

Dated: March 22, 2011.

**Adam Szubin,**

*Director, Office of Foreign Assets Control.*

[FR Doc. 2011–7225 Filed 3–25–11; 8:45 am]

BILLING CODE 4811–42–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Art Advisory Panel—Notice of closed meeting

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Notice of closed meeting of Art Advisory Panel for Fine Art.

**SUMMARY:** Closed meeting of the Art Advisory Panel will be held in Washington, DC.

**DATES:** The meeting will be April 13, 2011.

**ADDRESSES:** The closed meeting of the Art Advisory Panel for Fine Art will be held on April 13, 2011, beginning at 9:30 a.m., in the Appeals Media Center, Franklin Court Building, 1099 14th Street, NW., Washington, DC 20005.

**FOR FURTHER INFORMATION CONTACT:** Daniel M. Beckerle, Jr., C:AP:PV:ART, 1099 14th Street, NW., Washington, DC 20005. Telephone (202) 435–5790 (not a toll free number).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App., that a closed meeting of the Art Advisory Panel for Fine Art will be held on April 13, 2011, beginning at 9:30 a.m., in Room 4136—Appeals Media Center, Franklin Court Building, 1099 14th Street, NW., Washington, DC 20005.

The agenda will consist of the review and evaluation of the acceptability of fair market value appraisals of works of art involved in Federal income, estate, or gift tax returns. This will involve the discussion of material in individual tax returns made confidential by the provisions of 26 U.S.C. 6103.

A determination as required by section 10(d) of the Federal Advisory Committee Act has been made that this meeting is concerned with matters listed in section 552b(c)(3), (4), (6), and (7), and that the meeting will not be open to the public.

**Diane S. Ryan,**

*Chief, Appeals.*

[FR Doc. 2011–7113 Filed 3–25–11; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### United States Mint

### Revision to Currently Approved Information Collection: Comment Request for Customer Satisfaction and Opinion Surveys and Focus Group Interviews

**AGENCY:** United States Mint, Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, 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 revisions to currently approved information collection 1525–0012, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the United States Mint, a bureau of the Department of the Treasury, is soliciting comments on the United States Mint customer satisfaction and opinion surveys and focus group interviews.

**DATES:** Written comments should be received on or before May 27, 2011 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Yvonne Pollard; Chief, Compliance Branch; United States Mint; 801 9th Street, NW., 5th Floor; Washington, DC 20220; (202) 354–6784 (this is not a toll-free number); *YPollard@usmint.treas.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection package should be directed to Yvonne Pollard; Chief, Compliance Branch; United States Mint; 801 9th Street, NW., 5th Floor; Washington, DC 20220; (202) 354–6784 (this is not a toll-free number); *YPollard@usmint.treas.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* United States Mint customer satisfaction and opinion surveys and focus group interviews.

*OMB Number:* 1525–0012.

*Abstract:* The proposed customer satisfaction and opinion surveys and focus group interviews will allow the United States Mint to assess the acceptance of, potential demand for, and barriers to acceptance/increased demand for current and future products, and the needs and desires of customers for more efficient, economical services.

*Current Actions:* The United States Mint conducts surveys and focus group interviews to measure customer opinion and assess acceptance of, potential demand for and barriers to acceptance/

increased demand for United States Mint products, and to determine the level of satisfaction of United States Mint customers and the public.

*Type of Review:* Revision of estimated annual respondents and estimated annual burden hours.

*Affected Public:* The affected public includes serious and casual numismatic collectors, dealers and persons in the numismatic business, and the general public.

*Estimated Number of Respondents:* The estimated number of annual respondents is 60,145.

*Estimated Total Annual Burden Hours:* The estimated number of annual burden hours is 12,603.

*Requests for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall 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 to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: March 23, 2011.

**Yvonne Pollard,**

*Chief, Compliance Branch, United States Mint.*

[FR Doc. 2011–7223 Filed 3–25–11; 8:45 am]

**BILLING CODE 4810–37–P**

# FEDERAL REGISTER

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Part II

## Securities and Exchange Commission

17 CFR Part 211
Staff Accounting Bulletin No. 114; Rule

## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Part 211

**[Release No. SAB 114]**

## Staff Accounting Bulletin No. 114

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Publication of Staff Accounting Bulletin.

**SUMMARY:** This Staff Accounting Bulletin (SAB) revises or rescinds portions of the interpretive guidance included in the codification of the Staff Accounting Bulletin Series. This update is intended to make the relevant interpretive guidance consistent with current authoritative accounting guidance issued as part of the Financial Accounting Standards Board's Accounting Standards Codification. The principal changes involve revision or removal of accounting guidance references and other conforming changes to ensure consistency of referencing throughout the SAB Series.

**DATES:** *Effective Date:* March 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Lisa Tapley, Assistant Chief Accountant, or Annemarie Ettinger, Senior Special Counsel, Office of the Chief Accountant, at (202) 551–5300, or Craig Olinger, Deputy Chief Accountant, Division of Corporation Finance, at (202) 551–3400, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The statements in staff accounting bulletins are not rules or interpretations of the Commission, nor are they published as bearing the Commission's official approval. They represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the Federal securities laws.

Dated: March 7, 2011.

**Elizabeth M. Murphy,**

*Secretary.*

## PART 211—[AMENDED]

■ Accordingly, Part 211 of Title 17 of the Code of Federal Regulations is amended by adding Staff Accounting Bulletin No. 114 to the table found in Subpart B.

### Staff Accounting Bulletin No. 114

This Staff Accounting Bulletin (SAB) revises or rescinds portions of the interpretive guidance included in the codification of the Staff Accounting Bulletin Series. This update is intended to make the relevant interpretive guidance consistent with current authoritative accounting guidance issued as part of the Financial Accounting Standards Board's Accounting Standards Codification (FASB ASC). The principal changes involve revision or removal of accounting guidance references and other conforming changes to ensure consistency of referencing throughout the SAB Series.

The following describes the changes made to the Staff Accounting Bulletin Series and certain specific topics that are presented at the end of this release:

a. The SAB Series is amended to update authoritative accounting literature references to the FASB ASC throughout. In addition, several conforming formatting changes were made for consistency across SAB topics. Due to the number of these changes, the SAB Series is represented in its entirety in this release. All of the changes are technical in nature, and none of the changes are intended to change the guidance provided in the SAB Series.

*Topic 1: Financial Statements*

a. Topic 1.D.1, the introductory facts are amended to conform to changes made to Items 17 and 18 of Form 20–F to reflect that certain disclosures are required only if a basis of accounting other than U.S. generally accepted accounting principles (GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board is used. The introductory facts are also amended to remove the reference to Form F–2, as this form was eliminated effective December 1, 2005. Finally, the introductory facts are amended to reflect the foreign issuer reporting enhancements contained in SEC Release No. 33–8959.

b. Topic 1.I, the footnote previously numbered 6 within the interpretive response to question 1 is removed as the referenced guidance is now within the FASB ASC, and thus a history of the prior source is no longer relevant.

c. Topic 1.I, the footnote previously numbered 7 within the interpretive response to question 2 is removed as the term "ADC" is now defined within the body of SAB Topic 1.I.

d. Topic 1.K, the interpretive response to question 3 is amended to conform to the accounting guidance contained in FASB ASC Topic 350, Intangible Assets—Goodwill and Other. This conforming change reflects the fact that goodwill is no longer subject to amortization. The interpretive response to question 3 is also amended to replace the term "carrying value" with the term "fair value" to reflect the measurement guidance for financial assets and liabilities as stated in FASB ASC Topic 820, Fair Value Measurements and Disclosures.

e. Topic 1.K, the interpretive response to question 4, is amended to replace Item 7 of Form 8–K with Item 9.01 of Form 8–K.

*Topic 3: Senior Securities*

a. Topic 3.A, the interpretive response is amended to replace Rule 11–02(a)(7) of Regulation S–X with Rule 11–02(b)(7) of Regulation S–X.

*Topic 5: Miscellaneous Accounting*

a. Topic 5.F, the introductory facts and interpretive response are amended to replace the term "restatement" with the term "retrospective adjustment," to replace the term "restate(d)" with the term "retrospectively adjust(ed)" and to replace the term "retroactively" with the term "retrospectively" to conform to the accounting guidance contained in FASB ASC Topic 250, Accounting Changes and Error Corrections.

b. Topic 5.F, the interpretive response is amended to remove an unnecessary reference to FASB Statement No. 5 and FASB Statement No. 13.

c. Topic 5.M, the footnote previously numbered 8 within the interpretive response is removed to delete a reference which is not included in the FASB ASC.

d. Topic 5.S, the interpretive responses to questions 2, 4 (including footnote 29) and 5 are amended to revise the quoted accounting guidance to conform to the language as published in the FASB ASC. The interpretive response to question 4 is amended to remove guidance which is not included in the FASB ASC. The footnote previously numbered 31 within the interpretive response to question 4 is removed to delete a reference which is not included in the FASB ASC.

e. Topic 5.V, the interpretive response to question 1 is amended to remove an unnecessary reference to SAB Topic 5.E, as the referenced guidance in SAB Topic 5.E was removed with the issuance of SAB No. 112. As a result, the related footnote previously numbered 38 is removed.

f. Topic 5.Y, the interpretive response to question 3 is amended to remove the reference to Regulation S–B, as this Regulation was eliminated effective February 4, 2008.

g. Topic 5.Z.4, footnote 51 is amended to remove an unnecessary reference to SAB Topic 5.E.

h. Topic 5.BB, the introductory facts are amended to revise the quoted

accounting guidance to conform to the language as published in the FASB ASC.

*Topic 6: Interpretations of Accounting Series Releases and Financial Reporting Releases*

a. Topic 6.K.3, the interpretive response is amended to conform to the accounting guidance contained in FASB ASC Topic 350, Intangible Assets—Goodwill and Other. This conforming change reflects the fact that goodwill is not amortized, but rather only tested for impairment.

b. Topic 6.L is amended throughout to update the references to the AICPA Audit and Accounting Guide, Depository and Lending Institutions with Conforming Changes as of June 1, 2009 (Audit Guide). Quoted guidance has been amended to conform to the language as published in the Audit Guide.

*Topic 8: Retail Companies*

a. Topic 8.A, the interpretive response is amended to remove unnecessary background information on the issuance of pre-FASB Codification standards.

*Topic 13: Revenue Recognition*

a. Topic 13.A.4.c, the interpretive response is amended to revise the quoted accounting guidance to conform to the language as published in the FASB ASC.

b. Topic 13.B, questions 2, 3, 4 and 5 and the interpretive responses and footnotes related to questions 2, 3, 4 and 5 are removed to eliminate unnecessary references and guidance specifically related to the original adoption of this SAB Topic.

*Topic 14: Share-Based Payment*

a. Topic 14.G is removed to eliminate unnecessary guidance on non-GAAP financial measures. Staff guidance on non-GAAP financial measures can be found in the Division of Corporation Finance's Compliance and Disclosure Interpretations.

b. Topics 14.H, 14.J, 14.K and 14.M are removed to eliminate unnecessary transition guidance specifically related to the first time adoption of FASB Statement No. 123(R), Share-Based Payment. Companies that had share-based payment arrangements prior to the adoption of FASB Statement No. 123(R) were required to apply this transition guidance in 2006 and therefore for these companies the guidance in Topics 14.H, 14.J, 14.K and 14.M is no longer relevant. For companies now entering into share-based payment arrangements for the first time, the guidance in FASB ASC Topic 718, Compensation—Stock Compensation, should be applied.

c. Topic 14.L is removed to conform to changes made to Items 17 and 18 of Form 20–F to reflect that reconciling items are required for disclosure only if a basis of accounting other than U.S. generally accepted accounting principles or International Financial Reporting Standards as issued by the International Accounting Standards Board is used.[

**Note:** The text of SAB 114 will not appear in the Code of Federal Regulations.

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2. Filing of a Letter From the Accountants
H. Accounting Series Release 148-Disclosure Of Compensating Balances And Short-Term Borrowing Arrangements (Adopted November 13, 1973 As Modified By ASR 172 Adopted On June 13, 1975 And ASR 280 Adopted On September 2, 1980)
1. *Applicability*
*a. Arrangements With Other Lending Institutions*
*b. Bank Holding Companies and Brokerage Firms*
*c. Financial Statements of Parent Company and Unconsolidated Subsidiaries*
*d. Foreign Lenders*
2. *Classification of Short-Term Obligations-Debt Related to Long-Term Projects*
3. *Compensating Balances*
*a. Compensating Balances for Future Credit Availability*
*b. Changes in Compensating Balances*
*c. Float*
4. *Miscellaneous*
*a. Periods Required*
*b. 10–Q Disclosures*
I. Accounting Series Release 149-Improved Disclosure Of Income Tax Expense (Adopted November 28, 1973 And Modified By ASR 280 Adopted On September 2, 1980)
1. *Tax Rate*
2. *Taxes of Investee Company*
3. *Net of Tax Presentation*
4. *Loss Years*
5. *Foreign Registrants*
6. *Securities Gains and Losses*
7. *Tax Expense Components v. "Overall" Presentation*
J. Removed by SAB 47
K. Accounting Series Release 302—Separate Financial Statements Required by Regulation S–X
1. Removed by SAB 103
2. *Parent Company Financial Information*
*a. Computation of Restricted Net Assets of Subsidiaries*
*b. Application of Tests for Parent Company Disclosures*
3. *Undistributed Earnings of 50% or Less Owned Persons*
4. *Application of Significant Subsidiary Test to Investees and Unconsolidated Subsidiaries*
*a. Separate Financial Statement Requirements*
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L. Financial Reporting Release 28—Accounting for Loan Losses by Registrants Engaged in Lending Activities
1. *Accounting for loan losses*
2. *Developing and Documenting a Systematic Methodology*
*a. Developing a Systematic Methodology*
*b. Documenting a Systematic Methodology*
3. *Applying a Systematic Methodology—Measuring and Documenting Loan Losses Under FASB ASC Subtopic 310–10*
*a. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 310–10—General*
*b. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 310–10 for a Collateral Dependent Loan*
*c. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 310–10—Fully Collateralized Loans*
4. *Applying a Systematic Methodology—Measuring and Documenting Loan Losses Under FASB ASC Subtopic 450–20*
*a. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 450–20—General*
*b. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 450–20—Adjusting Loss Rates*
*c. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 450–20—Estimating Losses on Loans Individually Reviewed for Impairment but not Considered Individually Impaired*
5. *Documenting the Results of a Systematic Methodology*
*a. Documenting the Results of a Systematic Methodology—General*
*b. Documenting the Results of a Systematic Methodology—Allowance Adjustments*
6. *Validating a Systematic Methodology*

**TOPIC 7: REAL ESTATE COMPANIES**

A. Removed by SAB 103
B. Removed by SAB 103
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**TOPIC 8: RETAIL COMPANIES**

A. Sales Of Leased Or Licensed Departments
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A. Removed by SAB 103
B. Removed by ASR 307

**TOPIC 10: UTILITY COMPANIES**

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B. Removed by SAB 103
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B. Depreciation and Depletion Excluded From Cost of Sales
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G. Tax Equivalent Adjustment in Financial Statements of Bank Holding Companies
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I. Reporting of an Allocated Transfer Risk Reserve in Filings Under the Federal Securities Laws
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L. Income Statement Presentation of Casino-Hotels
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3. *Disclosure of Reserve Information*
a. Removed by SAB 103
b. Removed by SAB 113
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*e. Rate Regulated Companies*
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B. Removed by SAB 103
C. Methods of Accounting by Oil and Gas Producers
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1. *Treatment of Income Tax Effects in the Computation of the Limitation on Capitalized Costs*
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*b. Use of Cash Flow Hedges in the Computation of the Limitation on Capitalized Costs*
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4. *Interaction of FASB ASC Subtopic 410–20, Asset Retirement and Environmental Obligations—Asset Retirement Obligations, and the Full Cost Rules*
*a. Impact of FASB ASC Subtopic 410–20 on the Full Cost Ceiling Test*
*b. Impact of FASB ASC Subtopic 410–20 on the Calculation of Depreciation, Depletion, and Amortization*
c. Removed by SAB 113
E. Financial Statements of Royalty Trusts
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**TOPIC 13: REVENUE RECOGNITION**

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1. *Revenue Recognition—General*
2. *Persuasive Evidence of an Arrangement*
3. *Delivery and Performance*
*a. Bill and Hold Arrangements*
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*e. Layaway Sales Arrangements*
*f. Nonrefundable Up-Front Fees*
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*a. Refundable Fees for Services*
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**TOPIC 14: SHARE–BASED PAYMENT**

A. Share-Based Payment Transactions with Nonemployees
B. Transition From Nonpublic to Public Entity Status
C. Valuation Methods
D. Certain Assumptions Used in Valuation Methods
E. FASB ASC Topic 718, Compensation—Stock Compensation, and Certain Redeemable Financial Instruments
F. Classification of Compensation Expense Associated With Share-Based Payment Arrangements
G. Removed by SAB 114
H. Removed by SAB 114
I. Capitalization of Compensation Cost Related to Share-Based Payment Arrangements
J. Removed by SAB 114
K. Removed by SAB 114
L. Removed by SAB 114
M. Removed by SAB 114

## TOPIC 1: FINANCIAL STATEMENTS

### *A. Target Companies*

*Facts:* Company X proposes to file a registration statement covering an exchange offer to stockholders of Company Y, a publicly held company. Company X asks Company Y to furnish information about its business, including current audited financial statements, for inclusion in the prospectus. Company Y declines to furnish such information.

*Question 1:* In filing the registration statement without the required information about Company Y, may Company X rely on Rule 409 in that the information is "unknown or not reasonably available?"

*Interpretive Response:* Yes, but to determine whether such reliance is justified, the staff requests the registrant to submit as supplemental information copies of correspondence between the registrant and the target company evidencing the request for and the refusal to furnish the financial statements. In addition, the prospectus must include any financial statements which are relevant and available from the Commission's public files and must contain a statement adequately describing the situation and the sources of information about the target company. Other reliable sources of financial information should also be utilized.

*Question 2:* Would the response change if Company Y was a closely held company?

*Interpretive Response:* Yes. The staff does not believe that Rule 409 is applicable to negotiated transactions of this type.

### *B. Allocation of Expenses and Related Disclosure in Financial Statements of Subsidiaries, Divisions or Lesser Business Components of Another Entity*

*Facts:* A company (the registrant) operates as a subsidiary of another company (parent). Certain expenses incurred by the parent on behalf of the subsidiary have not been charged to the subsidiary in the past. The subsidiary files a registration statement under the Securities Act of 1933 in connection with an initial public offering.

#### 1. Costs Reflected in Historical Financial Statements

*Question 1:* Should the subsidiary's historical income statements reflect all of the expenses that the parent incurred on its behalf?

*Interpretive Response:* In general, the staff believes that the historical income statements of a registrant should reflect all of its costs of doing business. Therefore, in specific situations, the staff has required the subsidiary to revise its financial statements to include certain expenses incurred by the parent on its behalf. Examples of such expenses may include, but are not necessarily limited to, the following (income taxes and interest are discussed separately below):

1. Officer and employee salaries,
2. Rent or depreciation,
3. Advertising,
4. Accounting and legal services, and
5. Other selling, general and administrative expenses.

When the subsidiary's financial statements have been previously reported on by independent accountants and have been used other than for internal purposes, the staff has accepted a presentation that shows income before tax as previously reported, followed by adjustments for expenses not previously allocated, income taxes, and adjusted net income.

*Question 2:* How should the amount of expenses incurred on the subsidiary's behalf by its parent be determined, and what disclosure is required in the financial statements?

*Interpretive Response:* The staff expects any expenses clearly applicable to the subsidiary to be reflected in its income statements. However, the staff understands that in some situations a reasonable method of allocating common expenses to the subsidiary (*e.g.,* incremental or proportional cost allocation) must be chosen because specific identification of expenses is not practicable. In these situations, the staff has required an explanation of the allocation method used in the notes to the financial statements along with management's assertion that the method used is reasonable.

In addition, since agreements with related parties are by definition not at arms length and may be changed at any time, the staff has required footnote disclosure, when practicable, of management's estimate of what the expenses (other than income taxes and interest discussed separately below) would have been on a stand alone basis, that is, the cost that would have been incurred if the subsidiary had operated as an unaffiliated entity. The disclosure has been presented for each year for which an income statement was required when such basis produced materially different results.

*Question 3:* What are the staff's views with respect to the accounting for and disclosure of the subsidiary's income tax expense?

*Interpretive Response:* Recently, a number of parent companies have sold interests in subsidiaries, but have retained sufficient ownership interests to permit continued inclusion of the subsidiaries in their consolidated tax returns. The staff believes that it is material to investors to know what the effect on income would have been if the registrant had not been eligible to be included in a consolidated income tax return with its parent. Some of these subsidiaries have calculated their tax provision on the separate return basis,

which the staff believes is the preferable method. Others, however, have used different allocation methods. When the historical income statements in the filing do not reflect the tax provision on the separate return basis, the staff has required a pro forma income statement for the most recent year and interim period reflecting a tax provision calculated on the separate return basis.[1]

*Question 4:* Should the historical income statements reflect a charge for interest on intercompany debt if no such charge had been previously provided?

*Interpretive Response:* The staff generally believes that financial statements are more useful to investors if they reflect all costs of doing business, including interest costs. Because of the inherent difficulty in distinguishing the elements of a subsidiary's capital structure, the staff has not insisted that the historical income statements include an interest charge on intercompany debt if such a charge was not provided in the past, except when debt specifically related to the operations of the subsidiary and previously carried on the parent's books will henceforth be recorded in the subsidiary's books. In any case, financing arrangements with the parent must be discussed in a note to the financial statements. In this connection, the staff has taken the position that, where an interest charge on intercompany debt has not been provided, appropriate disclosure would include an analysis of the intercompany accounts as well as the average balance due to or from related parties for each period for which an income statement is required. The analysis of the intercompany accounts has taken the form of a listing of transactions (*e.g.,* the allocation of costs to the subsidiary, intercompany purchases, and cash transfers between entities) for each period for which an income statement was required, reconciled to the intercompany accounts reflected in the balance sheets.

2. Pro Forma Financial Statements and Earnings per Share

*Question:* What disclosure should be made if the registrant's historical financial statements are not indicative of the ongoing entity (*e.g.,* tax or other cost sharing agreements will be terminated or revised)?

*Interpretive Response:* The registration statement should include pro forma financial information that is in accordance with Article 11 of Regulation S–X and reflects the impact of terminated or revised cost sharing agreements and other significant changes.

3. Other matters

*Question:* What is the staff's position with respect to dividends declared by the subsidiary subsequent to the balance sheet date?

*Interpretive Response:* The staff believes that such dividends either be given retroactive effect in the balance sheet with appropriate footnote disclosure, or reflected in a pro forma balance sheet. In addition, when the dividends are to be paid from the proceeds of the offering, the staff believes it is appropriate to include pro forma per share data (for the latest year and interim period only) giving effect to the number of shares whose proceeds were to be used to pay the dividend. A similar presentation is appropriate when dividends exceed earnings in the current year, even though the stated use of proceeds is other than for the payment of dividends. In these situations, pro forma per share data should give effect to the increase in the number of shares which, when multiplied by the offering price, would be sufficient to replace the capital in excess of earnings being withdrawn.

*C. Unaudited Financial Statements for a Full Fiscal Year*

*Facts:* Company A, which is a reporting company under the Securities Exchange Act of 1934, proposes to file a registration statement within 90 days of its fiscal year end but does not have audited year-end financial statements available. The company meets the criteria under Rule 3–01(c) of Regulation S–X and is therefore not required to include year-end audited financial statements in its registration statement. However, the Company does propose to include in the prospectus the unaudited results of operations for its entire fiscal year.

*Question:* Would the staff find this objectionable?

*Interpretive Response:* The staff recognizes that many registrants publish the results of their most recent year's operations prior to the availability of year-end audited financial statements. The staff will not object to the inclusion of unaudited results for a full fiscal year and indeed would expect such data in the registration statement if the registrant has published such information. When such data is included in a prospectus, it must be covered by a management's representation that all adjustments necessary for a fair statement of the results have been made.

*D. Foreign Companies*

1. Disclosures Required of Companies Complying With Item 17 of Form 20–F

*Facts:* A foreign private issuer may use Form 20–F as a registration statement under section 12 or as an annual report under section 13(a) or 15(d) of the Exchange Act. The registrant must furnish the financial statements specified in Item 17 of that form (Effective for fiscal years ending on or after December 15, 2011, compliance with Item 18 rather than Item 17 will be required for all issuer financial statements in all Securities Act registration statements, Exchange Act registration statements on Form 20–F, and annual reports on Form 20–F. *See* SEC Release No. 33–8959). However, in certain circumstances, Form F–3 requires that the annual report include financial statements complying with Item 18 of the form. Also, financial statements complying with Item 18 are required for registration of securities under the Securities Act in most circumstances. Item 17 permits the registrant to use its financial statements that are prepared on a comprehensive basis other than U.S. GAAP, but requires quantification of the material differences in the principles, practices and methods of accounting for any basis other than International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). An issuer complying with Item 18, other than those using IFRS as issued by the IASB, must satisfy the requirements of Item 17 and also must provide all other information required by U.S. GAAP and Regulation S–X.

*Question:* Assuming that the registrant's financial statements include a discussion of material variances from U.S. GAAP along with quantitative reconciliations of net income and material balance sheet items, does Item 17 of Form 20–F require other disclosures in addition to those prescribed by the standards and practices which comprise the comprehensive basis on which the registrant's primary financial statements are prepared?

*Interpretive Response:* No. The distinction between Items 17 and 18 is premised on a classification of the requirements of U.S. GAAP and

[1] FASB ASC paragraph 740–10–30–27 (Income Taxes Topic) states: "The consolidated amount of current and deferred tax expense for a group that files a consolidated tax return shall be allocated among the members of the group when those members issue separate financial statements. * * * The method adopted * * * shall be systematic, rational, and consistent with the broad principles established by this Subtopic. A method that allocates current and deferred taxes to members of the group by applying this Topic to each member as if it were a separate taxpayer meets those criteria."

Regulation S–X into those that specify the methods of measuring the amounts shown on the face of the financial statements and those prescribing disclosures that explain, modify or supplement the accounting measurements. Disclosures required by U.S. GAAP but not required under the foreign GAAP on which the financial statements are prepared need not be furnished pursuant to Item 17.

Notwithstanding the absence of a requirement for certain disclosures within the body of the financial statements, some matters routinely disclosed pursuant to U.S. GAAP may rise to a level of materiality such that their disclosure is required by Item 5 (Management's Discussion and Analysis) of Form 20–F. Among other things, this item calls for a discussion of any known trends, demands, commitments, events or uncertainties that are reasonably likely to affect liquidity, capital resources or the results of operations in a material way. Also, instruction 2 of this item requires "a discussion of any aspects of the differences between foreign and U.S. GAAP, not discussed in the reconciliation, that the registrant believes is necessary for an understanding of the financial statements as a whole." Matters that may warrant discussion in response to Item 5 include the following:

- Material undisclosed uncertainties (such as reasonably possible loss contingencies), commitments (such as those arising from leases), and credit risk exposures and concentrations;
- Material unrecognized obligations (such as pension obligations);
- Material changes in estimates and accounting methods, and other factors or events affecting comparability;
- Defaults on debt and material restrictions on dividends or other legal constraints on the registrant's use of its assets;
- Material changes in the relative amounts of constituent elements comprising line items presented on the face of the financial statements;
- Significant terms of financings which would reveal material cash requirements or constraints;
- Material subsequent events, such as events that affect the recoverability of recorded assets;
- Material related party transactions (as addressed by FASB ASC Topic 850, Related Party Disclosures) that may affect the terms under which material revenues or expenses are recorded; and
- Significant accounting policies and measurement assumptions not disclosed in the financial statements, including methods of costing inventory, recognizing revenues, and recording and amortizing assets, which may bear upon an understanding of operating trends or financial condition.

2. "Free Distributions" by Japanese Companies

*Facts:* It is the general practice in Japan for corporations to issue "free distributions" of common stock to existing shareholders in conjunction with offerings of common stock so that such offerings may be made at less than market. These free distributions usually are from 5 to 10 percent of outstanding stock and are accounted for in accordance with provisions of the Commercial Code of Japan by a transfer of the par value of the stock distributed from paid-in capital to the common stock account. Similar distributions are sometimes made at times other than when offering new stock and are also designated "free distributions." U.S. accounting practice would require that the fair value of such shares, if issued by U.S. companies, be transferred from retained earnings to the appropriate capital accounts.

*Question:* Should the financial statements of Japanese corporations included in Commission filings which are stated to be prepared in accordance with U.S. GAAP be adjusted to account for stock distributions of less than 25 percent of outstanding stock by transferring the fair value of such stock from retained earnings to appropriate capital accounts?

*Interpretive Response:* If registrants and their independent accountants believe that the institutional and economic environment in Japan with respect to the registrant is sufficiently different that U.S. accounting principles for stock dividends should not apply to free distributions, the staff will not object to such distributions being accounted for at par value in accordance with Japanese practice. If such financial statements are identified as being prepared in accordance with U.S. GAAP, then there should be footnote disclosure of the method being used which indicates that U.S. companies issuing shares in comparable amounts would be required to account for them as stock dividends, and including in such disclosure the fair value of any such shares issued during the year and the cumulative amount (either in an aggregate figure or a listing of the amounts by year) of the fair value of shares issued over time.

*E. Requirements for Audited or Certified Financial Statements*

1. Removed by SAB 103

2. Qualified Auditors' Opinions

*Facts:* The accountants' report is qualified as to scope of audit, or the accounting principles used.

*Question:* Does the staff consider the requirements for audited or certified financial statements met when the auditors' opinion is so qualified?

*Interpretive Response:* No. The staff does not accept as consistent with the requirements of Rule 2–02(b) of Regulation S–X financial statements on which the auditors' opinions are qualified because of a limitation on the scope of the audit, since in these situations the auditor was unable to perform all the procedures required by professional standards to support the expression of an opinion. This position was discussed in Accounting Series Release (ASR) 90 in connection with representations concerning the verification of prior years' inventories in first audits.

Financial statements for which the auditors' opinions contain qualifications relating to the acceptability of accounting principles used or the completeness of disclosures made are also unacceptable. (*See* ASR 4, and with respect to a "going concern" qualification, ASR 115.)

*F. Financial Statement Requirements in Filings Involving the Formation of a One-Bank Holding Company*

*Facts:* Holding Company A is organized for the purpose of issuing common stock to acquire all of the common stock of Bank A. Under the plan of reorganization, each share of common stock of Bank A will be exchanged for one share of common stock of the holding company. The shares of the holding company to be issued in the transaction will be registered on Form S–4. The holding company will not engage in any operations prior to consummation of the reorganization, and its only significant asset after the transaction will be its investment in the bank. The bank has been furnishing its shareholders with an annual report that includes financial statements that comply with GAAP. Item 14 of Schedule 14A of the proxy rules provides that financial statements generally are not necessary in proxy material relating only to changes in legal organization (such as reorganizations involving the issuer and one or more of its totally held subsidiaries).

*Question 1:* Must the financial statements and the information required

by Securities Act Industry Guide ("Guide 3")[2] for Bank A be included in the initial registration statement on Form S–4?

*Interpretive Response:* No, provided that certain conditions are met. The staff will not take exception to the omission of financial statements and Guide 3 information in the initial registration statement on Form S–4 if all of the following conditions are met:

- There are no anticipated changes in the shareholders' relative equity ownership interest in the underlying bank assets, except for redemption of no more than a nominal number of shares of unaffiliated persons who dissent;
- In the aggregate, only nominal borrowings are to be incurred for such purposes as organizing the holding company, to pay nonaffiliated persons who dissent, or to meet minimum capital requirements;
- There are no new classes of stock authorized other than those corresponding to the stock of Bank A immediately prior to the reorganization;
- There are no plans or arrangements to issue any additional shares to acquire any business other than Bank A; and,
- There has been no material adverse change in the financial condition of the bank since the latest fiscal year-end included in the annual report to shareholders.

If at the time of filing the S–4, a letter is furnished to the staff stating that all of these conditions are met, it will not be necessary to request the Division of Corporation Finance to waive the financial statement or Guide 3 requirements of Form S–4.

Although the financial statements may be omitted, the filing should include a section captioned, "Financial Statements," which states either that an annual report containing financial statements for at least the latest fiscal year prepared in conformity with GAAP was previously furnished to shareholders or is being delivered with the prospectus. If financial statements have been previously furnished, it should be indicated that an additional copy of such report for the latest fiscal year will be furnished promptly upon request without charge to shareholders. The name and address of the person to whom the request should be made should be provided. One copy of such annual report should be furnished supplementally with the initial filing for purposes of staff review.

If any nominal amounts are to be borrowed in connection with the formation of the holding company, a statement of capitalization should be included in the filing which shows Bank A on an historical basis, the pro forma adjustments, and the holding company on a pro forma basis. A note should also explain the pro forma effect, in total and per share, which the borrowings would have had on net income for the latest fiscal year if the transaction had occurred at the beginning of the period.

*Question 2:* Are the financial statements of Bank A required to be audited for purposes of the initial Form S–4 or the subsequent Form 10–K report?

*Interpretive Response:* The staff will not insist that the financial statements in the annual report to shareholders used to satisfy the requirement of the initial Form S–4 be audited.

The consolidated financial statements of the holding company to be included in the registrant's initial report on Form 10–K should comply with the applicable financial statement requirements in Regulation S–X at the time such annual report is filed. However, the regulations also provide that the staff may allow one or more of the required statements to be unaudited where it is consistent with the protection of investors.[3] Accordingly, the policy of the Division of Corporation Finance is as follows:

> The registrant should file audited balance sheets as of the two most recent fiscal years and audited statements of income and cash flows for each of the three latest fiscal years, with appropriate footnotes and schedules as required by Regulation S–X unless the financial statements have not previously been audited for the periods required to be filed. In such cases, the Division will not object if the financial statements in the first annual report on Form 10–K (or the special report filed pursuant to Rule 15d–2)[4] are audited only for the two latest fiscal years.[5] This policy only applies to filings on Form 10–K, and not to any Securities Act filings made after the initial S–4 filing.

The above procedure may be followed without making a specific request of the Division of Corporation Finance for a waiver of the financial statement requirements of Form 10–K.

The information required by Guide 3 should also be provided in the Form 10–K for at least the periods for which audited financial statements are furnished. If some of the statistical information for the two most recent fiscal years for which audited financial statements are included (other than information on nonperforming loans and the summary of loan loss experience) is unavailable and cannot be obtained without unwarranted or undue burden or expense, such data may be omitted provided a brief explanation in support of such representation is included in the report on Form 10–K. In all cases, however, information with respect to nonperforming loans and loan loss experience, or reasonably comparable data, must be furnished for at least the two latest fiscal years in the initial 10–K. Thereafter, for subsequent years in reports on Form 10–K, all of the Guide 3 information is required; Guide 3 information which had been omitted in the initial 10–K in accordance with the above procedure can be excluded in any subsequent 10–Ks.

*G. Removed by Financial Reporting Release (FRR) 55*

*H. Removed by FRR 55*

*I. Financial Statements of Properties Securing Mortgage Loans*

*Facts:* A registrant files a Securities Act registration statement covering a maximum of $100 million of securities. Proceeds of the offering will be used to make mortgage loans on operating residential or commercial property. Proceeds of the offering will be placed in escrow until $1 million of securities are sold at which point escrow may be broken, making the proceeds immediately available for lending, while the selling of securities would continue.

*Question 1:* Under what circumstances are the financial statements of a property on which the registrant makes or expects to make a loan required to be included in a filing?

*Interpretive Response:* Rule 3–14 of Regulation S–X specifies the requirements for financial statements when the registrant has acquired one or more properties which in the aggregate are significant, or since the date of the latest balance sheet required has acquired or proposes to acquire one or more properties which in the aggregate are significant.

Included in the category of properties acquired or to be acquired under Rule 3–14 are operating properties underlying certain mortgage loans, which in economic substance represent an investment in real estate or a joint venture rather than a loan. Certain characteristics of a lending arrangement indicate that the "lender" has the same risks and potential rewards as an owner or joint venturer. Those characteristics

[2] Item 801 of Regulation S–K.

[3] Rule 3–13 of Regulation S–X.

[4] Rule 15d–2 would be applicable if the annual report furnished with the Form S–4 was not for the registrant's most recent fiscal year. In such a situation, Rule 15d–2 would require the registrant to file a special report within 90 days after the effective date of the Form S–4 furnishing audited financial statements for the most recent fiscal year.

[5] Unaudited statements of income and cash flows should be furnished for the earliest period.

are set forth in the Acquisition, Development, and Construction Arrangements (ADC Arrangements) Subsection of FASB ASC Subtopic 310–10, Receivables—Overall.[6] [7] In September 1986 the EITF [8] reached a consensus on this issue [9] to the effect that, although the guidance in the ADC Arrangements Subsection of FASB ASC Subtopic 310–10 was issued to address the real estate ADC arrangements of financial institutions, preparers and auditors should consider that guidance in accounting for shared appreciation mortgages, loans on operating real estate and real estate ADC arrangements entered into by enterprises other than financial institutions.

FASB ASC Subtopic 815–15, Derivatives and Hedging—Embedded Derivatives, generally requires that embedded instruments meeting the definition of a derivative and not clearly and closely related to the host contract be accounted for separately from the host instrument. If the embedded expected residual profit component of an ADC arrangement need not be separately accounted for as a derivative under FASB ASC Topic 815, then the disclosure requirements discussed below for ADC loans and similar arrangements should be followed.[10]

In certain cases the "lender" has virtually the same potential rewards as those of an owner or a joint venturer by virtue of participating in expected residual profit.[11] In addition, the ADC Arrangements Subsection of FASB ASC Subtopic 310–10 includes a number of other characteristics which, when considered individually or in combination, would suggest that the risks of an ADC arrangement are similar to those associated with an investment in real estate or a joint venture or, conversely, that they are similar to those associated with a loan. Among those other characteristics is whether the lender agrees to provide all or substantially all necessary funds to acquire the property, resulting in the borrower having title to, but little or no equity in, the underlying property. The staff believes that the borrower's equity in the property is adequate to support accounting for the transaction as a mortgage loan when the borrower's initial investment meets the criteria in FASB ASC paragraph 360–20–40–18 (Property, Plant, and Equipment Topic) [12] and the borrower's payments of principal and interest on the loan are adequate to maintain a continuing investment in the property which meets the criteria in FASB ASC paragraph 360–20–40–19.[13]

The financial statements of properties which will secure mortgage loans made or to be made from the proceeds of the offering which have the characteristics of real estate investments or joint ventures should be included as required by Rule 3–14 in the registration statement when such properties secure loans previously made, or have been identified as security for probable loans prior to effectiveness, and in filings made pursuant to the undertaking in Item 20D of Securities Act Industry Guide 5.

Rule 1–02(w) of Regulation S–X includes the conditions used in determining whether an acquisition is significant. The separate financial statements of an individual property should be provided when a property would meet the requirements for a significant subsidiary under this rule using the amount of the "loan" as a substitute for the "investment in the subsidiary" in computing the specified conditions. The combined financial statements of properties which are not individually significant should also be provided. However, the staff will not object if the combined financial statements of such properties are not included if none of the conditions specified in Rule 1–02(w), with respect to all such properties combined, exceeds 20% in the aggregate.

Under certain circumstances, information may also be required regarding operating properties underlying mortgage loans where the terms do not result in the lender having virtually the same risks and potential rewards as those of owners or joint venturers. Generally, the staff believes that, where investment risks exist due to substantial asset concentration, financial and other information should be included regarding operating properties underlying a mortgage loan that represents a significant amount of the registrant's assets. Such presentation is consistent with Rule 3–13 of Regulation S–X and Rule 408 under the Securities Act of 1933.

Where the amount of a loan exceeds 20% of the amount in good faith expected to be raised in the offering, disclosures would be expected to consist of financial statements for the underlying operating properties for the periods contemplated by Rule 3–14. Further, where loans on related properties are made to a single person or group of affiliated persons which in the aggregate amount to more than 20% of the amount expected to be raised, the staff believes that such lending arrangements result in a sufficient concentration of assets so as to warrant the inclusion of financial and other information regarding the underlying properties.

*Question 2:* Will the financial statements of the mortgaged properties be required in filings made under the 1934 Act?

*Interpretive Response:* Rule 3–09 of Regulation S–X specifies the requirement for significant, as defined, investments in operating entities, the operations of which are not included in the registrant's consolidated financial statements.[14] Accordingly, the staff believes that the financial statements of properties securing significant loans which have the characteristics of real

[6] [Original footnote removed by SAB 114.]

[7] [Original footnote removed by SAB 114.]

[8] The Emerging Issues Task Force ("EITF") was formed in 1984 to assist the Financial Accounting Standards Board in the early identification and resolution of emerging accounting issues. Topics to be discussed by the EITF are publicly announced prior to its meetings and minutes of all EITF meetings are available to the public.

[9] FASB ASC paragraph 310–10–05–9.

[10] The equity kicker (the expected residual profit) would typically not be separated from the host contract and accounted for as a derivative because FASB ASC subparagraph 815–15–25–1(c) exempts a hybrid contract from bifurcation if a separate instrument with the same terms as the embedded equity kicker is not a derivative instrument subject to the requirements of FASB ASC Topic 815.

[11] Expected residual profit is defined in the ADC Arrangements Subsection of FASB ASC Subtopic 310–10 as the amount of profit, whether called interest or another name, such as equity kicker, above a reasonable amount of interest and fees expected to be earned by the "lender."

[12] FASB ASC Subtopic 360–20 establishes standards for the recognition of profit on real estate sales transactions. FASB ASC paragraph 360–20–40–18 states that the buyer's initial investment shall be adequate to demonstrate the buyer's commitment to pay for the property and shall indicate a reasonable likelihood that the seller will collect the receivable. Guidance on minimum initial investments in various types of real estate is provided in FASB ASC paragraphs 360–20–40–55–1 and 360–20–40–55–2.

[13] FASB ASC paragraph 360–20–40–19 states that the buyer's continuing investment in a real estate transaction shall not qualify unless the buyer is contractually required to pay each year on its total debt for the purchase price of the property an amount at least equal to the level annual payment that would be needed to pay that debt and interest on the unpaid balance over not more than (a) 20 years for debt for land and (b) the customary amortization term of a first mortgage loan by an independent established lending institution for other real estate.

[14] Rule 3–14 states that the financial statements of an acquired property should be furnished if the acquisition took place during the period for which the registrant's income statements are required. Paragraph (b) of the Rule states that the information required by the Rule is not required to be included in a filing on Form 10–K. That exception is consistent with Item 8 of Form 10–K which excludes acquired company financial statements, which would otherwise be required by Rule 3–05 of Regulation S–X, from inclusion in filings on that Form. Those exceptions are based, in part, on the fact that acquired properties and acquired companies will generally be included in the registrant's consolidated financial statements from the acquisition date.

estate investments or joint ventures should be included in subsequent filings as required by Rule 3–09. The materiality threshold for determining whether such an investment is significant is the same as set forth in paragraph (a) of that Rule.[15]

Likewise, the staff believes that filings made under the 1934 Act should include the same financial and other information relating to properties underlying any loans which are significant as discussed in the last paragraph of Question 1, except that in the determination of significance the 20% disclosure threshold should be measured using total assets. The staff believes that this presentation would be consistent with Rule 12b–20 under the Securities Exchange Act of 1934.

*Question 3:* The interpretive response to question 1 indicates that the staff believes that the borrower's equity in an operating property is adequate to support accounting for the transaction as a mortgage loan when the borrower's initial investment meets the criteria in FASB ASC paragraph 360–20–40–18 and the borrower's payments of principal and interest on the loan are adequate to maintain a continuing investment in the property which meets the criteria in FASB ASC paragraph 360–20–40–19. Is it the staff's view that meeting these criteria is the only way the borrower's equity in the property is considered adequate to support accounting for the transaction as a mortgage loan?

*Interpretive Response:* No. It is the staff's position that the determination of whether loan accounting is appropriate for these arrangements should be made by the registrant and its independent accountants based on the facts and circumstances of the individual arrangements, using the guidance provided in the ADC Arrangements Subsection of FASB ASC Subtopic 310–10. As stated in that Subsection, loan accounting may not be appropriate when the lender participates in expected residual profit and has virtually the same risks as those of an owner, or joint venturer. In assessing the question of whether the lender has virtually the same risks as an owner, or joint venturer, the essential test that needs to be addressed is whether the borrower has and is expected to continue to have a substantial amount at risk in the project.[16] The criteria described in FASB ASC Subtopic 360–20, Property, Plant, and Equipment—Real Estate Sales, provide a "safe harbor" for determining whether the borrower has a substantial amount at risk in the form of a substantial equity investment. The borrower may have a substantial amount at risk without meeting the criteria described in FASB ASC Subtopic 360–20.

*Question 4:* What financial statements should be included in filings made under the Securities Act regarding investment-type arrangements that individually amount to 10% or more of total assets?

*Interpretive Response:* In the staff's view, separate audited financial statements should be provided for any investment-type arrangement that constitutes 10% or more of the greater of (i) the amount of minimum proceeds or (ii) the total assets of the registrant, including the amount of proceeds raised, as of the date the filing is required to be made. Of course, the narrative information required by items 14 and 15 of Form S–11 should also be included with respect to these investment-type arrangements.

*Question 5:* What information must be provided under the Securities Act for investment-type arrangements that individually amount to less than 10%?

*Interpretive Response:* No specific financial information need be presented for investment-type arrangements that amount to less than 10%. However, where such arrangements aggregate more than 20%, a narrative description of the general character of the properties and arrangements should be included that gives an investor an understanding of the risks and rewards associated with these arrangements. Such information may, for example, include a description of the terms of the arrangements, participation by the registrant in expected residual profits, and property types and locations.

*Question 6:* What financial statements should be included in annual reports filed under the Exchange Act with respect to investment-type arrangements that constitute 10% or more of the registrant's total assets?

*Interpretive Response:* In annual reports filed with the Commission, the staff has advised registrants that separate audited financial statements should be provided for each nonconsolidated investment-type arrangement that is 20% or more of the registrant's total assets. While the distribution is on-going, however, the percentage may be calculated using the greater of (i) the amount of the minimum proceeds or (ii) the total assets of the registrant, including the amount of proceeds raised, as of the date the filing is required to be made. In annual reports to shareholders registrants may either include the separate audited financial statements for 20% or more nonconsolidated investment-type arrangements or, if those financial statements are not included, present summarized financial information for those arrangements in the notes to the registrant's financial statements.

The staff has also indicated that separate summarized financial information (as defined in Rule 1–02(bb) of Regulation S–X) should be provided in the footnotes to the registrant's financial statements for each nonconsolidated investment-type arrangement that is 10% or more but less than 20%. Of course, registrants should also make appropriate textural disclosure with respect to material investment-type arrangements in the "business" and "property" sections of their annual reports to the Commission.[17]

*Question 7:* What information should be provided in annual reports filed under the Exchange Act with respect to investment-type arrangements that do not meet the 10% threshold?

*Interpretive Response:* The staff believes it will not be necessary to provide any financial information (full or summarized) for investment-type arrangements that do not meet the 10% threshold. However, in the staff's view, where such arrangements aggregate more than 20%, a narrative description of the general character of the properties and arrangements would be necessary. The staff believes that information should be included that would give an investor an understanding of the risks and rewards associated with these arrangements. Such information may, for example, include a description of the terms of the arrangements, participation by the registrant in expected residual profits, and property types and locations. Of course, disclosure regarding the operations of such components should be included as part

[15] Rule 3–09(a) states, in part, that "[i]f any of the conditions set forth in [Rule] 1–02(w), substituting 20 percent for 10 percent in the tests used therein to determine significant subsidiary, are met * * * separate financial statements * * * shall be filed."

[16] Regarding the composition of the borrower's investment, FASB ASC paragraph 310–10–25–20 indicates that the borrower's investment may include the value of land or other assets contributed by the borrower, net of encumbrances. The staff emphasizes that such paragraph indicates, "* * * recently acquired property generally should be valued at no higher than cost * * *" Thus, for such recently acquired property, appraisals will not be sufficient to justify the use of a value in excess of cost.

[17] Registrants are reminded that in filings on Form 8–K that are triggered in connection with an acquisition of an investment-type arrangement, separate audited financial statements are required for any such arrangement that individually constitutes 10% or more.

of the Management's Discussion and Analysis where there is a known trend or uncertainty in the operations of such properties, either individually or in the aggregate, which would be reasonably likely to result in a material impact on the registrant's future operations, liquidity or capital resources.

*J. Application of Rule 3–05 in Initial Public Offerings*

*Facts:* Rule 3–05 of Regulation S–X establishes the financial statement requirements for businesses acquired or to be acquired. If required, financial statements must be provided for one, two or three years depending upon the relative significance of the acquired entity as determined by the application of Rule 1–02(w) of Regulation S–X. The calculations required for these tests are applied by comparison of the financial data of the registrant and acquiree(s) for the fiscal years most recently completed prior to the acquisition. The staff has recognized that these tests literally applied in some initial public offerings may require financial statements for an acquired entity which may not be significant to investors because the registrant has had substantial growth in assets and earnings in recent years.[18]

*Question:* How should Rules 3–05 and 1–02(w) of Regulation S–X be applied in determining the periods for which financial statements of acquirees are required to be included in registration statements for initial public offerings?

*Interpretive Response:* It is the staff's view that initial public offerings involving businesses that have been built by the aggregation of discrete businesses that remain substantially intact after acquisition[19] were not contemplated during the drafting of Rule 3–05 and that the significance of an acquired entity in such situations may be better measured in relation to the size of the registrant at the time the registration statement is filed, rather than its size at the time the acquisition was made. Therefore, for a first time registrant, the staff has indicated that in applying the significance tests in Rule 3–05, the three tests in Rule 1–02(w) generally can be measured against the combined entities, including those to be acquired, which comprise the registrant at the time the registration statement is filed. The staff's policy is intended to ensure that the registration statement will include not less than three, two and one year(s) of audited financial statements for not less than 60%, 80% and 90%, respectively, of the constituent businesses that will comprise the registrant on an ongoing basis. In all circumstances, the audited financial statements of the registrant are required for three years, or since its inception if less than three years. The requirement to provide the audited financial statements of a constituent business in the registration statement is satisfied for the post-acquisition period by including the entity's results in the audited consolidated financial statements of the registrant. If additional periods are required, the entity's separate audited financial statements for the immediate pre-acquisition period(s) should be presented.[20]

In order for the pre-acquisition audited financial statements of an acquiree to be omitted from the registration statement, the following conditions must be met:

a. The combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 9 months[21] may not exceed 10%;

b. The combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 21 months may not exceed 20%; and

c. The combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 33 months may not exceed 40%.

Combined significance is the total, for all included companies, of each individual company's highest level of significance computed under the three tests of significance. The significance tests should be applied to pro forma financial statements of the registrant, prepared in a manner consistent with Article 11 of Regulation S–X. The pro forma balance sheet should be as of the date of the registrant's latest balance sheet included in the registration statement, and should give effect to businesses acquired subsequent to the end of the latest year or to be acquired as if they had been acquired on that date. The pro forma statement of operations should be for the registrant's most recent fiscal year included in the registration statement and should give effect to all acquisitions consummated during and subsequent to the end of the year and probable acquisitions as if they had been consummated at the beginning of that fiscal year.

The three tests specified in Rule 1–02(w) should be made in comparison to the registrant's pro forma consolidated assets and pretax income from continuing operations. The assets and pretax income of the acquired businesses which are being evaluated for significance should reflect any new cost basis arising from purchase accounting.

*Example:* On February 20, 20X9 Registrant files Form S–1 containing its audited consolidated financial statements as of and for the three years ended December 31, 20X8. Acquisitions since inception have been:

| Acquiree | Fiscal year end | Date of acquisition | Highest significance at acquisition (percent) |
|---|---|---|---|
| A | 3/31 | 1/1/x7 | 60 |
| B | 7/31 | 4/1/x7 | 45 |
| C | 9/30 | 9/1/x7 | 40 |
| D | 12/31 | 2/1/x8 | 21 |
| E | 3/31 | 11/1/x8 | 11 |

[18] An acquisition which was relatively significant in the earliest year for which a registrant is required to file financial statements may be insignificant to its latest fiscal year due to internal growth and/or subsequent acquisitions. Literally applied, Rules 3–05 and 1–02(w) might still require separate financial statements for the now insignificant acquisition.

[19] For example, nursing homes, hospitals or cable TV systems. This interpretation would not apply to businesses for which the relative significance of one portion of the business to the total business may be altered by post-acquisition decisions as to the allocation of incoming orders between plants or locations. This bulletin does not address all possible cases in which similar relief may be appropriate but, rather, attempts to describe a general framework within which administrative policy has been established. In other distinguishable situations, registrants may request relief as appropriate to their individual facts and circumstances.

[20] If audited pre-acquisition financial statements of a business are necessary pursuant to the alternative tests described here, the interim period following that entity's latest pre-acquisition fiscal year end but prior to its acquisition by the registrant generally would be required to be audited.

[21] As a matter of policy the staff accepts financial statements for periods of not less than 9, 21 and 33 consecutive months (not more than 12 months may be included in any period reported on) as substantial compliance with requirements for financial statements for 1, 2 and 3 years, respectively.

| Acquiree | Fiscal year end | Date of acquisition | Highest significance at acquisition (percent) |
|---|---|---|---|
| F | 12/31 | To be acquired. | 11 |

The following table reflects the application of the significance tests to the combined financial information at the time the registration statement is filed.

| Component entity | Significance of | | | Highest level of significance |
|---|---|---|---|---|
| | Assets (percent) | Earnings (percent) | Investment percent) | |
| A | 12 | 23 | 12 | 23 |
| B | 10 | 21 | 10 | 21 |
| C | 21 | 3 | 4 | 21 |
| D | 10 | 5 | 13 | 13 |
| E | 4 | *9 | 3 | 9 |
| F | 2 | 11 | 6 | 11 |

*Loss.

Year 1 (most recent fiscal year)—Entity E is the only acquiree for which pre-acquisition financial statements may be omitted for the latest year since significance for each other entity exceeds 10% under one or more test.

Year 2 (preceding fiscal year)—Financial statements for E and F may be omitted since their combined significance is 20% and no other combination can be formed with E which would not exceed 20%.

Year 3 (second preceding fiscal year)—Financial statements for D, E and F may be omitted since the combined significance of these entities is 33% [22] and no other combination can be formed with E and F which would not exceed 40%.

The financial statement requirements must be satisfied by filing separate pre-acquisition audited financial statements for each entity that was not included in the consolidated financial statements for the periods set forth above. The following table illustrates the requirements for this example.

| Component entity | Date of acquisition | Minimum financial statement requirement | Period in consolidated financial statements (months) | Separate pre-acquisition audited financial statement |
|---|---|---|---|---|
| Registrant | N/A | 33 | 36 | |
| A | 1/1/x7 | 33 | 24 | 9 |
| B | 4/1/x7 | 33 | 21 | [23] 12 |
| C | 9/1/x7 | 33 | 16 | 17 |
| D | 2/1/x8 | 21 | 11 | 10 |
| E | 11/1/x8 | | 2 | |
| F | To be acquired. | 9 | | 9 |

*K. Financial Statements of Acquired Troubled Financial Institutions*

*Facts:* Federally insured depository institutions are subject to regulatory oversight by various Federal agencies including the Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Office of Thrift Supervision. During the 1980s, certain of these institutions experienced significant financial difficulties resulting in their inability to meet necessary capital and other regulatory requirements. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 was adopted to address various issues affecting this industry.

Many troubled institutions have merged into stronger institutions or reduced the scale of their operations through the sale of branches and other assets pursuant to recommendation or directives of the regulatory agencies. In other situations, institutions that were taken over by or operated under the management of a Federal regulator have been reorganized, sold or transferred by that Federal agency to financial and nonfinancial companies.

A number of registrants have acquired, or are contemplating acquisition of, these troubled financial institutions. Complete audited financial statements of the institutions for the periods necessary to comply fully with Rule 3–05 of Regulation S–X may not be reasonably available in some cases. Some troubled institutions have never obtained an audit while others have been operated under receivership by regulators for a significant period without audit. Auditors' reports on the financial statements of some of these acquirees may not satisfy the requirements of Rule 2–02 of Regulation S–X because they contain qualifications due to audit scope limitations or disclaim an opinion.

[22] Combined significance is the sum of the significance of D's investment test (13%), E's earnings test (9%) and F's earnings test (11%).

[23] The audited pre-acquisition period need not correspond to the acquiree's pre-acquisition fiscal year. However, audited periods must not be for periods in excess of 12 months.

A registrant that acquires a troubled financial institution for which complete audited financial statements are not reasonably available may be precluded from raising capital through a public offering of securities for up to three years following the acquisition because of the inability to comply with Rule 3–05.

*Question 1:* Are there circumstances under which the staff would conclude that financial statements of an acquired troubled financial institution are not required by Rule 3–05?

*Interpretive Response:* Yes. In some case, financial statements will not be required because there is not sufficient continuity of the acquired entity's operations prior to and after the acquisition, so that disclosure of prior financial information is material to an understanding of future operations, as discussed in Rule 11–01 of Regulation S–X. For example, such a circumstance may exist in the case of an acquisition solely of the physical facilities of a banking branch with assumption of the related deposits if neither income-producing assets (other than treasury bills and similar low-risk investment) nor the management responsible for its historical investment and lending activities transfer with the branch to the registrant. In this and other circumstances, where the registrant can persuasively demonstrate that continuity of operations is substantially lacking and a representation to this effect is included in the filing, the staff will not object to the omission of financial statements. However, applicable disclosures specified by Industry Guide 3, Article 11 of Regulation S–X (pro forma information), and other information which is descriptive of the transaction and of the assets acquired and liabilities assumed should be furnished to the extent reasonably available.

*Question 2:* If the acquired financial institution is found to constitute a business having material continuity of operations after the transaction, are there circumstances in which the staff will waive the requirements of Rule 3–05?

*Interpretive Response:* Yes. The staff believes the circumstances surrounding the present restructuring of U.S. depository institutions are unique. Accordingly, the staff has identified situations in which it will grant a waiver of the requirements of Rule 3–05 of Regulation S–X to the extent that audited financial statements are not reasonably available.

For purposes of this waiver a "troubled financial institution" is one which either:

1. Is in receivership, conservatorship or is otherwise operating under a similar supervisory agreement with a Federal financial regulatory agency; or
2. Is controlled by a Federal regulatory agency; or
3. Is acquired in a Federally assisted transaction.

A registrant that acquires a troubled financial institution that is deemed significant pursuant to Rule 3–05 may omit audited financial statements of the acquired entity, if such statements are not reasonably available and the total acquired assets of the troubled institution do not exceed 20% of the registrant's assets before giving effect to the acquisition. The staff will consider requests for waivers in situations involving more significant acquisitions, where Federal financial assistance or guarantees are an essential part of the transaction, or where the nature and magnitude of Federal assistance is so pervasive as to substantially reduce the relevance of such information to an assessment of future operations. Where financial statements are waived, disclosure concerning the acquired business as outlined in response to Question 3 must be furnished.

*Question 3:* Where historical financial statements meeting the requirements of Rule 3–05 of Regulation S–X are waived, what financial statements and other disclosures would the staff expect to be provided in filings with the Commission?

*Interpretive Response:* Where complete audited historical financial statements of a significant acquiree that is a troubled financial institution are not provided, the staff would expect filings to include an audited statement of assets acquired and liabilities assumed if the acquisition is not already reflected in the registrant's most recent audited balance sheet at the time the filing is made. Where reasonably available, unaudited statement of operations and cash flows that are prepared in accordance with GAAP and otherwise comply with Regulation S–X should be filed in lieu of any audited financial statements which are not provided if historical information may be relevant.

In all cases where a registrant succeeds to assets and/or liabilities of a troubled financial institution which are significant to the registrant pursuant to the tests in Rule 1–02(w) of Regulation S–X, narrative description should be required, quantified to the extent practicable, of the anticipated effects of the acquisition on the registrant's financial condition, liquidity, capital resources and operating results. If Federal financial assistance (including any commitments, agreements or understandings made with respect to capital, accounting or other forbearances) may be material, the limits, conditions and other variables affecting its availability should be disclosed, along with an analysis of its likely short term and long term effects on cash flows and reported results.

If the transaction will result in the recognition of any significant intangibles that cannot be separately sold, such as goodwill or a core deposit intangible, the discussion of the transaction should describe the amount of such intangibles, the necessarily subjective nature of the estimation of the life (in the case of intangibles subject to amortization) and value of such intangibles, and the effects upon future results of operations, liquidity and capital resources, including any consequences if a recognized intangible will be excluded from the calculation of capital for regulatory purposes. The discussion of the impact on future operations should specifically address the period over which intangibles subject to amortization will be amortized and the period over which any discounts on acquired assets will be taken into income. If amortization of intangibles subject to amortization will be over a period which differs from the period over which income from discounts on acquired assets will be recognized (whether from amortization of discounts or sale of discounted assets), disclosure should be provided concerning the disparate effects of the amortization and income recognition on operating results for all affected periods.

Information specified by Industry Guide 3 should be furnished to the extent applicable and reasonably available. For the categories identified in the Industry Guide, the registrant should disclose the fair value of loans and investments acquired, as well as their principal amount and average contractual yield and term. Amounts of acquired investments, loans, or other assets that are nonaccrual, past due or restructured, or for which other collectibility problems are indicated should be disclosed. Where historical financial statements of the acquired entity are furnished, pro forma information presented pursuant to Rule 11–02 should be supplemented as necessary with a discussion of the likely effects of any Federal assistance and changes in operations subsequent to the acquisition. To the extent historical financial statements meeting all the requirements of Rule 3–05 are not furnished, the filing should include an explanation of the basis for their omission.

*Question 4:* If an audited statement of assets acquired and liabilities assumed is required, but certain of the assets conveyed in the transaction are subject to rights allowing the registrant to put the assets back to the seller upon completion of a due diligence review, will the staff grant an extension of time for filing the required financial statement until the put period lapses?

*Interpretive Response:* If it is impracticable to provide an audited statement at the time the Form 8–K reporting the transaction is filed, an extension of time is available under certain circumstances. Specifically, if more than 25% of the acquired assets may be put and the put period does not exceed 120 days, the registrant should timely file a statement of assets acquired and liabilities assumed on an unaudited basis with full disclosure of the terms and amounts of the put arrangement. Within 21 days after the put period lapses, the registrant should furnish an audited statement of assets acquired and liabilities assumed unless the effects of the transaction are already reflected in an audited balance sheet which has been filed with the Commission. However, until the audited financial statement has been filed, certain offerings under the Securities Act of 1933 would be prevented, as described in the instructions to Item 9.01 of Form 8–K.

*L. Removed by SAB 103*

*M. Materiality*

1. Assessing Materiality

*Facts:* During the course of preparing or auditing year-end financial statements, financial management or the registrant's independent auditor becomes aware of misstatements in a registrant's financial statements. When combined, the misstatements result in a 4% overstatement of net income and a $.02 (4%) overstatement of earnings per share. Because no item in the registrant's consolidated financial statements is misstated by more than 5%, management and the independent auditor conclude that the deviation from GAAP is immaterial and that the accounting is permissible.[24]

*Question:* FASB ASC paragraph 105–10–05–6 (Generally Accepted Accounting Principles Topic) states, "The provisions of the Codification need not be applied to immaterial items." In the staff's view, may a registrant or the auditor of its financial statements assume the immateriality of items that fall below a percentage threshold set by management or the auditor to determine whether amounts and items are material to the financial statements?

*Interpretive Response:* No. The staff is aware that certain registrants, over time, have developed quantitative thresholds as "rules of thumb" to assist in the preparation of their financial statements, and that auditors also have used these thresholds in their evaluation of whether items might be considered material to users of a registrant's financial statements. One rule of thumb in particular suggests that the misstatement or omission [25] of an item that falls under a 5% threshold is not material in the absence of particularly egregious circumstances, such as self-dealing or misappropriation by senior management. The staff reminds registrants and the auditors of their financial statements that exclusive reliance on this or any percentage or numerical threshold has no basis in the accounting literature or the law.

The use of a percentage as a numerical threshold, such as 5%, may provide the basis for a preliminary assumption that—without considering all relevant circumstances—a deviation of less than the specified percentage with respect to a particular item on the registrant's financial statements is unlikely to be material. The staff has no objection to such a "rule of thumb" as an initial step in assessing materiality. But quantifying, in percentage terms, the magnitude of a misstatement is only the beginning of an analysis of materiality; it cannot appropriately be used as a substitute for a full analysis of all relevant considerations. Materiality concerns the significance of an item to users of a registrant's financial statements. A matter is "material" if there is a substantial likelihood that a reasonable person would consider it important. In its Concepts Statement 2, Qualitative Characteristics of Accounting Information, the FASB stated the essence of the concept of materiality as follows:

> The omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.[26]

This formulation in the accounting literature is in substance identical to the formulation used by the courts in interpreting the Federal securities laws. The Supreme Court has held that a fact is material if there is—

> a substantial likelihood that the * * * fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[27]

Under the governing principles, an assessment of materiality requires that one views the facts in the context of the "surrounding circumstances," as the accounting literature puts it, or the "total mix" of information, in the words of the Supreme Court. In the context of a misstatement of a financial statement item, while the "total mix" includes the size in numerical or percentage terms of the misstatement, it also includes the factual context in which the user of financial statements would view the financial statement item. The shorthand in the accounting and auditing literature for this analysis is that financial management and the auditor must consider both "quantitative" and "qualitative" factors in assessing an item's materiality.[28] Court decisions, Commission rules and enforcement actions, and accounting and auditing literature [29] have all considered "qualitative" factors in various contexts.

[24] AU 312 states that the auditor should consider audit risk and materiality both in (a) planning and setting the scope for the audit and (b) evaluating whether the financial statements taken as a whole are fairly presented in all material respects in conformity with GAAP. The purpose of this SAB is to provide guidance to financial management and independent auditors with respect to the evaluation of the materiality of misstatements that are identified in the audit process or preparation of the financial statements (*i.e.,* (b) above). This SAB is not intended to provide definitive guidance for assessing "materiality" in other contexts, such as evaluations of auditor independence, as other factors may apply. There may be other rules that address financial presentation. *See, e.g.,* Rule 2a–4, 17 CFR 270.2a–4, under the Investment Company Act of 1940.

[25] As used in this SAB, "misstatement" or "omission" refers to a financial statement assertion that would not be in conformity with GAAP.

[26] Concepts Statement 2, paragraph 132. *See also* Concepts Statement 2, Glossary of Terms—Materiality.

[27] *TSC Industries* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976). *See also Basic, Inc.* v. *Levinson,* 485 U.S. 224 (1988). As the Supreme Court has noted, determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him.* * *" TSC Industries, 426 U.S. at 450.

[28] *See, e.g.,* Concepts Statement 2, paragraphs 123–124; AU 312A.10 (materiality judgments are made in light of surrounding circumstances and necessarily involve both quantitative and qualitative considerations); AU 312A.34 ("Qualitative considerations also influence the auditor in reaching a conclusion as to whether misstatements are material."). As used in the accounting literature and in this SAB, "qualitative" materiality refers to the surrounding circumstances that inform an investor's evaluation of financial statement entries. Whether events may be material to investors for non-financial reasons is a matter not addressed by this SAB.

[29] *See, e.g.,* Rule 1–02(o) of Regulation S–X, 17 CFR 210.1–02(o), Rule 405 of Regulation C, 17 CFR 230.405, and Rule 12b–2, 17 CFR 240.12b–2; AU 312A.10–.11, 317.13, 411.04 n. 1, and 508.36; In re Kidder Peabody Securities Litigation, 10 F. Supp. 2d 398 (S.D.N.Y. 1998); Parnes v. Gateway 2000, Inc., 122 F.3d 539 (8th Cir. 1997); In re

The FASB has long emphasized that materiality cannot be reduced to a numerical formula. In its Concepts Statement 2, the FASB noted that some had urged it to promulgate quantitative materiality guides for use in a variety of situations. The FASB rejected such an approach as representing only a "minority view, stating—

> The predominant view is that materiality judgments can properly be made only by those who have all the facts. The Board's present position is that no general standards of materiality could be formulated to take into account all the considerations that enter into an experienced human judgment.[30]

The FASB noted that, in certain limited circumstances, the Commission and other authoritative bodies had issued quantitative materiality guidance, citing as examples guidelines ranging from one to ten percent with respect to a variety of disclosures.[31] And it took account of contradictory studies, one showing a lack of uniformity among auditors on materiality judgments, and another suggesting widespread use of a "rule of thumb" of five to ten percent of net income.[32] The FASB also considered whether an evaluation of materiality could be based solely on anticipating the market's reaction to accounting information.[33]

The FASB rejected a formulaic approach to discharging "the onerous duty of making materiality decisions"[34] in favor of an approach that takes into account all the relevant considerations. In so doing, it made clear that—

> [M]agnitude by itself, without regard to the nature of the item and the circumstances in which the judgment has to be made, will not generally be a sufficient basis for a materiality judgment.[35]

Evaluation of materiality requires a registrant and its auditor to consider *all* the relevant circumstances, and the staff believes that there are numerous circumstances in which misstatements below 5% could well be material. Qualitative factors may cause misstatements of quantitatively small amounts to be material; as stated in the auditing literature:

> As a result of the interaction of quantitative and qualitative considerations in materiality judgments, misstatements of relatively small amounts that come to the auditor's attention could have a material effect on the financial statements.[36]

Among the considerations that may well render material a quantitatively small misstatement of a financial statement item are—

- Whether the misstatement arises from an item capable of precise measurement or whether it arises from an estimate and, if so, the degree of imprecision inherent in the estimate.[37]
- Whether the misstatement masks a change in earnings or other trends.
- Whether the misstatement hides a failure to meet analysts' consensus expectations for the enterprise.
- Whether the misstatement changes a loss into income or vice versa.
- Whether the misstatement concerns a segment or other portion of the registrant's business that has been identified as playing a significant role in the registrant's operations or profitability.
- Whether the misstatement affects the registrant's compliance with regulatory requirements.
- Whether the misstatement affects the registrant's compliance with loan covenants or other contractual requirements.
- Whether the misstatement has the effect of increasing management's compensation—for example, by satisfying requirements for the award of bonuses or other forms of incentive compensation.
- Whether the misstatement involves concealment of an unlawful transaction.

This is not an exhaustive list of the circumstances that may affect the materiality of a quantitatively small misstatement.[38] Among other factors, the demonstrated volatility of the price of a registrant's securities in response to certain types of disclosures may provide guidance as to whether investors regard quantitatively small misstatements as material. Consideration of potential market reaction to disclosure of a misstatement is by itself "too blunt an instrument to be depended on" in considering whether a fact is material.[39] When, however, management or the independent auditor expects (based, for example, on a pattern of market performance) that a known misstatement may result in a significant positive or negative market reaction, that expected reaction should be taken into account when considering whether a misstatement is material.[40]

For the reasons noted above, the staff believes that a registrant and the auditors of its financial statements should not assume that even small intentional misstatements in financial statements, for example those pursuant to actions to "manage" earnings, are immaterial.[41] While the intent of management does not render a misstatement material, it may provide significant evidence of materiality. The evidence may be particularly compelling where management has intentionally misstated items in the financial statements to "manage" reported earnings. In that instance, it presumably has done so believing that the resulting amounts and trends would be significant to users of the registrant's financial statements.[42] The staff believes that investors generally would regard as significant a management practice to over- or under-state earnings up to an amount just short of a percentage threshold in order to "manage" earnings. Investors presumably also would regard as significant an accounting practice that, in essence, rendered all earnings figures subject to a management-directed margin of misstatement.

The materiality of a misstatement may turn on where it appears in the financial statements. For example, a misstatement may involve a segment of the

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Westinghouse Securities Litigation, 90 F.3d 696 (3d Cir. 1996); In the Matter of W.R. Grace & Co., Accounting and Auditing Enforcement Release ("AAER") 1140 (June 30, 1999); In the Matter of Eugene Gaughan, AAER 1141 (June 30, 1999); In the Matter of Thomas Scanlon, AAER 1142 (June 30, 1999); and In re Sensormatic Electronics Corporation, Sec. Act Rel. No. 7518 (March 25, 1998).

[30] Concepts Statement 2, paragraph 131.

[31] Concepts Statement 2, paragraphs 131 and 166.

[32] Concepts Statement 2, paragraph 167.

[33] Concepts Statement 2, paragraphs 168–169.

[34] Concepts Statement 2, paragraph 170.

[35] Concepts Statement 2, paragraph 125.

[36] AU 312.11.

[37] As stated in Concepts Statement 2, paragraph 130:

> Another factor in materiality judgments is the degree of precision that is attainable in estimating the judgment item. The amount of deviation that is considered immaterial may increase as the attainable degree of precision decreases. For example, accounts payable usually can be estimated more accurately than can contingent liabilities arising from litigation or threats of it, and a deviation considered to be material in the first case may be quite trivial in the second.

This SAB is not intended to change current law or guidance in the accounting literature regarding accounting estimates. *See, e.g.,* FASB ASC Topic 250, Accounting Changes and Error Corrections.

[38] The staff understands that the Big Five Audit Materiality Task Force ("Task Force") was convened in March of 1998 and has made recommendations to the Auditing Standards Board including suggestions regarding communications with audit committees about unadjusted misstatements. *See generally* Big Five Audit Materiality Task Force. "Materiality in a Financial Statement Audit—Considering Qualitative Factors When Evaluating Audit Findings" (August 1998).

[39] *See* Concepts Statement 2, paragraph 169.

[40] If management does not expect a significant market reaction, a misstatement still may be material and should be evaluated under the criteria discussed in this SAB.

[41] Intentional management of earnings and intentional misstatements, as used in this SAB, do not include insignificant errors and omissions that may occur in systems and recurring processes in the normal course of business. *See* notes 37 and 49 *infra.*

[42] Assessments of materiality should occur not only at year-end, but also during the preparation of each quarterly or interim financial statement. *See, e.g.,* In the Matter of Venator Group, Inc., AAER 1049 (June 29, 1998).

registrant's operations. In that instance, in assessing materiality of a misstatement to the financial statements taken as a whole, registrants and their auditors should consider not only the size of the misstatement but also the significance of the segment information to the financial statements taken as a whole.[43] "A misstatement of the revenue and operating profit of a relatively small segment that is represented by management to be important to the future profitability of the entity"[44] is more likely to be material to investors than a misstatement in a segment that management has not identified as especially important. In assessing the materiality of misstatements in segment information—as with materiality generally—

> situations may arise in practice where the auditor will conclude that a matter relating to segment information is qualitatively material even though, in his or her judgment, it is quantitatively immaterial to the financial statements taken as a whole.[45]

Aggregating and Netting Misstatements

In determining whether multiple misstatements cause the financial statements to be materially misstated, registrants and the auditors of their financial statements should consider each misstatement separately and the aggregate effect of all misstatements.[46] A registrant and its auditor should evaluate misstatements in light of quantitative and qualitative factors and "consider whether, in relation to individual amounts, subtotals, or totals in the financial statements, they materially misstate the financial statements taken as a whole."[47] This requires consideration of—

> the significance of an item to a particular entity (for example, inventories to a manufacturing company), the pervasiveness of the misstatement (such as whether it affects the presentation of numerous financial statement items), and the effect of the misstatement on the financial statements taken as a whole.* * *[48]

Registrants and their auditors first should consider whether each misstatement is material, irrespective of its effect when combined with other misstatements. The literature notes that the analysis should consider whether the misstatement of "individual amounts" causes a material misstatement of the financial statements taken as a whole. As with materiality generally, this analysis requires consideration of both quantitative and qualitative factors.

If the misstatement of an individual amount causes the financial statements as a whole to be materially misstated, that effect cannot be eliminated by other misstatements whose effect may be to diminish the impact of the misstatement on other financial statement items. To take an obvious example, if a registrant's revenues are a material financial statement item and if they are materially overstated, the financial statements taken as a whole will be materially misleading even if the effect on earnings is completely offset by an equivalent overstatement of expenses.

Even though a misstatement of an individual amount may not cause the financial statements taken as a whole to be materially misstated, it may nonetheless, when aggregated with other misstatements, render the financial statements taken as a whole to be materially misleading. Registrants and the auditors of their financial statements accordingly should consider the effect of the misstatement on subtotals or totals. The auditor should aggregate all misstatements that affect each subtotal or total and consider whether the misstatements in the aggregate affect the subtotal or total in a way that causes the registrant's financial statements taken as a whole to be materially misleading.[49]

The staff believes that, in considering the aggregate effect of multiple misstatements on a subtotal or total, registrants and the auditors of their financial statements should exercise particular care when considering whether to offset (or the appropriateness of offsetting) a misstatement of an estimated amount with a misstatement of an item capable of precise measurement. As noted above, assessments of materiality should never be purely mechanical; given the imprecision inherent in estimates, there is by definition a corresponding imprecision in the aggregation of misstatements involving estimates with those that do not involve an estimate.

Registrants and auditors also should consider the effect of misstatements from prior periods on the current financial statements. For example, the auditing literature states,

> Matters underlying adjustments proposed by the auditor but not recorded by the entity could potentially cause future financial statements to be materially misstated, even though the auditor has concluded that the adjustments are not material to the current financial statements.[50]

This may be particularly the case where immaterial misstatements recur in several years and the cumulative effect becomes material in the current year.

2. Immaterial Misstatements That Are Intentional

*Facts:* A registrant's management intentionally has made adjustments to various financial statement items in a manner inconsistent with GAAP. In each accounting period in which such actions were taken, none of the individual adjustments is by itself material, nor is the aggregate effect on the financial statements taken as a whole material for the period. The registrant's earnings "management" has been effected at the direction or acquiescence of management in the belief that any deviations from GAAP have been immaterial and that accordingly the accounting is permissible.

*Question:* In the staff's view, may a registrant make intentional immaterial misstatements in its financial statements?

*Interpretive Response:* No. In certain circumstances, intentional immaterial misstatements are unlawful.

Considerations of the Books and Records Provisions Under the Exchange Act

Even if misstatements are immaterial,[51] registrants must comply with Sections 13(b)(2)—(7) of the Securities Exchange Act of 1934 (the "Exchange Act").[52] Under these provisions, each registrant with

[43] *See, e.g.,* In the Matter of W.R. Grace & Co., AAER 1140 (June 30, 1999).

[44] AU 9326.33.

[45] *Id.*

[46] The auditing literature notes that the "concept of materiality recognizes that some matters, either individually or in the aggregate, are important for fair presentation of financial statements in conformity with generally accepted accounting principles." AU 312.03. *See also* AU 312.04.

[47] AU 312.34. Quantitative materiality assessments often are made by comparing adjustments to revenues, gross profit, pretax and net income, total assets, stockholders' equity, or individual line items in the financial statements. The particular items in the financial statements to be considered as a basis for the materiality determination depend on the proposed adjustment to be made and other factors, such as those identified in this SAB. For example, an adjustment to inventory that is immaterial to pretax income or net income may be material to the financial statements because it may affect a working capital ratio or cause the registrant to be in default of loan covenants.

[48] AU 508.36.

[49] AU 312.34.

[50] AU 380.09.

[51] FASB ASC paragraph 105–10–05–6 states that "[t]he provisions of the Codification need not be applied to immaterial items." This SAB is consistent with that provision of the Codification. In theory, this language is subject to the interpretation that the registrant is free intentionally to set forth immaterial items in financial statements in a manner that plainly would be contrary to GAAP if the misstatement were material. The staff believes that the FASB did not intend this result.

[52] 15 U.S.C. 78m(b)(2)–(7).

securities registered pursuant to Section 12 of the Exchange Act,[53] or required to file reports pursuant to Section 15(d),[54] must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant and must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP.[55] In this context, determinations of what constitutes "reasonable assurance" and "reasonable detail" are based not on a "materiality" analysis but on the level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs.[56] Accordingly, failure to record accurately immaterial items, in some instances, may result in violations of the securities laws.

The staff recognizes that there is limited authoritative guidance[57] regarding the "reasonableness" standard in Section 13(b)(2) of the Exchange Act. A principal statement of the Commission's policy in this area is set forth in an address given in 1981 by then Chairman Harold M. Williams.[58] In his address, Chairman Williams noted that, like materiality, "reasonableness" is not an "absolute standard of exactitude for corporate records."[59] Unlike materiality, however, "reasonableness" is not solely a measure of the significance of a financial statement item to investors. "Reasonableness," in this context, reflects a judgment as to whether an issuer's failure to correct a known misstatement implicates the purposes underlying the accounting provisions of Sections 13(b)(2)—(7) of the Exchange Act.[60]

In assessing whether a misstatement results in a violation of a registrant's obligation to keep books and records that are accurate "in reasonable detail," registrants and their auditors should consider, in addition to the factors discussed above concerning an evaluation of a misstatement's potential materiality, the factors set forth below.

- *The significance of the misstatement.* Though the staff does not believe that registrants need to make finely calibrated determinations of significance with respect to immaterial items, plainly it is "reasonable" to treat misstatements whose effects are clearly inconsequential differently than more significant ones.
- *How the misstatement arose.* It is unlikely that it is ever "reasonable" for registrants to record misstatements or not to correct known misstatements—even immaterial ones—as part of an ongoing effort directed by or known to senior management for the purposes of "managing" earnings. On the other hand, insignificant misstatements that arise from the operation of systems or recurring processes in the normal course of business generally will not cause a registrant's books to be inaccurate "in reasonable detail."[61]
- *The cost of correcting the misstatement.* The books and records provisions of the Exchange Act do not require registrants to make major expenditures to correct small misstatements.[62] Conversely, where there is little cost or delay involved in correcting a misstatement, failing to do so is unlikely to be "reasonable."
- *The clarity of authoritative accounting guidance with respect to the misstatement.* Where reasonable minds may differ about the appropriate accounting treatment of a financial statement item, a failure to correct it may not render the registrant's financial statements inaccurate "in reasonable detail." Where, however, there is little ground for reasonable disagreement, the case for leaving a misstatement uncorrected is correspondingly weaker.

There may be other indicators of "reasonableness" that registrants and their auditors may ordinarily consider. Because the judgment is not mechanical, the staff will be inclined to continue to defer to judgments that "allow a business, acting in good faith, to comply with the Act's accounting provisions in an innovative and cost-effective way."[63]

## The Auditor's Response to Intentional Misstatements

Section 10A(b) of the Exchange Act requires auditors to take certain actions upon discovery of an "illegal act."[64] The statute specifies that these obligations are triggered "whether or not [the illegal acts are] perceived to have a material effect on the financial statements of the issuer. * * *" Among other things, Section 10A(b)(1) requires the auditor to inform the appropriate level of management of an illegal act (unless clearly inconsequential) and assure that the registrant's audit committee is "adequately informed" with respect to the illegal act.

As noted, an intentional misstatement of immaterial items in a registrant's financial statements may violate Section 13(b)(2) of the Exchange Act and thus be an illegal act. When such a violation occurs, an auditor must take steps to see that the registrant's audit committee is "adequately informed" about the illegal act. Because Section 10A(b)(1) is triggered regardless of whether an illegal

[53] 15 U.S.C. 78l.

[54] 15 U.S.C. 78o(d).

[55] Criminal liability may be imposed if a person knowingly circumvents or knowingly fails to implement a system of internal accounting controls or knowingly falsifies books, records or accounts. 15 U.S.C. 78m(4) and (5). *See also* Rule 13b2–1 under the Exchange Act, 17 CFR 240.13b2–1, which states, "No person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act."

[56] 15 U.S.C. 78m(b)(7). The books and records provisions of section 13(b) of the Exchange Act originally were passed as part of the Foreign Corrupt Practices Act ("FCPA"). In the conference committee report regarding the 1988 amendments to the FCPA, the committee stated:

The conference committee adopted the prudent man qualification in order to clarify that the current standard does not connote an unrealistic degree of exactitude or precision. The concept of reasonableness of necessity contemplates the weighing of a number of relevant factors, including the costs of compliance.

Cong. Rec. H2116 (daily ed. April 20, 1988).

[57] So far as the staff is aware, there is only one judicial decision that discusses Section 13(b)(2) of the Exchange Act in any detail, *SEC* v. *World-Wide Coin Investments, Ltd.,* 567 F. Supp. 724 (N.D. Ga. 1983), and the courts generally have found that no private right of action exists under the accounting and books and records provisions of the Exchange Act. *See e.g., Lamb* v. *Phillip Morris Inc.,* 915 F.2d 1024 (6th Cir. 1990) and *JS Service Center Corporation* v. *General Electric Technical Services Company,* 937 F. Supp. 216 (S.D.N.Y. 1996).

[58] The Commission adopted the address as a formal statement of policy in Securities Exchange Act Release No. 17500 (January 29, 1981), 46 FR 11544 (February 9, 1981), 21 SEC Docket 1466 (February 10, 1981).

[59] *Id.* at 46 FR 11546.

[60] *Id.*

[61] For example, the conference report regarding the 1988 amendments to the FCPA stated:

The Conferees intend to codify current Securities and Exchange Commission (SEC) enforcement policy that penalties not be imposed for insignificant or technical infractions or inadvertent conduct. The amendment adopted by the Conferees [Section 13(b)(4)] accomplishes this by providing that criminal penalties shall not be imposed for failing to comply with the FCPA's books and records or accounting provisions. This provision [Section 13(b)(5)] is meant to ensure that criminal penalties would be imposed where acts of commission or omission in keeping books or records or administering accounting controls have the purpose of falsifying books, records or accounts, or of circumventing the accounting controls set forth in the Act. This would include the deliberate falsification of books and records and other conduct calculated to evade the internal accounting controls requirement.

Cong. Rec. H2115 (daily ed. April 20, 1988).

[62] As Chairman Williams noted with respect to the internal control provisions of the FCPA, "[t]housands of dollars ordinarily should not be spent conserving hundreds." 46 FR 11546.

[63] *Id.,* at 11547.

[64] Section 10A(f) defines, for purposes of Section 10A, an "illegal act" as "an act or omission that violates any law, or any rule or regulation having the force of law." This is broader than the definition of an "illegal act" in AU 317.02, which states, "Illegal acts by clients do not include personal misconduct by the entity's personnel unrelated to their business activities."

act has a material effect on the registrant's financial statements, where the illegal act consists of a misstatement in the registrant's financial statements, the auditor will be required to report that illegal act to the audit committee irrespective of any "netting" of the misstatements with other financial statement items.

The requirements of Section 10A echo the auditing literature. *See, e.g.,* Statement on Auditing Standards (SAS) Nos. 54 and 99. Pursuant to paragraph 77 of SAS 99, if the auditor determines there is evidence that fraud may exist, the auditor must discuss the matter with the appropriate level of management that is at least one level above those involved, and with senior management and the audit committee. The auditor must report directly to the audit committee fraud involving senior management and fraud that causes a material misstatement of the financial statements. Paragraph 6 of SAS 99 states that "misstatements arising from fraudulent financial reporting are intentional misstatements or omissions of amounts or disclosures in financial statements designed to deceive financial statement users * * *"[65] SAS 99 further states that fraudulent financial reporting may involve falsification or alteration of accounting records; misrepresenting or omitting events, transactions or other information in the financial statements; and the intentional misapplication of accounting principles relating to amounts, classifications, the manner of presentation, or disclosures in the financial statements.[66] The clear implication of SAS 99 is that immaterial misstatements may be fraudulent financial reporting.[67]

Auditors that learn of intentional misstatements may also be required to (1) re-evaluate the degree of audit risk involved in the audit engagement, (2) determine whether to revise the nature, timing, and extent of audit procedures accordingly, and (3) consider whether to resign.[68]

Intentional misstatements also may signal the existence of reportable conditions or material weaknesses in the registrant's system of internal accounting control designed to detect and deter improper accounting and financial reporting.[69] As stated by the National Commission on Fraudulent Financial Reporting, also known as the Treadway Commission, in its 1987 report,

> The tone set by top management—the corporate environment or culture within which financial reporting occurs—is the most important factor contributing to the integrity of the financial reporting process. Notwithstanding an impressive set of written rules and procedures, if the tone set by management is lax, fraudulent financial reporting is more likely to occur.[70]

An auditor is required to report to a registrant's audit committee any reportable conditions or material weaknesses in a registrant's system of internal accounting control that the auditor discovers in the course of the examination of the registrant's financial statements.[71]

GAAP Precedence Over Industry Practice

Some have argued to the staff that registrants should be permitted to follow an industry accounting practice even though that practice is inconsistent with authoritative accounting literature. This situation might occur if a practice is developed when there are few transactions and the accounting results are clearly inconsequential, and that practice never changes despite a subsequent growth in the number or materiality of such transactions. The staff disagrees with this argument. Authoritative literature takes precedence over industry practice that is contrary to GAAP.[72]

General Comments

This SAB is not intended to change current law or guidance in the accounting or auditing literature.[73] This SAB and the authoritative accounting literature cannot specifically address all of the novel and complex business transactions and events that may occur. Accordingly, registrants may account for, and make disclosures about, these transactions and events based on analogies to similar situations or other factors. The staff may not, however, always be persuaded that a registrant's determination is the most appropriate under the circumstances. When disagreements occur after a transaction or an event has been reported, the consequences may be severe for registrants, auditors, and, most importantly, the users of financial statements who have a right to expect consistent accounting and reporting for, and disclosure of, similar transactions and events. The staff, therefore,

[65] An unintentional illegal act triggers the same procedures and considerations by the auditor as a fraudulent misstatement if the illegal act has a direct and material effect on the financial statements. *See* AU 110 n. 1, 317.05 and 317.07. Although distinguishing between intentional and unintentional misstatements is often difficult, the auditor must plan and perform the audit to obtain reasonable assurance that the financial statements are free of material misstatements in either case.

[66] Although the auditor is not required to plan or perform the audit to detect misstatements that are immaterial to the financial statements, SAS 99 requires the auditor to evaluate several fraud "risk factors" that may bring such misstatements to his or her attention. For example, an analysis of fraud risk factors under SAS 99 must include, among other things, consideration of management's interest in maintaining or increasing the registrant's stock price or earnings trend through the use of unusually aggressive accounting practices, whether management has a practice of committing to analysts or others that it will achieve unduly aggressive or clearly unrealistic forecasts, and the existence of assets, liabilities, revenues, or expenses based on significant estimates that involve unusually subjective judgments or uncertainties.

[67] In requiring the auditor to consider whether fraudulent misstatements are material, and in requiring differing responses depending on whether the misstatement is material, SAS 99 makes clear that fraud can involve immaterial misstatements. Indeed, a misstatement can be "inconsequential" and still involve fraud. Under SAS 99, assessing whether misstatements due to fraud are material to the financial statements is a "cumulative process" that should occur both during and at the completion of the audit. SAS 99 further states that this accumulation is primarily a "qualitative matter" based on the auditor's judgment. The staff believes that in making these assessments, management and auditors should refer to the discussion in Part 1 of this SAB.

[68] Auditors should document their determinations in accordance with SAS 96, SAS 99, and other appropriate sections of the audit literature.

[69] *See, e.g.,* SAS 99.

[70] Report of the National Commission on Fraudulent Financial Reporting at 32 (October 1987). *See also* Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (February 8, 1999).

[71] AU 325.02. *See also* AU 380.09, which, in discussing matters to be communicated by the auditor to the audit committee, states:

> The auditor should inform the audit committee about adjustments arising from the audit that could, in his judgment, either individually or in the aggregate, have a significant effect on the entity's financial reporting process. For purposes of this section, an audit adjustment, whether or not recorded by the entity, is a proposed correction of the financial statements. * * *

[72] *See* AU 411.05.

[73] The FASB Discussion Memorandum, "Criteria for Determining Materiality," states that the financial accounting and reporting process considers that "a great deal of the time might be spent during the accounting process considering insignificant matters. * * * If presentations of financial information are to be prepared economically on a timely basis and presented in a concise intelligible form, the concept of materiality is crucial." This SAB is not intended to require that misstatements arising from insignificant errors and omissions (individually and in the aggregate) arising from the normal recurring accounting close processes, such as a clerical error or an adjustment for a missed accounts payable invoice, always be corrected, even if the error is identified in the audit process and known to management. Management and the auditor would need to consider the various factors described elsewhere in this SAB in assessing whether such misstatements are material, need to be corrected to comply with the FCPA, or trigger procedures under Section 10A of the Exchange Act. Because this SAB does not change current law or guidance in the accounting or auditing literature, adherence to the principles described in this SAB should not raise the costs associated with recordkeeping or with audits of financial statements.

encourages registrants and auditors to discuss on a timely basis with the staff proposed accounting treatments for, or disclosures about, transactions or events that are not specifically covered by the existing accounting literature.

*N. Considering the Effects of Prior Year Misstatements When Quantifying Misstatements in Current Year Financial Statements*

(Added by SAB 108)

*Facts:* During the course of preparing annual financial statements, a registrant is evaluating the materiality of an improper expense accrual (*e.g.,* overstated liability) in the amount of $100, which has built up over 5 years, at $20 per year.[74] The registrant previously evaluated the misstatement as being immaterial to each of the prior year financial statements (*i.e.,* years 1–4). For the purpose of evaluating materiality in the current year (*i.e.,* year 5), the registrant quantifies the error as a $20 overstatement of expenses.

*Question 1:* Has the registrant appropriately quantified the amount of this error for the purpose of evaluating materiality for the current year?

*Interpretive Response:* No. In this example, the registrant has only quantified the effects of the identified unadjusted error that arose in the current year income statement. The staff believes a registrant's materiality evaluation of an identified unadjusted error should quantify the effects of the identified unadjusted error on each financial statement and related financial statement disclosure.

Topic 1M notes that a materiality evaluation must be based on all relevant quantitative and qualitative factors.[75] This analysis generally begins with quantifying potential misstatements to be evaluated. There has been diversity in practice with respect to this initial step of a materiality analysis.

The diversity in approaches for quantifying the amount of misstatements primarily stems from the effects of misstatements that were not corrected at the end of the prior year ("prior year misstatements"). These prior year misstatements should be considered in quantifying misstatements in current year financial statements.

The techniques most commonly used in practice to accumulate and quantify misstatements are generally referred to as the "rollover" and "iron curtain" approaches.

The rollover approach, which is the approach used by the registrant in this example, quantifies a misstatement based on the amount of the error originating in the current year income statement. Thus, this approach ignores the effects of correcting the portion of the current year balance sheet misstatement that originated in prior years (*i.e.,* it ignores the "carryover effects" of prior year misstatements).

The iron curtain approach quantifies a misstatement based on the effects of correcting the misstatement existing in the balance sheet at the end of the current year, irrespective of the misstatement's year(s) of origination. Had the registrant in this fact pattern applied the iron curtain approach, the misstatement would have been quantified as a $100 misstatement based on the end of year balance sheet misstatement. Thus, the adjustment needed to correct the financial statements for the end of year error would be to reduce the liability by $100 with a corresponding decrease in current year expense.

As demonstrated in this example, the primary weakness of the rollover approach is that it can result in the accumulation of significant misstatements on the balance sheet that are deemed immaterial in part because the amount that originates in each year is quantitatively small. The staff is aware of situations in which a registrant, relying on the rollover approach, has allowed an erroneous item to accumulate on the balance sheet to the point where eliminating the improper asset or liability would itself result in a material error in the income statement if adjusted in the current year. Such registrants have sometimes concluded that the improper asset or liability should remain on the balance sheet into perpetuity.

In contrast, the primary weakness of the iron curtain approach is that it does not consider the correction of prior year misstatements in the current year (*i.e.,* the reversal of the carryover effects) to be errors. Therefore, in this example, if the misstatement was corrected during the current year such that no error existed in the balance sheet at the end of the current year, the reversal of the $80 prior year misstatement would not be considered an error in the current year financial statements under the iron curtain approach. Implicitly, the iron curtain approach assumes that because the prior year financial statements were not materially misstated, correcting any immaterial errors that existed in those statements in the current year is the "correct" accounting, and is therefore not considered an error in the current year. Thus, utilization of the iron curtain approach can result in a misstatement in the current year income statement not being evaluated as an error at all.

The staff does not believe the exclusive reliance on either the rollover or iron curtain approach appropriately quantifies all misstatements that could be material to users of financial statements.

In describing the concept of materiality, Concepts Statement 2, Qualitative Characteristics of Accounting Information, indicates that materiality determinations are based on whether "it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced *by the inclusion or correction of the item*" (emphasis added).[76] The staff believes registrants must quantify the impact of correcting all misstatements, including both the carryover and reversing effects of prior year misstatements, on the current year financial statements. The staff believes that this can be accomplished by quantifying an error under both the rollover and iron curtain approaches as described above and by evaluating the error measured under each approach. Thus, a registrant's financial statements would require adjustment when either approach results in quantifying a misstatement that is material, after considering all relevant quantitative and qualitative factors.

As a reminder, a change from an accounting principle that is not generally accepted to one that is generally accepted is a correction of an error.[77]

The staff believes that the registrant should quantify the current year misstatement in this example using both the iron curtain approach (*i.e.,* $100) and the rollover approach (*i.e.,* $20). Therefore, if the $100 misstatement is considered material to the financial statements, after all of the relevant quantitative and qualitative factors are considered, the registrant's financial statements would need to be adjusted.

It is possible that correcting an error in the current year could materially misstate the current year's income statement. For example, correcting the

[74] For purposes of these facts, assume the registrant properly determined that the overstatement of the liability resulted from an error rather than a change in accounting estimate. *See* the FASB ASC Master Glossary for the distinction between an error in previously issued financial statements and a change in accounting estimate.

[75] Topic 1N addresses certain of these quantitative issues, but does not alter the analysis required by Topic 1M.

[76] Concepts Statement 2, paragraph 132. *See also* Concepts Statement 2, Glossary of Terms—Materiality.

[77] *See* definition of "error in previously issued financial statements" in the FASB ASC Master Glossary.

$100 misstatement in the current year will:

- Correct the $20 error originating in the current year;
- Correct the $80 balance sheet carryover error that originated in Years 1 through 4; but also
- Misstate the current year income statement by $80.

If the $80 understatement of current year expense is material to the current year, after all of the relevant quantitative and qualitative factors are considered, the prior year financial statements should be corrected, even though such revision previously was and continues to be immaterial to the prior year financial statements. Correcting prior year financial statements for immaterial errors would not require previously filed reports to be amended. Such correction may be made the next time the registrant files the prior year financial statements.

The following example further illustrates the staff's views on quantifying misstatements, including the consideration of the effects of prior year misstatements:

*Facts:* During the course of preparing annual financial statements, a registrant is evaluating the materiality of a sales cut-off error in which $50 of revenue from the following year was recorded in the current year, thereby overstating accounts receivable by $50 at the end of the current year. In addition, a similar sales cut-off error existed at the end of the prior year in which $110 of revenue from the current year was recorded in the prior year. As a result of the combination of the current year and prior year cut-off errors, revenues in the current year are understated by $60 ($110 understatement of revenues at the beginning of the current year partially offset by a $50 overstatement of revenues at the end of the current year). The prior year error was evaluated in the prior year as being immaterial to those financial statements.

*Question 2:* How should the registrant quantify the misstatement in the current year financial statements?

*Interpretive Response:* The staff believes the registrant should quantify the current year misstatement in this example using both the iron curtain approach (*i.e.,* $50) and the rollover approach (*i.e.,* $60). Therefore, assuming a $60 misstatement is considered material to the financial statements, after all relevant quantitative and qualitative factors are considered, the registrant's financial statements would need to be adjusted.

Further, in this example, recording an adjustment in the current year could alter the amount of the error affecting the current year financial statements. For instance:

- If only the $60 understatement of revenues were to be corrected in the current year, then the overstatement of current year end accounts receivable would increase to $110; or,
- If only the $50 overstatement of accounts receivable were to be corrected in the current year, then the understatement of current year revenues would increase to $110.

If the misstatement that exists after recording the adjustment in the current year financial statements is material (considering all relevant quantitative and qualitative factors), the prior year financial statements should be corrected, even though such revision previously was and continues to be immaterial to the prior year financial statements. Correcting prior year financial statements for immaterial errors would not require previously filed reports to be amended. Such correction may be made the next time the registrant files the prior year financial statements.

If the cut-off error that existed in the prior year was not discovered until the current year, a separate analysis of the financial statements of the prior year (and any other prior year in which previously undiscovered errors existed) would need to be performed to determine whether such prior year financial statements were materially misstated. If that analysis indicates that the prior year financial statements are materially misstated, they would need to be restated in accordance with FASB ASC Topic 250, Accounting Changes and Error Corrections.[78]

*Facts:* When preparing its financial statements for years ending on or before November 15, 2006, a registrant quantified errors by using either the iron curtain approach or the rollover approach, but not both. Based on consideration of the guidance in this Staff Accounting Bulletin, the registrant concludes that errors existing in previously issued financial statements are material.

*Question 3:* Will the staff expect the registrant to restate prior period financial statements when first applying this guidance?

*Interpretive Response:* The staff will not object if a registrant[79] does not restate financial statements for fiscal years ending on or before November 15, 2006, if management properly applied its previous approach, either iron curtain or rollover, so long as all relevant qualitative factors were considered.

To provide full disclosure, registrants electing not to restate prior periods should reflect the effects of initially applying the guidance in Topic 1N in their annual financial statements covering the first fiscal year ending after November 15, 2006. The cumulative effect of the initial application should be reported in the carrying amounts of assets and liabilities as of the beginning of that fiscal year, and the offsetting adjustment should be made to the opening balance of retained earnings for that year. Registrants should disclose the nature and amount of each individual error being corrected in the cumulative adjustment. The disclosure should also include when and how each error being corrected arose and the fact that the errors had previously been considered immaterial.

Early application of the guidance in Topic 1N is encouraged in any report for an interim period of the first fiscal year ending after November 15, 2006, filed after the publication of this Staff Accounting Bulletin. In the event that the cumulative effect of application of the guidance in Topic 1N is first reported in an interim period other than the first interim period of the first fiscal year ending after November 15, 2006, previously filed interim reports need not be amended. However, comparative information presented in reports for interim periods of the first year subsequent to initial application should be adjusted to reflect the cumulative effect adjustment as of the beginning of the year of initial application. In addition, the disclosures of selected quarterly information required by Item 302 of Regulation S–K should reflect the adjusted results.

## TOPIC 2: BUSINESS COMBINATIONS

### *A. Acquisition Method*

1. Removed by SAB 103
2. Removed by SAB 103
3. Removed by SAB 103
4. Removed by SAB 103
5. Removed by SAB 112
6. Debt Issue Costs

*Facts:* Company A is to acquire the net assets of Company B in a transaction

[78] FASB ASC paragraph 250–10–45–23.

[79] If a registrant's initial registration statement is not effective on or before November 15, 2006, and the registrant's prior year(s) financial statements are materially misstated based on consideration of the guidance in this Staff Accounting Bulletin, the prior year financial statements should be restated in accordance with FASB ASC paragraph 250–10–45–23. If a registrant's initial registration statement is effective on or before November 15, 2006, the guidance in the interpretive response to Question 3 is applicable.

to be accounted for as a business combination. In connection with the transaction, Company A has retained an investment banker to provide advisory services in structuring the acquisition and to provide the necessary financing. It is expected that the acquisition will be financed on an interim basis using "bridge financing" provided by the investment banker. Permanent financing will be arranged at a later date through a debt offering, which will be underwritten by the investment banker. Fees will be paid to the investment banker for the advisory services, the bridge financing, and the underwriting of the permanent financing. These services may be billed separately or as a single amount.

*Question 1:* Should total fees paid to the investment banker for acquisition-related services and the issuance of debt securities be allocated between the services received?

*Interpretive Response:* Yes. Fees paid to an investment banker in connection with a business combination or asset acquisition, when the investment banker is also providing interim financing or underwriting services, must be allocated between acquisition related services and debt issue costs.

When an investment banker provides services in connection with a business combination or asset acquisition and also provides underwriting services associated with the issuance of debt or equity securities, the total fees incurred by an entity should be allocated between the services received on a relative fair value basis. The objective of the allocation is to ascribe the total fees incurred to the actual services provided by the investment banker.

FASB ASC Topic 805, Business Combinations, provides guidance for the portion of the costs that represent acquisition-related services. The portion of the costs pertaining to the issuance of debt or equity securities should be accounted for in accordance with other applicable GAAP.

*Question 2:* May the debt issue costs of the interim "bridge financing" be amortized over the anticipated combined life of the bridge and permanent financings?

1. *Interpretive Response:* No. Debt issue costs should be amortized by the interest method over the life of the debt to which they relate. Debt issue costs related to the bridge financing should be recognized as interest cost during the estimated interim period preceding the placement of the permanent financing with any unamortized amounts charged to expense if the bridge loan is repaid prior to the expiration of the estimated period. Where the bridged financing consists of increasing rate debt, the guidance issued in FASB ASC Topic 470, Debt, should be followed.[1]

7. Removed by SAB 112

8. Business Combinations Prior to an Initial Public Offering

*Facts:* Two or more businesses combine in a single combination just prior to or contemporaneously with an initial public offering.

*Question:* Does the guidance in SAB Topic 5.G apply to business combinations entered into just prior to or contemporaneously with an initial public offering?

*Interpretive Response:* No. The guidance in SAB Topic 5.G is intended to address the transfer, just prior to or contemporaneously with an initial public offering, of nonmonetary assets in exchange for a company's stock. The guidance in SAB Topic 5.G is not intended to modify the requirements of FASB ASC Topic 805. Accordingly, the staff believes that the combination of two or more businesses should be accounted for in accordance with FASB ASC Topic 805.

9. Removed by SAB 112

*B. Removed by SAB 103*

*C. Removed by SAB 103*

*D. Financial Statements of Oil And Gas Exchange Offers*

*Facts:* The oil and gas industry has experienced periods of time where there have been a significant number of "exchange offers" (also referred to as "roll-ups" or "put-togethers") to form a publicly held company, take an existing private company public, or increase the size of an existing publicly held company. An exchange offer transaction involves a swap of shares in a corporation for interests in properties, typically limited partnership interests. Such interests could include direct interests such as working interests and royalties related to developed or undeveloped properties and indirect interests such as limited partnership interests or shares of existing oil and gas companies. Generally, such transactions are structured to be tax-free to the individual or entity trading the property interest for shares of the corporation. Under certain circumstances, however, part or all of the transaction may be taxable. For purposes of the discussion in this Topic, in each of these situations, the entity (or entities) or property (or properties) are deemed to constitute a business.

One financial reporting issue in exchange transactions involves deciding which prior financial results of the entities should be reported.

*Question 1:* In Form 10–K filings with the Commission, the staff has permitted limited partnerships to omit certain of the oil and gas reserve value information and the supplemental summary of oil and gas activities disclosures required by FASB ASC Subtopic 932–235, Extractive Activities—Oil and Gas—Notes to Financial Statements, in some circumstances. Is it permissible to omit these disclosures from the financial statements included in an exchange offering?

*Interpretive Response:* No. Normally full disclosures of reserve data and related information are required. The exemptions previously allowed relate only to partnerships where value-oriented data are otherwise available to the limited partners pursuant to the partnership agreement. The staff has previously stated that it will require all of the required disclosures for partnerships which are the subject of exchange offers.[2] These disclosures may, however, be presented on a combined basis if the entities are under common control.

The staff believes that the financial statements in an exchange offer registration statement should provide sufficient historical reserve quantity and value-based disclosures to enable offerees and secondary market public investors to evaluate the effect of the exchange proposal. Accordingly, in all cases, it will be necessary to present information as of the latest year-end on reserve quantities and the future net revenues associated with such quantities. In certain circumstances, where the exchange is accounted for using the acquisition method of accounting, the staff will consider, on a case-by-case basis, granting exemptions from (i) the disclosure requirements for year-to-year reconciliations of reserve quantities, and (ii) the requirements for a summary of oil and gas producing activities and a summary of changes in the net present value of reserves. For instance, the staff may consider requests for exemptions in cases where the properties acquired in the exchange transaction are fully explored and developed, particularly if the management of the emerging company has not been involved in the exploration and development of such properties.

[1] As noted in FASB ASC paragraph 470–10–35–2, the term-extending provisions of the debt instrument should be analyzed to determine whether they constitute an embedded derivative requiring separate accounting in accordance with FASB ASC Topic 815, Derivatives and Hedging.

[2] *See* SAB 40, Topic 12.A.3.c.

*Question 2:* If the exchange company will use the full cost method of accounting, does the full cost ceiling limitation apply as of the date of the financial statements reflecting the exchange?

*Interpretive Response:* Yes. The full cost ceiling limitation on costs capitalized does apply. However, as discussed under Topic 12.D.3, the Commission has stated that in unusual circumstances, registrants may request an exemption if as a result of a major purchase, a write-down would be required even though it can be demonstrated that the fair value of the properties clearly exceeds the unamortized costs.

*Question 3:* How should "common control accounting" be applied to the specific assets and liabilities of the new exchange company?

*Interpretive Response:* Consistent with SAB Topic 12.C.2, under "common control accounting" the various accounting methods followed by the offeree entities should be conformed to the methods adopted by the new exchange company. It is not appropriate to combine assets and liabilities accounted for on different bases. Accordingly, all of the oil and gas properties of the new entity must be accounted for on the same basis (either full cost or successful efforts) applied retrospectively.

*Question 4:* What pro forma financial information is required in an exchange offer filing?

*Interpretive Response:* The requirements for pro forma financial information in exchange offer filings are the same as in any other filings with the Commission and are detailed in Article 11 of Regulation S–X.[3] Rule 11–02(b) specifies the presentation requirements, including periods presented and types of adjustments to be made. The general criteria of Rule 11–02(b)(6) are that pro forma adjustments should give effect to events that are (i) directly attributable to the transaction, (ii) expected to have a continuing impact on the registrant, and (iii) factually supportable. In the case of an exchange offer, such adjustments typically are made to:

(1) Show varying levels of acceptance of the offer.

(2) Conform the accounting methods used in the historical financial statements to those to be applied by the new entity.

(3) Recompute the depreciation, depletion and amortization charges, in cases where the new entity will use full-cost accounting, on a combined basis. If this computation is not practicable, and the exchange offer is accounted for as a transaction among entities under common control, historical depreciation, depletion and amortization provisions may be aggregated, with appropriate disclosure.

(4) Reflect the acquisition in the pro forma statements where the exchange offer is accounted for using the acquisition method of accounting, including depreciation, depletion and amortization based on the measurement guidance in FASB ASC Topic 805, Business Combinations.

(5) Provide pro forma reserve information comparable to the disclosures required by FASB ASC paragraphs 932–235–50–3 through 932–235–50–11B and FASB ASC paragraphs 932–235–50–29 through 932–235–50–36.

(6) Reflect significant changes, if any, in levels of operations (revenues or costs), or in income tax status and to reflect debt incurred in connection with the transaction.

In addition, the depreciation, depletion and amortization rate which will apply for the initial period subsequent to consummation of the exchange offer should be disclosed.

*Question 5:* Are there conditions under which the presentation of other than full historical financial statements would be acceptable?

*Interpretive Response:* Generally, full historical financial statements as specified in Rules 3–01 and 3–02 of Regulation S–X are considered necessary to enable offerees and secondary market investors to evaluate the transaction. Where securities are being registered to offer to the security holders (including limited partners and other ownership interests) of the businesses to be acquired, such financial statements are normally required pursuant to Rule 3–05 of Regulation S–X, either individually for each entity or, where appropriate, separately for the offeror and on a combined basis for other entities, generally excluding corporations. However, certain exceptions may apply as explained in the outline below:

A. Acquisition Method Accounting

1. If the registrant can demonstrate that full historical financial statements of the offeree businesses are not reasonably available, the staff may permit presentation of audited Statements of Combined Gross Revenues and Direct Lease Operating Expenses for all years for which an income statement would otherwise be required. In these circumstances, the registrant should also disclose in an unaudited footnote the amounts of total exploration and development costs, and general and administrative expenses along with the reasons why presentation of full historical financial statements is not practicable.

2. The staff will consider requests to waive the requirement for prior year financial statements of the offerees and instead allow presentation of only the latest fiscal year and interim period, if the registrant can demonstrate that the prior years' data would not be meaningful because the offerees had no material quantity of production.

B. Common Control Accounting

The staff would expect that the full historical financial statements as specified in Rules 3–01 and 3–02 of Regulation S–X would be included in the registration statement for exchange offers accounted for as transactions among entities under common control, including all required supplemental reserve information. The presentation of individual or combined financial statements would depend on the circumstances of the particular exchange offer.

Registrants are also reminded that wherever historical results are presented, it may be appropriate to explain the reasons why historical costs are not necessarily indicative of future expenditures.

*E. Removed by SAB 103*

*F. Removed by SAB 103*

**TOPIC 3: SENIOR SECURITIES**

*A. Convertible Securities*

*Facts:* Company B proposes to file a registration statement covering convertible securities.

*Question:* In registration, what consideration should be given to the dilutive effects of convertible securities?

*Interpretive Response:* In a registration statement of convertible preferred stock or debentures, the staff believes that disclosure of pro forma earnings per share (EPS) is important to investors when the proceeds will be used to extinguish existing preferred stock or debt and such extinguishments will have a material effect on EPS. That disclosure is required by Article 11, Rule 11–01(a)(8) and Rule 11–02(b)(7) of Regulation S–X, if material.

*B. Removed by ASR 307*

*C. Redeemable Preferred Stock*

*Facts:* Rule 5–02.27 of Regulation S–X states that redeemable preferred stocks are not to be included in amounts reported as stockholders' equity, and that their redemption amounts are to be

[3] As announced in Financial Reporting Release No. 2 (July 9, 1982).

shown on the face of the balance sheet. However, the Commission's rules and regulations do not address the carrying amount at which redeemable preferred stock should be reported, or how changes in its carrying amount should be treated in calculations of earnings per share and the ratio of earnings to combined fixed charges and preferred stock dividends.

*Question 1:* How should the carrying amount of redeemable preferred stock be determined?

*Interpretive Response:* The initial carrying amount of redeemable preferred stock should be its fair value at date of issue. Where fair value at date of issue is less than the mandatory redemption amount, the carrying amount shall be increased by periodic accretions, using the interest method, so that the carrying amount will equal the mandatory redemption amount at the mandatory redemption date. The carrying amount shall be further periodically increased by amounts representing dividends not currently declared or paid, but which will be payable under the mandatory redemption features, or for which ultimate payment is not solely within the control of the registrant (*e.g.,* dividends that will be payable out of future earnings). Each type of increase in carrying amount shall be effected by charges against retained earnings or, in the absence of retained earnings, by charges against paid-in capital.

The accounting described in the preceding paragraph would apply irrespective of whether the redeemable preferred stock may be voluntarily redeemed by the issuer prior to the mandatory redemption date, or whether it may be converted into another class of securities by the holder. Companies also should consider the guidance in FASB ASC paragraph 480–10–S99–3A (Distinguishing Liabilities from Equity Topic).

*Question 2:* How should periodic increases in the carrying amount of redeemable preferred stock be treated in calculations of earnings per share and ratios of earnings to combined fixed charges and preferred stock dividends?

*Interpretive Response:* Each type of increase in carrying amount described in the Interpretive Response to Question 1 should be treated in the same manner as dividends on nonredeemable preferred stock.

## TOPIC 4: EQUITY ACCOUNTS

### *A. Subordinated Debt*

*Facts:* Company E proposes to include in its registration statement a balance sheet showing its subordinate debt as a portion of stockholders' equity.

*Question:* Is this presentation appropriate?

*Interpretive Response:* Subordinated debt may not be included in the stockholders' equity section of the balance sheet. Any presentation describing such debt as a component of stockholders' equity must be eliminated. Furthermore, any caption representing the combination of stockholders' equity and only subordinated debts must be deleted.

### *B. S Corporations*

*Facts:* An S corporation has undistributed earnings on the date its S election is terminated.

*Question:* How should such earnings be reflected in the financial statements?

*Interpretive Response:* Such earnings must be included in the financial statements as additional paid-in capital. This assumes a constructive distribution to the owners followed by a contribution to the capital of the corporation.

### *C. Change in Capital Structure*

*Facts:* A capital structure change to a stock dividend, stock split or reverse split occurs after the date of the latest reported balance sheet but before the release of the financial statements or the effective date of the registration statement, whichever is later.

*Question:* What effect must be given to such a change?

*Interpretive Response:* Such changes in the capital structure must be given retroactive effect in the balance sheet. An appropriately cross-referenced note should disclose the retroactive treatment, explain the change made and state the date the change became effective.

### *D. Earnings per Share Computations in an Initial Public Offering*

*Facts:* A registration statement is filed in connection with an initial public offering (IPO) of common stock. During the periods covered by income statements that are included in the registration statement or in the subsequent period prior to the effective date of the IPO, the registrant issued for nominal consideration [1] common stock, options or warrants to purchase common stock or other potentially dilutive instruments (collectively, referred to hereafter as "nominal issuances").

Prior to the effective date of FASB ASC Topic 260, Earnings Per Share, the staff believed that certain stock and warrants [2] should be treated as outstanding for all reporting periods in the same manner as shares issued in a stock split or a recapitalization effected contemporaneously with the IPO. The dilutive effect of such stock and warrants could be measured using the treasury stock method.

*Question 1:* Does the staff continue to believe that such treatment for stock and warrants would be appropriate upon adoption of FASB ASC Topic 260?

*Interpretive Response:* Generally, no. Historical EPS should be prepared and presented in conformity with FASB ASC Topic 260.

In applying the requirements of FASB ASC Topic 260, the staff believes that nominal issuances are recapitalizations in substance. In computing basic EPS for the periods covered by income statements included in the registration statement and in subsequent filings with the SEC, nominal issuances of common stock should be reflected in a manner similar to a stock split or stock dividend for which retroactive treatment is required by FASB ASC paragraph 260–10–55–12. In computing diluted EPS for such periods, nominal issuances of common stock and potential common stock [3] should be reflected in a manner similar to a stock split or stock dividend.

Registrants are reminded that disclosure about materially dilutive issuances is required outside the financial statements. Item 506 of Regulation S–K requires presentation of the dilutive effects of those issuances on net tangible book value. The effects of dilutive issuances on the registrant's liquidity, capital resources and results of operations should be addressed in Management's Discussion and Analysis.

*Question 2:* Does reflecting nominal issuances as outstanding for all historical periods in the computation of earnings per share alter the registrant's responsibility to determine whether compensation expense must be

[1] Whether a security was issued for nominal consideration should be determined based on facts and circumstances. The consideration the entity receives for the issuance should be compared to the security's fair value to determine whether the consideration is nominal.

[2] The stock and warrants encompasses by the prior guidance were those issuances of common stock at prices below the IPO price and options or warrants with exercise prices below the IPO price that were issued within a one-year period prior to the initial filing of the registration statement relating to the IPO through the registration statement's effective date.

[3] The FASB ASC Master Glossary defines potential common stock as "a security or other contract that may entitle its holder to obtain common stock during the reporting period or after the end of the reporting period."

recognized for such issuances to employees?

*Interpretive Response:* No. Registrants must follow GAAP in determining whether the recognition of compensation expense for any issuances of equity instruments to employees is necessary.[4] Reflecting nominal issuances as outstanding for all historical periods in the computation of earnings per share does not alter that existing responsibility under GAAP.

*E. Receivables From Sale of Stock*

*Facts:* Capital stock is sometimes issued to officers or other employees before the cash payment is received.

*Question:* How should the receivables from the officers or other employees be presented in the balance sheet?

*Interpretive Response:* The amount recorded as a receivable should be presented in the balance sheet as a deduction from stockholders' equity. This is generally consistent with Rule 5–02.30 of Regulation S–X which states that accounts or notes receivable arising from transactions involving the registrant's capital stock should be presented as deductions from stockholders' equity and not as assets.

It should be noted generally that all amounts receivable from officers and directors resulting from sales of stock or from other transactions (other than expense advances or sales on normal trade terms) should be separately stated in the balance sheet irrespective of whether such amounts may be shown as assets or are required to be reported as deductions from stockholders' equity.

The staff will not suggest that a receivable from an officer or director be deducted from stockholders' equity if the receivable was paid in cash prior to the publication of the financial statements and the payment date is stated in a note to the financial statements. However, the staff would consider the subsequent return of such cash payment to the officer or director to be part of a scheme or plan to evade the registration or reporting requirements of the securities laws.

*F. Limited Partnerships*

*Facts:* There exist a number of publicly held partnerships having one or more corporate or individual general partners and a relatively larger number of limited partners. There are no specific requirements or guidelines relating to the presentation of the partnership equity accounts in the financial statements. In addition, there are many approaches to the parallel problem of relating the results of operations to the two classes of partnership equity interests.

*Question:* How should the financial statements of limited partnerships be presented so that the two ownership classes can readily determine their relative participations in both the net assets of the partnership and in the results of its operations?

*Interpretive Response:* The equity section of a partnership balance sheet should distinguish between amounts ascribed to each ownership class. The equity attributed to the general partners should be stated separately from the equity of the limited partners, and changes in the number of equity units authorized and outstanding should be shown for each ownership class. A statement of changes in partnership equity for each ownership class should be furnished for each period for which an income statement is included.

The income statements of partnerships should be presented in a manner which clearly shows the aggregate amount of net income (loss) allocated to the general partners and the aggregate amount allocated to the limited partners. The statement of income should also state the results of operations on a per unit basis.

*G. Notes and Other Receivables From Affiliates*

*Facts:* The balance sheet of a corporate general partner is often presented in a registration statement. Frequently, the balance sheet of the general partner discloses that it holds notes or other receivables from a parent or another affiliate. Often the notes or other receivables were created in order to meet the "substantial assets" test which the Internal Revenue Service utilizes in applying its "Safe Harbor" doctrine in the classification of organizations for income tax purposes.

*Question:* How should such notes and other receivables be reported in the balance sheet of the general partner?

*Interpretive Response:* While these notes and other receivables evidencing a promise to contribute capital are often legally enforceable, they seldom are actually paid. In substance, these receivables are equivalent to unpaid subscriptions receivable for capital shares which Rule 5–02.30 of Regulation S–X requires to be deducted from the dollar amount of capital shares subscribed.

The balance sheet display of these or similar items is not determined by the quality or actual value of the receivable or other asset "contributed" to the capital of the affiliated general partner, but rather by the relationship of the parties and the control inherent in that relationship. Accordingly, in these situations, the receivable must be treated as a deduction from stockholders' equity in the balance sheet of the corporate general partner.

**TOPIC 5: MISCELLANEOUS ACCOUNTING**

*A. Expenses of Offering*

*Facts:* Prior to the effective date of an offering of equity securities, Company Y incurs certain expenses related to the offering.

*Question:* Should such costs be deferred?

*Interpretive Response:* Specific incremental costs directly attributable to a proposed or actual offering of securities may properly be deferred and charged against the gross proceeds of the offering. However, management salaries or other general and administrative expenses may not be allocated as costs of the offering and deferred costs of an aborted offering may not be deferred and charged against proceeds of a subsequent offering. A short postponement (up to 90 days) does not represent an aborted offering.

*B. Gain or Loss From Disposition of Equipment*

*Facts:* Company A has adopted the policy of treating gains and losses from disposition of revenue producing equipment as adjustments to the current year's provision for depreciation. Company B reflects such gains and losses as a separate item in the statement of income.

*Question:* Does the staff have any views as to which method is preferable?

*Interpretive Response:* Gains and losses resulting from the disposition of revenue producing equipment should not be treated as adjustments to the provision for depreciation in the year of disposition, but should be shown as a separate item in the statement of income.

If such equipment is depreciated on the basis of group of composite accounts for fleets of like vehicles, gains (or losses) may be charged (or credited) to accumulated depreciation with the result that depreciation is adjusted over a period of years on an average basis. It should be noted that the latter treatment would not be appropriate for (1) an enterprise (such as an airline) which replaces its fleet on an episodic rather than a continuing basis or (2) an enterprise (such as a car leasing company) where equipment is sold after limited use so that the equipment on hand is both fairly new and carried at amounts closely related to current acquisition cost.

[4] As prescribed by FASB ASC Topic 718, Compensation—Stock Compensation.

*C.1. Removed by SAB 103*

*C.2. Removed by SAB 103*

*D. Organization and Offering Expenses and Selling Commissions—Limited Partnerships Trading in Commodity Futures*

*Facts:* Partnerships formed for the purpose of engaging in speculative trading in commodity futures contracts sell limited partnership interests to the public and frequently have a general partner who is an affiliate of the partnership's commodity broker or the principal underwriter selling the limited partnership interests. The commodity broker or a subsidiary typically assumes the liability for all or part of the organization and offering expenses and selling commissions in connection with the sale of limited partnership interests. Funds raised from the sale of partnership interests are deposited in a margin account with the commodity broker and are invested in Treasury Bills or similar securities. The arrangement further provides that interest earned on the investments for an initial period is to be retained by the broker until it has been reimbursed for all or a specified portion of the aforementioned expenses and commissions and that thereafter interest earned accrues to the partnership.

In some instances, there may be no reference to reimbursement of the broker for expenses and commissions to be assumed. The arrangements may provide that all interest earned on investments accrues to the partnership but that commissions on commodity transactions paid to the broker are at higher rates for a specified initial period and at lower rates subsequently.

*Question 1:* Should the partnership recognize a commitment to reimburse the commodity broker for the organization and offering expenses and selling commissions?

*Interpretive Response:* Yes. A commitment should be recognized by reducing partnership capital and establishing a liability for the estimated amount of expenses and commissions for which the broker is to be reimbursed.

*Question 2:* Should the interest income retained by the broker for reimbursement of expenses be recognized as income by the partnership?

*Interpretive Response:* Yes. All the interest income on the margin account investments should be recognized as accruing to the partnership as earned. The portion of income retained by the broker and not actually realized by the partnership in cash should be applied to reduce the liability for the estimated amount of reimbursable expenses and commissions.

*Question 3:* If the broker retains all of the interest income for a specified period and thereafter it accrues to the partnership, should an equivalent amount of interest income be reflected on the partnership's financial statements during the specified period?

*Interpretive Response:* Yes. If it appears from the terms of the arrangement that it was the intent of the parties to provide for full or partial reimbursement for the expenses and commissions paid by the broker, then a commitment to reimbursement should be recognized by the partnership and an equivalent amount of interest income should be recognized on the partnership's financial statements as earned.

*Question 4:* Under the arrangements where commissions on commodity transactions are at a lower rate after a specified period and there is no reference to reimbursement of the broker for expenses and commissions, should recognition be given on the partnership's financial statements to a commitment to reimburse the broker for all or part of the expenses and commissions?

*Interpretive Response:* If it appears from the terms of the arrangement that the intent of the parties was to provide for full or partial reimbursement of the broker's expenses and commissions, then the estimated commitment should be recognized on the partnership's financial statements. During the specified initial period commissions on commodity transactions should be charged to operations at the lower commission rate with the difference applied to reduce the aforementioned commitment.

*E. Accounting for Divestiture of a Subsidiary or Other Business Operation*

*Facts:* Company X transferred certain operations (including several subsidiaries) to a group of former employees who had been responsible for managing those operations. Assets and liabilities with a net book value of approximately $8 million were transferred to a newly formed entity—Company Y—wholly owned by the former employees. The consideration received consisted of $1,000 in cash and interest bearing promissory notes for $10 million, payable in equal annual installments of $1 million each, plus interest, beginning two years from the date of the transaction. The former employees possessed insufficient assets to pay the notes and Company X expected the funds for payments to come exclusively from future operations of the transferred business. Company X remained contingently liable for performance on existing contracts transferred and agreed to guarantee, at its discretion, performance on future contracts entered into by the newly formed entity. Company X also acted as guarantor under a line of credit established by Company Y.

The nature of Company Y's business was such that Company X's guarantees were considered a necessary predicate to obtaining future contracts until such time as Company Y achieved profitable operations and substantial financial independence from Company X.

*Question:* If deconsolidation of the subsidiaries and business operations is appropriate, can Company X recognize a gain?

*Interpretive Response:* Before recognizing any gain, Company X should identify all of the elements of the divesture arrangement and allocate the consideration exchanged to each of those elements. In this regard, we believe that Company X would recognize the guarantees at fair value in accordance with FASB ASC Topic 460, Guarantees; the contingent liability for performance on existing contracts in accordance with FASB ASC Topic 450, Contingencies; and the promissory notes in accordance with FASB ASC Topic 310, Receivables, and FASB ASC Topic 835, Interest.

*F. Accounting Changes Not Retroactively Applied Due to Immateriality*

*Facts:* A registrant is required to adopt an accounting principle by means of retrospective adjustment of prior periods' financial statements. However, the registrant determines that the accounting change does not have a material effect on prior periods' financial statements and, accordingly, decides not to retrospectively adjust such financial statements.

*Question:* In these circumstances, is it acceptable to adjust the beginning balance of retained earnings of the period in which the change is made for the cumulative effect of the change on the financial statements of prior periods?

*Interpretive Response:* No. If prior periods are not retrospectively adjusted, the cumulative effect of the change should be included in the statement of income for the period in which the change is made. Even in cases where the total cumulative effect is not significant, the staff believes that the amount should be reflected in the results of operations for the period in which the change is made. However, if the cumulative effect

is material to current operations or to the trend of the reported results of operations, then the individual income statements of the earlier years should be retrospectively adjusted.

*G. Transfers of Nonmonetary Assets by Promoters or Shareholders*

*Facts:* Nonmonetary assets are exchanged by promoters or shareholders for all or part of a company's common stock just prior to or contemporaneously with a first-time public offering.

*Question:* Since FASB ASC paragraph 845–10–15–4 (Nonmonetary Transactions Topic) states that the guidance in this topic is not applicable to transactions involving the acquisition of nonmonetary assets or services on issuance of the capital stock of an enterprise, what value should be ascribed to the acquired assets by the company?

*Interpretive Response:* The staff believes that transfers of nonmonetary assets to a company by its promoters or shareholders in exchange for stock prior to or at the time of the company's initial public offering normally should be recorded at the transferors' historical cost basis determined under GAAP.

The staff will not always require that predecessor cost be used to value nonmonetary assets received from an enterprise's promoters or shareholders. However, deviations from this policy have been rare applying generally to situations where the fair value of either the stock issued [1] or assets acquired is objectively measurable and the transferor's stock ownership following the transaction was not so significant that the transferor had retained a substantial indirect interest in the assets as a result of stock ownership in the company.

*H. Removed by SAB 112*

*I. Removed by SAB 70*

*J. New Basis of Accounting Required in Certain Circumstances*

*Facts:* Company A (or Company A and related persons) acquired substantially all of the common stock of Company B in one or a series of purchase transactions.

*Question 1:* Must Company B's financial statements presented in either its own or Company A's subsequent filings with the Commission reflect the new basis of accounting arising from Company A's acquisition of Company B when Company B's separate corporate entity is retained?

*Interpretive Response:* Yes. The staff believes that purchase transactions that result in an entity becoming substantially wholly owned (as defined in Rule 1–02(aa) of Regulation S–X) establish a new basis of accounting for the purchased assets and liabilities.

When the form of ownership is within the control of the parent, the basis of accounting for purchased assets and liabilities should be the same regardless of whether the entity continues to exist or is merged into the parent's operations. Therefore, Company B's separate financial statements should reflect the new basis of accounting recorded by Company A upon acquisition (*i.e.,* "pushed down" basis).

*Question 2:* What is the staff's position if Company A acquired less than substantially all of the common stock of Company B or Company B had publicly held debt or preferred stock at the time Company B became wholly owned?

*Interpretive Response:* The staff recognizes that the existence of outstanding public debt, preferred stock or a significant noncontrolling interest in a subsidiary might impact the parent's ability to control the form of ownership. Although encouraging its use, the staff generally does not insist on the application of push down accounting in these circumstances.

*Question 3:* Company A borrows funds to acquire substantially all of the common stock of Company B. Company B subsequently files a registration statement in connection with a public offering of its stock or debt.[2] Should Company B's new basis ("push down") financial statements include Company A's debt related to its purchase of Company B?

*Interpretive Response:* The staff believes that Company A's debt,[3] related interest expense, and allocable debt issue costs should be reflected in Company B's financial statements included in the public offering (or an initial registration under the Exchange Act) if: (1) Company B is to assume the debt of Company A, either presently or in a planned transaction in the future; (2) the proceeds of a debt or equity offering of Company B will be used to retire all or a part of Company A's debt; or (3) Company B guarantees or pledges its assets as collateral for Company A's debt. Other relationships may exist between Company A and Company B, such as the pledge of Company B's stock as collateral for Company A's debt.[4] While in this latter situation, it may be clear that Company B's cash flows will service all or part of Company A's debt, the staff does not insist that the debt be reflected in Company B's financial statements providing there is full and prominent disclosure of the relationship between Companies A and B and the actual or potential cash flow commitment. In this regard, the staff believes that FASB ASC Topic 450, Contingencies, FASB ASC Topic 850, Related Party Disclosures, and FASB ASC Topic 460, Guarantees, require sufficient disclosure to allow users of Company B's financial statements to fully understand the impact of the relationship on Company B's present and future cash flows. Rule 4–08(e) of Regulation S–X also requires disclosure of restrictions which limit the payment of dividends.

Therefore, the staff believes that the equity section of Company B's balance sheet and any pro forma financial information and capitalization tables should clearly disclose that this arrangement exists.[5] Regardless of whether the debt is reflected in Company B's financial statements, the notes to Company B's financial statements should generally disclose, at a minimum: (1) The relationship between Company A and Company B; (2) a description of any arrangements that result in Company B's guarantee, pledge of assets [6] or stock, *etc.* that provides security for Company A's debt; (3) the extent (in the aggregate and for each of the five years subsequent to the date of the latest balance sheet presented) to which Company A is dependent on Company B's cash flows to service its debt and the method by

[1] Estimating the fair value of the common stock issued, however, is not appropriate when the stock is closely held and/or seldom or ever traded.

[2] The guidance in this SAB should also be considered for Company B's separate financial statements included in its public offering following Company B's spin-off or carve-out from Company A.

[3] The guidance in this SAB should also be considered where Company A has financed the acquisition of Company B through the issuance of mandatory redeemable preferred stock.

[4] The staff does not believe Company B's financial statements must reflect the debt in this situation because in the event of default on the debt by Company A, the debt holder(s) would only be entitled to Company B's stock held by Company A. Other equity or debt holders of Company B would retain their priority with respect to the net assets of Company B.

[5] For example, the staff has noted that certain registrants have indicated on the face of such financial statements (as part of the stockholder's equity section) the actual or potential financing arrangement and the registrant's intent to pay dividends to satisfy its parent's debt service requirements. The staff believes such disclosures are useful to highlight the existence of arrangements that could result in the use of Company B's cash to service Company A's debt.

[6] A material asset pledge should be clearly indicated on the face of the balance sheet. For example, if all or substantially all of the assets are pledged, the "assets" and "total assets" captions should include parenthetically: "pledged for parent company debt—*See* Note X."

which this will occur; and (4) the impact of such cash flows on Company B's ability to pay dividends or other amounts to holders of its securities. Additionally, the staff believes Company B's Management's Discussion and Analysis of Financial Condition and Results of Operations should discuss any material impact of its servicing of Company A's debt on its own liquidity pursuant to Item 303(a)(1) of Regulation S–K.

*K. Removed by SAB 95*

*L. LIFO Inventory Practices*

*Facts:* On November 30, 1984, AcSEC and its Task Force on LIFO Inventory Problems (task force) issued a paper, "Identification and Discussion of Certain Financial Accounting and Reporting Issues Concerning LIFO Inventories." This paper identifies and discusses certain financial accounting and reporting issues related to the last-in, first-out (LIFO) inventory method for which authoritative accounting literature presently provides no definitive guidance. For some issues, the task force's advisory conclusions recommend changes in current practice to narrow the diversity which the task force believes exists. For other issues, the task force's advisory conclusions recommend that current practice should be continued for financial reporting purposes and that additional accounting guidance is unnecessary. Except as otherwise noted in the paper, AcSEC generally supports the task force's advisory conclusions. As stated in the issues paper, "Issues papers of the AICPA's accounting standards division are developed primarily to identify financial accounting and reporting issues the division believes need to be addressed or clarified by the Financial Accounting Standards Board." On February 6, 1985, the FASB decided not to add to its agenda a narrow project on the subject of LIFO inventory practices.

*Question 1:* What is the SEC staff's position on the issues paper?

*Interpretive Response:* In the absence of existing authoritative literature on LIFO accounting, the staff believes that registrants and their independent accountants should look to the paper for guidance in determining what constitutes acceptable LIFO accounting practice.[7] In this connection, the staff considers the paper to be an accumulation of existing acceptable LIFO accounting practices which does not establish any new standards and does not diverge from GAAP.

The staff also believes that the advisory conclusions recommended in the issues paper are generally consistent with conclusions previously expressed by the Commission, such as:

1. Pooling-paragraph 4–6 of the paper discusses LIFO inventory pooling and concludes "establishing separate pools with the principal objective of facilitating inventory liquidations is unacceptable." In Accounting and Auditing Enforcement Release 35, August 13, 1984, the Commission stated that it believes that the Company improperly realigned its LIFO pools in such a way as to maximize the likelihood and magnitude of LIFO liquidations and thus, overstated net income.

2. New Items-paragraph 4–27 of the paper discusses determination of the cost of new items and concludes "if the double extension or an index technique is used, the objective of LIFO is achieved by reconstructing the base year cost of new items added to existing pools." In ASR 293, the Commission stated that when the effects of inflation on the cost of new products are measured by making a comparison with current cost as the base-year cost, rather than a reconstructed base-year cost, income is improperly increased.

*Question 2:* If a registrant utilizes a LIFO practice other than one recommended by an advisory conclusion in the issues paper, must the registrant change its practice to one specified in the paper?

*Interpretive Response:* Now that the issues paper is available, the staff believes that a registrant and its independent accountants should re-examine previously adopted LIFO practices and compare them to the recommendations in the paper. In the event that the registrant and its independent accountants conclude that the registrant's LIFO practices are preferable in the circumstances, they should be prepared to justify their position in the event that a question is raised by the staff.

*Question 3:* If a registrant elects to change its LIFO practices to be consistent with the guidance in the issues paper and discloses such changes in accordance with FASB ASC Topic 250, Accounting Changes and Error Corrections, will the registrant be requested by the staff to explain its past practices and its justification for those practices?

*Interpretive Response:* The staff does not expect to routinely raise questions about changes in LIFO practices which are made to make a company's accounting consistent with the recommendations in the issues paper.

*M. Other Than Temporary Impairment of Certain Investments in Equity Securities*

*Facts:* FASB ASC paragraph 320–10–35–33 (Investments—Debt and Equity Securities Topic) does not define the phrase "other than temporary" for available-for-sale equity securities. For its available-for-sale equity securities, Company A has interpreted "other than temporary" to mean permanent impairment. Therefore, because Company A's management has not been able to determine that its investment in Company B's equity securities is permanently impaired, no realized loss has been recognized even though the market price of Company B's equity securities is currently less than one-third of Company A's average acquisition price.

*Question:* For equity securities classified as available-for-sale, does the staff believe that the phrase "other than temporary" should be interpreted to mean "permanent"?

*Interpretive Response:* No. The staff believes that the FASB consciously chose the phrase "other than temporary" because it did not intend that the test be "permanent impairment," as has been used elsewhere in accounting practice.[8]

The value of investments in equity securities classified as available-for-sale may decline for various reasons. The market price may be affected by general market conditions which reflect prospects for the economy as a whole or by specific information pertaining to an industry or an individual company. Such declines require further investigation by management. Acting upon the premise that a write-down may be required, management should consider all available evidence to evaluate the realizable value of its investment in equity securities classified as available-for-sale.

There are numerous factors to be considered in such an evaluation and their relative significance will vary from case to case. The staff believes that the

[7] In ASR 293 (July 2, 1981) *see* Financial Reporting Codification § 205, the Commission expressed its concerns about the inappropriate use of Internal Revenue Service (IRS) LIFO practices for financial statement preparation. Because the IRS amended its regulations concerning the LIFO conformity rule on January 13, 1981, allowing companies to apply LIFO differently for financial reporting purposes than for tax purposes, the Commission strongly encouraged registrants and their independent accountants to examine their financial reporting LIFO practices. In that release, the Commission acknowledged the "task force which has been established by AcSEC to accumulate information about [LIFO] application problems" and noted that "This type of effort, in addition to self-examination [of LIFO practices] by individual registrants, is appropriate * * *"

[8] [Original footnote removed by SAB 114.]

following are only a few examples of the factors which, individually or in combination, indicate that a decline in value of an equity security classified as available-for-sale is other than temporary and that a write-down of the carrying value is required:

a. The length of the time and the extent to which the market value has been less than cost;

b. The financial condition and near-term prospects of the issuer, including any specific events which may influence the operations of the issuer such as changes in technology that may impair the earnings potential of the investment or the discontinuance of a segment of the business that may affect the future earnings potential; or

c. The intent and ability of the holder to retain its investment in the issuer for a period of time sufficient to allow for any anticipated recovery in market value.

Unless evidence exists to support a realizable value equal to or greater than the carrying value of the investment in equity securities classified as available-for-sale, a write-down to fair value accounted for as a realized loss should be recorded. Such loss should be recognized in the determination of net income of the period in which it occurs and the written down value of the investment in the company becomes the new cost basis of the investment.

*N. Discounting by Property-Casualty Insurance Companies*

*Facts:* A registrant which is an insurance company discounts certain unpaid claims liabilities related to short-duration [9] insurance contracts for purposes of reporting to state regulatory authorities, using discount rates permitted or prescribed by those authorities ("statutory rates") which approximate 3½ percent. The registrant follows the same practice in preparing its financial statements in accordance with GAAP. It proposes to change for GAAP purposes, to using a discount rate related to the historical yield on its investment portfolio ("investment related rate") which is represented to approximate 7 percent, and to account for the change as a change in accounting estimate, applying the investment related rate to claims settled in the current and subsequent years while the statutory rate would continue to be applied to claims settled in all prior years.

*Question 1:* What is the staff's position with respect to discounting claims liabilities related to short-duration insurance contracts?

*Interpretive Response:* The staff is aware of efforts by the accounting profession to assess the circumstances under which discounting may be appropriate in financial statements. Pending authoritative guidance resulting from those efforts however, the staff will raise no objection if a registrant follows a policy for GAAP reporting purposes of:

- Discounting liabilities for unpaid claims and claim adjustment expenses at the same rates that it uses for reporting to state regulatory authorities with respect to the same claims liabilities, or
- Discounting liabilities with respect to settled claims under the following circumstances:

(1) The payment pattern and ultimate cost are fixed and determinable on an individual claim basis, and

(2) The discount rate used is reasonable on the facts and circumstances applicable to the registrant at the time the claims are settled.

*Question 2:* Does the staff agree with the registrant's proposal that the change from a statutory rate to an investment related rate be accounted for as a change in accounting estimate?

*Interpretive Response:* No. The staff believes that such a change involves a change in the method of applying an accounting principle, *i.e.,* the method of selecting the discount rate was changed. The staff therefore believes that the registrant should reflect the cumulative effect of the change in accounting by applying the new selection method retroactively to liabilities for claims settled in all prior years, in accordance with the requirements of FASB ASC Topic 250, Accounting Changes and Error Corrections. Initial adoption of discounting for GAAP purposes would be treated similarly. In either case, in addition to the disclosures required by FASB ASC Topic 250 concerning the change in accounting principle, a preferability letter from the registrant's independent accountant is required.

*O. Research and Development Arrangements*

*Facts:* FASB ASC paragraph 730–20–25–5 (Research and Development Topic) states that conditions other than a written agreement may exist which create a presumption that the enterprise will repay the funds provided by other parties under a research and development arrangement. FASB ASC subparagraph 730–20–25–6(c) lists as one of those conditions the existence of a "significant related party relationship" between the enterprise and the parties funding the research and development.

*Question 1:* What does the staff consider a "significant related party relationship" as that term is used in FASB ASC subparagraph 730–20–25–6(c)?

*Interpretive Response:* The staff believes that a significant related party relationship exists when 10 percent or more of the entity providing the funds is owned by related parties.[10] In unusual circumstances, the staff may also question the appropriateness of treating a research and development arrangement as a contract to perform service for others at the less than 10 percent level. In reviewing these matters the staff will consider, among other factors, the percentage of the funding entity owned by the related parties in relationship to their ownership in and degree of influence or control over the enterprise receiving the funds.

*Question 2:* FASB ASC paragraph 730–20–25–5 states that the presumption of repayment "can be overcome only by substantial evidence to the contrary." Can the presumption be overcome by evidence that the funding parties were assuming the risk of the research and development activities since they could not reasonably expect the enterprise to have resources to repay the funds based on its current and projected future financial condition?

*Interpretive Response:* No. FASB ASC paragraph 730–20–25–3 specifically indicates that the enterprise "may settle the liability by paying cash, by issuing securities, or by some other means." While the enterprise may not be in a position to pay cash or issue debt, repayment could be accomplished through the issuance of stock or various other means. Therefore, an apparent or projected inability to repay the funds with cash (or debt which would later be paid with cash) does not necessarily demonstrate that the funding parties were accepting the entire risks of the activities.

*P. Restructuring Charges*

1. Removed by SAB 103

2. Removed by SAB 103

3. Income Statement Presentation of Restructuring Charges

*Facts:* Restructuring charges often do not relate to a separate component of the entity, and, as such, they would not qualify for presentation as losses on the disposal of a discontinued operation.

[9] The term "short-duration" refers to the period of coverage (*see* FASB ASC paragraph 944–20–15–7 (Financial Services—Insurance Topic)), not the period that the liabilities are expected to be outstanding.

[10] Related parties as used herein are as defined in the FASB ASC Master Glossary.

Additionally, since the charges are not both unusual and infrequent[11] they are not presented in the income statement as extraordinary items.

*Question 1:* May such restructuring charges be presented in the income statement as a separate caption after income from continuing operations before income taxes (*i.e.,* preceding income taxes and/or discontinued operations)?

*Interpretive Response:* No. FASB ASC paragraph 225–20–45–16 (Income Statement Topic) states that items that do not meet the criteria for classification as an extraordinary item should be reported as a component of income from continuing operations.[12] Neither FASB ASC Subtopic 225–20, Income Statement—Extraordinary and Unusual Items, nor Rule 5–03 of Regulation S–X contemplate a category in between continuing and discontinued operations. Accordingly, the staff believes that restructuring charges should be presented as a component of income from continuing operations, separately disclosed if material. Furthermore, the staff believes that a separately presented restructuring charge should not be preceded by a sub-total representing "income from continuing operations before restructuring charge" (whether or not it is so captioned). Such a presentation would be inconsistent with the intent of FASB ASC Subtopic 225–20.

*Question 2:* Some registrants utilize a classified or "two-step" income statement format (*i.e.,* one which presents operating revenues, expenses and income followed by other income and expense items). May a charge which relates to assets or activities for which the associated revenues and expenses have historically been included in operating income be presented as an item of "other expense" in such an income statement?

*Interpretive Response:* No. The staff believes that the proper classification of a restructuring charge depends on the nature of the charge and the assets and operations to which it relates. Therefore, charges which relate to activities for which the revenues and expenses have historically been included in operating income should generally be classified as an operating expense, separately disclosed if material. Furthermore, when a restructuring charge is classified as an operating expense, the staff believes that it is generally inappropriate to present a preceding subtotal captioned or representing operating income before restructuring charges. Such an amount does not represent a measurement of operating results under GAAP.

Conversely, charges relating to activities previously included under "other income and expenses" should be similarly classified, also separately disclosed if material.

*Question 3:* Is it permissible to disclose the effect on net income and earnings per share of such a restructuring charge?

*Interpretive Response:* Discussions in MD&A and elsewhere which quantify the effects of unusual or infrequent items on net income and earnings per share are beneficial to a reader's understanding of the financial statements and are therefore acceptable.

MD&A also should discuss the events and decisions which gave rise to the restructuring, the nature of the charge and the expected impact of the restructuring on future results of operations, liquidity and sources and uses of capital resources.

4. Disclosures

Beginning with the period in which the exit plan is initiated, FASB ASC Topic 420, Exit or Disposal Cost Obligations, requires disclosure, in *all* periods, *including interim* periods, until the exit plan is completed, of the following:

a. A description of the exit or disposal activity, including the facts and circumstances leading to the expected activity and the expected completion date

b. For each major type of cost associated with the activity (for example, one-time termination benefits, contract termination costs, and other associated costs):

(1) The total amount expected to be incurred in connection with the activity, the amount incurred in the period, and the cumulative amount incurred to date

(2) A reconciliation of the beginning and ending liability balances showing separately the changes during the period attributable to costs incurred and charged to expense, costs paid or otherwise settled, and any adjustments to the liability with an explanation of the reason(s) therefor

c. The line item(s) in the income statement or the statement of activities in which the costs in (b) above are aggregated

d. For each reportable segment, the total amount of costs expected to be incurred in connection with the activity, the amount incurred in the period, and the cumulative amount incurred to date, net of any adjustments to the liability with an explanation of the reason(s) therefor

e. If a liability for a cost associated with the activity is not recognized because fair value cannot be reasonably estimated, that fact and the reasons therefor

*Question:* What specific disclosures about restructuring charges has the staff requested to fulfill the disclosure requirements of FASB ASC Topic 420 and MD&A?

*Interpretive Response:* The staff often has requested greater disaggregation and more precise labeling when exit and involuntary termination costs are grouped in a note or income statement line item with items unrelated to the exit plan. For the reader's understanding, the staff has requested that discretionary, or decision-dependent, costs of a period, such as exit costs, be disclosed and explained in MD&A separately. Also to improve transparency, the staff has requested disclosure of the nature and amounts of additional types of exit costs and other types of restructuring charges[13] that appear quantitatively or qualitatively material, and requested that losses relating to asset impairments be identified separately from charges based on estimates of future cash expenditures.

The staff frequently reminds registrants that in periods subsequent to the initiation date that material changes and activity in the liability balances of each significant type of exit cost and involuntary employee termination benefits[14] (either as a result of expenditures or changes in/reversals of estimates or the fair value of the liability) should be disclosed in the footnotes to the interim and annual financial statements and discussed in MD&A. In the event a company recognized liabilities for exit costs and involuntary employee termination benefits relating to multiple exit plans, the staff believes presentation of separate information for each individual exit plan that has a material effect on

[11] *See* FASB ASC paragraph 225–20–45–2.

[12] FASB ASC paragraph 225–20–45–16 further provides that such items should not be reported on the income statement net of income taxes or in any manner that implies that they are similar to extraordinary items.

[13] Examples of common components of exit costs and other types of restructuring charges which should be considered for separate disclosure include, but are not limited to, involuntary employee terminations and related costs, changes in valuation of current assets such as inventory writedowns, long term asset disposals, adjustments for warranties and product returns, leasehold termination payments, and other facility exit costs, among others.

[14] The staff would expect similar disclosures for employee termination benefits whether those costs have been recognized pursuant to FASB ASC Topic 420, FASB ASC Topic 712, Compensation—Nonretirement Postemployment Benefits, or FASB ASC Topic 715, Compensation—Retirement Benefits.

the balance sheet, results of operations or cash flows generally is appropriate.

For material exit or involuntary employee termination costs related to an acquired business, the staff has requested disclosure in either MD&A or the financial statements of:

1. When the registrant began formulating exit plans for which accrual may be necessary,
2. The types and amounts of liabilities recognized for exit costs and involuntary employee termination benefits and included in the acquisition cost allocation, and
3. Any unresolved contingencies or purchase price allocation issues and the types of additional liabilities that may result in an adjustment of the acquisition cost allocation.

The staff has noted that the economic or other events that cause a registrant to consider and/or adopt an exit plan or that impair the carrying amount of assets, generally occur over time. Accordingly, the staff believes that as those events and the resulting trends and uncertainties evolve, they often will meet the requirement for disclosure pursuant to the Commission's MD&A rules prior to the period in which the exit costs and liabilities are recorded pursuant to GAAP. Whether or not currently recognizable in the financial statements, material exit or involuntary termination costs that affect a known trend, demand, commitment, event, or uncertainty to management, should be disclosed in MD&A. The staff believes that MD&A should include discussion of the events and decisions which gave rise to the exit costs and exit plan, and the likely effects of management's plans on financial position, future operating results and liquidity unless it is determined that a material effect is not reasonably likely to occur. Registrants should identify the periods in which material cash outlays are anticipated and the expected source of their funding. Registrants should also discuss material revisions to exit plans, exit costs, or the timing of the plan's execution, including the nature and reasons for the revisions.

The staff believes that the expected effects on future earnings and cash flows resulting from the exit plan (for example, reduced depreciation, reduced employee expense, *etc.*) should be quantified and disclosed, along with the initial period in which those effects are expected to be realized. This includes whether the cost savings are expected to be offset by anticipated increases in other expenses or reduced revenues. This discussion should clearly identify the income statement line items to be impacted (for example, cost of sales; marketing; selling, general and administrative expenses; *etc.*). In later periods if actual savings anticipated by the exit plan are not achieved as expected or are achieved in periods other than as expected, MD&A should discuss that outcome, its reasons, and its likely effects on future operating results and liquidity.

The staff often finds that, because of the discretionary nature of exit plans and the components thereof, presenting and analyzing material exit and involuntary termination charges in tabular form, with the related liability balances and activity (*e.g.,* beginning balance, new charges, cash payments, other adjustments with explanations, and ending balances) from balance sheet date to balance sheet date, is necessary to explain fully the components and effects of significant restructuring charges. The staff believes that such a tabular analysis aids a financial statement user's ability to disaggregate the restructuring charge by income statement line item in which the costs would have otherwise been recognized, absent the restructuring plan, (for example, cost of sales; selling, general, and administrative; *etc.*).

*Q. Increasing Rate Preferred Stock*

*Facts:* A registrant issues Class A and Class B nonredeemable preferred stock [15] on 1/1/X1. Class A, by its terms, will pay no dividends during the years 20X1 through 20X3. Class B, by its terms, will pay dividends at annual rates of $2, $4 and $6 per share in the years 20X1, 20X2 and 20X3, respectively. Beginning in the year 20X4 and thereafter as long as they remain outstanding, each instrument will pay dividends at an annual rate of $8 per share. In all periods, the scheduled dividends are cumulative.

At the time of issuance, eight percent per annum was considered to be a market rate for dividend yield on Class A, given its characteristics other than scheduled cash dividend entitlements (voting rights, liquidation preference, *etc.*), as well as the registrant's financial condition and future economic prospects. Thus, the registrant could have expected to receive proceeds of approximately $100 per share for Class A if the dividend rate of $8 per share (the "perpetual dividend") had been in effect at date of issuance. In consideration of the dividend payment terms, however, Class A was issued for proceeds of $79⅜ per share. The difference, $20⅝, approximated the value of the absence of $8 per share dividends annually for three years, discounted at 8%.

The issuance price of Class B shares was determined by a similar approach, based on the terms and characteristics of the Class B shares.

*Question 1:* How should preferred stocks of this general type (referred to as "increasing rate preferred stocks") be reported in the balance sheet?

*Interpretive Response:* As is normally the case with other types of securities, increasing rate preferred stock should be recorded initially at its fair value on date of issuance. Thereafter, the carrying amount should be increased periodically as discussed in the Interpretive Response to Question 2.

*Question 2:* Is it acceptable to recognize the dividend costs of increasing rate preferred stocks according to their stated dividend schedules?

*Interpretive Response:* No. The staff believes that when consideration received for preferred stocks reflects expectations of future dividend streams, as is normally the case with cumulative preferred stocks, any discount due to an absence of dividends (as with Class A) or gradually increasing dividends (as with Class B) for an initial period represents prepaid, unstated dividend cost.[16] Recognizing the dividend cost of these instruments according to their stated dividend schedules would report Class A as being cost-free, and would report the cost of Class B at less than its effective cost, from the standpoint of common stock interests (*i.e.,* for purposes of computing income applicable to common stock and earnings per common share) during the years 20X1 through 20X3.

Accordingly, the staff believes that discounts on increasing rate preferred stock should be amortized over the period(s) preceding commencement of the perpetual dividend, by charging imputed dividend cost against retained earnings and increasing the carrying amount of the preferred stock by a corresponding amount. The discount at time of issuance should be computed as

[15] "Nonredeemable" preferred stock, as used in this SAB, refers to preferred stocks which are not redeemable or are redeemable only at the option of the issuer.

[16] As described in the "Facts" section of this issue, a registrant would receive less in proceeds for a preferred stock, if the stock were to pay less than its perpetual dividend for some initial period(s), than if it were to pay the perpetual dividend from date of issuance. The staff views the discount on increasing rate preferred stock as equivalent to a prepayment of dividends by the issuer, as though the issuer had concurrently (a) issued the stock with the perpetual dividend being payable from date of issuance, and (b) returned to the investor a portion of the proceeds representing the present value of certain future dividend entitlements which the investor agreed to forgo.

the present value of the difference between (a) dividends that will be payable, if any, in the period(s) preceding commencement of the perpetual dividend; and (b) the perpetual dividend amount for a corresponding number of periods; discounted at a market rate for dividend yield on preferred stocks that are comparable (other than with respect to dividend payment schedules) from an investment standpoint. The amortization in each period should be the amount which, together with any stated dividend for the period (ignoring fluctuations in stated dividend amounts that might result from variable rates,[17] results in a constant rate of effective cost vis-a-vis the carrying amount of the preferred stock (the market rate that was used to compute the discount).

Simplified (ignoring quarterly calculations) application of this accounting to the Class A preferred stock described in the "Facts" section of this bulletin would produce the following results on a per share basis:

CARRYING AMOUNT OF PREFERRED STOCK

| | Beginning of year (BOY) | Imputed dividend (8% of carrying amount at BOY) | End of year |
|---|---|---|---|
| Year 20x1 | $79.38 | 6.35 | 85.73 |
| Year 20x2 | 85.73 | 6.86 | 92.59 |
| Year 20x3 | 92.59 | 7.41 | 100.00 |

During 20X4 and thereafter, the stated dividend of $8 measured against the carrying amount of $100[18] would reflect dividend cost of 8%, the market rate at time of issuance.

The staff believes that existing authoritative literature, while not explicitly addressing increasing rate preferred stocks, implicitly calls for the accounting described in this bulletin.

The pervasive, fundamental principle of accrual accounting would, in the staff's view, preclude registrants from recognizing the dividend cost on the basis of whatever cash payment schedule might be arranged. Furthermore, recognition of the effective cost of unstated rights and privileges is well-established in accounting, and is specifically called for by FASB ASC Subtopic 835–30, Interest—Imputation of Interest, and Topic 3.C of this codification for unstated interest costs of debt capital and unstated dividend costs of redeemable preferred stock capital, respectively. The staff believes that the requirement to recognize the effective periodic cost of capital applies also to nonredeemable preferred stocks because, for that purpose, the distinction between debt capital and preferred equity capital (whether redeemable [19] or nonredeemable) is irrelevant from the standpoint of common stock interests.

*Question 3:* Would the accounting for discounts on increasing rate preferred stock be affected by variable stated dividend rates?

*Interpretive Response:* No. If stated dividends on an increasing rate preferred stock are variable, computations of initial discount and subsequent amortization should be based on the value of the applicable index at date of issuance and should not be affected by subsequent changes in the index.

For example, assume that a preferred stock issued 1/1/X1 is scheduled to pay dividends at annual rates, applied to the stock's par value, equal to 20% of the actual (fluctuating) market yield on a particular Treasury security in 20X1 and 20X2, and 90% of the fluctuating market yield in 20X3 and thereafter. The discount would be computed as the present value of a two-year dividend stream equal to 70% (90% less 20%) of the 1/1/X1 Treasury security yield, annually, on the stock's par value. The discount would be amortized in years 20X1 and 20X2 so that, together with 20% of the 1/1/X1 Treasury yield on the stock's par value, a constant rate of cost vis-a-vis the stock's carrying amount would result. Changes in the Treasury security yield during 20X1 and 20X2 would, of course, cause the rate of total reported preferred dividend cost (amortization of discount plus cash dividends) in those years to be more or less than the rate indicated by discount amortization plus 20% of the 1/1/X1 Treasury security yield. However, the fluctuations would be due solely to the impact of changes in the index on the stated dividends for those periods.

*Question 4:* Will the staff expect retroactive changes by registrants to comply with the accounting described in this bulletin?

*Interpretive Response:* All registrants will be expected to follow the accounting described in this bulletin for increasing rate preferred stocks issued after December 4, 1986.[20] Registrants that have not followed this accounting for increasing rate preferred stocks issued before that date were encouraged to retroactively change their accounting for those preferred stocks in the financial statements next filed with the Commission. The staff did not object if registrants did not make retroactive changes for those preferred stocks, provided that all presentations of and discussions regarding income applicable to common stock and earnings per share in future filings and shareholders' reports are accompanied by equally prominent supplemental disclosures (on the face of the income statement, in presentations of selected financial data, in MD&A, *etc.*) of the impact of not changing their accounting and an explanation of such impact (*e.g.,* that dividend cost has been recognized on a cash basis).

*R. Removed by SAB 103*

*S. Quasi-Reorganization*

*Facts:* As a consequence of significant operating losses and/or recent write-downs of property, plant and equipment, a company's financial statements reflect an accumulated deficit. The company desires to eliminate the deficit by reclassifying amounts from paid-in-capital. In addition, the company anticipates adopting a discretionary change in

[17] *See* Question 3 regarding variable increasing rate preferred stocks.

[18] It should be noted that the $100 per share amount used in this issue is for illustrative purposes, and is not intended to imply that application of this issue will necessarily result in the carrying amount of a nonredeemable preferred stock being accreted to its par value, stated value, voluntary redemption value or involuntary liquidation value.

[19] Application of the interest method with respect to redeemable preferred stocks pursuant to Topic 3.C results in accounting consistent with the provisions of this bulletin irrespective of whether the redeemable preferred stocks have constant or increasing stated dividend rates. The interest method, as described in FASB ASC Subtopic 835–30, produces a constant effective periodic rate of cost that is comprised of amortization of discount as well as the stated cost in each period.

[20] The staff first publicly expressed its view as to the appropriate accounting at the December 3–4, 1986 meeting of the EITF.

accounting principles [21] that will be recorded as a cumulative-effect type of accounting change. The recording of the cumulative effect will have the result of increasing the company's retained earnings.

*Question 1:* May the company reclassify its capital accounts to eliminate the accumulated deficit without satisfying all of the conditions enumerated in Section 210 [22] of the Codification of Financial Reporting Policies for a quasi-reorganization?

*Interpretive Response:* No. The staff believes a deficit reclassification of any nature is considered to be a quasi-reorganization. As such, a company may not reclassify or eliminate a deficit in retained earnings unless all requisite conditions set forth in Section 210 [23] for a quasi-reorganization are satisfied. [24]

*Question 2:* Must the company implement the discretionary change in accounting principle simultaneously with the quasi-reorganization or may it adopt the change after the quasi-reorganization has been effected?

*Interpretive Response:* The staff has taken the position that the company should adopt the anticipated accounting change prior to or as an integral part of the quasi-reorganization. Any such accounting change should be effected by following GAAP with respect to the change. [25]

FASB ASC paragraph 852–20–25–5 (Reorganizations Topic) indicates that, following a quasi-reorganization, an "entity's accounting shall be substantially similar to that appropriate for a new entity." The staff believes that implicit in this "fresh-start" concept is the need for the company's accounting principles in place at the time of the quasi-reorganization to be those planned to be used following the reorganization to avoid a misstatement of earnings and retained earnings after the reorganization.[26] FASB ASC paragraph 852–20–30–2 states, in part, "* * * in general, assets should be carried forward as of the date of the readjustment at fair and not unduly conservative amounts, *determined with due regard for the accounting to be subsequently employed by the entity*." (emphasis added)

In addition, the staff believes that adopting a discretionary change in accounting principle that will be reflected in the financial statements within 12 months following the consummation of a quasi-reorganization leads to a presumption that the accounting change was contemplated at the time of the quasi-reorganization.[27]

*Question 3:* In connection with a quasi-reorganization, may there be a write-up of net assets?

*Interpretive Response:* No. The staff believes that increases in the recorded values of specific assets (or reductions in liabilities) to fair value are appropriate providing such adjustments are factually supportable; however, the amount of such increases is limited to offsetting adjustments to reflect decreases in other assets (or increases in liabilities) to reflect their new fair value. In other words, a quasi-reorganization should not result in a write-up of net assets of the registrant.

*Question 4:* The interpretive response to question 1 indicates that the staff believes that a deficit reclassification of any nature is considered to be a quasi-reorganization, and accordingly, must satisfy all the conditions of Section 210.[28] Assume a company has satisfied all the requisite conditions of Section 210, and has eliminated a deficit in retained earnings by a concurrent reduction in paid-in capital, but did not need to restate assets and liabilities by a charge to capital because assets and liabilities were already stated at fair values. How should the company reflect the tax benefits of operating loss or tax credit carryforwards for financial reporting purposes that existed as of the date of the quasi-reorganization when such tax benefits are subsequently recognized for financial reporting purposes?

*Interpretive Response:* The staff believes FASB ASC Subtopic 852–740, Reorganizations—Income Taxes, requires that any subsequently recognized tax benefits of operating loss or tax credit carryforwards that existed as of the date of a quasi-reorganization be reported as a direct addition to paid-in capital. The staff believes that this position is consistent with the "new company" or "fresh-start" concept embodied in Section 210,[29] and in existing accounting literature regarding quasi-reorganizations, and with the FASB staff's justification for such a position when they stated that a "new enterprise would not have tax benefits attributable to operating losses or tax credits that arose prior to its organization date. [30]

The staff believes that all registrants that comply with the requirements of Section 210 in effecting a quasi-

[21] Discretionary accounting changes require the filing of a preferability letter by the registrant's independent accountant pursuant to Item 601 of Regulation S–K and Rule 10–01(b)(6) of Regulation S–X, respectively.

[22] ASR 25.

[23] Section 210 (ASR 25) indicates the following conditions under which a quasi-reorganization can be effected without the creation of a new corporate entity and without the intervention of formal court proceedings:

1. Earned surplus, as of the date selected, is exhausted;

2. Upon consummation of the quasi-reorganization, no deficit exists in any surplus account;

3. The entire procedure is made known to all persons entitled to vote on matters of general corporate policy and the appropriate consents to the particular transactions are obtained in advance in accordance with the applicable laws and charter provisions;

The procedure accomplishes, with respect to the accounts, substantially what might be accomplished in a reorganization by legal proceedings—namely, the restatement of assets in terms of present considerations as well as appropriate modifications of capital and capital surplus, in order to obviate, so far as possible, the necessity of future reorganization of like nature.

[24] In addition, FASB ASC Subtopic 852–20, Reorganizations—Quasi-Reorganizations, outlines procedures that must be followed in connection with and after a quasi-reorganization.

[25] FASB ASC Topic 250 provides accounting principles to be followed when adopting accounting changes. In addition, many newly-issued accounting pronouncements provide specific guidance to be followed when adopting the accounting specified in such pronouncements.

[26] Certain newly-issued accounting standards do not require adoption until some future date. The staff believes, however, that if the registrant intends or is required to adopt those standards within 12 months following the quasi-reorganization, the registrant should adopt those standards prior to or as an integral part of the quasi-reorganization. Further, registrants should consider early adoption of standards with effective dates more than 12 months subsequent to a quasi-reorganization.

[27] Certain accounting changes require restatement of prior financial statements. The staff believes that if a quasi-reorganization had been recorded in a restated period, the effects of the accounting change on quasi-reorganization adjustments should also be restated to properly reflect the quasi-reorganization in the restated financial statements.

[28] *See* footnote 27.

[29] Section 210 (ASR 25) discusses the "conditions under which a quasi-reorganization has come to be applied in accounting to the corporate procedures in the course of which a company, without creation of new corporate entity and without intervention of formal court proceedings, is enabled to eliminate a deficit whether resulting from operations or recognition of other losses or both and to establish a new earned surplus account for the accumulation of earnings subsequent to the date selected as the effective date of the quasi-reorganization." It further indicates that "it is implicit in a procedure of this kind that it is not to be employed recurrently, *but only under circumstances which would justify an actual reorganization or formation of a new corporation,* particularly if the sole purpose of the quasi-reorganization is the elimination of a deficit in earned surplus resulting from operating losses." (emphasis added)

[30] FASB ASC paragraph 852–740–55–4 states in part: "As indicated in paragraph 852–20–25–5, after a quasi-reorganization, the entity's accounting shall be substantially similar to that appropriate for a new entity. As such, any subsequently recognized tax benefit of an operating loss or tax credit carryforward that existed at the date of a quasi-reorganization shall not be included in the determination of income of the "new" entity, regardless of whether losses that gave rise to an operating loss carryforward were charged to income before the quasi-reorganization or directly to contributed capital as part of the quasi-reorganization. A new entity would not have tax benefits attributable to operating losses or tax credits that arose before its organization date."

reorganization should apply the accounting required by FASB ASC paragraph 852–740–45–3 for the tax benefits of tax carryforward items.[31, 32] Therefore, even though the only effect of a quasi-reorganization is the elimination of a deficit in retained earnings because assets and liabilities are already stated at fair values and the revaluation of assets and liabilities is unnecessary (or a write-up of net assets is prohibited as indicated in the interpretive response to question 3 above), subsequently recognized tax benefits of operating loss or tax credit carryforward items should be recorded as a direct addition to paid-in capital.

*Question 5:* If a company had previously recorded a quasi-reorganization that only resulted in the elimination of a deficit in retained earnings, may the company reverse such entry and "undo" its quasi-reorganization?

*Interpretive Response:* No. The staff believes FASB ASC Topic 250, Accounting Changes and Error Corrections, would preclude such a change in accounting. It states: "a method of accounting that was previously adopted for a type of transaction or event that is being terminated *or that was a single, nonrecurring event in the past shall not be changed.*" (emphasis added.) [33]

*T. Accounting for Expenses or Liabilities Paid by Principal Stockholder(s)*

(Replaced by SAB 107)

*Facts:* Company X was a defendant in litigation for which the company had not recorded a liability in accordance with FASB ASC Topic 450, Contingencies. A principal stockholder [34] of the company transfers a portion of his shares to the plaintiff to settle such litigation. If the company had settled the litigation directly, the company would have recorded the settlement as an expense.

*Question:* Must the settlement be reflected as an expense in the company's financial statements, and if so, how?

*Interpretive Response:* Yes. The value of the shares transferred should be reflected as an expense in the company's financial statements with a corresponding credit to contributed (paid-in) capital.

The staff believes that such a transaction is similar to those described in FASB ASC paragraph 718–10–15–4 (Compensation—Stock Compensation Topic), which states that "share-based payments awarded to an employee of the reporting entity by a related party or other holder of an economic interest [35] in the entity as compensation for services provided to the entity are share-based payment transactions to be accounted for under this Topic unless the transfer is clearly for a purpose other than compensation for services to the reporting entity." As explained in this paragraph, the substance of such a transaction is that the economic interest holder makes a capital contribution to the reporting entity, and the reporting entity makes a share-based payment to its employee in exchange for services rendered.

The staff believes that the problem of separating the benefit to the principal stockholder from the benefit to the company cited in FASB ASC Topic 718 is not limited to transactions involving stock compensation. Therefore, similar accounting is required in this and other [36] transactions where a principal stockholder pays an expense for the company, unless the stockholder's action is caused by a relationship or obligation completely unrelated to his position as a stockholder or such action clearly does not benefit the company.

Some registrants and their accountants have taken the position that since FASB ASC Topic 850, Related Party Disclosures, applies to these transactions and requires only the disclosure of material related party transactions, the staff should not analogize to the accounting called for by FASB ASC paragraph 718–10–15–4 for transactions other than those specifically covered by it. The staff notes, however, that FASB ASC Topic 850 does not address the measurement of related party transactions and that, as a result, such transactions are generally recorded at the amounts indicated by their terms.[37] However, the staff believes that transactions of the type described above differ from the typical related party transactions.

The transactions for which FASB ASC Topic 850 requires disclosure generally are those in which a company receives goods or services directly from, or provides goods or services directly to, a related party, and the form and terms of such transactions may be structured to produce either a direct or indirect benefit to the related party. The participation of a related party in such a transaction negates the presumption that transactions reflected in the financial statements have been consummated at arm's length. Disclosure is therefore required to compensate for the fact that, due to the related party's involvement, the terms of the transaction may produce an accounting measurement for which a more faithful measurement may not be determinable.

However, transactions of the type discussed in the facts given do not have such problems of measurement and appear to be transacted to provide a benefit to the stockholder through the enhancement or maintenance of the value of the stockholder's investment. The staff believes that the substance of such transactions is the payment of an expense of the company through contributions by the stockholder. Therefore, the staff believes it would be inappropriate to account for such transactions according to the form of the transaction.

*U. Removed by SAB 112*

*V. Certain Transfers of Nonperforming Assets*

*Facts:* A financial institution desires to reduce its nonaccrual or reduced rate loans and other nonearning assets, including foreclosed real estate (collectively, "nonperforming assets"). Some or all of such nonperforming assets are transferred to a newly-formed entity (the "new entity"). The financial

[31] [Original footnote removed by SAB 114.]

[32] FASB ASC paragraph 852–740–45–3 states: "[t]he tax benefit of deductible temporary differences and carryforwards as of the date of a quasi reorganization as defined and contemplated in FASB ASC Subtopic 852–20, ordinarily are reported as a direct addition to contributed capital if the tax benefits are recognized in subsequent years."

[33] FASB ASC paragraph 250–10–45–12.

[34] The FASB ASC Master Glossary defines principal owners as "owners of record or known beneficial owners of more than 10 percent of the voting interests of the enterprise."

[35] The FASB ASC Master Glossary defines an economic interest in an entity as "any type or form of pecuniary interest or arrangement that an entity could issue or be a party to, including equity securities; financial instruments with characteristics of equity, liabilities or both; long-term debt and other debt-financing arrangements; leases; and contractual arrangements such as management contracts, service contracts, or intellectual property licenses." Accordingly, a principal stockholder would be considered a holder of an economic interest in an entity.

[36] For example, SAB Topic 1.B indicates that the separate financial statements of a subsidiary should reflect any costs of its operations which are incurred by the parent on its behalf. Additionally, the staff notes that AICPA Technical Practice Aids § 4160 also indicates that the payment by principal stockholders of a company's debt should be accounted for as a capital contribution.

[37] However, in some circumstances it is necessary to reflect, either in the historical financial statements or a pro forma presentation (depending on the circumstances), related party transactions at amounts other than those indicated by their terms. Two such circumstances are addressed in Staff Accounting Bulletin Topic 1.B.1, Questions 3 and 4. Another example is where the terms of a material contract with a related party are expected to change upon the completion of an offering (*i.e.,* the principal shareholder requires payment for services which had previously been contributed by the shareholder to the company).

institution, as consideration for transferring the nonperforming assets, may receive (a) the cash proceeds of debt issued by the new entity to third parties, (b) a note or other redeemable instrument issued by the new entity, or (c) a combination of (a) and (b). The residual equity interests in the new entity, which carry voting rights, initially owned by the financial institution, are transferred to outsiders (for example, via distribution to the financial institution's shareholders or sale or contribution to an unrelated third party).

The financial institution typically will manage the assets for a fee, providing necessary services to liquidate the assets, but otherwise does not have the right to appoint directors or legally control the operations of the new entity.

FASB ASC Topic 860, Transfers and Servicing, provides guidance for determining when a transfer of financial assets can be recognized as a sale. The interpretive guidance provided in response to Questions 1 and 2 of this SAB does not apply to transfers of financial assets falling within the scope of FASB ASC Topic 860. Because FASB ASC Topic 860 does not apply to distributions of financial assets to shareholders or a contribution of such assets to unrelated third parties, the interpretive guidance provided in response to Questions 1 and 2 of this SAB would apply to such conveyances.

Further, registrants should consider the guidance contained in FASB ASC Topic 810, Consolidation, in determining whether it should consolidate the newly-formed entity.

*Question 1:* What factors should be considered in determining whether such transfer of nonperforming assets can be accounted for as a disposition by the financial institution?

*Interpretive Response:* The staff believes that determining whether nonperforming assets have been disposed of in substance requires an assessment as to whether the risks and rewards of ownership have been transferred.[38] The staff believes that the transfer described should not be accounted for as a sale or disposition if (a) the transfer of nonperforming assets to the new entity provides for recourse by the new entity to the transferor financial institution, (b) the financial institution directly or indirectly guarantees debt of the new entity in whole or in part, (c) the financial institution retains a participation in the rewards of ownership of the transferred assets, for example through a higher than normal incentive or other management fee arrangement,[39] or (d) the fair value of any material non-cash consideration received by the financial institution (for example, a note or other redeemable instrument) cannot be reasonably estimated. Additionally, the staff believes that the accounting for the transfer as a sale or disposition generally is not appropriate where the financial institution retains rewards of ownership through the holding of significant residual equity interests or where third party holders of such interests do not have a significant amount of capital at risk.

Where accounting for the transfer as a sale or disposition is not appropriate, the nonperforming assets should remain on the financial institution's balance sheet and should continue to be disclosed as nonaccrual, past due, restructured or foreclosed, as appropriate, and the debt of the new entity should be recorded by the financial institution.

*Question 2:* If the transaction is accounted for as a sale to an unconsolidated party, at what value should the transfer be recorded by the financial institution?

*Interpretive Response:* The staff believes that the transfer should be recorded by the financial institution at the fair value of assets transferred (or, if more clearly evident, the fair value of assets received) and a loss recognized by the financial institution for any excess of the net carrying value[40] over the fair value.[41] Fair value is the amount that would be realizable in an outright sale to an unrelated third party for cash.[42] The same concepts should be applied in determining fair value of the transferred assets, *i.e.,* if an active market exists for the assets transferred, then fair value is equal to the market value. If no active market exists, but one exists for similar assets, the selling prices in that market may be helpful in estimating the fair value. If no such market price is available, a forecast of expected cash flows, discounted at a rate commensurate with the risks involved, may be used to aid in estimating the fair value. In situations where discounted cash flows are used to estimate fair value of nonperforming assets, the staff would expect that the interest rate used in such computations will be substantially higher than the cost of funds of the financial institution and appropriately reflect the risk of holding these nonperforming assets. Therefore, the fair value determined in such a way will be lower than the amount at which the assets would have been carried by the financial institution had the transfer not occurred, unless the financial institution had been required under GAAP to carry such assets at market value or the lower of cost or market value.

*Question 3:* Where the transaction may appropriately be accounted for as a sale to an unconsolidated party and the financial institution receives a note receivable or other redeemable instrument from the new entity, how should such asset be disclosed pursuant to Item III C, "Risk Elements," of Industry Guide 3? What factors should be considered related to the subsequent accounting for such instruments received?

*Interpretive Response:* The staff believes that the financial institution may exclude the note receivable or other asset from its Risk Elements disclosures under Guide 3 provided that: (a) The receivable itself does not constitute a nonaccrual, past due, restructured, or potential problem loan that would require disclosure under Guide 3, and (b) the underlying collateral is described in sufficient detail to enable investors to understand the nature of the note receivable or other asset, if material, including the extent of any over-collateralization. The description of the collateral normally would include material information similar to that which would be provided if such assets were owned by the financial institution, including pertinent Risk Element disclosures.

The staff notes that, in situations in which the transaction is accounted for as a sale to an unconsolidated party and a portion of the consideration received by the registrant is debt or another

[38] [Original footnote removed by SAB 114.]

[39] The staff recognizes that the determination of whether the financial institution retains a participation in the rewards of ownership will require an analysis of the facts and circumstances of each individual transaction. Generally, the staff believes that, in order to conclude that the financial institution has disposed of the assets in substance, the management fee arrangement should not enable the financial institution to participate to any significant extent in the potential increases in cash flows or value of the assets, and the terms of the arrangement, including provisions for discontinuance of services, must be substantially similar to management arrangements with third parties.

[40] The carrying value should be reduced by any allocable allowance for credit losses or other valuation allowances. The staff believes that the loss recognized for the excess of the net carrying value over the fair value should be considered a credit loss and this should not be included by the financial institution as loss on disposition.

[41] The staff notes that FASB ASC paragraph 942–810–45–2 (Financial Services—Depository and Lending Topic) provides guidance that the newly created "liquidating bank" should continue to report its assets and liabilities at fair values at the date of the financial statements.

[42] FASB ASC paragraph 845–10–30–14 (Nonmonetary Transactions Topic) provides guidance that an enterprise that distributes loans to its owners should report such distribution at fair value.

redeemable instrument, careful consideration must be given to the appropriateness of recording profits on the management fee arrangement, or interest or dividends on the instrument received, including consideration of whether it is necessary to defer such amounts or to treat such payments on a cost recovery basis. Further, if the new entity incurs losses to the point that its permanent equity based on GAAP is eliminated, it would ordinarily be necessary for the financial institution, at a minimum, to record further operating losses as its best estimate of the loss in realizable value of its investment.[43]

*W. Contingency Disclosures Regarding Property-Casualty Insurance Reserves for Unpaid Claim Costs*

*Facts:* A property-casualty insurance company (the "Company") has established reserves, in accordance with FASB ASC Topic 944, Financial Services—Insurance, for unpaid claim costs, including estimates of costs relating to claims incurred but not reported ("IBNR").[44] The reserve estimate for IBNR claims was based on past loss experience and current trends except that the estimate has been adjusted for recent significant unfavorable claims experience that the Company considers to be nonrecurring and abnormal. The Company attributes the abnormal claims experience to a recent acquisition and accelerated claims processing; however, actuarial studies have been inconclusive and subject to varying interpretations. Although the reserve is deemed adequate to cover all probable claims, there is a reasonable possibility that the abnormal claims experience could continue, resulting in a material understatement of claim reserves.

FASB ASC Topic 450, Contingencies, requires, among other things, disclosure of loss contingencies.[45] However, FASB ASC paragraph 450–10–05–6 notes that "[n]ot all uncertainties inherent in the accounting process give rise to contingencies."

FASB ASC Topic 275, Risks and Uncertainties,[46] also provides disclosure guidance regarding certain significant estimates.

*Question 1:* In the staff's view, do FASB ASC Topics 450 and 275 disclosure requirements apply to property-casualty insurance reserves for unpaid claim costs? If so, how?

*Interpretive Response:* Yes. The staff believes that specific uncertainties (conditions, situations and/or sets of circumstances) not considered to be normal and recurring because of their significance and/or nature can result in loss contingencies[47] for purposes of applying FASB ASC Topics 450 and 275 disclosure requirements. General uncertainties, such as the amount and timing of claims, that are normal, recurring, and inherent to estimations of property-casualty insurance reserves are not considered subject to the disclosure requirements of FASB ASC Topic 450. Some specific uncertainties that may result in loss contingencies pursuant to FASB ASC Topic 450, depending on significance and/or nature, include insufficiently understood trends in claims activity; judgmental adjustments to historical experience for purposes of estimating future claim costs (other than for normal recurring general uncertainties); significant risks to an individual claim or group of related claims; or catastrophe losses. The requirements of FASB ASC Topic 275 apply when "[i]t is at least reasonably possible that the estimate of the effect on the financial statements of a condition, situation, or set of circumstances that existed at the date of the financial statements will change in the near term due to one or more future confirming events * * * [and] the effect of the change would be material to the financial statements."

*Question 2:* Do the facts presented above describe an uncertainty that requires disclosures under FASB ASC Topics 450 and 275?

*Interpretive Response:* Yes. The staff believes the judgmental adjustments to historical experience for insufficiently understood claims activity noted above results in a loss contingency within the scope of FASB ASC Topics 450 and 275. Based on the facts presented above, at a minimum the Company's financial statements should disclose that for purposes of estimating IBNR claim reserves, past experience was adjusted for what management believes to be abnormal claims experience related to the recent acquisition of Company A and accelerated claims processing. It should also be disclosed that there is a reasonable possibility that the claims experience could be the indication of an unfavorable trend which would require additional IBNR claim reserves in the approximate range of $XX–$XX million (alternatively, if Company management is unable to estimate the possible loss or range of loss, a statement to that effect should be disclosed).

Additionally, the staff also expects companies to disclose the nature of the loss contingency and the potential impact on trends in their loss reserve development discussions provided pursuant to Property-Casualty Industry Guides 4 and 6. Consideration should also be given to the need to provide disclosure in MD&A.

*Question 3:* Does the staff have an example in which specific uncertainties involving an individual claim or group of related claims result in a loss contingency the staff believes requires disclosure?

*Interpretive Response:* Yes. A property-casualty insurance company (the "Company") underwrites product liability insurance for an insured manufacturer which has produced and sold millions of units of a particular product which has been used effectively and without problems for many years. Users of the product have recently begun to report serious health problems that they attribute to long term use of the product and have asserted claims under the insurance policy underwritten and retained by the Company. To date, the number of users reporting such problems is relatively small, and there is presently no conclusive evidence that demonstrates a causal link between long term use of the product and the health problems experienced by the claimants. However,

[43] Typically, the financial institution's claim on the new entity is subordinate to other debt instruments and thus the financial institution will incur any losses beyond those incurred by the permanent equity holders.

[44] FASB ASC paragraph 944–40–30–1 prescribes that "[t]he liability for unpaid claims shall be based on the estimated ultimate cost of settling the claims (including the effects of inflation and other societal and economic factors), using past experience adjusted for current trends, and any other factors that would modify past experience." [Footnote reference omitted]

[45] FASB ASC paragraphs 450–20–50–3 through 450–20–50–4 provide guidance that if no accrual is made for a loss contingency because one or both of the conditions in FASB ASC paragraph 450–20–25–2 are not met, *or if an exposure to loss exists in excess of the amount accrued* pursuant to the provisions of FASB ASC paragraph 450–20–25–2, disclosure of the contingency shall be made when there is at least a reasonable possibility that a loss or an additional loss may have been incurred. The disclosure shall indicate the nature of the contingency and shall give an estimate of the possible loss or range of loss or state that such an estimate cannot be made." [Footnote reference omitted and emphasis added.]

[46] FASB ASC Topic 275 provides that disclosures regarding certain significant estimates should be made when certain criteria are met. The guidance provides that the disclosure shall indicate the nature of the uncertainty and include an indication that it is at least reasonably possible that a change in the estimate will occur in the near term. If the estimate involves a loss contingency covered by FASB ASC Topic 450, the disclosure also should include an estimate of the possible loss or range of loss, or state that such an estimate cannot be made. Disclosure of the factors that cause the estimate to be sensitive to change is encouraged but not required.

FASB ASC Topic 275 requires disclosures regarding current vulnerability due to certain concentrations which may be applicable as well.

[47] The loss contingency referred to in this document is the potential for a material understatement of reserves for unpaid claims.

the evidence generated to date indicates that there is at least a reasonable possibility that the product is responsible for the problems and the assertion of additional claims is considered probable, and therefore the potential exposure of the Company is material. While an accrual may not be warranted since the loss exposure may not be both probable and estimable, in view of the reasonable possibility of material future claim payments, the staff believes that disclosures made in accordance with FASB ASC Topics 450 and 275 would be required under these circumstances.

The disclosure concepts expressed in this example would also apply to an individual claim or group of claims that are related to a single catastrophic event or multiple events having a similar effect.

*X. Removed by SAB 103*

*Y. Accounting and Disclosures Relating to Loss Contingencies*

*Facts:* A registrant believes it may be obligated to pay material amounts as a result of product or environmental remediation liability. These amounts may relate to, for example, damages attributed to the registrant's products or processes, clean-up of hazardous wastes, reclamation costs, fines, and litigation costs. The registrant may seek to recover a portion or all of these amounts by filing a claim against an insurance carrier or other third parties.

*Question 1:* Assuming that the registrant's estimate of an environmental remediation or product liability meets the conditions set forth in FASB ASC paragraph 410–30–35–12 (Asset Retirement and Environmental Obligations Topic) for recognition on a discounted basis, what discount rate should be applied and what, if any, special disclosures are required in the notes to the financial statements?

*Interpretive Response:* The rate used to discount the cash payments should be the rate that will produce an amount at which the environmental or product liability could be settled in an arm's-length transaction with a third party. Further, the discount rate used to discount the cash payments should not exceed the interest rate on monetary assets that are essentially risk free [48] and have maturities comparable to that of the environmental or product liability.

If the liability is recognized on a discounted basis to reflect the time value of money, the notes to the financial statements should, at a minimum, include disclosures of the discount rate used, the expected aggregate undiscounted amount, expected payments for each of the five succeeding years and the aggregate amount thereafter, and a reconciliation of the expected aggregate undiscounted amount to amounts recognized in the statements of financial position. Material changes in the expected aggregate amount since the prior balance sheet date, other than those resulting from pay-down of the obligation, should be explained.

*Question 2:* What financial statement disclosures should be furnished with respect to recorded and unrecorded product or environmental remediation liabilities?

*Interpretive Response:* FASB ASC Section 450–20–50, Contingencies—Loss Contingencies—Disclosure, identify disclosures regarding loss contingencies that generally are furnished in notes to financial statements. FASB ASC Section 410–30–50, Asset Retirement and Environmental Obligations—Environmental Obligations—Disclosure, identifies disclosures that are required and recommended regarding both recorded and unrecorded environmental remediation liabilities. The staff believes that product and environmental remediation liabilities typically are of such significance that detailed disclosures regarding the judgments and assumptions underlying the recognition and measurement of the liabilities are necessary to prevent the financial statements from being misleading and to inform readers fully regarding the range of reasonably possible outcomes that could have a material effect on the registrant's financial condition, results of operations, or liquidity. In addition to the disclosures required by FASB ASC Section 450–20–50 and FASB ASC Section 410–30–50, examples of disclosures that may be necessary include:

- Circumstances affecting the reliability and precision of loss estimates.
- The extent to which unasserted claims are reflected in any accrual or may affect the magnitude of the contingency.
- Uncertainties with respect to joint and several liability that may affect the magnitude of the contingency, including disclosure of the aggregate expected cost to remediate particular sites that are individually material if the likelihood of contribution by the other significant parties has not been established.
- Disclosure of the nature and terms of cost-sharing arrangements with other potentially responsible parties.
- The extent to which disclosed but unrecognized contingent losses are expected to be recoverable through insurance, indemnification arrangements, or other sources, with disclosure of any material limitations of that recovery.
- Uncertainties regarding the legal sufficiency of insurance claims or solvency of insurance carriers.[49]
- The time frame over which the accrued or presently unrecognized amounts may be paid out.
- Material components of the accruals and significant assumptions underlying estimates.

Registrants are cautioned that a statement that the contingency is not expected to be material does not satisfy the requirements of FASB ASC Topic 450 if there is at least a reasonable possibility that a loss exceeding amounts already recognized may have been incurred and the amount of that additional loss would be material to a decision to buy or sell the registrant's securities. In that case, the registrant must either (a) disclose the estimated additional loss, or range of loss, that is reasonably possible, or (b) state that such an estimate cannot be made.

*Question 3:* What disclosures regarding loss contingencies may be necessary outside the financial statements?

*Interpretive Response:* Registrants should consider the requirements of Items 101 (Description of Business), 103 (Legal Proceedings), and 303 (MD&A) of Regulation S–K. The Commission has issued interpretive releases that provide additional guidance with respect to these items.[50] In a 1989 interpretive release, the Commission noted that the availability of insurance, indemnification, or contribution may be relevant in determining whether the criteria for disclosure have been met with respect to a contingency.[51] The registrant's assessment in this regard should include consideration of facts such as the periods in which claims for recovery may be realized, the likelihood that the claims may be contested, and

[48] As described in Concepts Statement 7, Using Cash Flow Information and Present Value in Accounting Measurements.

[49] The staff believes there is a rebuttable presumption that no asset should be recognized for a claim for recovery from a party that is asserting that it is not liable to indemnify the registrant. Registrants that overcome that presumption should disclose the amount of recorded recoveries that are being contested and discuss the reasons for concluding that the amounts are probable of recovery.

[50] *See* Securities Act Release No. 6130, FR 36, Securities Act Release No. 33–8040, Securities Act Release No. 33–8039, and Securities Act Release 33–8176.

[51] *See, e.g.,* footnote 30 of FR 36 (footnote 17 of Section 501.02 of the Codification of Financial Reporting Policies).

the financial condition of third parties from which recovery is expected.

Disclosures made pursuant to the guidance identified in the preceding paragraph should be sufficiently specific to enable a reader to understand the scope of the contingencies affecting the registrant. For example, a registrant's discussion of historical and anticipated environmental expenditures should, to the extent material, describe separately (a) recurring costs associated with managing hazardous substances and pollution in on-going operations, (b) capital expenditures to limit or monitor hazardous substances or pollutants, (c) mandated expenditures to remediate previously contaminated sites, and (d) other infrequent or non-recurring clean-up expenditures that can be anticipated but which are not required in the present circumstances. Disaggregated disclosure that describes accrued and reasonably likely losses with respect to particular environmental sites that are individually material may be necessary for a full understanding of these contingencies. Also, if management's investigation of potential liability and remediation cost is at different stages with respect to individual sites, the consequences of this with respect to amounts accrued and disclosed should be discussed.

Examples of specific disclosures typically relevant to an understanding of historical and anticipated product liability costs include the nature of personal injury or property damages alleged by claimants, aggregate settlement costs by type of claim, and related costs of administering and litigating claims. Disaggregated disclosure that describes accrued and reasonably likely losses with respect to particular claims may be necessary if they are individually material. If the contingency involves a large number of relatively small individual claims of a similar type, such as personal injury from exposure to asbestos, disclosure of the number of claims pending at each balance sheet date, the number of claims filed for each period presented, the number of claims dismissed, settled, or otherwise resolved for each period, and the average settlement amount per claim may be necessary. Disclosures should address historical and expected trends in these amounts and their reasonably likely effects on operating results and liquidity.

*Question 4:* What disclosures should be furnished with respect to site restoration costs or other environmental remediation costs? [52]

*Interpretive Response:* The staff believes that material liabilities for site restoration, post-closure, and monitoring commitments, or other exit costs that may occur on the sale, disposal, or abandonment of a property as a result of unanticipated contamination of the asset should be disclosed in the notes to the financial statements. Appropriate disclosures generally would include the nature of the costs involved, the total anticipated cost, the total costs accrued to date, the balance sheet classification of accrued amounts, and the range or amount of reasonably possible additional losses. If an asset held for sale or development will require remediation to be performed by the registrant prior to development, sale, or as a condition of sale, a note to the financial statements should describe how the necessary expenditures are considered in the assessment of the asset's value and the possible need to reflect an impairment loss. Additionally, if the registrant may be liable for remediation of environmental damage relating to assets or businesses previously disposed, disclosure should be made in the financial statements unless the likelihood of a material unfavorable outcome of that contingency is remote.[53] The registrant's accounting policy with respect to such costs should be disclosed in accordance with FASB ASC Topic 235, Notes to Financial Statements.

*Z. Accounting and Disclosure Regarding Discontinued Operations*

1. Removed by SAB 103

2. Removed by SAB 103

3. Removed by SAB 103

4. Disposal of Operation With Significant Interest Retained

*Facts:* A Company disposes of its controlling interest in a component of an entity as defined by the FASB ASC Master Glossary. The Company retains a minority voting interest directly in the component or it holds a minority voting interest in the buyer of the component. Controlling interest includes those controlling interests established through other means, such as variable interests. Because the Company's voting interest enables it to exert significant influence over the operating and financial policies of the investee, the Company is required by FASB ASC Subtopic 323–10, Investments—Equity Method and Joint Ventures—Overall, to account for its residual investment using the equity method.[54]

*Question:* May the historical operating results of the component and the gain or loss on the sale of the majority interest in the component be classified in the Company's statement of operations as "discontinued operations" pursuant to FASB ASC Subtopic 205–20, Presentation of Financial Statements—Discontinued Operations?

*Interpretive Response:* No. A condition necessary for discontinued operations reporting, as indicated in FASB ASC paragraph 205–20–45–1 is that an entity "not have any significant continuing involvement in the operations of the component after the disposal transaction." In these circumstances, the transaction should be accounted for as the disposal of a group of assets that is not a component of an entity and classified within continuing operations pursuant to FASB ASC paragraph 360–10–45–5 (Property, Plant, and Equipment Topic).[55]

5. Classification and Disclosure of Contingencies Relating to Discontinued Operations

*Facts:* A company disposed of a component of an entity in a previous accounting period. The Company received debt and/or equity securities of the buyer of the component or of the disposed component as consideration in the sale, but this financial interest is not sufficient to enable the Company to apply the equity method with respect to its investment in the buyer. The Company made certain warranties to the buyer with respect to the discontinued business, or remains liable under environmental or other laws with respect to certain facilities or operations transferred to the buyer. The disposition satisfied the criteria of FASB ASC Subtopic 205–20 for presentation as "discontinued operations." The Company estimated the fair value of the securities received in the transaction for purposes of calculating the gain or loss on disposal that was recognized in its financial statements. The results of discontinued operations prior to the

[52] Registrants are reminded that FASB ASC Subtopic 410–20, Asset Retirement and Environmental Obligations—Asset Retirement Obligations, provides guidance for accounting and reporting for costs associated with asset retirement obligations.

[53] If the company has a guarantee as defined by FASB ASC Topic 460, Guarantees, the entity is required to provide the disclosures and recognize the fair value of the guarantee in the company's financial statements even if the "contingent" aspect of the guarantee is deemed to be remote.

[54] In some circumstances, the seller's continuing interest may be so great that divestiture accounting is inappropriate.

[55] However, a plan of disposal that contemplates the transfer of assets to a limited-life entity created for the single purpose of liquidating the assets of a component of an entity would not necessitate classification within continuing operations solely because the registrant retains control or significant influence over the liquidating entity.

date of disposal or classification as held for sale included provisions for the Company's existing obligations under environmental laws, product warranties, or other contingencies. The calculation of gain or loss on disposal included estimates of the Company's obligations arising as a direct result of its decision to dispose of the component, under its warranties to the buyer, and under environmental or other laws. In a period subsequent to the disposal date, the Company records a charge to income with respect to the securities because their fair value declined materially and the Company determined that the decline was other than temporary. The Company also records adjustments of its previously estimated liabilities arising under the warranties and under environmental or other laws.

*Question 1:* Should the writedown of the carrying value of the securities and the adjustments of the contingent liabilities be classified in the current period's statement of operations within continuing operations or as an element of discontinued operations?

*Interpretive Response:* Adjustments of estimates of contingent liabilities or contingent assets that remain after disposal of a component of an entity or that arose pursuant to the terms of the disposal generally should be classified within discontinued operations.[56] However, the staff believes that changes in the carrying value of assets received as consideration in the disposal or of residual interests in the business should be classified within continuing operations.

FASB ASC paragraph 205–20–45–4 requires that "adjustments to amounts previously reported in discontinued operations that are directly related to the disposal of a component of an entity in a prior period shall be classified separately in the current period in discontinued operations." The staff believes that the provisions of FASB ASC paragraph 205–20–45–4 apply only to adjustments that are necessary to reflect new information about events that have occurred that becomes available prior to disposal of the component of the entity, to reflect the actual timing and terms of the disposal when it is consummated, and to reflect the resolution of contingencies associated with that component, such as warranties and environmental liabilities retained by the seller.

Developments subsequent to the disposal date that are not directly related to the disposal of the component or the operations of the component prior to disposal are not "directly related to the disposal" as contemplated by FASB ASC paragraph 205–20–45–4. Subsequent changes in the carrying value of assets received upon disposition of a component do not affect the determination of gain or loss at the disposal date, but represent the consequences of management's subsequent decisions to hold or sell those assets. Gains and losses, dividend and interest income, and portfolio management expenses associated with assets received as consideration for discontinued operations should be reported within continuing operations.

*Question 2:* What disclosures would the staff expect regarding discontinued operations prior to the disposal date and with respect to risks retained subsequent to the disposal date?

*Interpretive Response:* MD&A[57] should include disclosure of known trends, events, and uncertainties involving discontinued operations that may materially affect the Company's liquidity, financial condition, and results of operations (including net income) between the date when a component of an entity is classified as discontinued and the date when the risks of those operations will be transferred or otherwise terminated. Disclosure should include discussion of the impact on the Company's liquidity, financial condition, and results of operations of changes in the plan of disposal or changes in circumstances related to the plan. Material contingent liabilities,[58] such as product or environmental liabilities or litigation, that may remain with the Company notwithstanding disposal of the underlying business should be identified in notes to the financial statements and any reasonably likely range of possible loss should be disclosed pursuant to FASB ASC Topic 450, Contingencies. MD&A should include discussion of the reasonably likely effects of these contingencies on reported results and liquidity. If the Company retains a financial interest in the discontinued component or in the buyer of that component that is material to the Company, MD&A should include discussion of known trends, events, and uncertainties, such as the financial condition and operating results of the issuer of the security, that may be reasonably expected to affect the amounts ultimately realized on the investments.

6. Removed by SAB 103

7. Accounting for the Spin-Off of a Subsidiary

*Facts:* A Company disposes of a business through the distribution of a subsidiary's stock to the Company's shareholders on a pro rata basis in a transaction that is referred to as a spin-off.

*Question:* May the Company elect to characterize the spin-off transaction as resulting in a change in the reporting entity and restate its historical financial statements as if the Company never had an investment in the subsidiary, in the manner specified by FASB ASC Topic 250, Accounting Changes and Error Corrections?

*Interpretive Response:* Not ordinarily. If the Company was required to file periodic reports under the Exchange Act within one year prior to the spin-off, the staff believes the Company should reflect the disposition in conformity with FASB ASC Topic 360. This presentation most fairly and completely depicts for investors the effects of the previous and current organization of the Company. However, in limited circumstances involving the initial registration of a company under the Exchange Act or Securities Act, the staff has not objected to financial statements that retroactively reflect the reorganization of the business as a change in the reporting entity if the spin-off transaction occurs prior to effectiveness of the registration statement. This presentation may be acceptable in an initial registration if the Company and the subsidiary are in dissimilar businesses, have been managed and financed historically as if they were autonomous, have no more than incidental common facilities and costs, will be operated and financed autonomously after the spin-off, and will not have material financial commitments, guarantees, or contingent liabilities to each other after the spin-off. This exception to the prohibition against retroactive omission of the subsidiary is intended for companies that have not distributed widely financial statements that include the spun-off subsidiary. Also, dissimilarity contemplates substantially greater differences in the nature of the businesses than those that would ordinarily distinguish reportable segments as defined by FASB ASC paragraph 280–10–50–10 (Segment Reporting Topic).

[56] Registrants are reminded that FASB ASC Topic 460, Guarantees, requires recognition and disclosure of certain guarantees which may impose accounting and disclosure requirements in addition to those discussed in this SAB Topic.

[57] Item 303 of Regulation S–K.

[58] Registrants also should consider the disclosure requirements of FASB ASC Topic 460.

*AA. Removed by SAB 103*

*BB. Inventory Valuation Allowances*

*Facts:* FASB ASC paragraph 330–10–35–1 (Inventory Topic), specifies that: "[a] departure from the cost basis of pricing the inventory is required when the utility of the goods is no longer as great as its cost. Where there is evidence that the utility of goods, in their disposal in the ordinary course of business, will be less than cost, whether due to physical deterioration, obsolescence, changes in price levels, or other causes, the difference shall be recognized as a loss of the current period. This is generally accomplished by stating such goods at a lower level commonly designated as market."

FASB ASC paragraph 330–10–35–14 indicates that "[i]n the case of goods which have been written down below cost at the close of a fiscal year, such reduced amount is to be considered the cost for subsequent accounting purposes."

Lastly, the FASB ASC Master Glossary provides "inventory obsolescence" as one of the items subject to a change in accounting estimate.

*Question:* Does the write-down of inventory to the lower of cost or market, as required by FASB ASC Topic 330, create a new cost basis for the inventory or may a subsequent change in facts and circumstances allow for restoration of inventory value, not to exceed original historical cost?

*Interpretive Response:* Based on FASB ASC paragraph 330–10–35–14, the staff believes that a write-down of inventory to the lower of cost or market at the close of a fiscal period creates a new cost basis that subsequently cannot be marked up based on changes in underlying facts and circumstances.[59]

*CC. Impairments*

Standards for recognizing and measuring impairment of the carrying amount of long-lived assets including certain identifiable intangibles to be held and used in operations are found in FASB ASC Topic 360, Property, Plant, and Equipment. Standards for recognizing and measuring impairment of the carrying amount of goodwill and identifiable intangible assets that are not currently being amortized are found in FASB ASC Topic 350, Intangibles—Goodwill and Other.

*Facts:* Company X has mainframe computers that are to be abandoned in six to nine months as replacement computers are put in place. The mainframe computers were placed in service in January 20X0 and were being depreciated on a straight-line basis over seven years. No salvage value had been projected at the end of seven years and the original cost of the computers was $8,400. The board of directors, with the appropriate authority, approved the abandonment of the computers in March 20X3 when the computers had a remaining carrying value of $4,600. No proceeds are expected upon abandonment. Abandonment cannot occur prior to the receipt and installation of replacement computers, which is expected prior to the end of 20X3. Management had begun reevaluating its mainframe computer capabilities in January 20X2 and had included in its 20X3 capital expenditures budget an estimated amount for new mainframe computers. The 20X3 capital expenditures budget had been prepared by management in August 20X2, had been discussed with the company's board of directors in September 20X2 and was formally approved by the board of directors in March 20X3. Management had also begun soliciting bids for new mainframe computers beginning in the fall of 20X2. The mainframe computers, when grouped with assets at the lowest level of identifiable cash flows, were not impaired on a "held and used" basis throughout this time period. Management had not adjusted the original estimated useful life of the computers (seven years) since 20X0.

*Question 1:* Company X proposes to recognize an impairment charge under FASB ASC Topic 360 for the carrying value of the mainframe computers of $4,600 in March 20X3. Does Company X meet the requirements in FASB ASC Topic 360 to classify the mainframe computer assets as "to be abandoned?"

*Interpretive Response:* No. FASB ASC paragraph 360–10–35–47 provides that "a long-lived asset to be abandoned is disposed of when it ceases to be used. If an entity commits to a plan to abandon a long-lived asset before the end of its previously estimated useful life, depreciation estimates shall be revised in accordance with FASB ASC Topic 250, Accounting Changes and Error Corrections, to reflect the use of the asset over its shortened useful life."

*Question 2:* Would the staff accept an adjustment to write down the carrying value of the computers to reflect a "normalized depreciation" rate for the period from March 20X3 through actual abandonment (*e.g.,* December 20X3)? Normalized depreciation would represent the amount of depreciation otherwise expected to be recognized during that period without adjustment of the asset's useful life, or $1,000 ($100/month for ten months) in the example fact pattern.

*Interpretive Response:* No. The mainframe computers would be viewed as "held and used" at March 20X3 under the fact pattern described. There is no basis under FASB ASC Topic 360 to write down an asset to an amount that would subsequently result in a "normalized depreciation" charge through the disposal date, whether disposal is to be by sale, abandonment, or other means. FASB ASC paragraph 360–10–35–43 requires the asset to be valued at the lower of carrying amount or fair value less cost to sell in order to be classified as "held for sale." For assets that are classified as "held and used" under FASB ASC Topic 360, an assessment must first be made as to whether the asset (asset group) is impaired. FASB ASC paragraph 360–10–35–17 indicates that an impairment loss shall be recognized only if the carrying amount of a long-lived asset (asset group) is not recoverable and exceeds its fair value. The carrying amount of a long-lived asset (asset group) is not recoverable if it exceeds the sum of the undiscounted cash flows expected to result from the use and eventual disposition of the asset (asset group). The staff would object to a write down of long-lived assets to a "normalized depreciation" value as representing an acceptable alternative to the approaches required in FASB ASC Topic 360.

The staff also believes that registrants must continually evaluate the appropriateness of useful lives assigned to long-lived assets, including identifiable intangible assets and goodwill. In the above fact pattern, management had contemplated removal of the mainframe computers beginning in January 20X2 and, more formally, in August 20X2 as part of compiling the 20X3 capital expenditures budget. At those times, at a minimum, management should have reevaluated the original useful life assigned to the computers to determine whether a seven year amortization period remained appropriate given the company's current facts and circumstances, including ongoing technological changes in the market place. This reevaluation process should have continued at the time of the September 20X2 board of directors' meeting to discuss capital expenditure plans and, further, as the company pursued mainframe computer bids. Given the contemporaneous evidence that management's best estimate during much of 20X2 was that the current mainframe computers would be removed from service in 20X3, the depreciable life of the computers should

[59] *See also* disclosure requirement for inventory balances in Rule 5–02(6) of Regulation S–X.

have been adjusted prior to 20X3 to reflect this new estimate. The staff does not view the recognition of an impairment charge to be an acceptable substitute for choosing the appropriate initial amortization or depreciation period or subsequently adjusting this period as company or industry conditions change. The staff's view applies also to selection of, and changes to, estimated residual values. Consequently, the staff may challenge impairment charges for which the timely evaluation of useful life and residual value cannot be demonstrated.

*Question 3:* Has the staff expressed any views with respect to company-determined estimates of cash flows used for assessing and measuring impairment of assets under FASB ASC Topic 360?

*Interpretive Response:* In providing guidance on the development of cash flows for purposes of applying the provisions of that Topic, FASB ASC paragraph 360–10–35–30 indicates that "estimates of future cash flows used to test the recoverability of a long-lived asset (asset group) shall incorporate the entity's own assumptions about its use of the asset (asset group) and shall consider all available evidence. The assumptions used in developing those estimates shall be reasonable in relation to the assumptions used in developing other information used by the entity for comparable periods, such as internal budgets and projections, accruals related to incentive compensation plans, or information communicated to others."

The staff recognizes that various factors, including management's judgments and assumptions about the business plans and strategies, affect the development of future cash flow projections for purposes of applying FASB ASC Topic 360. The staff, however, cautions registrants that the judgments and assumptions made for purposes of applying FASB ASC Topic 360 must be consistent with other financial statement calculations and disclosures and disclosures in MD&A. The staff also expects that forecasts made for purposes of applying FASB ASC Topic 360 be consistent with other forward-looking information prepared by the company, such as that used for internal budgets, incentive compensation plans, discussions with lenders or third parties, and/or reporting to management or the board of directors.

For example, the staff has reviewed a fact pattern where a registrant developed cash flow projections for purposes of applying the provisions of FASB ASC Topic 360 using one set of assumptions and utilized a second, more conservative set of assumptions for purposes of determining whether deferred tax valuation allowances were necessary when applying the provisions of FASB ASC Topic 740, Income Taxes. In this case, the staff objected to the use of inconsistent assumptions.

In addition to disclosure of key assumptions used in the development of cash flow projections, the staff also has required discussion in MD&A of the implications of assumptions. For example, do the projections indicate that a company is likely to violate debt covenants in the future? What are the ramifications to the cash flow projections used in the impairment analysis? If growth rates used in the impairment analysis are lower than those used by outside analysts, has the company had discussions with the analysts regarding their overly optimistic projections? Has the company appropriately informed the market and its shareholders of its reduced expectations for the future that are sufficient to cause an impairment charge? The staff believes that cash flow projections used in the impairment analysis must be both internally consistent with the company's other projections and externally consistent with financial statement and other public disclosures.

*DD. Written Loan Commitments Recorded at Fair Value Through Earnings*

*Facts:* Bank A enters into a loan commitment with a customer to originate a mortgage loan at a specified rate. As part of this written loan commitment, Bank A expects to receive future net cash flows related to servicing rights from servicing fees (included in the loan's interest rate or otherwise), late charges, and other ancillary sources, or from selling the servicing rights to a third party. If Bank A intends to sell the mortgage loan after it is funded, pursuant to FASB ASC paragraph 815–10–15–83 (Derivatives and Hedging Topic), the written loan commitment is accounted for as a derivative instrument and recorded at fair value through earnings (referred to hereafter as a "derivative loan commitment"). If Bank A does not intend to sell the mortgage loan after it is funded, the written loan commitment is not accounted for as a derivative under FASB ASC Subtopic 815–10, Derivatives and Hedging—Overall. However, FASB ASC subparagraph 825–10–15–4(c) (Financial Instruments Topic) permits Bank A to record the written loan commitment at fair value through earnings (referred to hereafter as a "written loan commitment"). Pursuant to FASB ASC Subtopic 825–10, Financial Instruments—Overall, the fair value measurement for a written loan commitment would include the expected net future cash flows related to the associated servicing of the loan.

*Question 1:* In measuring the fair value of a derivative loan commitment accounted for under FASB ASC Subtopic 815–10, should Bank A include the expected net future cash flows related to the associated servicing of the loan?

*Interpretive Response:* Yes. The staff believes that, consistent with the guidance in FASB ASC Subtopic 860–50, Transfers and Servicing—Servicing Assets and Liabilities,[60] and FASB ASC Subtopic 825–10, the expected net future cash flows related to the associated servicing of the loan should be included in the fair value measurement of a derivative loan commitment. The expected net future cash flows related to the associated servicing of the loan that are included in the fair value measurement of a derivative loan commitment or a written loan commitment should be determined in the same manner that the fair value of a recognized servicing asset or liability is measured under FASB ASC Subtopic 860–50. However, as discussed in FASB ASC paragraph 860–50–25–1, a separate and distinct servicing asset or liability is not recognized for accounting purposes until the servicing rights have been contractually separated from the underlying loan by sale or securitization of the loan with servicing retained.

The views in Question 1 apply to all loan commitments that are accounted for at fair value through earnings. However, for purposes of electing fair value accounting pursuant to FASB ASC Subtopic 825–10, the views in Question 1 are not intended to be applied by analogy to any other instrument that contains a nonfinancial element.

*Question 2:* In measuring the fair value of a derivative loan commitment accounted for under FASB ASC Subtopic 815–10 or a written loan commitment accounted for under FASB ASC Subtopic 825–10, should Bank A include the expected net future cash flows related to internally-developed intangible assets?

*Interpretive Response:* No. The staff does not believe that internally-developed intangible assets (such as customer relationship intangible assets) should be recorded as part of the fair value of a derivative loan commitment or a written loan commitment. Such

[60] FASB ASC Subtopic 860–50 permits an entity to subsequently measure recognized servicing assets and servicing liabilities (which are nonfinancial instruments) at fair value through earnings.

nonfinancial elements of value should not be considered a component of the related instrument. Recognition of such assets would only be appropriate in a third-party transaction. For example, in the purchase of a portfolio of derivative loan commitments in a business combination, a customer relationship intangible asset is recorded separately from the fair value of such loan commitments. Similarly, when an entity purchases a credit card portfolio, FASB ASC paragraph 310–10–25–7 (Receivables Topic) requires an allocation of the purchase price to a separately recorded cardholder relationship intangible asset.

The view in Question 2 applies to all loan commitments that are accounted for at fair value through earnings.

## TOPIC 6: INTERPRETATIONS OF ACCOUNTING SERIES RELEASES AND FINANCIAL REPORTING RELEASES

*A.1. Removed by SAB 103*

*B. Accounting Series Release 280—General Revision of Regulation S–X: Income or Loss Applicable to Common Stock*

*Facts:* A registrant has various classes of preferred stock. Dividends on those preferred stocks and accretions of their carrying amounts cause income applicable to common stock to be less than reported net income.

*Question:* In ASR 280, the Commission stated that although it had determined not to mandate presentation of income or loss applicable to common stock in all cases, it believes that disclosure of that amount is of value in certain situations. In what situations should the amount be reported, where should it be reported, and how should it be computed?

*Interpretive Response:* Income or loss applicable to common stock should be reported on the face of the income statement [1] when it is materially different in quantitative terms from reported net income or loss [2] or when it is indicative of significant trends or other qualitative considerations. The amount to be reported should be computed for each period as net income or loss less: (a) Dividends on preferred stock, including undeclared or unpaid dividends if cumulative; and (b) periodic increases in the carrying amounts of instruments reported as redeemable preferred stock (as discussed in Topic 3.C) or increasing rate preferred stock (as discussed in Topic 5.Q).

*C. Accounting Series Release 180—Institution of Staff Accounting Bulletins (SABs)—Applicability of Guidance Contained in SABs*

*Facts:* The series of SABs was instituted to achieve wide dissemination of administrative interpretations and practices of the Commission's staff. In illustration of certain interpretations and practices, SABs may be written narrowly to describe the circumstances of particular matters which resulted in expression of the staff's views on those particular matters.

*Question:* How does the staff intend SABs to be applied in circumstances analogous to those addressed in SABs?

*Interpretive Response:* The staff's purpose in issuing SABs is to disseminate guidance for application not only in the narrowly described circumstances, but also, unless authoritative accounting literature calls for different treatment, in other circumstances where events and transactions have similar accounting and/or disclosure implications.

Registrants and independent accountants are encouraged to consult with the staff if they believe that particular circumstances call for accounting and/or disclosure different from that which would result from application of a SAB addressing those same or analogous circumstances.

*D. Redesignated as Topic 12.A by SAB 47*

*E. Redesignated as Topic 12.B by SAB 47*

*F. Removed by SAB 103*

*G. Accounting Series Releases 177 and 286—Relating to Amendments to Form 10–Q, Regulation S–K, and Regulations S–X Regarding Interim Financial Reporting*

*General Facts:* Disclosure requirements for quarterly data on Form 10–Q were amended in ASR 177 and 286 to include condensed interim financial statements, a narrative analysis of financial condition and results of operations, a letter from the registrant's independent public accountant commenting on any accounting change, and a signature by the registrant's chief financial officer or chief accounting officer.[3] In addition, certain selected quarterly data is required to be disclosed by virtually all registrants (*see* Item 302(a)(5) of Regulation S–K).

1. Selected Quarterly Financial Data (Item 302(a) of Regulation S–K)

a. Disclosure of Selected Quarterly Financial Data

*Facts:* Item 302(a)(1) of Regulation S–K requires disclosure of net sales, gross profit, income before extraordinary items and cumulative effect of a change in accounting, per share data based upon such income (loss), net income (loss), and net income (loss) attributable to the registrant for each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included. Item 302(a)(3) requires the registrant to describe the effect of any disposals of components of an entity [4] and extraordinary, unusual or infrequently occurring items recognized in each quarter, as well as the aggregate effect and the nature of year-end or other adjustments which are material to the results of that quarter. Furthermore, Item 302(a)(2) requires a reconciliation of amounts previously reported on Form 10–Q to the quarterly data presented if the amounts differ.

*Question 1:* Are these disclosure requirements applicable to supplemental financial statements included in a filing with the SEC for unconsolidated subsidiaries and 50% or less owned persons?

*Interpretive Response:* The summarized quarterly financial data required by Item 302(a)(1) need not be included in supplemental financial statements for unconsolidated subsidiaries and 50% or less owned persons unless the financial statements are for a subsidiary or affiliate that is itself a registrant which meets the criteria set forth in Item 302(a)(5).

*Question 2:* If a company is in a specialized industry where "gross profit" generally is not computed (*e.g.,* banks, insurance companies and finance companies), what disclosure should be made to comply with the requirements of Item 302(a)(1)?

*Interpretive Response:* Companies in specialized industries should present summarized quarterly financial data which are most meaningful in their

[1] When a registrant reports net income and total comprehensive income in one continuous financial statement, the registrant must continue to follow the guidance set forth in the SAB Topic. One approach may be to provide a separate reconciliation of net income to income available to common stock below comprehensive income reported on a statement of income and comprehensive income.

[2] The assessment of materiality is the responsibility of each registrant. However, absent concerns about trends or other qualitative considerations, the staff generally will not insist on the reporting of income or loss applicable to common stock if the amount differs from net income or loss by less than ten percent.

[3] These requirements have been further revised to require the company's CEO and CFO to certify to the information contained in the company's periodic filing.

[4] *See* question 5 for a discussion of the meaning of components of an entity as used in Item 302(a)(2).

particular circumstances. For example, a bank might present interest income, interest expense, provision for loan losses, security gains or losses and net income. Similarly, an insurance company might present net premiums earned, underwriting costs and expenses, investment income, security gains or losses and net income.

*Question 3:* If a company wishes to make its quarterly and annual disclosures on the same basis, would disclosure of costs and expenses associated directly with or allocated to products sold or services rendered, or other appropriate data to enable users to compute "gross profit," satisfy the requirements of Item 302(a)(1)?

*Interpretive Response:* Yes.

*Question 4:* What is meant by "per-share data based upon such income" as used in Item 302(a)(1)?

*Interpretive Response:* Item 302(a)(1) only requires disclosure of per share amounts for income before extraordinary items and cumulative effect of a change in accounting. It is expected that when per share data is calculated for each full quarter based upon such income, the per share amounts would be both basic and diluted. Although it is not required by the rule, there are many instances where it would be desirable to disclose other per share figures such as net earnings per share and the per share effect of extraordinary items also. Where such disclosure is made, per share data should be both basic and diluted.

*Question 5:* What is intended by the requirement set forth in Item 302(a)(3) that registrants "describe the effect of" disposals of segments of a business, *etc.*?

*Interpretive Response:* The rule uses the language of segments of a business that was previously found in the authoritative literature. Consistent with the terminology used in FASB ASC Subtopic 205–20, Presentation of Financial Statements—Discontinued Operations, as used here, segments of a business is intended to mean components of an entity. The rule is intended to require registrants to "disclose the amount" of such unusual transactions and events included in the results reported for each quarter. Such disclosure would be made in narrative form. However, it would not require that matters covered by MD&A be repeated. In this situation, registrants should disclose the nature and amount of the unusual transaction or event and refer to MD&A for further discussion of the matter.

*Question 6:* What is intended by the requirement of Item 302(a)(3) to disclose "the aggregate effect and the nature of year-end or other adjustments which are material to the results of that quarter"?

*Interpretive Response:* This language is taken directly from FASB ASC paragraph 270–10–50–2 (Interim Reporting Topic) which relates to disclosures required for the fourth quarter of the year. FASB ASC Topic 270 indicates that earlier quarters should not be restated to reflect a change in accounting estimate recorded at year end. However, changes in an accounting estimate made in an interim period that materially affect the quarter in which the change occurred are required to be disclosed in order to avoid misleading comparisons. In making such disclosure, registrants may wish to identify (but not restate) the prior periods in which transactions were recorded which relate to the change in the quarter.

*Question 7:* If company has filed a Form 10–Q/A amending a previously filed Form 10–Q, is a reconciliation of quarterly data in annual financial statements with the amounts originally reported on Form 10–Q required?

*Interpretive Response:* Yes. However, if the company publishes quarterly reports to shareholders and has previously made detailed disclosure to shareholders in such reports of the change reported on the Form 10–Q/A, no reconciliation would be required.

b. Financial Statements Presented on Other Than a Quarterly Basis

*Facts:* Item 302(a)(1) requires disclosure of quarterly financial data for each full quarter of the last two fiscal years and in any subsequent interim period for which an income statement is presented.

*Question:* If a company reports at interim dates on other than a calendar-quarter basis (*e.g.,* 12–12–16–12 week basis), will it be precluded from reporting on such basis in the future?

*Interpretive Response:* No, as long as it discloses the basis of interim fiscal period reporting and the interim fiscal periods on which it reports are consistently determined from year to year (or, if not, the lack of comparability is disclosed).

c. Removed by SAB 103

2. *Amendments to Form 10–Q*

a. Form of Condensed Financial Statements

*Facts:* Rules 10–01(a)(2) and (3) of Regulation S–X provide that interim balance sheets and statements of income shall include only major captions (*i.e.,* numbered captions) set forth in Regulation S–X, with the exception of inventories where data as to raw materials, work in process and finished goods shall be included, if applicable, either on the face of the balance sheet or in notes thereto. Where any major balance sheet caption is less than 10% of total assets and the amount in the caption has not increased or decreased by more than 25% since the end of the preceding fiscal year, the caption may be combined with others. When any major income statement caption is less than 15% of average net income attributable to the registrant for the most recent three fiscal years and the amount in the caption has not increased or decreased by more than 20% as compared to the corresponding interim period of the preceding fiscal year, the caption may be combined with others. Similarly, the statement of cash flows may be abbreviated, starting with a single figure of cash flows provided by operations and showing other changes individually only when they exceed 10% of the average of cash flows provided by operations for the most recent three years.

*Question 1:* If a company previously combined captions in a Form 10–Q but is required to present such captions separately in the Form 10–Q for the current quarter, must it retroactively reclassify amounts included in the prior-year financial statements presented for comparative purposes to conform with the captions presented for the current-year quarter?

*Interpretive Response:* Yes.

*Question 2:* If a company uses the gross profit method or some other method to determine cost of goods sold for interim periods, will it be acceptable to state only that it is not practicable to determine components of inventory at interim periods?

*Interpretive Response:* The staff believes disclosure of inventory components is important to investors. In reaching this decision, the staff recognizes that registrants may not take inventories during interim periods and that managements, therefore, will have to estimate the inventory components. However, the staff believes that management will be able to make reasonable estimates of inventory components based upon their knowledge of the company's production cycle, the costs (labor and overhead) associated with this cycle as well as the relative sales and purchasing volume of the company.

*Question 3:* If a company has years during which operations resulted in a net outflow of cash and cash equivalents, should it exclude such years from the computation of cash and cash equivalents provided by operations for the three most recent years in

determining what sources and applications must be shown separately?

*Interpretive Response:* Yes. Similar to the determination of average net income, if operations resulted in a net outflow of cash and cash equivalents during any year, such amount should be excluded in making the computation of cash flow provided by operations for the three most recent years unless operations resulted in a net outflow of cash and cash equivalents in all three years, in which case the average of the net outflow of cash and cash equivalents should be used for the test.

b. Reporting Requirements for Accounting Changes

1. Preferability

*Facts:* Rule 10–01(b)(6) of Regulation S–X requires that a registrant who makes a material change in its method of accounting shall indicate the date of and the reason for the change. The registrant also must include as an exhibit in the first Form 10–Q filed subsequent to the date of an accounting change, a letter from the registrant's independent accountants indicating whether or not the change is to an alternative principle which in his judgment is preferable under the circumstances. A letter from the independent accountant is not required when the change is made in response to a standard adopted by the Financial Accounting Standards Board which requires such a change.

*Question 1:* For some alternative accounting principles, authoritative bodies have specified when one alternative is preferable to another. However, for other alternative accounting principles, no authoritative body has specified criteria for determining the preferability of one alternative over another. In such situations, how should preferability be determined?

*Interpretive Response:* In such cases, where objective criteria for determining the preferability among alternative accounting principles have not been established by authoritative bodies, the determination of preferability should be based on the particular circumstances described by and discussed with the registrant. In addition, the independent accountant should consider other significant information of which he is aware.[5]

*Question 2:* Management may offer, as justification for a change in accounting principle, circumstances such as: their expectation as to the effect of general economic trends on their business (*e.g.,* the impact of inflation), their expectation regarding expanding consumer demand for the company's products, or plans for change in marketing methods. Are these circumstances which enter into the determination of preferability?

*Interpretive Response:* Yes. Those circumstances are examples of business judgment and planning and should be evaluated in determining preferability. In the case of changes for which objective criteria for determining preferability have not been established by authoritative bodies, business judgment and business planning often are major considerations in determining that the change is to a preferable method because the change results in improved financial reporting.

*Question 3:* What responsibility does the independent accountant have for evaluating the business judgment and business planning of the registrant?

*Interpretive Response:* Business judgment and business planning are within the province of the registrant. Thus, the independent accountant may accept the registrant's business judgment and business planning and express reliance thereon in his letter. However, if either the plans or judgment appear to be unreasonable to the independent accountant, he should not accept them as justification. For example, an independent accountant should not accept a registrant's plans for a major expansion if he believes the registrant does not have the means of obtaining the funds necessary for the expansion program.

*Question 4:* If a registrant, who has changed to an accounting method which was preferable under the circumstances, later finds that it must abandon its business plans or change its business judgment because of economic or other factors, is the registrant's justification nullified?

*Interpretive Response:* No. A registrant must in good faith justify a change in its method of accounting under the circumstances which exist at the time of the change. The existence of different circumstances at a later time does not nullify the previous justification for the change.

*Question 5:* If a registrant justified a change in accounting method as preferable under the circumstances, and the circumstances change, may the registrant revert to the method of accounting used before the change?

*Interpretive Response:* Any time a registrant makes a change in accounting method, the change must be justified as preferable under the circumstances. Thus, a registrant may not change back to a principle previously used unless it can justify that the previously used principle is preferable in the circumstances as they currently exist.

*Question 6:* If one client of an independent accounting firm changes its method of accounting and the accountant submits the required letter stating his view of the preferability of the principle in the circumstances, does this mean that all clients of that firm are constrained from making the converse change in accounting (*e.g.,* if one client changes from FIFO to LIFO, can no other client change from LIFO to FIFO)?

*Interpretive Response:* No. Each registrant must justify a change in accounting method on the basis that the method is preferable under the circumstances of that registrant. In addition, a registrant must furnish a letter from its independent accountant stating that in the judgment of the independent accountant the change in method is preferable under the circumstances of that registrant. If registrants in apparently similar circumstances make changes in opposite directions, the staff has a responsibility to inquire as to the factors which were considered in arriving at the determination by each registrant and its independent accountant that the change was preferable under the circumstances because it resulted in improved financial reporting. The staff recognizes the importance, in many circumstances, of the judgments and plans of management and recognizes that such management judgments may, in good faith, differ. As indicated above, the concern relates to registrants in apparently similar circumstances, no matter who their independent accountants may be.

*Question 7:* If a registrant changes its accounting to one of two methods specifically approved by the FASB in the Accounting Standards Codification, need the independent accountant express his view as to the preferability of the method selected?

*Interpretive Response:* If a registrant was formerly using a method of accounting no longer deemed acceptable, a change to either method approved by the FASB may be presumed to be a change to a preferable method and no letter will be required from the independent accountant. If, however, the registrant was formerly using one of the methods approved by

[5] Registrants also are reminded that FASB ASC paragraph 250–10–50–1 (Accounting Changes and Error Corrections Topic) requires that companies disclose the nature of and justification for the change as well as the effects of the change on net income for the period in which the change is made. Furthermore, the justification for the change should explain clearly why the newly adopted principle is preferable to the previously-applied principle.

the FASB for current use and wishes to change to an alternative approved method, then the registrant must justify its change as being one to a preferable method in the circumstances and the independent accountant must submit a letter stating that in his view the change is to a principle that is preferable in the circumstances.

2. Filing of a Letter From the Accountants

*Facts:* The registrant makes an accounting change in the fourth quarter of its fiscal year. Rule 10–01(b)(6) of Regulation S–X requires that the registrant file a letter from its independent accountants stating whether or not the change is preferable in the circumstances in the next Form 10–Q. Item 601(b)(18) of Regulation S–K provides that the independent accountant's preferability letter be filed as an exhibit to reports on Forms 10–K or 10–Q.

*Question:* When the independent accountant's letter is filed with the Form 10–K, must another letter also be filed with the first quarter's Form 10–Q in the following year?

*Interpretive Response:* No. A letter is not required to be filed with Form 10–Q if it has been previously filed as an exhibit to the Form 10–K.

*H. Accounting Series Release 148—Disclosure of Compensating Balances and Short-Term Borrowing Arrangements (Adopted November 13, 1973 as Modified by ASR 172 Adopted on June 13, 1975 and ASR 280 Adopted on September 2, 1980)*

*Facts:* ASR 148 (as modified) amends Regulation S–X to include:

1. Disclosure of compensating balance arrangements.

2. Segregation of cash for compensating balance arrangements that are legal restrictions on the availability of cash.

1. Applicability

a. Arrangements With Other Lending Institutions

*Question:* In addition to banks, is ASR 148 applicable to arrangements with factors, commercial finance companies or other lending entities?

*Interpretive Response:* Yes.

b. Bank Holding Companies and Brokerage Firms

*Question:* Do the provisions of ASR 148 apply to bank holding companies and to brokerage firms filing under Rule 17a–5?

*Interpretive Response:* Yes; however, brokerage firms are not expected to meet these requirements when filing Form X–17a–5.

c. Financial Statements of Parent Company and Unconsolidated Subsidiaries

*Question:* Are the provisions of ASR 148 applicable to parent company financial statements in addition to consolidated financial statements? To financial statements of unconsolidated subsidiaries?

*Interpretive Response:* ASR 148 data for consolidated financial statements only will generally be sufficient when a filing includes consolidated and parent company financial statements. Such data are required for each unconsolidated subsidiary or other entity when a filing is required to include complete financial statements of those entities. When the filing includes summarized financial data in a footnote about such entities, the disclosures under ASR 148 relating to the consolidated financial statements will be sufficient.

d. Foreign Lenders

*Question:* Are ASR 148 disclosure requirements applicable to arrangements with foreign lenders?

*Interpretive Response:* Yes.

2. Classification of Short-Term Obligations—Debt Related to Long-Term Projects

*Facts:* Companies engaging in significant long-term construction programs frequently arrange for revolving cover loans which extend until the completion of long-term construction projects. Such revolving cover loans are typically arranged with substantial financial institutions and typically have the following characteristics:

1. A firm long-term mortgage commitment is obtained for each project.

2. Interest rates and terms are in line with the company's normal borrowing arrangements.

3. Amounts are equal to the expected full mortgage amount of all projects.

4. The company may draw down funds at its option up to the maximum amount of the agreement.

5. The company uses short-term interim construction financing (commercial paper, bank loans, *etc.*) against the revolving cover loan. Such indebtedness is rolled over or drawn down on the revolving cover loan at the company's option. The company typically has regular bank lines of credit, but these generally are not legally enforceable.

*Question:* Under FASB ASC Subtopic 470–10, Debt—Overall, will the classification of loans such as described above as long-term be acceptable?

*Interpretive Response:* Where such conditions exist providing for a firm commitment throughout the construction program as well as a firm commitment for permanent mortgage financing, and where there are no contingencies other than the completion of construction, the guideline criteria are met and the borrowing under such a program should be classified as long-term with appropriate disclosure.

3. Compensating Balances

a. Compensating Balances for Future Credit Availability

*Facts:* Rule 5–02.1 of Regulation S–X requires disclosure of compensating balances in order to avoid undisclosed commingling of such balances with other funds having different liquidity characteristics and bearing no determinable relationship to borrowing arrangements. It also requires footnote disclosure distinguishing the amounts of such balances maintained under a formal agreement to assure future credit availability.

*Question:* In disclosing compensating balances maintained to assure future credit availability, is it necessary to segregate compensating balances for an unused portion of a regular line of credit when a total compensating balance amount covering both used and unused amounts of a line of credit is disclosed?

*Interpretive Response:* No.

b. Changes in Compensating Balances

*Facts:* ASR 148 guidelines indicate the need for additional disclosures where compensating balances were materially greater during the period than at the end of the period.

*Question:* Does this disclosure relate to changes in the arrangement (*e.g.,* the required compensating balance percentage) or changes in borrowing levels?

*Interpretive Response:* Both.

c. Float

*Facts:* ASR 148 states that "compensating balance arrangements * * * are normally expressed in terms of collected bank ledger balances but the financial statements are presented on the basis of the company's books. In order to make the disclosure of compensating balance amounts * * * consistent with the cash amounts reflected in the financial statements, the balance figure agreed upon by the bank and the company should be adjusted if possible by the estimated float."

*Question:* In determining the amount of "float" as suggested by ASR 148 guidelines, frequently an adjustment to the bank balance is required for "uncollected funds." On what basis should this adjustment be estimated?

*Interpretive Response:* The adjustment should be estimated based upon the method used by the bank or a reasonable approximation of that method. The following is a sample computation of the amount of compensating balances to be disclosed where uncollected funds are involved.

*Assumptions:* The company has agreed to maintain compensating balances equal to 20% of short-term borrowings.

| | |
|---|---|
| Short-term borrowings | $10,000,000 |
| Compensating balances per bank balances | 2,000,000 |
| Estimated float (approximates the excess of outstanding checks over deposits in transit) | 480,000 |
| Estimated uncollected funds | 320,000 |
| *Computation:* | |
| Compensating balances per bank balances | 2,000,000 |
| Estimated uncollected funds | 320,000 |
| Estimated float | *(480,000)* |
| Compensating balances stated in terms of a book cash balance and to be disclosed | *1,840,000* |

4. Miscellaneous

a. Periods required

*Question:* For what periods are ASR 148 disclosures required?

*Interpretive Response:* Disclosure of compensating balance arrangements and other disclosures called for in ASR 148 are required for the latest fiscal year but are generally not required for any later interim period unless a material change has occurred since year end.

b. 10–Q Disclosures

*Question:* Are ASR 148 disclosures required in 10–Q's?

*Interpretive Response:* In general, ASR 148 disclosures are not required in Form 10–Q. However, in some instances material changes in borrowing arrangements or borrowing levels may give rise to the need for disclosure either in Form 10–Q or Form 8–K.

*I. Accounting Series Release 149—Improved Disclosure of Income Tax Expense (Adopted November 28, 1973 and Modified by ASR 280 Adopted on September 2, 1980)*

*Facts:* ASR 149 and 280 amend Regulation S–X to include:

1. Disclosure of tax effect of timing differences comprising deferred income tax expense.

2. Disclosure of the components of income tax expense, including currently payable and the net tax effects of timing differences.

3. Disclosure of the components of income [loss] before income tax expense [benefit] as either domestic or foreign.

4. Reconciliation between the statutory Federal income tax rate and the effective tax rate.

1. Tax rate

*Question 1:* In reconciling to the effective tax rate should the rate used be a combination of state and Federal income tax rates?

*Interpretive Response:* No, the reconciliation should be made to the Federal income tax rate only.

*Question 2:* What is the "applicable statutory Federal income tax rate"?

*Interpretive Response:* The applicable statutory Federal income tax rate is the normal rate applicable to the reporting entity. Hence, the statutory rate for a U.S. partnership is zero. If, for example, the statutory rate for U.S. corporations is 22% on the first $25,000 of taxable income and 46% on the excess over $25,000, the "normalized rate" for corporations would fluctuate in the range between 22% and 46% depending on the amount of pretax accounting income a corporation has.

2. Taxes of Investee Company

*Question:* If a registrant records its share of earnings or losses of a 50% or less owned person on the equity basis and such person has an effective tax rate which differs by more than 5% from the applicable statutory Federal income tax rate, is a reconciliation as required by Rule 4–08(g) necessary?

*Interpretive Response:* Whenever the tax components are known and material to the investor's (registrant's) financial position or results of operations, appropriate disclosure should be made. In some instances where 50% or less owned persons are accounted for by the equity method of accounting in the financial statements of the registrant, the registrant may not know the rate at which the various components of income are taxed and it may not be practicable to provide disclosure concerning such components.

It should also be noted that it is generally necessary to disclose the aggregate dollar and per-share effect of situations where temporary tax exemptions or "tax holidays" exist, and that such disclosures are also applicable to 50% or less owned persons. Such disclosures should include a brief description of the factual circumstances and give the date on which the special tax status will terminate. *See* Topic 11.C.

3. Net of Tax Presentation

*Question:* What disclosure is required when an item is reported on a net of tax basis (*e.g.,* extraordinary items, discontinued operations, or cumulative adjustment related to accounting change)?

*Interpretive Response:* When an item is reported on a net of tax basis, additional disclosure of the nature of the tax component should be provided by reconciling the tax component associated with the item to the applicable statutory Federal income tax rate or rates.

4. Loss Years

*Question:* Is a reconciliation of a tax recovery in a loss year required?

*Interpretive Response:* Yes, in loss years the actual book tax benefit of the loss should be reconciled to expected normal book tax benefit based on the applicable statutory Federal income tax rate.

5. Foreign Registrants

*Question 1:* Occasionally, reporting foreign persons may not operate under a normal income tax base rate such as the current U.S. Federal corporate income tax rate. What form of disclosure is acceptable in these circumstances?

*Interpretive Response:* In such instances, reconciliations between year-to-year effective rates or between a weighted average effective rate and the current effective rate of total tax expense may be appropriate in meeting the requirements of Rule 4–08(h)(2). A brief description of how such a rate was determined would be required in addition to other required disclosures. Such an approach would not be acceptable for a U.S. registrant with foreign operations. Foreign registrants with unusual tax situations may find that these guidelines are not fully responsive to their needs. In such instances, registrants should discuss the matter with the staff.

*Question 2:* Where there are significant reconciling items that relate in significant part to foreign operations as well as domestic operations, is it necessary to disclose the separate amounts of the tax component by geographical area, *e.g.,* statutory depletion allowances provided for by U.S. and by other foreign jurisdictions?

*Interpretive Response:* It is not practicable to give an all-encompassing answer to this question. However, in many cases such disclosure would seem appropriate.

6. Securities Gains and Losses

*Question:* If the tax on the securities gains and losses of banks and insurance companies varies by more than 5% from the applicable statutory Federal income tax rate, should a reconciliation to the statutory rate be provided?

*Interpretive Response:* Yes.

Tax Expense Components v. "Overall" Presentation

*Facts:* Rule 4–08(h) requires that the various components of income tax expense be disclosed, *e.g.,* currently payable domestic taxes, deferred foreign taxes, *etc.* Frequently income tax expense will be included in more than one caption in the financial statements. For example, income taxes may be allocated to continuing operations, discontinued operations, extraordinary items, cumulative effects of an accounting change and direct charges and credits to shareholders' equity.

*Question:* In instances where income tax expense is allocated to more than one caption in the financial statements, must the components of income tax expense included in each caption be disclosed or will an "overall" presentation such as the following be acceptable?

The components of income tax expense are:

| | |
|---|---|
| Currently payable (per tax return): | |
| Federal | $350,000 |
| Foreign | 150,000 |
| State | 50,000 |
| Deferred: | |
| Federal | 125,000 |
| Foreign | 75,000 |
| State | *50,000* |
| | *800,000* |

Income tax expense is included in the financial statements as follows:

| | |
|---|---|
| Continuing operations | $600,000 |
| Discontinued operations | (200,000) |
| Extraordinary income | 300,000 |
| Cumulative effect of change in accounting principle | *100,000* |
| | *800,000* |

*Interpretive Response:* An overall presentation of the nature described will be acceptable.

*J. Removed by SAB 47*

*K. Accounting Series Release 302—Separate Financial Statements Required By Regulation S–X*

1. Removed by SAB 103

2. Parent Company Financial Information

a. Computation of Restricted Net Assets of Subsidiaries

*Facts:* The revised rules for parent company disclosures adopted in ASR 302 require, in certain circumstances, (1) footnote disclosure in the consolidated financial statements about the nature and amount of significant restrictions on the ability of subsidiaries to transfer funds to the parent through intercompany loans, advances or cash dividends [Rule 4–08(e)(3)], and (2) the presentation of condensed parent company financial information and other data in a schedule (Rule 12–04). To determine which disclosures, if any, are required, a registrant must compute its proportionate share of the net assets of its consolidated and unconsolidated subsidiary companies as of the end of the most recent fiscal year which are restricted as to transfer to the parent company because the consent of a third party (a lender, regulatory agency, foreign government, *etc.*) is required. If the registrant's proportionate share of the restricted net assets of consolidated subsidiaries exceeds 25% of the registrant's consolidated net assets, both the footnote and schedule information are required. If the amount of such restrictions is less than 25%, but the sum of these restrictions plus the amount of the registrant's proportionate share of restricted net assets of unconsolidated subsidiaries plus the registrant's equity in the undistributed earnings of 50% or less owned persons (investees) accounted for by the equity method exceed 25% of consolidated net assets, the footnote disclosure is required.

*Question 1:* How are restricted net assets of subsidiaries computed?

*Interpretative Response:* The calculation of restricted net assets requires an evaluation of each subsidiary to identify any circumstances where third parties may limit the subsidiary's ability to loan, advance or dividend funds to the parent. This evaluation normally comprises a review of loan agreements, statutory and regulatory requirements, *etc.,* to determine the dollar amount of each subsidiary's restrictions. The related amount of the subsidiary's net assets designated as restricted, however, should not exceed the amount of the subsidiary's net assets included in consolidated net assets, since parent company disclosures are triggered when a significant amount of consolidated net assets are restricted. The amount of each subsidiary's net assets included in consolidated net assets is determined by allocating (pushing down) to each subsidiary any related consolidation adjustments such as intercompany balances, intercompany profits, and differences between fair value and historical cost arising from a business combination accounted for as a purchase. This amount is referred to as the subsidiary's adjusted net assets. If the subsidiary's adjusted net assets are less than the amount of its restrictions because the push down of consolidating adjustments reduced its net assets, the subsidiary's adjusted net assets is the amount of the subsidiary's restricted net assets used in the tests.

Registrants with numerous subsidiaries and investees may wish to develop approaches to facilitate the determination of its parent company disclosure requirements. For example, if the parent company's adjusted net assets (excluding any interest in its subsidiaries) exceed 75% of consolidated net assets, or if the total of all of the registrant's consolidated and unconsolidated subsidiaries' restrictions and its equity in investees' earnings is less than 25% of consolidated net assets, then the allocation of consolidating adjustments to the subsidiaries to determine the amount of their adjusted net assets would not be necessary since no parent company disclosures would be required.

*Question 2:* If a registrant makes a decision that it will permanently reinvest the undistributed earnings of a subsidiary, and thus does not provide for income taxes thereon because it meets the criteria set forth in FASB ASC Subtopic 740–30, Income Taxes—Other Considerations or Special Areas, is there considered to be a restriction for purposes of the test?

*Interpretive Response:* No. The rules require that only third party restrictions be considered. Restrictions on subsidiary net assets imposed by management are not included.

b. Application of Tests for Parent Company Disclosures

*Facts:* The balance sheet of the registrant's 100%-owned subsidiary at the most recent fiscal year-end is summarized as follows:

| | | | |
|---|---|---|---|
| Current assets | $120 | Current liabilities | $30 |
| Noncurrent assets | *45* | Long-term debt | *60* |
| | | | *90* |
| | | Common stock | 25 |
| | | Retained earnings | *50* |
| | | | *75* |
| | *165* | | *165* |

Net assets of the subsidiary are $75. Assume there are no consolidating adjustments to be allocated to the subsidiary. Restrictive covenants of the subsidiary's debt agreements provide that:

Net assets, excluding intercompany loans, cannot be less than $35

60% of accumulated earnings must be maintained

*Question 1:* What is the amount of the subsidiary's restricted net assets?

*Interpretive Response:*

| Restriction | Computed restrictions |
|---|---|
| Net assets: Currently $75, cannot be less than $35; therefore | $35 |
| Dividends: 60% of accumulated earnings ($50) cannot be paid out; therefore | 30 |

Restricted net assets for purposes of the test are $35. The maximum amount that can be loaned or advanced to the parent without violating the net asset covenant is $40 ($75 − 35). Alternatively, the subsidiary could pay a dividend of up to $20 ($50 − 30) without violating the dividend covenant, and loan or advance up to $20, without violating the net asset provision.

*Facts:* The registrant has one 100%-owned subsidiary. The balance sheet of the subsidiary at the latest fiscal year-end is summarized as follows:

| | | | |
|---|---|---|---|
| Current assets | $75 | Current liabilities | $23 |
| Noncurrent assets | *90* | Long-term debt | *57* |
| | | Redeemable preferred stock | *10* |
| | | Common stock | 30 |
| | | Retained earnings | *45* |
| | | | *75* |
| | *165* | | *165* |

Assume that the registrant's consolidated net assets are $130 and there are no consolidating adjustments to be allocated to the subsidiary. The subsidiary's net assets are $75. The subsidiary's noncurrent assets are comprised of $40 in operating plant and equipment used in the subsidiary's business and a $50 investment in a 30% investee. The subsidiary's equity in this investee's undistributed earnings is $18. Restrictive covenants of the subsidiary's debt agreements are as follows:

1. Net assets, excluding intercompany balances, cannot be less than $20.

2. 80% of accumulated earnings must be reinvested in the subsidiary.

3. Current ratio of 2:1 must be maintained.

*Question 2:* Are parent company footnote or schedule disclosures required?

*Interpretive Response:* Only the parent company footnote disclosures are required. The subsidiary's restricted net assets are computed as follows:

| Restriction | Computed restriction |
|---|---|
| Net assets: Currently $75, cannot be less than $20; therefore | $20 |
| Dividends: 80% of accumulated earnings ($45) cannot be paid; therefore | 36 |
| Current ratio: Must be at least 2:1 ($46 current assets must be maintained since current liabilities are $23 at fiscal year-end); therefore | 46 |

Restricted net assets for purposes of the test are $20. The amount computed from the dividend restriction ($36) and the current ratio requirement ($46) are not used because net assets may be transferred by the subsidiary up to the limitation imposed by the requirement to maintain net assets of at least $20, without violating the other restrictions. For example, a transfer to the parent of up to $55 of net assets could be accomplished by a combination of dividends of current assets of $9 ($45 − 36), and loans or advances of current assets of up to $20 and noncurrent assets of up to $26.

Parent company footnote disclosures are required in this example since the restricted net assets of the subsidiary and the registrant's equity in the earnings of its 100%-owned subsidiary's investee exceed 25% of consolidated net assets [($20 + 18)/$130 = 29%]. The parent company schedule information is not required since the restricted net assets of the subsidiary are only 15% of consolidated net assets ($20/$130 = 15%).

Although the subsidiary's noncurrent assets are not in a form which is readily transferable to the parent company, the illiquid nature of the assets is not relevant for purposes of the parent company tests. The objective of the tests is to require parent company disclosures when the parent company does not have control of its subsidiaries' funds because it does not have unrestricted access to their net assets. The tests trigger parent company disclosures only when there are significant third party restrictions on transfers by subsidiaries of net assets and the subsidiaries' net assets comprise a significant portion of consolidated net assets. Practical limitations, other than third party restrictions on transferability at the measurement date (most recent fiscal year-end), such as subsidiary illiquidity, are not considered in computing restricted net assets. However, the potential effect of any limitations other than those imposed by third parties should be considered for inclusion in Management's Discussion and Analysis of liquidity.

*Facts:*

| | Net assets |
|---|---|
| Subsidiary A | $(500) |
| Subsidiary B | 2,000 |

| | Net assets |
|---|---|
| Consolidated | 3,700 |

Subsidiaries A and B are 100% owned by the registrant. Assume there are no consolidating adjustments to be allocated to the subsidiaries. Subsidiary A has restrictions amounting to $200. Subsidiary B's restrictions are $1,000.

*Question 3:* What parent company disclosures are required for the registrant?

*Interpretive Response:* Since subsidiary A has an excess of liabilities over assets, it has no restricted net assets for purposes of the test. However, both parent company footnote and schedule disclosures are required, since the restricted net assets of subsidiary B exceed 25% of consolidated net assets ($1,000/3,700 = 27%).

*Facts:*

| | Net assets |
|---|---|
| Subsidiary A | $850 |
| Subsidiary B | 300 |
| Consolidated | 3,700 |

The registrant owns 80% of subsidiary A. Subsidiary A owns 100% of subsidiary B. Assume there are no consolidating adjustments to be allocated to the subsidiaries. A may not pay any dividends or make any affiliate loans or advances. B has no restrictions. A's net assets of $850 do not include its investment in B.

*Question 4:* Are parent company footnote or schedule disclosures required for this registrant?

*Interpretive Response:* No. All of the registrant's share of subsidiary A's net assets ($680) are restricted. Although B may pay dividends and loan or advance funds to A, the parent's access to B's funds through A is restricted. However, since there are no limitations on B's ability to loan or advance funds to the parent, none of the parent's share of B's net assets are restricted. Since A's restricted net assets are less than 25% of consolidated net assets ($680/3700 = 18%), no parent company disclosures are required.

*Facts:* The consolidating balance sheet of the registrant at the latest fiscal year-end is summarized as follows:

| | Registrant | Subsidiary | Consolidating adjustments | Consolidated |
|---|---|---|---|---|
| Current assets | $800 | $700 | $0 | $1,500 |
| 30% investment in affiliate | 175 | 0 | 0 | 175 |
| Investment in subsidiary | 350 | 0 | (350) | 0 |
| Other noncurrent assets | *625* | *300* | *(100)* | *825* |
| | *1,950* | *1,000* | *(450)* | *2,500* |
| Current liabilities | *600* | *400* | 0 | *1,000* |
| Concurrent liabilities | *375* | *150* | 0 | *525* |
| Redeemable preferred stock | *275* | 0 | 0 | *275* |
| Common stock | 110 | 1 | (1) | 110 |
| Paid-in capital | 290 | 49 | (49) | 290 |
| Retained earnings | *300* | *400* | *(400)* | *300* |
| | *700* | *450* | *(450)* | *700* |
| | *1,950* | *1,000* | *(450)* | *2,500* |

The acquisition of the 100%-owned subsidiary was consummated on the last day of the most recent fiscal year. Immediately preceding the acquisition, the registrant had net assets of $700, which included its equity in the undistributed earnings of its 30% investee of $75. Immediately after acquiring the subsidiary's net assets, which had an historical cost of $450 and a fair value of $350, the registrant's net assets were still $700 since debt and preferred stock totaling $350 were issued in the purchase. The subsidiary has debt covenants which permit dividends, loans or advances, to the extent, if any, that net assets exceed an amount which is determined by the sum of $100 plus 75% of the subsidiary's accumulated earnings.

*Question 5:* What is the amount of the subsidiary's restricted net assets? Are parent company footnote or schedule disclosures required?

*Interpretive Response:* Restricted net assets for purposes of the test are $350, and both the parent company footnote and schedule disclosures are required.

The amount of the subsidiary's restrictions at year-end is $400 [$100 + (75% × $400)]. The subsidiary's adjusted net assets after the push down of the consolidation entry to the subsidiary to record the noncurrent assets acquired at their fair value is $350 ($450 − $100). Since the subsidiary's adjusted net assets ($350) are less than the amount of its restrictions ($400), restricted net assets are $350. The computed percentages applicable to each of the disclosure tests is in excess of 25%. Therefore, both parent company footnote and schedule information are required. The percentage applicable to the footnote disclosure test is 61% [($75 + 350)/$700]. The computed percentage for the schedule disclosure is 50% ($350/$700).

3. Undistributed Earnings of 50% or Less Owned Persons

*Facts:* Rule 4–08(e)(2) of Regulation SX requires footnote disclosures of the amount of consolidated retained earnings which represents undistributed earnings of 50% or less owned persons (investee) accounted for by the equity method. The test adopted in ASR 302 to trigger disclosures about the registrant's restricted net assets (Rule 4–08(e)(3)) includes the parent's equity in the undistributed earnings of investees.

*Question:* Is the amount required for footnote disclosure the same as the amount included in the test to determine disclosures about restrictions?

*Interpretive Response:* Yes. The amount used in the test in Rule 4–08(e)(3) should be the same as the amount required to be disclosed by Rule 4–08(e)(2). This is the portion of the registrant's consolidated retained earnings which represents the undistributed earnings of an investee since the date(s) of acquisition. It is computed by determining the registrant's cumulative equity in the investee's earnings, adjusted by any dividends received, related goodwill

write-downs, and any related income taxes provided.

4. Application of Significant Subsidiary Test to Investees and Unconsolidated Subsidiaries

a. Separate Financial Statement Requirements

*Facts:* Rule 3–09 of Regulation SX requires the presentation of separate financial statements of unconsolidated subsidiaries and of 50% or less owned persons (investee) accounted for by the equity method either by the registrant or by a subsidiary of the registrant in filings with the Commission if any of the tests of a significant subsidiary are met at a 20% level.

*Question 1:* Are the requirements for separate financial statements also applicable to an investee accounted for by the equity method by an investee of the registrant?

*Interpretive Response:* Yes. Rule 3–09 is intended to apply to all investees which are material to the financial position or results of operations of the registrant, regardless of whether the investee is held by the registrant, a subsidiary or another investee. Separate financial statements should be provided for any lower tier investee where such an entity is significant to the registrant's consolidated financial statements.

*Question 2:* How is the significant subsidiary test applied to the lower tier investee in the situation described in Question 1?

*Interpretive Response:* Since the disclosures provided by separate financial statements of an investee are considered necessary to evaluate the overall financial condition of the registrant, the significant subsidiary test is computed based on the materiality of the lower tier investee to the registrant consolidated. An example of the application of the assets test of the significant subsidiary rules to such an investee situation will illustrate the materiality measurement. A registrant with total consolidated assets of $5,000 owns 50% of Investee A, whose total assets are $3,800. Investee A has a 45% investment in Investee B, whose total assets are $4,800. There are no intercompany eliminations. Separate financial statements are required for Investee A, and they are required for Investee B because the registrant's share of B's total assets exceeds 20% of consolidated assets [(50% × 45% × $4800)/$5000 = 22%].

b. Summarized Financial Statement Requirements

*Facts:* Rule 4–08(g) of Regulation S–X requires summarized financial information about unconsolidated subsidiaries and 50% or less owned persons (investee) to be included in the footnotes to the financial statements if, in the aggregate, they meet the tests of a significant subsidiary set forth in Rule 1–02(w).

*Question 1:* Must a registrant which includes separate financial statements or condensed financial statements for unconsolidated subsidiaries or investees in its annual report to shareholders also include in such report the summarized financial information for these entities pursuant to Rule 4–08(g)?

*Interpretive Response:* No. The purpose of the summarized information is to provide minimum standards of disclosure when the impact of such entities on the consolidated financial statements is significant. If the registrant furnishes more information in the annual report than is required by these minimum disclosure standards, such as condensed financial information or separate audited financial statements, the summarized data can be excluded. The Commission's rules are not intended to conflict with the provisions of FASB ASC subparagraph 323–10–50–3(c) (Investments—Equity Method and Joint Ventures Topic), which provide that either separate financial statements of investees be presented with the financial statements of the reporting entity or that summarized information be included in the reporting entity's financial statement footnotes.

*Question 2:* Can summarized information be omitted for individual entities as long as the aggregate information for the omitted entity(s) does not exceed 10% under any of the significance tests of Rule 1–02(w)?

*Interpretive Response:* The 10% measurement level of the significant subsidiary rule was not intended to establish a materiality criteria for omission, and the arbitrary exclusion of summarized information for selected entities up to a 10% level is not appropriate. Rule 4–08(g) requires that the summarized information be included for all unconsolidated subsidiaries and investees. However, the staff recognizes that exclusion of the summarized information for certain entities is appropriate in some circumstances where it is impracticable to accumulate such information and the summarized information to be excluded is de minimis.

*L. Financial Reporting Release 28—Accounting for Loan Losses by Registrants Engaged in Lending Activities*

1. Accounting for Loan Losses

*General:* GAAP for recognition of loan losses is provided by FASB ASC Subtopic 450–20, Contingencies—Loss Contingencies, and FASB ASC Subtopic 310–10, Receivables—Overall.[6] An estimated loss from a loss contingency, such as the collectibility of receivables, should be accrued when, based on information available prior to the issuance of the financial statements, it is probable that an asset has been impaired or a liability has been incurred at the date of the financial statements and the amount of the loss can be reasonably estimated.[7] FASB ASC Subtopic 310–10 provides more specific guidance on measurement of loan impairment and related disclosures but does not change the fundamental recognition criteria for loan losses provided by FASB ASC Subtopic 450–20.

Further guidance for SEC registrants is provided by FRR 28, which added subsection (b), Procedural Discipline in Determining the Allowance and Provision for Loan Losses to be Reported, of Section 401.09, Accounting for Loan Losses by Registrants Engaged in Lending Activities, to the Codification of Financial Reporting Policies (hereafter referred to as FRR 28). Additionally, public companies are required to comply with the books and records provisions of the Securities Exchange Act of 1934 (Exchange Act). Under Sections 13(b)(2)—(7) of the Exchange Act, registrants must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant. Registrants also must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP.

This staff interpretation applies to all registrants that are creditors in loan transactions that, individually or in the aggregate, have a material effect on the registrant's financial statements.[8]

[6] [Original footnote removed by SAB 114.]

[7] FASB ASC paragraph 450–20–25–2.

[8] For purposes of this interpretation, a loan is defined (consistent with the FASB ASC Master Glossary) as a contractual right to receive money on demand or on fixed or determinable dates that is recognized as an asset in the creditor's statement of financial position. For purposes of this interpretation, loans do not include trade accounts

Continued

2. Developing and Documenting a Systematic Methodology

a. Developing a Systematic Methodology

*Facts:* Registrant A, or one of its consolidated subsidiaries, engages in lending activities and is developing or performing a review of its loan loss allowance methodology.

*Question:* What are some of the factors or elements that the staff normally would expect Registrant A to consider when developing (or subsequently performing an assessment of) its methodology for determining its loan loss allowance under GAAP?

*Interpretive Response:* The staff normally would expect a registrant that engages in lending activities to develop and document a systematic methodology [9] to determine its provision for loan losses and allowance for loan losses as of each financial reporting date. It is critical that loan loss allowance methodologies incorporate management's current judgments about the credit quality of the loan portfolio through a disciplined and consistently applied process. A registrant's loan loss allowance methodology is influenced by entity-specific factors, such as an entity's size, organizational structure, business environment and strategy, management style, loan portfolio characteristics, loan administration procedures, and management information systems.

However, as indicated in the AICPA Audit and Accounting Guide, Depository and Lending Institutions with Conforming Changes as of June 1, 2009 (Audit Guide), while different institutions may use different methods, there are certain common elements that should be included in any [loan loss allowance] methodology for it to be effective.[10] A registrant's loan loss allowance methodology generally should: [11]

- Include a detailed analysis of the loan portfolio, performed on a regular basis;
- Consider all loans (whether on an individual or group basis);
- Identify loans to be evaluated for impairment on an individual basis under FASB ASC Subtopic 310–10 and segment the remainder of the portfolio into groups of loans with similar risk characteristics for evaluation and analysis under FASB ASC Subtopic 450–20;
- Consider all known relevant internal and external factors that may affect loan collectibility;
- Be applied consistently but, when appropriate, be modified for new factors affecting collectibility;
- Consider the particular risks inherent in different kinds of lending;
- Consider current collateral values (less costs to sell), where applicable;
- Require that analyses, estimates, reviews and other loan loss allowance methodology functions be performed by competent and well-trained personnel;
- Be based on current and reliable data;
- Be well documented, in writing, with clear explanations of the supporting analyses and rationale (*see* Question 2 below for staff views on documenting a loan loss allowance methodology); and
- Include a systematic and logical method to consolidate the loss estimates and ensure the loan loss allowance balance is recorded in accordance with GAAP.

For many entities engaged in lending activities, the allowance and provision for loan losses are significant elements of the financial statements.

Therefore, the staff believes it is appropriate for an entity's management to review, on a periodic basis, its methodology for determining its allowance for loan losses.[12] Additionally, for registrants that have audit committees, the staff believes that oversight of the financial reporting and auditing of the loan loss allowance by the audit committee can strengthen the registrant's control system and process for determining its allowance for loan losses.[13]

A systematic methodology that is properly designed and implemented should result in a registrant's best estimate of its allowance for loan losses.[14] Accordingly, the staff normally would expect registrants to adjust their loan loss allowance balance, either upward or downward, in each period for differences between the results of the systematic determination process and the unadjusted loan loss allowance balance in the general ledger.[15]

b. Documenting a Systematic Methodology

*Question 1:* Assume the same facts as in Question 1. What would the staff normally expect Registrant A to include in its documentation of its loan loss allowance methodology?

*Interpretive Response:* In FRR 28, the Commission provided guidance for documentation of loan loss provisions and allowances for registrants engaged in lending activities. The staff believes that appropriate written supporting documentation for the loan loss provision and allowance facilitates review of the loan loss allowance process and reported amounts, builds discipline and consistency into the loan loss allowance determination process, and improves the process for estimating loan losses by helping to ensure that all relevant factors are appropriately considered in the allowance analysis.

The staff, therefore, normally would expect a registrant to document the relationship between the findings of its detailed review of the loan portfolio and the amount of the loan loss allowance and the provision for loan losses reported in each period.[16]

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receivable or notes receivable with terms less than one year or debt securities subject to the provisions of FASB ASC Topic 320, Investments—Debt and Equity Securities.

[9] FRR 28 states that "the Commission's staff normally would expect to find that the books and records of registrants engaged in lending activities include documentation of [the]: (a) Systematic methodology to be employed each period in determining the amount of the loan losses to be reported, and (b) rationale supporting each period's determination that the amounts reported were adequate."

[10] *See* paragraph 9.05 of the Audit Guide.

[11] *Ibid.*

[12] For Federally insured depository institutions, the December 21, 1993 "Interagency Policy Statement on the Allowance for Loan and Lease Losses (ALLL)" (the 1993 Interagency Policy Statement) indicates that boards of directors and management have certain responsibilities for the ALLL process and amounts reported. For example, as indicated on page 4 of that statement, "the board of directors and management are expected to: Ensure that the institution has an effective loan review system and controls[;] Ensure the prompt charge-off of loans, or portions of loans, that available information confirms to be uncollectible[; and] Ensure that the institution's process for determining an adequate level for the ALLL is based on a comprehensive, adequately documented, and consistently applied analysis of the institution's loan and lease portfolio."

[13] SAS 61 (as amended by SAS 90) states, in part: "In connection with each SEC engagement the auditor should discuss with the audit committee the auditor's judgments about the quality, not just the acceptability, of the entity's accounting principles as applied in its financial reporting. The discussion should include items that have a significant impact on the representational faithfulness, verifiability, and neutrality of the accounting information included in the financial statements. [Footnote omitted.] Examples of items that may have such an impact are the following:

1. Selection of new or changes to accounting policies
2. Estimates, judgments, and uncertainties
3. Unusual transactions

Accounting policies relating to significant financial statement items, including the timing or transactions and the period in which they are recorded."

[14] Registrants should also refer to FASB ASC Section 450–20–30, Contingencies—Loss Contingencies—Initial Measurement, which provides accounting and disclosure guidance for situations in which a range of loss can be reasonably estimated but no single amount within the range appears to be a better estimate than any other amount within the range.

[15] Registrants should refer to the guidance on materiality in SAB Topic 1.M.

[16] FRR 28 states: "The specific rationale upon which the [loan loss allowance and provision] amount actually reported is based—*i.e.,* the bridge

The staff normally would expect to find that registrants maintain written supporting documentation for the following decisions, strategies, and processes:[17]

- Policies and procedures:
  - Over the systems and controls that maintain an appropriate loan loss allowance, and
  - Over the loan loss allowance methodology;
- Loan grading system or process;
- Summary or consolidation of the loan loss allowance balance;
- Validation of the loan loss allowance methodology; and
- Periodic adjustments to the loan loss allowance process.

*Question 2:* The Interpretive Response to Question 2 indicates that the staff normally would expect to find that registrants maintain written supporting documentation for their loan loss allowance policies and procedures. In the staff's view, what aspects of a registrant's loan loss allowance internal accounting control systems and processes would appropriately be addressed in its written policies and procedures?

*Interpretive Response:* The staff is aware that registrants utilize a wide range of policies, procedures, and control systems in their loan loss allowance processes, and these policies, procedures, and systems are tailored to the size and complexity of the registrant and its loan portfolio. However, the staff believes that, in order for a registrant's loan loss allowance methodology to be effective, the registrant's written policies and procedures for the systems and controls that maintain an appropriate loan loss allowance would likely address the following:

- The roles and responsibilities of the registrant's departments and personnel (including the lending function, credit review, financial reporting, internal audit, senior management, audit committee, board of directors, and others, as applicable) who determine or review, as applicable, the loan loss allowance to be reported in the financial statements;[18]
- The registrant's accounting policies for loans and loan losses, including the policies for charge-offs and recoveries and for estimating the fair value of collateral, where applicable;[19]
- The description of the registrant's systematic methodology, which should be consistent with the registrant's accounting policies for determining its loan loss allowance (*see* Question 4 below for further discussion);[20] and
- The system of internal controls used to ensure that the loan loss allowance process is maintained in accordance with GAAP.[21]

The staff normally would expect an internal control system[22] for the loan loss allowance estimation process to:

- Include measures to provide assurance regarding the reliability[23] and integrity of information and compliance with laws, regulations, and internal policies and procedures;[24]
- Reasonably assure that the registrant's financial statements are prepared in accordance with GAAP; and
- Include a well-defined loan review process.[25]

A well-defined loan review process[26] typically contains:

- An effective loan grading system that is consistently applied, identifies differing risk characteristics and loan quality problems accurately and in a timely manner, and prompts appropriate administrative actions;[27]
- Sufficient internal controls to ensure that all relevant loan review information is appropriately considered in estimating losses. This includes maintaining appropriate reports, details of reviews performed, and identification of personnel involved;[28] and
- Clear formal communication and coordination between a registrant's credit administration function, financial reporting group, management, board of directors, and others who are involved in the loan loss allowance determination or review process, as applicable (*e.g.,* written policies and procedures, management reports, audit programs, and committee minutes).[29]

*Question 3:* The Interpretive Response to Question 3 indicates that the staff normally would expect a registrant's written loan loss allowance policies and procedures to include a description of the registrant's systematic allowance methodology, which should be consistent with its accounting policies for determining its loan loss allowance. What elements of a registrant's loan loss allowance methodology would the staff normally expect to be described in the registrant's written policies and procedures?

*Interpretive Response:* The staff normally would expect a registrant's written policies and procedures to describe the primary elements of its loan loss allowance methodology, including portfolio segmentation and

between the findings of the detailed review [of the loan portfolio] and the amount actually reported in each period—would be documented to help ensure the adequacy of the reported amount, to improve auditability, and to serve as a benchmark for exercise of prudent judgment in future periods."

[17] Paragraph 9.64 in the Audit Guide outlines specific aspects of effective internal control related to the allowance for loan losses. These specific aspects include the control environment ("management communication of the need for proper reporting of the allowance"); management reports that summarize loan activity and the institution's procedures and controls ("accumulation of relevant, sufficient, and reliable data on which to base management's estimate of the allowance"); "independent loan review;" review of information and assumptions ("adequate review and approval of the allowance estimates by the individuals specified in management's written policy"); and assessment of the process ("comparison of prior estimates related to the allowance with subsequent results to assess the reliability of the process used to develop the allowance").

[18] Paragraph 9.64 of the Audit Guide discusses "management communication of the need for proper reporting of the allowance." As indicated in that paragraph, the "control environment strongly influences the effectiveness of the system of controls and reflects the overall attitude, awareness, and action of the board of directors and management concerning the importance of control."

[19] Paragraph 9.56 of the Audit Guide refers to the documentation, for disclosure purposes, that an entity should include in the notes to the financial statements describing the accounting policies the entity used to estimate its allowance and related provision for loan losses.

[20] *Ibid.* As indicated in paragraph 9.56, "[s]uch a description should identify the factors that influenced management's judgment (for example, historical losses and existing economic conditions) and may also include discussion of risk elements relevant to particular categories of financial instruments."

[21] *See also* paragraph 9.64 in the Audit Guide which provides information about specific aspects of effective internal control related to the allowance for loan losses.

[22] *Ibid.* Public companies are required to comply with the books and records provisions of the Exchange Act. Under Sections 13(b)(2)—(7) of the Exchange Act, registrants must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant. Registrants also must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP.

[23] Concepts Statement 2, *Qualitative Characteristics of Accounting Information,* provides guidance on "reliability" as a primary quality of accounting information.

[24] Section 13(b)(2)–(7) of the Exchange Act.

[25] As indicated in paragraph 9.05, item a, in the Audit Guide, a loan loss allowance methodology should "include a detailed and regular analysis of the loan portfolio." Paragraphs 9.06 to 9.13 provide additional information on how creditors traditionally identify and review loans on an individual basis and review or analyze loans on a group or pool basis.

[26] *Ibid.* Additionally, paragraph 9.64 in the Audit Guide provides guidance on the loan review process. As stated in that paragraph, "[m]anagement reports summarizing loan activity, renewals, and delinquencies are vital to the timely identification of problem loans." The paragraph further states: "Loan reviews should be conducted by competent institution personnel who are independent of the underwriting, supervision, and collections functions. The specific lines of reporting depend on the complexity of the institution's organizational structure, but the loan reviewers should report to a high level of management that is independent from the lending process in the institution."

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*

impairment measurement. The staff normally would expect that, in order for a registrant's loan loss allowance methodology to be effective, the registrant's written policies and procedures would describe the methodology:

- For segmenting the portfolio:
  - How the segmentation process is performed (*i.e.,* by loan type, industry, risk rates, *etc.*);[30]
  - When a loan grading system is used to segment the portfolio:
    - The definitions of each loan grade;
    - A reconciliation of the internal loan grades to supervisory loan grades, if applicable; and
    - The delineation of responsibilities for the loan grading system.
- For determining and measuring impairment under FASB ASC Subtopic 310–10:[31]
  - The methods used to identify loans to be analyzed individually;
  - For individually reviewed loans that are impaired, how the amount of any impairment is determined and measured, including:
    - Procedures describing the impairment measurement techniques available; and
    - Steps performed to determine which technique is most appropriate in a given situation.
  - The methods used to determine whether and how loans individually evaluated under FASB Subtopic 310–10, but not considered to be individually impaired, should be grouped with other loans that share common characteristics for impairment evaluation under FASB ASC Subtopic 450–20.[32]
- For determining and measuring impairment under FASB ASC Subtopic 450–20:[33]
  - How loans with similar characteristics are grouped to be evaluated for loan collectibility (such as loan type, past-due status, and risk);
  - How loss rates are determined (*e.g.,* historical loss rates adjusted for environmental factors or migration analysis) and what factors are considered when establishing appropriate time frames over which to evaluate loss experience; and
  - Descriptions of qualitative factors (*e.g.,* industry, geographical, economic, and political factors) that may affect loss rates or other loss measurements.

3. Applying a Systematic Methodology—Measuring and Documenting Loan Losses Under FASB ASC Subtopic 310–10

a. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 310–10—General

*Facts:* Approximately one-third of Registrant B's commercial loan portfolio consists of large balance, non-homogeneous loans. Due to their large individual balances, these loans meet the criteria under Registrant B's policies and procedures for individual review for impairment under FASB ASC Subtopic 310–10.

Upon review of the large balance loans, Registrant B determines that certain of the loans are impaired as defined by FASB ASC Subtopic 310–10.[34]

*Question:* For the commercial loans reviewed under FASB ASC Subtopic 310–10 that are individually impaired, how would the staff normally expect Registrant B to measure and document the impairment on those loans? Can it use an impairment measurement method other than the methods allowed by FASB ASC Subtopic 310–10?

*Interpretive Response:* For those loans that are reviewed individually under FASB ASC Subtopic 310–10 and considered individually impaired, Registrant B must use one of the methods for measuring impairment that is specified by FASB ASC Subtopic 310–10 (that is, the present value of expected future cash flows, the loan's observable market price, or the fair value of collateral).[35] Accordingly, in the circumstances described above, for the loans considered individually impaired under FASB ASC Subtopic 310–10, it would not be appropriate for Registrant B to choose a measurement method not prescribed by FASB ASC Subtopic 310–10. For example, it would not be appropriate to measure loan impairment by applying a loss rate to each loan based on the average historical loss percentage for all of its commercial loans for the past five years.

The staff normally would expect Registrant B to maintain as sufficient, objective evidence[36] written documentation to support its measurement of loan impairment under FASB ASC Subtopic 310–10.[37] If Registrant B uses the present value of expected future cash flows to measure impairment of a loan, it should document the amount and timing of cash flows, the effective interest rate used to discount the cash flows, and the basis for the determination of cash flows, including consideration of current environmental factors[38] and other information reflecting past events and current conditions. If Registrant B uses the fair value of collateral to measure impairment, the staff normally would expect to find that Registrant B had documented how it determined the fair value, including the use of appraisals, valuation assumptions and calculations, the supporting rationale for adjustments to appraised values, if any, and the determination of costs to sell, if applicable, appraisal quality, and the expertise and independence of the appraiser.[39] Similarly, the staff normally would expect to find that Registrant B had documented the amount, source, and date of the observable market price of a loan, if that method of measuring loan impairment is used.

[30] Paragraph 9.07 in the Audit Guide states that "creditors have traditionally identified loans that are to be evaluated for collectibility by dividing the loan portfolio into different segments. Loans with similar risk characteristics, such as risk classification, past-due status, and type of loan should be grouped together." Paragraph 9.08 provides additional guidance on classifying individual loans and paragraph 9.13 indicates considerations for groups or pools of loans.

[31] *See* FASB ASC paragraphs 310–10–35–16 through 310–10–35–19 on recognition of impairment and FASB ASC paragraphs 310–10–35–20 through 310–10–35–37 on measurement of impairment.

[32] *See* FASB ASC paragraph 310–10–35–36.

[33] *See* FASB ASC paragraph 450–20–25–2 on accrual of loss contingencies and FASB ASC paragraphs 310–10–35–5 through 310–10–35–11 on collectibility of receivables.

[34] FASB ASC paragraph 310–10–35–8 provides that a loan is impaired when, based on current information and events, it is probable that all amounts due will not be collected pursuant to the terms of the loan agreement.

[35] *See* FASB ASC paragraph 310–10–35–22.

[36] Under GAAS, auditors should obtain "sufficient competent evidential matter" to support its audit opinion. *See* AU Section 326. The staff normally would expect registrants to maintain such evidential matter for its allowances for loan losses for use by the auditors in conducting their annual audit.

[37] Paragraph 9.74 in the Audit Guide outlines sources of information, available from management, that the independent accountant should consider in identifying loans that contain high credit risk or other significant exposures and concentrations. These sources of information would also likely include documentation of loan impairment under FASB ASC Subtopic 310–10 or FASB ASC Subtopic 450–20. Additionally, as indicated in paragraphs 9.85 to 9.97 of the Audit Guide, the independent accountant, in conducting an audit, may perform a detailed loan file review for selected loans. A registrant's loan files may contain documentation about borrowers' financial resources and cash flows (*see* paragraph 9.92) or about the collateral securing the loans, if applicable (*see* paragraphs 9.94 and 9.95).

[38] FASB ASC paragraph 310–10–35–27 indicates that environmental factors include existing industry, geographical, economic, and political factors.

[39] *See* paragraphs 9.94 and 9.95 in the Audit Guide for additional information about documentation of loan collateral.

b. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 310–10 for a Collateral Dependent Loan

*Facts:* Registrant C has a $10 million loan outstanding to Company X that is secured by real estate, which Registrant C individually evaluates under FASB ASC Subtopic 310–10 due to the loan's size. Company X is delinquent in its loan payments under the terms of the loan agreement. Accordingly, Registrant C determines that its loan to Company X is impaired, as defined by FASB ASC Subtopic 310–10. Because the loan is collateral dependent, Registrant C measures impairment of the loan based on the fair value of the collateral. Registrant C determines that the most recent valuation of the collateral was performed by an appraiser eighteen months ago and, at that time, the estimated value of the collateral (fair value less costs to sell) was $12 million.

Registrant C believes that certain of the assumptions that were used to value the collateral eighteen months ago do not reflect current market conditions and, therefore, the appraiser's valuation does not approximate current fair value of the collateral.

Several buildings, which are comparable to the real estate collateral, were recently completed in the area, increasing vacancy rates, decreasing lease rates, and attracting several tenants away from the borrower. Accordingly, credit review personnel at Registrant C adjust certain of the valuation assumptions to better reflect the current market conditions as they relate to the loan's collateral.[40] After adjusting the collateral valuation assumptions, the credit review department determines that the current estimated fair value of the collateral, less costs to sell, is $8 million.[41] Given that the recorded investment in the loan is $10 million, Registrant C concludes that the loan is impaired by $2 million and records an allowance for loan losses of $2 million.

*Question:* What documentation would the staff normally expect Registrant C to maintain to support its determination of the allowance for loan losses of $2 million for the loan to Company X?

*Interpretive Response:* The staff normally would expect Registrant C to document that it measured impairment of the loan to Company X by using the fair value of the loan's collateral, less costs to sell, which it estimated to be $8 million.[42] This documentation[43] should include the registrant's rationale and basis for the $8 million valuation, including the revised valuation assumptions it used, the valuation calculation, and the determination of costs to sell, if applicable.

Because Registrant C arrived at the valuation of $8 million by modifying an earlier appraisal, it should document its rationale and basis for the changes it made to the valuation assumptions that resulted in the collateral value declining from $12 million eighteen months ago to $8 million in the current period.

c. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 310–10—Fully Collateralized Loans

*Question:* In the staff's view, what is an example of an acceptable documentation practice for a registrant to adequately support its determination that no allowance for loan losses should be recorded for a group of loans because the loans are fully collateralized?

*Interpretive Response:* Consider the following fact pattern: Registrant D has $10 million in loans that are fully collateralized by highly rated debt securities with readily determinable market values. The loan agreement for each of these loans requires the borrower to provide qualifying collateral sufficient to maintain a loan-to-value ratio with sufficient margin to absorb volatility in the securities' market prices. Registrant D's collateral department has physical control of the debt securities through safekeeping arrangements. In addition, Registrant D perfected its security interest in the collateral when the funds were originally distributed. On a quarterly basis, Registrant D's credit administration function determines the market value of the collateral for each loan using two independent market quotes and compares the collateral value to the loan carrying value. If there are any collateral deficiencies, Registrant D notifies the borrower and requests that the borrower immediately remedy the deficiency. Due in part to its efficient operation, Registrant D has historically not incurred any material losses on these loans. Registrant D believes these loans are fully-collateralized and therefore does not maintain any loan loss allowance balance for these loans.

Registrant D's management summary of the loan loss allowance includes documentation indicating that, in accordance with its loan loss allowance policy, the collateral protection on these loans has been verified by the registrant, no probable loss has been incurred, and no loan loss allowance is necessary.

Documentation in Registrant D's loan files includes the two independent market quotes obtained each quarter for each loan's collateral amount, the documents evidencing the perfection of the security interest in the collateral, and other relevant supporting documents. Additionally, Registrant D's loan loss allowance policy includes a discussion of how to determine when a loan is considered "fully collateralized" and does not require a loan loss allowance. Registrant D's policy requires the following factors to be considered and its findings concerning these factors to be fully documented:

- Volatility of the market value of the collateral;
- Recency and reliability of the appraisal or other valuation;
- Recency of the registrant's or third party's inspection of the collateral;
- Historical losses on similar loans;
- Confidence in the registrant's lien or security position including appropriate:
  - Type of security perfection (*e.g.,* physical possession of collateral or secured filing);
  - Filing of security perfection (*i.e.,* correct documents and with the appropriate officials); and
  - Relationship to other liens; and
- Other factors as appropriate for the loan type.

In the staff's view, Registrant D's documentation supporting its determination that certain of its loans are fully collateralized, and no loan loss allowance should be recorded for those loans, is acceptable under FRR 28.

4. Applying a Systematic Methodology—Measuring and Documenting Loan Losses Under FASB ASC Subtopic 450–20

a. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 450–20—General

*Question 1:* In the staff's view, what are some general considerations for a registrant in applying its systematic methodology to measure and document loan losses under FASB ASC Subtopic 450–20?

*Interpretive Response:* For loans evaluated on a group basis under FASB ASC Subtopic 450–20, the staff believes

[40] When reviewing collateral dependent loans, Registrant C may often find it more appropriate to obtain an updated appraisal to estimate the effect of current market conditions on the appraised value instead of internally estimating an adjustment.

[41] An auditor who uses the work of a specialist, such as an appraiser, in performing an audit in accordance with GAAS should refer to the guidance in SAS 73 (AU Section 336).

[42] *See* paragraphs 9.94 to 9.95 in the Audit Guide for further information about documentation of loan collateral and associated audit procedures that may be performed by the independent accountant.

[43] As stated in paragraph 9.14 of the Audit Guide, "[t]he approach for determination of the allowance should be well documented."

that a registrant should segment the loan portfolio by identifying risk characteristics that are common to groups of loans.[44] Registrants typically decide how to segment their loan portfolios based on many factors, which vary with their business strategies as well as their information system capabilities. Regardless of the segmentation method used, the staff normally would expect a registrant to maintain documentation to support its conclusion that the loans in each segment have similar attributes or characteristics. As economic and other business conditions change, registrants often modify their business strategies, which may result in adjustments to the way in which they segment their loan portfolio for purposes of estimating loan losses. The staff normally would expect registrants to maintain documentation to support these segmentation adjustments.[45]

Based on the segmentation of the loan portfolio, a registrant should estimate the FASB ASC Subtopic 450–20 portion of its loan loss allowance. For those segments that require an allowance for loan losses,[46] the registrant should estimate the loan losses, on at least a quarterly basis, based upon its ongoing loan review process and analysis of loan performance.[47] The registrant should follow a systematic and consistently applied approach to select the most appropriate loss measurement methods and support its conclusions and rationale with written documentation.[48]

*Facts:* After identifying certain loans for evaluation under FASB ASC Subtopic 310–10, Registrant E segments its remaining loan portfolio into five pools of loans. For three of the pools, it measures loan impairment under FASB ASC Subtopic 450–20 by applying historical loss rates, adjusted for relevant environmental factors, to the pools' aggregate loan balances. For the remaining two pools of loans, Registrant E uses a loss estimation model that is consistent with GAAP to measure loan impairment under FASB ASC Subtopic 450–20.

*Question 2:* What documentation would the staff normally expect Registrant E to prepare to support its loan loss allowance for its pools of loans under FASB ASC Subtopic 450–20?

*Interpretive Response:* Regardless of the method used to determine loan loss measurements under FASB ASC Subtopic 450–20, Registrant E should demonstrate and document that the loss measurement methods used to estimate the loan loss allowance for each segment of its loan portfolio are determined in accordance with GAAP as of the financial statement date.[49]

As indicated for Registrant E, one method of estimating loan losses for groups of loans is through the application of loss rates to the groups' aggregate loan balances. Such loss rates typically reflect the registrant's historical loan loss experience for each group of loans, adjusted for relevant environmental factors (*e.g.,* industry, geographical, economic, and political factors) over a defined period of time. If a registrant does not have loss experience of its own, it may be appropriate to reference the loss experience of other companies in the same business, provided that the registrant demonstrates that the attributes of the loans in its portfolio segment are similar to those of the loans included in the portfolio of the registrant providing the loss experience.[50] Registrants should maintain supporting documentation for the technique used to develop their loss rates, including the period of time over which the losses were incurred. If a range of loss is determined, registrants should maintain documentation to support the identified range and the rationale used for determining which estimate is the best estimate within the range of loan losses.[51]

The staff normally would expect that, before employing a loss estimation model, a registrant would evaluate and modify, as needed, the model's assumptions to ensure that the resulting loss estimate is consistent with GAAP. In order to demonstrate consistency with GAAP, registrants that use loss estimation models should typically document the evaluation, the conclusions regarding the appropriateness of estimating loan losses with a model or other loss estimation tool, and the objective support for adjustments to the model or its results.[52]

In developing loss measurements, registrants should consider the impact of current environmental factors and then document which factors were used in the analysis and how those factors affected the loss measurements. Factors that should be considered in developing loss measurements include the following:[53]

- Levels of and trends in delinquencies and impaired loans;
- Levels of and trends in charge-offs and recoveries;
- Trends in volume and terms of loans;
- Effects of any changes in risk selection and underwriting standards, and other changes in lending policies, procedures, and practices;
- Experience, ability, and depth of lending management and other relevant staff;
- National and local economic trends and conditions;
- Industry conditions; and
- Effects of changes in credit concentrations.

For any adjustment of loss measurements for environmental factors, a registrant should maintain sufficient, objective evidence[54] (a) to support the amount of the adjustment and (b) to explain why the adjustment is necessary to reflect current

[44] Paragraph 9.07 of the Audit Guide indicates that "loans with similar risk characteristics, such as risk classification, past-due status, and type of loan, should be grouped together."

[45] Segmentation of the loan portfolio is a standard element in a loan loss allowance methodology. As indicated in paragraph 9.05 of the Audit Guide, the loan loss allowance methodology "should be well documented, with clear explanations of the supporting analyses and rationale."

[46] An example of a loan segment that does not generally require an allowance for loan losses is a group of loans that are fully secured by deposits maintained at the lending institution.

[47] FRR 28 refers to a "systematic methodology to be employed each period" in determining provisions and allowances for loan losses. As indicated in FRR 28, the staff normally would expect that the systematic methodology would be documented "to help ensure that all matters affecting loan collectibility will consistently be identified in the detailed [loan] review process."

[48] *Ibid.* Also, as indicated in paragraph 9.05 of the Audit Guide, the loan loss allowance methodology "should be well documented, with clear explanations of the supporting analyses and rationale." Further, as indicated in paragraph 9.14 of the Audit Guide, "[t]he approach for determination of the allowance should be well documented."

[49] Refer to FASB ASC subparagraph 450–20–25–2(b). Also, as indicated in FASB ASC subparagraph 310–10–35–4(c), "[t]he approach for determination of the allowance shall be well documented and applied consistently from period to period."

[50] Refer to FASB ASC paragraphs 310–10–35–10 through 310–10–35–11.

[51] Registrants should also refer to FASB ASC Subtopic 450–20, which provides guidance for situations in which a range of loss can be reasonably estimated but no single amount within the range appears to be a better estimate than any other amount within the range. Also, paragraph 9.14 of the Audit Guide notes the use of "a method that results in a range of estimates for the allowance," except for impairment measurement under FASB ASC Subtopic 310–10, which is based on a single best estimate and not a range of estimates. Paragraph 9.14 also states that "[t]he approach for determination of the allowance should be well documented."

[52] The systematic methodology (including, if applicable, loss estimation models) used to determine loan loss provisions and allowances should be documented in accordance with FRR 28, paragraph 9.05 of the Audit Guide, and FASB ASC Subtopic 310–10.

[53] Refer to paragraph 9.13 in the Audit Guide.

[54] AU 326 describes the "sufficient competent evidential matter" that auditors must consider in accordance with GAAS.

information, events, circumstances, and conditions in the loss measurements.

b. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 450–20—Adjusting Loss Rates

*Facts:* Registrant F's lending area includes a metropolitan area that is financially dependent upon the profitability of a number of manufacturing businesses. These businesses use highly specialized equipment and significant quantities of rare metals in the manufacturing process. Due to increased low-cost foreign competition, several of the parts suppliers servicing these manufacturing firms declared bankruptcy. The foreign suppliers have subsequently increased prices and the manufacturing firms have suffered from increased equipment maintenance costs and smaller profit margins.

Additionally, the cost of the rare metals used in the manufacturing process increased and has now stabilized at double last year's price. Due to these events, the manufacturing businesses are experiencing financial difficulties and have recently announced downsizing plans.

Although Registrant F has yet to confirm an increase in its loss experience as a result of these events, management knows that it lends to a significant number of businesses and individuals whose repayment ability depends upon the long-term viability of the manufacturing businesses. Registrant F's management has identified particular segments of its commercial and consumer customer bases that include borrowers highly dependent upon sales or salary from the manufacturing businesses. Registrant F's management performs an analysis of the affected portfolio segments to adjust its historical loss rates used to determine the loan loss allowance. In this particular case, Registrant F has experienced similar business and lending conditions in the past that it can compare to current conditions.

*Question:* How would the staff normally expect Registrant F to document its support for the loss rate adjustments that result from considering these manufacturing firms' financial downturns? [55]

*Interpretive Response:* The staff normally would expect Registrant F to document its identification of the particular segments of its commercial and consumer loan portfolio for which it is probable that the manufacturing business' financial downturn has resulted in loan losses. In addition, the staff normally would expect Registrant F to document its analysis that resulted in the adjustments to the loss rates for the affected portfolio segments.[56] The staff normally would expect that, as part of its documentation, Registrant F would maintain copies of the documents supporting the analysis, which may include relevant economic reports, economic data, and information from individual borrowers.

Because in this case Registrant F has experienced similar business and lending conditions in the past, it should consider including in its supporting documentation an analysis of how the current conditions compare to its previous loss experiences in similar circumstances. The staff normally would expect that, as part of Registrant F's effective loan loss allowance methodology, it would create a summary of the amount and rationale for the adjustment factor for review by management prior to the issuance of the financial statements.[57]

c. Measuring and Documenting Loan Losses Under FASB ASC Subtopic 450–20—Estimating Losses on Loans Individually Reviewed for Impairment But Not Considered Individually Impaired

*Facts:* Registrant G has outstanding loans of $2 million to Company Y and $1 million to Company Z, both of which are paying as agreed upon in the loan documents. The registrant's loan loss allowance policy specifies that all loans greater than $750,000 must be individually reviewed for impairment under FASB ASC Subtopic 310–10. Company Y's financial statements reflect a strong net worth, good profits, and ongoing ability to meet debt service requirements. In contrast, recent information indicates Company Z's profitability is declining and its cash flow is tight. Accordingly, this loan is rated substandard under the registrant's loan grading system. Despite its concern, management believes Company Z will resolve its problems and determines that neither loan is individually impaired as defined by FASB ASC Subtopic 310–10.

Registrant G segments its loan portfolio to estimate loan losses under FASB ASC Subtopic 450–20. Two of its loan portfolio segments are Segment 1 and Segment 2. The loan to Company Y has risk characteristics similar to the loans included in Segment 1 and the loan to Company Z has risk characteristics similar to the loans included in Segment 2.[58]

In its determination of its loan loss allowance under FASB ASC Subtopic 450–20, Registrant G includes its loans to Company Y and Company Z in the groups of loans with similar characteristics (*i.e.,* Segment 1 for Company Y's loan and Segment 2 for Company Z's loan).[59] Management's analyses of Segment 1 and Segment 2 indicate that it is probable that each segment includes some losses, even though the losses cannot be identified to one or more specific loans. Management estimates that the use of its historical loss rates for these two segments, with adjustments for changes in environmental factors, provides a reasonable estimate of the registrant's probable loan losses in these segments.

*Question:* How would the staff normally expect Registrant G to adequately document a loan loss allowance under FASB ASC Subtopic 450–20 for these loans that were individually reviewed for impairment but are not considered individually impaired?

*Interpretive Response:* The staff normally would expect that, as part of Registrant G's effective loan loss allowance methodology, it would document its decision to include its loans to Company Y and Company Z in its determination of its loan loss allowance under FASB ASC Subtopic 450–20.[60] The staff also normally would

[55] This question and response would also apply to other registrant fact patterns in which the registrant adjusts loss rates for environmental factors.

[56] Paragraph 9.56 of the Audit Guide refers to the documentation, for disclosure purposes, that an entity should include in the notes to the financial statements describing the accounting policies and methodology the entity used to estimate its allowance and related provision for loan losses. As indicated in paragraph 9.56, "[s]uch a description should identify the factors that influenced management's judgment (for example, historical losses and existing economic conditions) and may also include discussion of risk elements relevant to particular categories of financial instruments."

[57] Paragraph 9.64 in the Audit Guide indicates that effective internal control related to the allowance for loan losses should include "accumulation of relevant, sufficient, and reliable data on which to base management's estimate of the allowance."

[58] These groups of loans do not include any loans that have been individually reviewed for impairment under FASB ASC Section 310–10–35, Receivables—Overall—Subsequent Measurement, and determined to be impaired as defined by FASB ASC Section 310–10–35.

[59] FASB ASC paragraph 310–10–35–36 states that if a creditor concludes that an individual loan specifically identified for evaluation is not impaired under FASB ASC Subtopic 310–10, that loan may be included in the assessment of the allowance for loan losses under FASB ASC Subtopic 450–20, but only if specific characteristics of the loan indicate that it is probable that there would be an incurred loss in a group of loans with those characteristics.

[60] Paragraph 9.05 in the Audit Guide indicates that an entity's method of estimating credit losses should "include a detailed and regular analysis of

Continued

expect that Registrant G would document the specific characteristics of the loans that were the basis for grouping these loans with other loans in Segment 1 and Segment 2, respectively.[61] Additionally, the staff normally would expect Registrant G to maintain documentation to support its method of estimating loan losses for Segment 1 and Segment 2, which typically would include the average loss rate used, the analysis of historical losses by loan type and by internal risk rating, and support for any adjustments to its historical loss rates.[62] The registrant would typically maintain copies of the economic and other reports that provided source data.

When measuring and documenting loan losses, Registrant G should take steps to prevent layering loan loss allowances. Layering is the inappropriate practice of recording in the allowance more than one amount for the same probable loan loss. Layering can happen when a registrant includes a loan in one segment, determines its best estimate of loss for that loan either individually or on a group basis (after taking into account all appropriate environmental factors, conditions, and events), and then includes the loan in another group, which receives an additional loan loss allowance amount.

5. Documenting the Results of a Systematic Methodology

a. Documenting the Results of a Systematic Methodology—General

*Facts:* Registrant H has completed its estimation of its loan loss allowance for the current reporting period, in accordance with GAAP, using its established systematic methodology.

*Question:* What summary documentation would the staff normally expect Registrant H to prepare to support the amount of its loan loss allowance to be reported in its financial statements?

*Interpretive Response:* The staff normally would expect that, to verify that loan loss allowance balances are presented fairly in accordance with GAAP and are auditable, management would prepare a document that summarizes the amount to be reported in the financial statements for the loan loss allowance.[63] Common elements that the staff normally would expect to find documented in loan loss allowance summaries include:[64]

- The estimate of the probable loss or range of loss incurred for each category evaluated (*e.g.,* individually evaluated impaired loans, homogeneous pools, and other groups of loans that are collectively evaluated for impairment);
- The aggregate probable loss estimated using the registrant's methodology;
- A summary of the current loan loss allowance balance;
- The amount, if any, by which the loan loss allowance balance is to be adjusted;[65] and
- Depending on the level of detail that supports the loan loss allowance analysis, detailed subschedules of loss estimates that reconcile to the summary schedule.

Generally, a registrant's review and approval process for the loan loss allowance relies upon the data provided in these consolidated summaries. There may be instances in which individuals or committees that review the loan loss allowance methodology and resulting allowance balance identify adjustments that need to be made to the loss estimates to provide a better estimate of loan losses. These changes may be due to information not known at the time of the initial loss estimate (*e.g.,* information that surfaces after determining and adjusting, as necessary, historical loss rates, or a recent decline in the marketability of property after conducting a FASB ASC Subtopic 310–10 valuation based upon the fair value of collateral). It is important that these adjustments are consistent with GAAP and are reviewed and approved by appropriate personnel.[66] Additionally, it would typically be appropriate for the summary to provide each subsequent reviewer with an understanding of the support behind these adjustments. Therefore, the staff normally would expect management to document the nature of any adjustments and the underlying rationale for making the changes.[67]

The staff also normally would expect this documentation to be provided to those among management making the final determination of the loan loss allowance amount.[68]

b. Documenting the Results of a Systematic Methodology—Allowance Adjustments

*Facts:* Registrant I determines its loan loss allowance using an established systematic process. At the end of each reporting period, the accounting department prepares a summary schedule that includes the amount of each of the components of the loan loss allowance, as well as the total loan loss allowance amount, for review by senior management, including the Credit Committee. Members of senior management meet to discuss the loan loss allowance. During these discussions, they identify changes that are required by GAAP to be made to certain of the loan loss allowance estimates. As a result of the adjustments made by senior management, the total amount of the loan loss allowance changes. However, senior management (or its designee) does not update the loan loss allowance summary schedule to reflect the adjustments or reasons for the adjustments. When performing their audit of the financial statements, the independent accountants are provided with the original loan loss allowance summary schedule reviewed by senior management, as well as a verbal explanation of the changes made by senior management when they met to discuss the loan loss allowance.

*Question:* In the staff's view, are Registrant I's documentation practices related to the balance of its loan loss allowance in compliance with existing documentation guidance in this area?

*Interpretive Response:* No. A registrant should maintain supporting documentation for the loan loss allowance amount reported in its financial statements.[69] As illustrated above, there may be instances in which loan loss allowance reviewers identify

the loan portfolio," "consider all loans (whether on an individual or pool-of-loans basis)," "be based on current and reliable data," and "be well documented, with clear explanations of the supporting analyses and rationale." FASB ASC paragraph 310–10–35–36 provides guidance as to the analysis to be performed when determining whether a loan that is not individually impaired under FASB ASC Subtopic 310–10 should be included in the assessment of the loan loss allowance under FASB ASC Subtopic 450–20.

[61] *Ibid.*

[62] *Ibid.*

[63] FRR 28 states: "[t]he specific rationale upon which the [loan loss allowance and provision] amount actually reported is based—*i.e.,* the bridge between the findings of the detailed review [of the loan portfolio] and the amount actually reported in each period—would be documented to help ensure the adequacy of the reported amount, to improve auditability, and to serve as a benchmark for exercise of prudent judgment in future periods."

[64] *See also* paragraph 9.14 of the Audit Guide.

[65] Subsequent to adjustments, the staff normally would expect that there would be no material differences between the consolidated loss estimate, as determined by the methodology, and the final loan loss allowance balance reported in the financial statements. Registrants should refer to SAB 99 and SAS 89 and its amendments to AU Section 310.

[66] Paragraph 9.64 in the Audit Guide indicates that effective internal control related to the allowance for loan losses should include "adequate review and approval of the allowance estimates by the individuals specified in management's written policy."

[67] *See* the guidance in paragraph 9.14 of the Audit Guide ("[t]he approach for determination of the allowance should be well documented") and in FRR 28 ("the specific rationale upon which the amount actually reported in each individual period is based would be documented").

[68] *Ibid.*

[69] *Ibid.*

adjustments that need to be made to the loan loss estimates. The staff normally would expect the nature of the adjustments, how they were measured or determined, and the underlying rationale for making the changes to the loan loss allowance balance to be documented.[70] The staff also normally would expect appropriate documentation of the adjustments to be provided to management for review of the final loan loss allowance amount to be reported in the financial statements. This documentation should also be made available to the independent accountants. If changes frequently occur during management or credit committee reviews of the loan loss allowance, management may find it appropriate to analyze the reasons for the frequent changes and to reassess the methodology the registrant uses.[71]

6. Validating a Systematic Methodology

*Question:* What is the staff's guidance to a registrant on validating, and documenting the validation of, its systematic methodology used to estimate loan loss allowances?

*Interpretive Response:* The staff believes that a registrant's loan loss allowance methodology is considered valid when it accurately estimates the amount of loss contained in the portfolio. Thus, the staff normally would expect the registrant's methodology to include procedures that adjust loan loss estimation methods to reduce differences between estimated losses and actual subsequent charge-offs, as necessary. To verify that the loan loss allowance methodology is valid and conforms to GAAP, the staff believes it is appropriate for management to establish internal control policies,[72] appropriate for the size of the registrant and the type and complexity of its loan products. These policies may include procedures for a review, by a party who is independent of the allowance for loan losses estimation process, of the allowance for loan losses methodology and its application in order to confirm its effectiveness.

In practice, registrants employ numerous procedures when validating the reasonableness of their loan loss allowance methodology and determining whether there may be deficiencies in their overall methodology or loan grading process. Examples are:

- A review of trends in loan volume, delinquencies, restructurings, and concentrations.
- A review of previous charge-off and recovery history, including an evaluation of the timeliness of the entries to record both the charge-offs and the recoveries.
- A review by a party that is independent of the loan loss allowance estimation process. This often involves the independent party reviewing, on a test basis, source documents and underlying assumptions to determine that the established methodology develops reasonable loss estimates.
- An evaluation of the appraisal process of the underlying collateral. This may be accomplished by periodically comparing the appraised value to the actual sales price on selected properties sold.

It is the staff's understanding that, in practice, management usually supports the validation process with the workpapers from the loan loss allowance review function. Additional documentation often includes the summary findings of the independent reviewer. The staff normally would expect that, if the methodology is changed based upon the findings of the validation process, documentation that describes and supports the changes would be maintained.[73]

## TOPIC 7: REAL ESTATE COMPANIES

### *A. Removed by SAB 103*

### *B. Removed by SAB 103*

### *C. Schedules of Real Estate and Accumulated Depreciation, and of Mortgage Loans on Real Estate*

*Facts:* Whenever investments in real estate or mortgage loans on real estate are significant, the schedules of such items (*see* Rules 12–28 and 12–29 of Regulation S–X) are required in a prospectus.

*Question:* Is such information also required in annual reports to shareholders?

*Interpretive Response:* Although Rules 14a–3 and 14c–3 permit the omission of financial statement schedules from annual reports to shareholders, the staff is of the view that the information required by these schedules is of such significance within the real estate industry that the information should be included in the financial statements in the annual report to shareholders.

### *D. Income Before Depreciation*

*Facts:* Occasionally an income statement format will contain a subtitle or caption titled "Income before depreciation and depletion."

*Question:* Is this caption appropriate?

*Interpretive Response:* The staff objects to this presentation because in the staff's view the presentation may suggest to the reader that the amount so captioned represents cash flow for the period, which is rarely the case (*see* ASR 142).

## TOPIC 8: RETAIL COMPANIES

### *A. Sales of Leased or Licensed Departments*

*Facts:* At times, department stores and other retailers have included the sales of leased or licensed departments in the amount reported as "total revenues."

*Question:* Does the staff have any objection to this practice?

*Interpretive Response:* The staff believes that FASB ASC Topic 840, Leases, requires department stores and other retailers that lease or license store space to account for rental income from leased departments in accordance with FASB ASC Topic 840. Accordingly, it would be inappropriate for a department store or other retailer to include in its revenue the sales of the leased or licensed departments. Rather, the department store or other retailer should include the rental income as part of its gross revenue. The staff would not object to disclosure in the footnotes to the financial statements of the amount of the lessee's sales from leased departments. If the arrangement is not a lease [1] but rather a service arrangement that provides for payment of a fee or commission, the retailer should recognize the fee or commission as revenue when earned. If the retailer assumes the risk of bad debts associated with the lessee's merchandise sales, the retailer generally should present bad debt expense in accordance with Rule 5–03 of Regulation S–X.

### *B. Finance Charges*

*Facts:* Department stores and other retailers impose finance charges on credit sales.

*Question:* How should such charges be disclosed?

*Interpretive Response:* As a minimum, the staff requests that the amount of gross revenue from such charges be stated in a footnote and that the income statement classification which includes

[70] *Ibid.*

[71] As outlined in paragraph 9.64 of the Audit Guide, effective internal controls related to the allowance for loan losses should include adequate review and approval of allowance estimates, including review of sources of relevant information, review of development of assumptions, review of reasonableness of assumptions and resulting estimates, and consideration of changes in previously established methods to arrive at the allowance.

[72] *Ibid.*

[73] *See* paragraph 9.64 of the Audit Guide.

[1] The FASB ASC Master Glossary defines a lease as "an agreement conveying the right to use property, plant, or equipment (land and/or depreciable assets) usually for a stated period of time."

such revenue be identified. The following are examples of acceptable disclosure:

Example 1

Consumer Credit Operations:

The results of the Consumer Credit Operations which are included in the Statement of Earnings as a separate line item are as follows for the fiscal year ended January 31, 20x0:

| | |
|---|---|
| Service charges | $167,000,000 |
| Operating expenses: | |
| Interest | 60,000,000 |
| Payroll | 35,000,000 |
| Provision for uncollected accounts | 29,000,000 |
| All other credit and collection expenses | 32,000,000 |
| Provision for Federal income taxes | *5,000,000* |
| Total operating expenses | *161,000,000* |
| Consumer credit operations earnings | 6,000,000 |

Example 2

Service charges on retail credit accounts are netted against selling, general and administrative expense. The cost of administering retail credit program continued to exceed service charges on customer receivables as follows:

| | In millions | | |
|---|---|---|---|
| | 20x2 | 20x1 | Percent increase (decrease) |
| Costs: | | | |
| Regional office operations | $45 | $42 | 9 |
| Interest | 51 | 44 | 13 |
| Provision for doubtful accounts | *21* | *15* | *34* |
| Total | 117 | 102 | 15 |
| Less service charge income | *96* | *79* | *22* |
| Net cost of credit | 21 | 23 | (10) |
| Net cost as percent of credit sales | 1.4% | 1.6% | |

The above results do not reflect either "in store" costs related to credit operations or any allocation of corporate overhead expenses.

This SAB is not intended to change current guidance in the accounting literature. For this reason, adherence to the principles described in this SAB should not raise the costs associated with record-keeping or with audits of financial statements.

## TOPIC 9: FINANCE COMPANIES

*A. Removed by SAB 103*

*B. Removed by ASR 307*

## TOPIC 10: UTILITY COMPANIES

*A. Financing by Electric Utility Companies Through Use of Construction Intermediaries*

*Facts:* Some electric utility companies finance construction of a generating plant or their share of a jointly owned plant through the use of a "construction intermediary" which may be organized as a trust or a corporation. Typically the utility assigns its interest in property and other contract rights to the construction intermediary with the latter authorized to obtain funds to finance construction with term loans, bank loans, commercial paper and other sources of funds and that may be available. The intermediary's borrowings are guaranteed in part of the work in progress but more significantly, although indirectly, by the obligation of the utility to purchase the project upon completion and assume or otherwise settle the borrowings. The utility may be committed to provide any deficiency of funds which the intermediary cannot obtain and excess funds may be loaned to the utility by the intermediary. (In one case involving construction of an entire generating plant, the intermediary appointed the utility as its agent to complete construction.) On the occurrence of an event such as commencement of the testing period for the plant or placing the plant in commercial service (but not later than a specified date) the interest in the plant reverts to the utility and concurrently the utility must either assume the obligations issued by the intermediary or purchase them from the holders. The intermediary also may be authorized to borrow amounts for accrued interest when due and those amounts are added to the balance of the outstanding indebtedness. Interest is thus capitalized during the construction period at rates being charged by the lenders; however, it is deductible by the utility for tax purposes in the year of accrual.

*Question:* How should construction work in progress and related liabilities and interest expense being financed through a construction intermediary be reflected in an electric utility's financial statements?

*Interpretive Response:* The balance sheet of an electric utility company using a construction intermediary to finance construction should include the intermediary's work in progress in the appropriate caption under utility plant. The related debt should be included in long-term liabilities and disclosed either on the balance sheet or in a note.

The amount of interest cost incurred and the respective amounts expensed or capitalized shall be disclosed for each period for which an income statement is presented. Consequently, capitalized interest included as part of an intermediary's construction work in progress on the balance sheet should be recognized on the current income statement as interest expense with a corresponding offset to allowance for borrowed funds used during construction. Income statements for

prior periods should also be restated. The amounts may be shown separately on the statement or included with interest expense and allowance for borrowed funds used during construction.

A note to the financial statements should describe briefly the organization and purpose of the intermediary and the nature of its authorization to incur debt to finance construction. The note should disclose the rate at which interest on this debt has been capitalized and the dollar amount for each period for which an income statement is presented.

*B. Removed by SAB 103*

*C. Jointly Owned Electric Utility Plants*

*Facts:* Groups of electric utility companies have been building and operating utility plants under joint ownership agreements or arrangements which do not create legal entities for which separate financial statements are presented.[1] Under these arrangements, a participating utility has an undivided interest in a utility plant and is responsible for its proportionate share of the costs of construction and operation and its entitled to its proportionate share of the energy produced.

During the construction period a participating utility finances its own share of a utility plant using its own financial resources and not the combined resources of the group. Allowance for funds used during construction is provided in the same manner and at the same rates as for plants constructed to be used entirely by the participant utility.

When a joint-owned plant becomes operational, one of the participant utilities acts as operator and bills the other participants for their proportionate share of the direct expenses incurred. Each individual participant incurs other expenses related to transmission, distribution, supervision and control which cannot be related to the energy generated or received from any particular source. Many companies maintain depreciation records on a composite basis for each class of property so that neither the accumulated allowance for depreciation nor the periodic expense can be allocated to specific generating units whether jointly or wholly owned.

*Question:* What disclosure should be made on the financial statements or in the notes concerning interests in jointly owned utility plants?

*Interpretive Response:* A participating utility should include information concerning the extent of its interests in jointly owned plants in a note to its financial statements. The note should include a table showing separately for each interest in a jointly owned plant the amount of utility plant in service, the accumulated provision for depreciation (if available), the amount of plant under construction, and the proportionate share. The amounts presented for plant in service or plant under construction may be further subdivided to show amounts applicable to plant subcategories such as production, transmission, and distribution. The note should include statements that the dollar amounts represent the participating utility's share in each joint plant and that each participant must provide its own financing. Information concerning two or more generating plants on the same site may be combined if appropriate.

The note should state that the participating utility's share of direct expenses of the joint plants is included in the corresponding operating expenses on its income statement (*e.g.,* fuel, maintenance of plant, other operating expense). If the share of direct expenses is charged to purchased power then the note should disclose the amount so charged and the proportionate amounts charged to specific operating expenses on the records maintained for the joint plants.

*D. Long-Term Contracts for Purchase of Electric Power*

*Facts:* Under long-term contracts with public utility districts, cooperatives or other organizations, a utility company receives a portion of the output of a production plant constructed and financed by the district or cooperative. The utility has only a nominal or no investment at all in the plant but pays a proportionate part of the plant's costs, including debt service. The contract may be in the form of a sale of a generating plant and its immediate lease back. The utility is obligated to pay certain minimum amounts which cover debt service requirements whether or not the plant is operating. At the option of other parties to the contract and in accordance with a predetermined schedule, the utility's proportionate share of the output may be reduced. Separate agreements may exist for the transmission of power to the utility's system.[2]

*Question:* How should the cost of power obtained under long-term purchase contracts be reflected on the financial statements and what supplemental disclosures should be made in notes to the statements?

*Interpretive Response:* The cost of power obtained under long-term purchase contracts, including payments required to be made when a production plant is not operating, should be included in the operating expenses section of the income statement. A note to the financial statements should present information concerning the terms and significance of such contracts to the utility company including date of contract expiration, share of plant output being purchased, estimated annual cost, annual minimum debt service payment required and amount of related long-term debt or lease obligations outstanding.

Additional disclosure should be given if the contract provides, or is expected to provide, in excess of five percent of current or estimated future system capability. This additional disclosure may be in the form of separate financial statements of the vendor entity or inclusion of the amount of the obligation under the contract as a liability on the balance sheet with a corresponding amount as an asset representing the right to purchase power under the contract.

The note to the financial statements should disclose the allocable portion of interest included in charges under such contracts.

*E. Classification of Charges for Abandonments and Disallowances*

*Facts:* A public utility company abandons the construction of a plant and, under the provisions of FASB ASC Subtopic 980–360, Regulated Operations—Property, Plant, and Equipment, must charge a portion of the costs of the abandoned plant to expense.[3] Also, the utility determines that it is probable that certain costs of a recently completed plant will be disallowed, and charges those costs to

[1] Before considering the guidance in this SAB Topic, registrants are reminded that the arrangement should be evaluated in accordance with the provisions of FASB ASC Topic 810, Consolidation.

[2] Registrants are reminded that the arrangement may contain a guarantee that is within the scope of FASB ASC Topic 460, Guarantees. Further, registrants should consider the guidance of FASB ASC Topic 810, Consolidation. Also, registrants would need to consider whether the arrangement contains a derivative that should be accounted for according to FASB ASC Topic 815, Derivatives and Hedging.

[3] FASB ASC paragraphs 980–360–35–1 through 980–360–35–3 requires that costs of abandoned plants in excess of the present value of the future revenues expected to be provided to recover any allowable costs be charged to expense in the period that the abandonment becomes probable. Also, FASB ASC paragraph 980–360–35–12 requires that disallowed costs for recently completed plants be charged to expense when the disallowance becomes probable and can be reasonably estimated.

expense as required by FASB ASC Subtopic 980–360.

*Question:* May such charges for abandonments and disallowances be reported as extraordinary items in the statement of income?

*Interpretive Response:* No. The staff does not believe that such charges meet the requirements of FASB ASC Subtopic 225–20, Income Statement—Extraordinary and Unusual Items, that an item be both unusual and infrequent to be classified as an extraordinary item. Accordingly, the public utility was advised by the staff that such charges should be reported as a component of income from continuing operations, separately presented, if material.[4]

FASB ASC paragraph 225–20–45–2 indicates that to be unusual, an item must "possess a high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the entity, taking into account the environment in which the entity operates." Similarly, that paragraph indicates that, to be infrequent, an event should "not reasonably be expected to recur in the foreseeable future."

Electric utilities operate under a franchise that requires them to furnish adequate supplies of electricity for their service area. That undertaking requires utilities to continually forecast the future demand for electricity, and the costs to be incurred in constructing the plants necessary to meet that demand. Abandonments and disallowances result from the failure of demand to reach projected levels and/or plant construction costs that exceed anticipated amounts. Neither event qualifies as being both unusual and infrequent in the environment in which electric utilities operate.

Accordingly, the staff believes that charges for abandonments and disallowances under FASB ASC Subtopic 980–360 should not be presented as extraordinary items.[5]

*F. Presentation of Liabilities for Environmental Costs*

*Facts:* A public utility company determines that it is obligated to pay material amounts as a result of an environmental liability. These amounts may relate to, for example, damages attributed to clean-up of hazardous wastes, reclamation costs, fines, and litigation costs.

*Question 1:* May a rate-regulated enterprise present on its balance sheet the amount of its estimated liability for environmental costs net of probable future revenue resulting from the inclusion of such costs in allowable costs for rate-making purposes?

*Interpretive Response:* No. FASB ASC Subtopic 980–340, Regulated Operations—Other Assets and Deferred Costs, specifies the conditions under which rate actions of a regulator can provide reasonable assurance of the existence of an asset. The staff believes that environmental costs meeting the criteria of FASB ASC paragraph 980–340–25–1[6] should be presented on the balance sheet as an asset and should not be offset against the liability. Contingent recoveries through rates that do not meet the criteria of FASB ASC paragraph 980–340–25–1 should not be recognized either as an asset or as a reduction of the probable liability.

*Question 2:* May a rate-regulated enterprise delay recognition of a probable and estimable liability for environmental costs which it has incurred at the date of the latest balance sheet until the regulator's deliberations have proceeded to a point enabling management to determine whether this cost is likely to be included in allowable costs for rate-making purposes?

*Interpretive Response:* No. FASB ASC Subtopic 450–20, Contingencies—Loss Contingencies, states that an estimated loss from a loss contingency shall be accrued by a charge to income if it is probable that a liability has been incurred and the amount of the loss can be reasonably estimated.[7] The staff believes that actions of a regulator can affect whether an incurred cost is capitalized or expensed pursuant to FASB ASC Subtopic 980–340, but the regulator's actions cannot affect the timing of the recognition of the liability.

**TOPIC 11: MISCELLANEOUS DISCLOSURE**

*A. Operating-Differential Subsidies*

*Facts:* Company A has received an operating-differential subsidy pursuant to the Merchant Marine Act of 1936, as amended.

*Question:* How should such subsidies be displayed in the income statement?

*Interpretive Response:* Revenue representing an operating-differential subsidy under the Merchant Marine Act of 1936, as amended, must be set forth as a separate line item in the income statement either under a revenue caption or as credit in the costs and expenses section.

*B. Depreciation and Depletion Excluded From Cost of Sales*

*Facts:* Company B excludes depreciation and depletion from cost of sales in its income statement.

*Question:* How should this exclusion be disclosed?

*Interpretive Response:* If cost of sales or operating expenses exclude charges for depreciation, depletion and amortization of property, plant and equipment, the description of the line item should read somewhat as follows: "Cost of goods sold (exclusive of items shown separately below)" or "Cost of goods sold (exclusive of depreciation shown separately below)." To avoid placing undue emphasis on "cash flow," depreciation, depletion and amortization should not be positioned in the income statement in a manner which results in reporting a figure for income before depreciation.

*C. Tax Holidays*

*Facts:* Company C conducts business in a foreign jurisdiction which attracts industry by granting a "holiday" from income taxes for a specified period.

*Question:* Does the staff generally request disclosure of this fact?

*Interpretive Response:* Yes. In such event, a note must (1) disclose the aggregate dollar and per share effects of the tax holiday and (2) briefly describe the factual circumstances including the date on which the special tax status will terminate.

*D. Removed by SAB 103*

*E. Chronological Ordering of Data*

*Question:* Does the staff have any preference in what order data are presented (*e.g.,* the most current data displayed first, *etc.*)?

*Interpretive Response:* The staff has no preference as to order; however,

[4] Additionally, the registrant was reminded that FASB ASC paragraph 225–20–45–16 provides that items which are not reported as extraordinary should not be reported on the income statement net of income taxes or in any manner that implies that they are similar to extraordinary items.

[5] The staff also notes that FASB ASC paragraphs 980–360–35–1 through 980–360–35–3 and 980–360–35–12, in requiring that such costs be "recognized as a loss," do not specify extraordinary item treatment. The staff believes that it generally has been the FASB's practice to affirmatively require extraordinary item treatment when it believes that it is appropriate for charges or credits to income specifically required by a provision of a statement.

[6] FASB ASC paragraph 980–340–25–16 requires a rate-regulated enterprise to capitalize all or part of an incurred cost that would otherwise be charged to expense if it is probable that future revenue will be provided to recover the previously incurred cost from inclusion of the costs in allowable costs for rate-making purposes.

[7] Registrants also should apply the guidance of FASB ASC Subtopic 410–30, Asset Retirement and Environmental Obligations—Environmental Obligations, in determining the appropriate recognition of environmental remediation costs.

financial statements and other data presented in tabular form should read consistently from left to right in the same chronological order throughout the filing. Similarly, numerical data included in narrative sections should be consistently ordered.

*F. LIFO Liquidations*

*Facts:* Registrant on LIFO basis of accounting liquidates a substantial portion of its LIFO inventory and as a result includes a material amount of income in its income statement which would not have been recorded had the inventory liquidation not taken place.

*Question:* Is disclosure required of the amount of income realized as a result of the inventory liquidation?

*Interpretive Response:* Yes. Such disclosure would be required in order to make the financial statements not misleading. Disclosure may be made either in a footnote or parenthetically on the face of the income statement.

*G. Tax Equivalent Adjustment in Financial Statements of Bank Holding Companies*

*Facts:* Bank subsidiaries of bank holding companies frequently hold substantial amounts of state and municipal bonds, interest income from which is exempt from Federal income taxes. Because of the tax exemption the stated yield on these securities is lower than the yield on securities with similar risk and maturity characteristics whose interest is subject to Federal tax. In order to make the interest income and resultant yields on tax exempt obligations comparable to those on taxable investments and loans, a "tax equivalent adjustment" is often added to interest income when presented in analytical tables or charts. When the data presented also includes income taxes, a corresponding amount is added to income tax expense so that there is no effect on net income. Adjustment may also be made for the tax equivalent effect of exemption from state and local taxes.

*Question 1:* Is the concept of the tax equivalent adjustment appropriate for inclusion in financial statements and related notes?

*Interpretive Response:* No. The tax equivalent adjustment represents a credit to interest income which is not actually earned and realized and a corresponding charge to taxes (or other expense) which will never be paid. Consequently, it should not be reflected on the income statement or in notes to financial statements included in reports to shareholders or in a report or registration statement filed with the Commission.

*Question 2:* May amounts representing tax equivalent adjustments be included in the body of a statement of income provided they are designated as not being included in the totals and balances on the statement?

*Interpretive Response:* No. The tabular format of a statement develops information in an orderly manner which becomes confusing when additional numbers not an integral part of the statement are inserted into it.

*Question 3:* May revenues on a tax equivalent adjusted basis be included in selected financial data?

*Interpretive Response:* Revenues may be included in selected financial data on a tax equivalent basis if the respective captions state which amounts are tax equivalent adjusted and if the corresponding unadjusted amounts are also reported in the selected financial data.

Because of differences among registrants in making the tax equivalency computation, a brief note should describe the extent of recognition of exemption from Federal, state and local taxes and the combined marginal or incremental rate used. Where net operating losses exist, the note should indicate the nature of the tax equivalency adjustment made.

*Question 4:* May information adjusted to a tax equivalent basis be included in management's discussion and analysis of financial condition and results of operations?

*Interpretive Response:* One of the purposes of MD&A is to enable investors to appraise the extent that earnings have been affected by changes in business activity and accounting principles or methods. Material changes in items of revenue or expense should be analyzed and explained in textual discussion and statistical tables. It may be appropriate to use amounts or to present yields on a tax equivalent basis. If appropriate, the discussion should include a comment on material changes in investment securities positions that affect tax exempt interest income. For example, there might be a comment on a change from investments in tax exempt securities because of the availability of net operating losses to offset taxable income of current and future periods, or a comment on a change in the quality level of the tax exempt investments resulting in increased interest income and risk and a corresponding increase in the tax equivalent adjustment.

Tax equivalent adjusted amounts should be clearly identified and related to the corresponding unadjusted amounts in the financial statements. A descriptive note similar to that suggested to accompany adjusted amounts included in selected financial data should be provided.

*H. Disclosures by Bank Holding Companies Regarding Certain Foreign Loans*

1. Deposit/Relending Arrangements

*Facts:* Certain foreign countries experiencing liquidity problems, by agreement with U.S. banks, have instituted arrangements whereby borrowers in the foreign country may remit local currency to the foreign country's central bank, in return for the central bank's assumption of the borrowers' non-local currency obligations to the U.S. banks. The local currency is held on deposit at the central bank, for the account of the U.S. banks, and may be subject to relending to other borrowers in the country. Ultimate repayment of the obligations to the U.S. banks, in the requisite non-local currency, may not be due until a number of years hence.

*Question:* What disclosures are appropriate regarding deposit/relending arrangements of this general type?

*Interpretive Response:* The staff emphasizes that it is the responsibility of each registrant to determine the appropriate financial statement treatment and classification of foreign outstandings. The facts and circumstances surrounding deposit/relending arrangements should be carefully analyzed to determine whether the local currency payments to the foreign central bank represent collections of outstandings for financial reporting purposes, and whether such outstandings should be classified as nonaccrual, past due or restructured loans pursuant to Item III.C.1. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies ("Guide 3").

The staff believes, however, that the impact of deposit/relending arrangements covering significant amounts of outstandings to a foreign country should be disclosed pursuant to Guide 3, Item III.C.3., Instruction (6)(a).[1] The disclosures should include a general description of the arrangements and, if significant, the amounts of interest income recognized for financial reporting purposes which has not been

[1] Instruction (6)(a) calls for description of the nature and impact of developments in countries experiencing liquidity problems which are expected to have a material impact on timely repayment of principal or interest. Additionally, Instruction (6)(d)(ii) to Item III.C.3. calls for disclosure of commitments to relend, or to maintain on deposit, arising in connection with certain restructurings of foreign outstanding.

remitted in the requisite non-local currency to the U.S. bank.

2. Accounting and Disclosures by Bank Holding Companies for a "Mexican Debt Exchange" Transaction

*Facts:* Inquiries have been made of the staff regarding certain accounting and disclosure issues raised by a proposed "Mexican Debt Exchange" transaction which could involve numerous bank holding companies with existing obligations of the United Mexican States ("Mexico") or other Mexican public sector entities (collectively, "Existing Obligations"). The key elements of the Mexican Debt Exchange are as follows:

Mexico will offer for sale bonds ("Bonds"), denominated in U.S. dollars, which will pay interest at a LIBOR-based floating rate and mature in twenty years. Mexico will undertake to list the Bonds on the Luxembourg Stock Exchange. The Bonds will be secured, as to their ultimate principal value only, by non-interest bearing securities of the U.S. Treasury ("Zero Coupon Treasury Securities") which will be purchased by Mexico. The Zero Coupon Treasury Securities will be pledged to holders of the Bonds and held in custody at the Federal Reserve Bank of New York and will have a maturity date and ultimate principal value which match the maturity date and principal value of the Bonds. While the Bonds will have default and acceleration provisions, the holder of a Bond will not be permitted to have access to the collateral prior to the final scheduled maturity date, at which time the proceeds of the collateral will be available to pay the full principal amount of the Bonds. As such, the holder of a Bond ultimately will be secured as to principal at maturity; however, the interest payments will not be secured. The Bonds will not be subject to future restructurings of Mexico's Existing Obligations, and Mexico has indicated that neither the Bonds nor the Existing Obligations exchanged therefore will be considered part of a base amount with respect to any future requests by Mexico for new money.

The Mexican Debt Exchange will be structured in such a way that potential purchasers of the Bonds will submit bids on a voluntary basis to the auction agent. These bids will specify the face dollar amount of existing restructured commercial bank obligations of Mexico or of other Mexican public sector entities that the potential purchaser is willing to tender and the face dollar amount of Bonds that the purchaser is willing to accept in exchange for the Existing Obligations. Following the auction date, Mexico will determine the face dollar amount of Bonds to be issued and will exchange the Bonds for Existing Obligations taking first the offer of the largest face dollar amount of Existing Obligations per face dollar amount of Bonds, and so on, until all Bonds which Mexico is willing to issue have been subscribed. It is therefore possible that a greater amount of Existing Obligations could be tendered than Mexico is willing to accept.

The lender has appropriately accounted for the transaction as a troubled debt restructuring in accordance with the provisions of FASB ASC Subtopic 310–40, Receivables—Troubled Debt Restructurings by Creditors.

*Question 1:* What financial statement and other disclosure issues regarding the Mexican Debt Exchange and the Bonds received should be considered by registrants?

*Interpretive Response:* The staff believes that disclosure of the nature of the transaction would be necessary, including:

- Carrying value and terms of Existing Obligations exchanged;
- Face value, carrying value, market value and terms of Bonds received;
- The effect of the transaction on the allowance for loan losses and the provision for losses in the current period; and
- Annual interest income on Existing Obligations exchanged and annual interest income on Bonds received.

On an ongoing basis, the staff believes that the terms, carrying value and market value of the Bonds should be disclosed, if material, due to their unique features.[2]

*Question 2:* What disclosure with respect to the Bonds received would be acceptable under Industry Guide 3?

*Interpretive Response:* Instruction (4) to Item III.C.3. of Industry Guide 3 states: "The value of any tangible, liquid collateral may also be netted against cross-border outstandings of a country if it is held and realizable by the lender outside of the borrower's country." Given the unique features of the Bonds in that the ultimate repayment of the principal amount (but not interest) at maturity is assured, the staff will not object to either of two presentations. Under the first presentation, the carrying value of the Bonds, including any accrued but unpaid interest, would be included as a "cross-border outstanding" to the extent it exceeds the current fair value of the Zero Coupon Treasury Securities which collateralize the bonds. Alternatively, under the second presentation, the carrying value of the Bond principal would be excluded from Mexican cross-border outstandings provided (a) disclosure is made of the exclusion, (b) for purposes of determining the 1% and .75% of total assets disclosure thresholds of Item III.C.3. of Industry Guide 3, such carrying values are not excluded, and (c) all the Guide 3 disclosures relating to cross-border outstandings continue to be made, as discussed further below.

For registrants that adopt the alternative disclosure approach and whose Mexican cross-border outstandings (excluding the carrying value of the Bond principal) exceed 1% of total assets, appropriate footnote disclosure of the exclusions should be made. Such footnote should indicate the face amount and carrying value of the Bonds excluded, the market value of such Bonds, and the face amount and current fair value of the Zero Coupon Treasury Securities which secure the Bonds.

If the Mexican cross-border outstandings (excluding the carrying value of the Bond principal) are less than 1% of total assets but with the addition of the carrying value of the Bond principal would exceed 1%, the carrying value of the Mexican cross-border outstandings may be excluded from the list of countries whose cross-border outstandings exceed 1% of total assets provided that a footnote discloses the amount of Mexican cross-border outstandings (excluding the carrying value of the Bond principal) along with the footnote-type disclosure concerning the Bonds discussed in the previous paragraph. This disclosure and any other material disclosure specified by Item III.C.3. of Industry Guide 3 would continue to be made as long as Mexican exposure, including the carrying value of the Bond principal, exceeded 1%.

If the Mexican cross-border outstandings (excluding the carrying value of the Bond principal) are less than .75% of total assets but with the addition of the carrying value of the Mexican Bond principal would exceed .75% but be less than 1%, cross-border outstandings disclosed pursuant to Instruction (7) to Item III.C.3. of Industry Guide 3 may exclude Mexico provided a footnote is added to the aggregate disclosure which discloses the amount of Mexican cross-border outstandings and the fact that they have not been included. The carrying value of the Bond principal may be excluded from the amount of Mexican cross-border outstandings disclosed in the

[2] Registrants also are reminded that if the security received in the exchange constitutes a debt security within the scope of FASB ASC Topic 320, Investments—Debt and Equity Securities, the disclosures required by FASB ASC Topic 320 also would need to be provided.

footnote provided the footnote-type disclosure discussed in the second preceding paragraph is also made.

In essence, the alternative discussed herein results in a change only in the method of presenting information, not in the total information required.[3]

The appropriate disclosure would depend on the level of Mexican cross-border outstandings as follows:

A. Assuming that the remaining Mexican cross-border outstandings are in excess of 1% of total assets:

• Mexican cross-border outstandings (which excludes the total amount of the carrying value of Bond principal) would be disclosed in the table presenting all such outstandings in excess of 1%.

• Proposed footnote disclosure—

Not included in this amount is $__ million of Mexican Government Bonds maturing in 2008, with a carrying value of $__ million [if different from face value]. These Mexican Government Bonds had a market value of $__ million on [reporting date]. The principal amount of these bonds is fully secured, at maturity, by $__ million face value of U.S. zero coupon treasury securities that mature on the same date. The current fair value of these U.S. Government securities is $__ million at [reporting date]. This collateral is pledged to holders of the bonds and held in custody at the Federal Reserve Bank of New York. The details of the transaction in which these bonds were acquired was reported in the Corporation's Form (8–K, 10–Q or 10–K) for (date). Accrued interest on the bonds, which is not secured, is included in the outstandings reported [amount to be disclosed if material]. Future interest on the bonds remains a cross-border risk.

B. Assuming that remaining Mexican cross-border outstandings are less than 1% of total assets but with the addition of the carrying value of the Mexican Bond principal would exceed 1%:

• There would not be any disclosure included in any cross-border table.

• The total amount of remaining cross-border Mexican outstandings would be disclosed in a footnote to the table. Such footnote would also explain that the Mexican outstandings are excluded from the table.

• Additional footnote disclosure—(same disclosure in A above)

• The disclosure required under this paragraph (plus any other disclosure required by Item III.C.3. of Guide 3) would continue so long as Mexican exposure, including the carrying value of the Mexican Bond principal, exceeded 1%.

C. Assuming that the remaining Mexican cross-border outstandings is less than .75% of total assets but with the addition of the carrying value of the Mexican Bond principal is greater than .75% but less than 1%:

• Mexico would not be included in the list of names of countries required by Instruction 7 to Item III.C.3. of Industry Guide 3 and the amount of Mexican cross-border outstandings would not be included in the aggregate amount of outstandings attributable to all such countries.

• A footnote would be added to this disclosure of aggregate outstandings which discusses the Mexican outstandings and the Mexican Bonds. An example follows:

Not included in the above aggregate outstandings are the Corporation's cross-border outstandings to Mexico which totaled $__ million at (reporting date). This amount is less than .75% of total assets. (The remaining portion of this footnote is the same disclosure in A above.)

D. Assuming that the total of the Mexican cross-border outstanding plus the carrying value of the Bond principal is less than the .75% of total assets:

• No disclosure would be required.

• However, same disclosure as in A above would be provided if any other aspects of the financial statements are materially affected by this transaction (such as the allowance for loan losses).

Changes in aggregate outstandings to certain countries experiencing liquidity problems are required to be presented in tabular form in compliance with Instruction (6)(b) to Item III.C.3. In this table, Existing Obligations exchanged for the Bonds would generally be included in the aggregate cross-border outstandings at the beginning of the period during which the exchange occurred. For registrants using the alternative method, the amount of Existing Obligations which were exchanged would be included as a deduction in the "other changes" caption in the table. In addition, a footnote will be provided to the table as follows:

• Relates primarily to the exchange of unsecured Mexican outstandings for Mexican bonds. The principal amount of these bonds is secured at maturity by $___ face U.S. Zero Coupon Treasury Securities which mature on the same date and have a current fair value of $___. Future interest on the bonds remains a cross-border risk.]

*I. Reporting of an Allocated Transfer Risk Reserve in Filings Under the Federal Securities Laws*

*Facts:* The Comptroller of the Currency, Board of Governors of the Federal Reserve System and Federal Deposit Insurance Corporation jointly issued final rules, pursuant to the International Lending Supervision Act of 1983, requiring banking institutions to establish special reserves (Allocated Transfer Risk Reserve "ATRR") against the risks presented in certain international assets when the Federal banking agencies determine that such reserves are necessary. The rules provide that the ATRR is to be accounted for separately from the General Allowances for Possible Loan Losses, and shall not be included in the banking institution's capital or surplus. The rules also provide that no ATRR provisions are required if the banking institution writes down the assets in the requisite amount.

*Question:* How should the ATRR be reported in filings under the Federal Securities Laws?

*Interpretive Response:* It is the staff's understanding that the three banking agencies believe that those bank holding companies that have not written down the designated assets by the requisite amount and, therefore, are required to establish an ATRR should disclose the amount of the ATRR. The staff believes that such disclosure should be part of the discussion of Loan Loss Experience, Item IV of Guide 3. Part A under Item IV calls for an analysis of loss experience in the form of a reconciliation of the allowance for loan losses, and the staff believes that it would be appropriate to show and discuss separately the ATRR in the context of that reconciliation.

Registrants should recognize that the amount provided as an ATRR, or the write off of the requisite amount, represents the identification of an amount which those regulatory agencies have determined should not be included as a part of the institution's capital or surplus for purposes of administration of the regulatory and supervisory functions of those agencies. In this context, the staff believes that disclosure of the ATRR, as part of the footnote required to be presented in a registrant's financial statements by Item 7(d) of Rule 9–03 of Regulation S–X, may provide a more complete explanation of charge offs and provisions for loan losses. It should be noted, however, that the ATRR amount to be excluded from the institution's capital and surplus does not address the more general issue of the adequacy of allowances for any particular bank holding company's loans. It is still the responsibility of each registrant to determine whether GAAP require an additional provision for losses in excess of the amount required to be included in an ATRR (or the requisite amount written off).

[3] The following represents proposed disclosure using the alternative method discussed above. Of course, it would be necessary to supplement this disclosure with the additional disclosures regarding foreign outstandings that are called for by Guide 3 (*e.g.,* an analysis of the changes in aggregate outstandings), and the disclosures called for by the Interpretive Responses to Question 1.

*J. Removed by SAB 103*

*K. Application of Article 9 and Guide 3*

*Facts:* Article 9 of Regulation S–X specifies the form and content of and requirements for financial statements for bank holding companies filing with the Commission. Similarly, bank holding companies disclose supplemental statistical disclosures in filings, pursuant to Industry Guide 3. No specific guidance as to the form and content of financial statements or supplemental disclosures has been promulgated for registrants which are not bank holding companies but which are engaged in similar lending and deposit activities.[4]

*Question:* Should non-bank holding company registrants with material amounts of lending and deposit activities file financial statements and make disclosures called for by Article 9 of Regulation S–X and Industry Guide 3?

*Interpretive Response:* In the staff's view, Article 9 and Guide 3, while applying literally only to bank holding companies, provide useful guidance to certain other registrants, including savings and loan holding companies, on certain disclosures relevant to an understanding of the registrant's operations. Thus, to the extent particular guidance is relevant and material to the operations of an entity, the staff believes the specified information, or comparable data, should be provided.

For example, in accordance with Guide 3, bank holding companies disclose information about yields and costs of various assets and liabilities. Further, bank holding companies provide certain information about maturities and repricing characteristics of various assets and liabilities. Such companies also disclose risk elements, such as nonaccrual and past due items in the lending portfolio. The staff believes that this information and other relevant data would be material to a description of business of other registrants with material lending and deposit activities and accordingly, the specified information and/or comparable data (such as scheduled item disclosure for risk elements) should be provided.

In contrast, other requirements of Article 9 and Guide 3 may not be material or relevant to an understanding of the financial statements of some financial institutions. For example, bank holding companies present average balance sheet information, because period-end statements might not be representative of bank activity throughout the year. Some financial institutions other than bank holding companies may determine that average balance sheet disclosure does not provide significant additional information. Others may determine that assets and liabilities are subject to sufficient volatility that average balance information should be presented.

Pursuant to Article 9, the income statements of bank holding companies use a "net interest income" presentation. Similarly, bank holding companies present the aggregate market value, at the balance sheet date, of investment securities, on the face of the balance sheet. The staff believes that such disclosures and other relevant information should also be provided by other registrants with material lending and deposit activities.

*L. Income Statement Presentation of Casino-Hotels*

*Facts:* Registrants having casino-hotel operations present separately within the income statement amounts of revenue attributable to casino, hotel and restaurant operations, respectively.

*Question:* What is the appropriate income statement presentation of expenses attributable to casino-hotel activities?

*Interpretive Response:* The staff believes that the expenses attributable to each of the separate revenue producing activities of casino, hotel and restaurant operations should be separately presented on the face of the income statement. Such a presentation is consistent with the general reporting format for income statement presentation under Regulation S–X (Rules 5–03.1 and 5–03.2) which requires presentation of amounts of revenues and related costs and expenses applicable to major revenue providing activities. This detailed presentation affords an analysis of the relative contribution to operating profits of each of the revenue producing activities of a typical casino-hotel operation.

*M. Disclosure of The Impact That Recently Issued Accounting Standards Will Have on the Financial Statements of the Registrant When Adopted in a Future Period*

*Facts:* An accounting standard has been issued[5] that does not require adoption until some future date. A registrant is required to include financial statements in filings with the Commission after the issuance of the standard but before it is adopted by the registrant.

*Question 1:* Does the staff believe that these filings should include disclosure of the impact that the recently issued accounting standard will have on the financial position and results of operations of the registrant when such standard is adopted in a future period?

*Interpretive Response:* Yes. The Commission addressed a similar issue and concluded that registrants should discuss the potential effects of adoption of recently issued accounting standards in registration statements and reports filed with the Commission.[6] The staff believes that this disclosure guidance applies to all accounting standards which have been issued but not yet adopted by the registrant unless the impact on its financial position and results of operations is not expected to be material.[7] MD&A[8] requires registrants to provide information with respect to liquidity, capital resources and results of operations and such other information that the registrant believes to be necessary to understand its financial condition and results of operations. In addition, MD&A requires disclosure of presently known material changes, trends and uncertainties that have had or that the registrant reasonably expects will have a material impact on future sales, revenues or income from continuing operations. The staff believes that disclosure of impending accounting changes is necessary to inform the reader about expected impacts on financial information to be reported in the future and, therefore, should be disclosed in accordance with the existing MD&A

[4] The Commission staff has been considering the need for more specific guidance in the area but believes that the FASB project on financial instruments may make Commission action in this area unnecessary. In the interim, this bulletin provides the staff's views with respect to filings by similar entities such as saving and loan holding companies.

[5] Some registrants may want to disclose the potential effects of proposed accounting standards not yet issued, (*e.g.,* exposure drafts). Such disclosures, which generally are not required because the final standard may differ from the exposure draft, are not addressed by this SAB. *See also* FRR 26.

[6] FRR 6, Section 2.

[7] In those instances where a recently issued standard will impact the preparation of, but not materially affect, the financial statements, the registrant is encouraged to disclose that a standard has been issued and that its adoption will not have a material effect on its financial position or results of operations.

[8] Item 303 of Regulation S–K.

requirements. With respect to financial statement disclosure, GAAS[9] specifically address the need for the auditor to consider the adequacy of the disclosure of impending changes in accounting principles if (a) the financial statements have been prepared on the basis of accounting principles that were acceptable at the financial statement date but that will not be acceptable in the future and (b) the financial statements will be retrospectively adjusted in the future as a result of the change. The staff believes that recently issued accounting standards may constitute material matters and, therefore, disclosure in the financial statements should also be considered in situations where the change to the new accounting standard will be accounted for in financial statements of future periods, prospectively or with a cumulative catch-up adjustment.

*Question 2:* Does the staff have a view on the types of disclosure that would be meaningful and appropriate when a new accounting standard has been issued but not yet adopted by the registrant?

*Interpretive Response:* The staff believes that the registrant should evaluate each new accounting standard to determine the appropriate disclosure and recognizes that the level of information available to the registrant will differ with respect to various standards and from one registrant to another. The objectives of the disclosure should be to (1) notify the reader of the disclosure documents that a standard has been issued which the registrant will be required to adopt in the future and (2) assist the reader in assessing the significance of the impact that the standard will have on the financial statements of the registrant when adopted. The staff understands that the registrant will only be able to disclose information that is known.

The following disclosures should generally be considered by the registrant:

- A brief description of the new standard, the date that adoption is required and the date that the registrant plans to adopt, if earlier.
- A discussion of the methods of adoption allowed by the standard and the method expected to be utilized by the registrant, if determined.
- A discussion of the impact that adoption of the standard is expected to have on the financial statements of the registrant, unless not known or reasonably estimable. In that case, a statement to that effect may be made.
- Disclosure of the potential impact of other significant matters that the registrant believes might result from the adoption of the standard (such as technical violations of debt covenant agreements, planned or intended changes in business practices, *etc.*) is encouraged.

*N. Disclosures of The Impact of Assistance From Federal Financial Institution Regulatory Agencies*

*Facts:* An entity receives financial assistance from a Federal regulatory agency in conjunction with either an acquisition of a troubled financial institution, transfer of nonperforming assets to a newly-formed entity, or other reorganization.

*Question:* What are the disclosure implications of the existence of regulatory assistance?

*Interpretive Response:* The staff believes that users of financial statements must be able to assess the impact of credit and other risks on a company following a regulatory assisted acquisition, transfer or other reorganization on a basis comparable to that disclosed by other institutions, *i.e.,* as if the assistance did not exist. In this regard, the staff believes that the amount of regulatory assistance should be disclosed separately and should be separately identified in the statistical information furnished pursuant to Industry Guide 3, to the extent it impacts such information.[10, 11] Further, the nature, extent and impact of such assistance needs to be fully discussed in Management's Discussion and Analysis.[12]

## TOPIC 12: OIL AND GAS PRODUCING ACTIVITIES

*A. Accounting Series Release 257—Requirements for Financial Accounting and Reporting Practices for Oil and Gas Producing Activities*

1. Estimates of Reserve Quantities

*Facts:* Rule 4–10 of Regulation S–X contains definitions of possible reserves, probable reserves, and proved and developed oil and gas reserves to be used in determining quantities of oil and gas reserves to be reported in filings with the Commission.

*Question:* What pressure base should be used for reporting gas and production, 14.73 psia or the pressure base specified by the state?

*Interpretive Response:* The reporting instructions to the Department of Energy's Form EIA–28 specify that natural gas reserves are to be reported at 14.73 psia and 60 degrees F. There is no pressure base specified in Regulation S–X or S–K. At the present time staff will not object to natural gas reserves and production data calculated at other pressure bases, if such pressure bases are identified in the filing.

2. Estimates of Future Net Revenues

*Facts:* U.S. GAAP requires the disclosure of the standardized measure of discounted future net cash flows from production of proved oil and gas reserves.

*Question:* F or purposes of determining reserves and estimated future net revenues, what price should be used for oil and gas which will be produced after an existing contract expires or after the redetermination date in a contract?

*Interpretive Response:* The price to be used for oil and gas which will be produced after a contract expires or has a redetermination is the average price during the 12-month period prior to the ending date of the period covered by the balance sheet, determined as an unweighted arithmetic average of the first-day-of-the-month price for each month within such period for that oil and gas. This average price, which should be based on the first-day-of-the-month market prices, may be increased thereafter only for additional fixed and determinable escalations, as appropriate. A fixed and determinable escalation is one which is specified in amount and is not based on future events such as rates of inflation.

3. Disclosure of Reserve Information

a. Removed by SAB 103
b. Removed by SAB 113
c. Limited Partnership 10–K Reports

*Facts:* Item 1201(a) of Regulation S–K contains an exemption from the requirements to disclose certain information relating to oil and gas operations for "limited partnerships or joint ventures that conduct, operate, manage, or report upon oil and gas drilling income programs that acquire properties either for drilling and production, or for production of oil, gas, or geothermal steam. * * *"

Limited partnership agreements often contain buy-out provisions under which the general partner agrees to purchase limited partnership interests that are offered for sale, based upon a specified valuation formula. Because of these arrangements, the requirements for

[9] *See* AU 9410.13–18.

[10] The staff has previously expressed its views regarding acceptable methods of compliance with this principle in FASB ASC paragraph 942–10–S99–6 (Financial Services—Depository and Lending Topic).

[11] *See* FASB ASC paragraph 942–10–S99–6 for guidance on the appropriate period in which to record certain types of regulatory assistance.

[12] *See* Section 501.06.c. of the Financial Reporting Codification for further discussion of the MD&A disclosures of the effects of regulatory assistance.

disclosure of reserve value information may be of little significance to the limited partners.

*Question:* Must the financial statements of limited partnerships included in reports on Form 10–K contain the disclosures of estimated future net revenues, present values and changes therein, and supplemental summary of oil and gas activities specified in FASB ASC paragraphs 932–235–50–23 through 932–235–50–36 (Extractive Activities—Oil and Gas Topic)?

*Interpretive Response:* The staff will not take exception to the omission of these disclosures in a limited partnership Form 10–K if reserve value information is available to the limited partners pursuant to the partnership agreement (even though the valuations may be computed differently and may be as of a date other than year end). However, the staff will require all of the information listed in FASB ASC paragraphs 932–235–50–23 through 932–235–50–36 for partnerships which are the subject of a business combination or exchange offer under which various limited partnerships are to be consolidated or combined into a single entity.

d. Removed by SAB 113

e. Rate Regulated Companies

*Question:* If a company has cost-of-service oil and gas producing properties, how should they be treated in the supplemental disclosures of reserve quantities and related future net revenues provided pursuant to FASB ASC paragraphs 932–235–50–29 through 932–235–50–36?

*Interpretive Response:* Rule 4–10 provides that registrants may give effect to differences arising from the ratemaking process for cost-of-service oil and gas properties. Accordingly, in these circumstances, the staff believes that the company's supplemental reserve quantity disclosures should indicate separately the quantities associated with properties subject to cost-of-service ratemaking, and that it is appropriate to exclude those quantities from the future net revenue disclosures. The company should also disclose the nature and impact of its cost-of-service ratemaking, including the unamortized cost included in the balance sheet.

4. Removed by SAB 103

*B. Removed by SAB 103*

*C. Methods of Accounting by Oil and Gas Producers*

1. First-Time Registrants

*Facts:* In ASR 300, the Commission announced that it would allow registrants to change methods of accounting for oil and gas producing activities so long as such changes were in accordance with GAAP. Accordingly, the Commission stated that changes from the full cost method to the successful efforts method would not require a preferability letter. Changes to full cost, however, would require justification by the company making the change and filing of a preferability letter from the company's independent accountants.

*Question:* How does this policy apply to a nonpublic company which changes its accounting method in connection with a forthcoming public offering or initial registration under either the 1933 Act or 1934 Act?

*Interpretive Response:* The Commission's policy that first-time registrants may change their previous accounting methods without filing a preferability letter is applicable. Therefore, such a company may change to the full cost method without filing a preferability letter.

2. Consistent Use of Accounting Methods Within a Consolidated Entity

*Facts:* Rule 4–10(c) of Regulation S–X states in part that "[a] reporting entity that follows the full cost method shall apply that method to all of its operations and to the operations of its subsidiaries * * *"

*Question 1:* May a subsidiary of the parent use the full cost method if the parent company uses the successful efforts method of accounting for oil and gas producing activities?

*Interpretive Response:* No. The use of different methods of accounting in the consolidated financial statements by a parent company and its subsidiary would be inconsistent with the full cost requirement that a parent and its subsidiaries all use the same method of accounting.

The staff's general policy is that an enterprise should account for all its like operations in the same manner. However, Rule 4–10 of Regulation S–X provides that oil and gas companies with cost-of-service oil and gas properties may give effect to any differences resulting from the ratemaking process, including regulatory requirements that a certain accounting method be used for the cost-of-service properties.

*Question 2:* Must the method of accounting (full cost or successful efforts) followed by a registrant for its oil and gas producing activities also be followed by any fifty percent or less owned companies in which the registrant carries its investment on the equity method (equity investees)?

*Interpretive Response:* No. Conformity of accounting methods between a registrant and its equity investees, although desirable, may not be practicable and thus is not required. However, if a registrant proportionately consolidates its equity investees, it will be necessary to present them all on the same basis of accounting.

*D. Application of Full Cost Method of Accounting*

1. *Treatment of Income Tax Effects in the Computation of the Limitation on Capitalized Costs*

*Facts:* Item (D) in Rule 4–10(c)(4)(i) of Regulation S–X provides that the income tax effects related to the properties involved should be deducted in computing the full cost ceiling.

*Question 1:* What specific types of income tax effects should be considered in computing the income tax effects to be deducted from estimated future net revenues?

*Interpretive Response:* The rule refers to income tax effects generally. Thus, the computation should take into account (i) the tax basis of oil and gas properties, (ii) net operating loss carryforwards, (iii) foreign tax credit carryforwards, (iv) investment tax credits, (v) alternative minimum taxes on tax preference items, and (vi) the impact of statutory (percentage) depletion.

It may often be difficult to allocate a net operating loss (NOL) carryforward between oil and gas assets and other assets. However, to the extent that the NOL is clearly attributable to oil and gas operations and is expected to be realized within the carryforward period, it should be added to tax basis.

Similarly, to the extent that investment tax credit (ITC) carryforwards and foreign tax credit carryforwards are attributable to oil and gas operations and are expected to be realized within the carryforward period, they should be considered as a deduction from the tax effect otherwise computed. Consideration of NOL and ITC or foreign tax credit carryforwards should not, of course, reduce the total tax effect below zero.

*Question 2:* How should the tax effect be computed considering the various factors discussed above?

*Interpretive Response:* Theoretically, taxable income and tax could be determined on a year-by-year basis and the present value of the related tax computed. However, the "shortcut" method illustrated below is also acceptable.

| | | | |
|---|---|---|---|
| **ASSUMPTIONS:** | | | |
| Cost of proved properties being amortized | | $396,000 | |
| Lower of cost or estimated fair value of unproved properties to be amortized | | 49,000 | |
| Cost of properties not being amortized | | *55,000* | |
| Capitalized costs of oil and gas assets | | 500,000 | |
| Accumulated DD&A | | *(100,000)* | |
| Book basis of oil and gas assets | | | $400,000 |
| Excess of book basis over tax basis ($270,000) of oil and gas assets | | $(130,000) | |
| NOL carryforward* | | *20,000* | |
| | | (110,000) | |
| Statutory tax rate (percent) | | *×46%* | |
| | | (50,600) | |
| Foreign tax credit carryforward* | | 1,000 | |
| ITC carryforward* | | *2,000* | |
| Related net deferred income tax liability | | | *(47,600)* |
| Net book basis to be recovered | | | *$352,400* |
| Other Assumptions: | | | |
| Present value of ITC relating to future development costs | | $1,500 | |
| Present value of statutory depletion attributable to future deductions | | $10,000 | |
| Estimated preference (minimum) tax on percentage depletion in excess of cost depletion | | $500 | |
| Present value of future net revenue from proved oil and gas reserves | | $272,000 | |
| **CALCULATION:** | | | |
| Present value of future net revenue | | $272,000 | |
| Cost of properties not being amortized | | 55,000 | |
| Lower of cost or estimated fair value of unproved properties included in costs being amortized | | *49,000* | |
| Total ceiling limitation before tax effects | | | $376,000 |
| Tax Effects: | | | |
| Total ceiling limitation before tax effects | | $376,000 | |
| Less: Tax basis of properties | $(270,000) | | |
| Statutory depletion | (10,000) | | |
| NOL carryforward | *(20,000)* | | |
| | | *(300,000)* | |
| Future taxable income | | 76,000 | |
| Tax rate (percent) | | *×46%* | |
| Tax at statutory rate | | (34,960) | |
| ITC (future development costs and carryforward) | | 3,500 | |
| Foreign tax credit carryforward | | 1,000 | |
| Estimated preference tax | | *(500)* | |
| Net tax effects | | | *(30,960)* |
| Cost Center Ceiling | | | $345,040 |
| Less: Net book basis to be recovered | | | *352,400* |
| REQUIRED WRITE-OFF, net of tax** | | | *$(7,360)* |

* All carryforward amounts in this example represent amounts which are available for tax purposes and which relate to oil and gas operations.
** For accounting purposes, the gross write-off should be recorded to adjust both the oil and gas properties account and the related deferred income taxes.

| | | | |
|---|---|---|---|
| **CALCULATION OF GROSS PRE-TAX WRITE-OFF:** | | | |
| Required write-off, net of tax | | | $(7,360) |
| Divided by (100% minus the statutory rate of 46%) | | | *54%* |
| Gross pre-tax write-off | | | $*(13,630)* |
| **Related Journal Entries** | **DR** | **CR** | |
| Full cost ceiling impairment | $13,630 | | |
| Oil and gas assets | | $13,630 | |
| Deferred income tax liability | $6,270 | | |
| Deferred income tax benefit | | $6,270 | |

2. Exclusion of Costs From Amortization

*Facts:* Rule 4–10(c)(3)(ii) indicates that the costs of acquiring and evaluating unproved properties may be excluded from capitalized costs to be amortized if the costs are unusually significant in relation to aggregate costs to be amortized. Costs of major development projects may also be incurred prior to ascertaining the quantities of proved reserves attributable to such properties.

*Question:* At what point should amortization of previously excluded costs commence—when proved reserves have been established or when those reserves become marketable? For instance, a determination of proved reserves may be made before completion of an extraction plant necessary to process sour crude or a pipeline necessary to market the reserves. May the costs continue to be excluded from amortization until the plant or pipeline is in service?

*Interpretive Response:* No. The proved reserves and the costs allocable to such reserves should be transferred into the amortization base on an ongoing (well-by-well or property-by-property) basis as the project is evaluated and proved reserves are established.

Once the determination of proved reserves has been made, there is no justification for continued exclusion from the full cost pool, regardless of whether other factors prevent immediate marketing. Moreover, at the same time that the costs are transferred into the amortization base, it is also necessary in accordance with FASB ASC Subtopic 932–835, Extractive Activities—Oil and Gas—Interest, and FASB ASC Subtopic 835–20, Interest—Capitalization of Interest, to terminate capitalization of interest on such properties.

In this regard, registrants are reminded of their responsibilities not to delay recognizing reserves as proved once they have met the engineering standards.

3. Full Cost Ceiling Limitation

a. Exemptions for Purchased Properties

*Facts:* During 20x1, a registrant purchases proved oil and gas reserves in place ("the purchased reserves") in an arm's-length transaction for the sum of $9.8 million. Primarily because the registrant expects oil and gas prices to escalate, it paid $1.2 million more for the purchased reserves than the "Present Value of Estimated Future Net Revenues" computed as defined in Rule 4–10(c)(4)(i)(A) of Regulation S–X. An analysis of the registrant's full cost center in which the purchased reserves are located at December 31, 20x1 is as follows:

| | Total | Purchased reserves | Other proved properties | Unproved properties |
|---|---|---|---|---|
| **(Amounts in thousands)** | | | | |
| Present value of estimated future net revenues | $14,100 | 8,600 | 5,500 | |
| Cost, net of amortization | 16,300 | 9,800 | 5,500 | 1,000 |
| Related deferred taxes | 2,300 | | 2,000 | 300 |
| Income tax effects related to properties | 2,500 | | 2,500 | |

| Comparison of capitalized costs with limitation on capitalized costs at December 31, 20x1: | | Including purchased reserves | Excluding purchased reserves | |
|---|---|---|---|---|
| Capitalized costs, net of amortization | ..... | $16,300 | $6,500 | ..... |
| Related deferred taxes | ..... | *(2,300)* | *(2,300)* | ..... |
| Net book cost | ..... | *14,000* | *4,200* | ..... |
| Present value of estimated future net revenues | ..... | 14,100 | 5,500 | ..... |
| Lower of cost or market of unproved properties | ..... | 1,000 | 1,000 | ..... |
| Income tax effects related to properties | ..... | *(2,500)* | *(2,500)* | ..... |
| Limitation on capitalized costs | ..... | *12,600* | *4,000* | ..... |
| Excess of capitalized costs over limitation on Capitalized costs, net of tax * | ..... | 1,400 | 200 | ..... |

* For accounting purposes, the gross write-off should be recorded to adjust both the oil and gas properties account and the related deferred income taxes.

*Question:* Is it necessary for the registrant to write down the carrying value of its full cost center at December 31, 20x1 by $1,400,000?

*Interpretive Response:* Although the net carrying value of the full cost center exceeds the cost center's limitation on capitalized costs, the text of ASR 258 provides that a registrant may request an exemption from the rule if as a result of a major purchase of proved properties, a write down would be required even though the registrant believes the fair value of the properties in a cost center clearly exceeds the unamortized costs.

Therefore, to the extent that the excess carrying value relates to the purchased reserves, the registrant may seek a temporary waiver of the full-cost ceiling limitation from the staff of the Commission. Registrants requesting a waiver should be prepared to demonstrate that the additional value exists beyond reasonable doubt.

To the extent that the excess costs relate to properties other than the purchased reserves, however, a write-off should be recorded in the current period. In order to determine the portion of the total excess carrying value which is attributable to properties other than the purchased reserves, it is necessary to perform the ceiling computation on a "with and without" basis as shown in the example above. Thus in this case, the registrant must record a write-down of $200,000 applicable to other reserves. An additional $1,200,000 write-down would be necessary unless a waiver was obtained.

b. Use of Cash Flow Hedges in the Computation of the Limitation on Capitalized Costs

*Facts:* Rule 4–10(c)(4) of Regulation S–X provides, in pertinent part, that capitalized costs, net of accumulated depreciation and amortization, and deferred income taxes, should not exceed an amount equal to the sum of components that include the present value of estimated future net revenues computed by applying current prices of oil and gas reserves (with consideration of price changes only to the extent provided by contractual arrangements) to estimated future production of proved oil and gas reserves as of the date of the latest balance sheet presented.

As of the reported balance sheet date, capitalized costs of an oil and gas producing company exceed the full cost limitation calculated under the above-described rule based on current prices, as defined in Rule 4–10(c)(8) of Regulation S–X, for oil and natural gas. However, prior to the balance sheet date, the company entered into certain hedging arrangements for a portion of its future natural gas and oil production, thereby enabling the company to receive future cash flows that are higher or lower than the estimated future cash flows indicated by use of the average price during the 12-month period prior to the balance sheet date, determined as

an unweighted arithmetic average of the first-day-of-the-month price for each month within such period. These arrangements qualify as cash flow hedges under the provisions of FASB ASC Topic 815, Derivatives and Hedging, and are documented, designated, and accounted for as such under the criteria of that standard.

*Question:* Under these circumstances, must the company use the higher or lower prices to be received after taking into account the hedging arrangements ("hedge-adjusted prices") in calculating the estimated cash flows from future production of oil and gas reserves covered by the hedges as of the reported balance sheet date?

*Interpretive Response:* Yes. Derivative contracts that qualify as a hedging instrument in a cash flow hedge and are accounted for as such pursuant to FASB ASC Topic 815 represent the type of contractual arrangements for which consideration of price changes should be given under the existing rule. While the SEC staff has objected to previous proposals to consider various hedging techniques as being equivalent to the contractual arrangements permitted under the existing rules, the staff's objection was based on concerns that the lack of clear, consistent guidance in the accounting literature would lead to inconsistent application in practice. However, the staff believes that FASB ASC Topic 815 and related guidance (including a more systematic approach to documentation) provides sufficient guidance so that comparable financial reporting in comparable factual circumstances should result.

This interpretive response reflects the SEC staff's view that, assuming compliance with the prerequisite accounting requirements, hedge-adjusted prices represent the best measure of estimated cash flows from future production of the affected oil and gas reserves to use in calculating the ceiling limitation. Nonetheless, the staff expects that oil and gas producing companies subject to the full cost rules will clearly indicate the effects of using cash flow hedges in calculating ceiling limitations within their financial statement footnotes. The staff further expects that disclosures will indicate the portion of future oil and gas production being hedged. The dollar amount that would have been charged to income had the effects of the cash flow hedges not been considered in calculating the ceiling limitation also should be disclosed.

The use of hedge-adjusted prices should be consistently applied in all reporting periods, including periods in which the hedge-adjusted price is more or less than the average price during the 12-month period prior to the balance sheet date, determined as an unweighted arithmetic average of the first-day-of-the-month price for each month within such period. Oil and gas producers whose computation of the ceiling limitation includes hedge-adjusted prices because of the use of cash flow hedges also should consider the disclosure requirements under FASB ASC Section 275–10–50, Risks and Uncertainties—Overall—Disclosure. FASB ASC paragraph 275–10–50–9 calls for disclosure when it is at least reasonably possible that the effects of cash flow hedges on capitalized costs on the reported balance sheet date will change in the near term due to one or more confirming events, such as potential future changes in commodity prices.

In addition, the use of cash flow hedges in calculating the ceiling limitation may represent a type of critical accounting policy that oil and gas producers should consider disclosing consistent with the cautionary advice provided in Financial Reporting Release No. 60 (Release Nos. 33–8040; 34–45149), Cautionary Advice Regarding Disclosure about Critical Accounting Policies (December 12, 2001), and Financial Reporting Release No. 72 (Release Nos. 33–8350; 34–48960), Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations (December 29, 2003). Through these releases, the Commission has encouraged companies to include, within their MD&A disclosures, full explanations, in plain English, of the judgments and uncertainties affecting the application of critical accounting policies, and the likelihood that materially different amounts would be reported under different conditions or using different assumptions.

The staff's guidance on this issue would apply to calculations of ceiling limitations both in interim and annual reporting periods.

c. Effect of Subsequent Events on the Computation of the Limitation on Capitalized Costs

*Facts:* Rule 4–10(c)(4)(ii) of Regulation S–X provides that an excess of unamortized capitalized costs within a cost center over the related cost ceiling shall be charged to expense in the period the excess occurs.

*Question:* Assume that at the date of the company's fiscal year-end, its capitalized costs of oil and gas producing properties exceed the limitation prescribed by Rule 4–10(c)(4) of Regulation S–X. Thus, a write-down is indicated. Subsequent to year-end but before the date of the auditor's report on the company's financial statements, assume that additional reserves are proved up (excluding the effect of increased oil and gas prices subsequent to year-end) on properties owned at year-end. The present value of future net revenues from the additional reserves is sufficiently large that if the full cost ceiling limitation were recomputed giving effect to those factors as of year-end, the ceiling would more than cover the costs. Is it necessary to record a write-down?

*Interpretive Response:* No. In this case, the proving up of additional reserves on properties owned at year-end indicates that the capitalized costs were not in fact impaired at year-end. However, for purposes of the revised computation of the "ceiling," the net book costs capitalized as of year-end should be increased by the amount of any additional costs incurred subsequent to year-end to prove the additional reserves or by any related costs previously excluded from amortization.

While the fact pattern described herein relates to annual periods, the guidance on the effects of subsequent events applies equally to interim period calculations of the ceiling limitation.

The registrant's financial statements should disclose that capitalized costs exceeded the limitation thereon at year-end and should explain why the excess was not charged against earnings. In addition, the registrant's supplemental disclosures of estimated proved reserve quantities and related future net revenues and costs should not give effect to the reserves proved up or the cost incurred after year-end. However, such quantities may be disclosed separately, with appropriate explanations.

Registrants should be aware that oil and gas reserves related to properties acquired after year-end would not justify avoiding a write-off indicated as of year-end. Similarly, the effects of cash flow hedging arrangements entered into after year-end cannot be factored into the calculation of the ceiling limitation at year-end. Such acquisitions and financial arrangements do not confirm situations existing at year-end.

4. Interaction of FASB ASC Subtopic 410–20, Asset Retirement and Environmental Obligations—Asset Retirement Obligations, and the Full Cost Rules

a. Impact of FASB ASC Subtopic 410–20 on the Full Cost Ceiling Test

*Facts:* A company following the full cost method of accounting under Rule 4–10(c) of Regulation S–X must periodically calculate a limitation on capitalized costs, *i.e.,* the full cost ceiling. Under FASB ASC Subtopic 410–20, a company must recognize a liability for an asset retirement obligation (ARO) at fair value in the period in which the obligation is incurred, if a reasonable estimate of fair value can be made. The company also must initially capitalize the associated asset retirement costs by increasing long-lived oil and gas assets by the same amount as the liability. Any asset retirement costs capitalized pursuant to FASB ASC Subtopic 410–20 are subject to the full cost ceiling limitation under Rule 4–10(c)(4) of Regulation S–X. If a company were to calculate the full cost ceiling by reducing expected future net revenues by the cash flows required to settle the ARO, then the effect would be to "double-count" such costs in the ceiling test. The assets that must be recovered would be increased while the future net revenues available to recover the assets continue to be reduced by the amount of the ARO settlement cash flows.

*Question:* How should a company compute the full cost ceiling to avoid double-counting the expected future cash outflows associated with asset retirement costs?

*Interpretive Response:* The future cash outflows associated with settling AROs that have been accrued on the balance sheet should be excluded from the computation of the present value of estimated future net revenues for purposes of the full cost ceiling calculation.[1,2]

b. Impact of FASB ASC Subtopic 410–20 on the Calculation of Depreciation, Depletion, and Amortization

*Facts:* Regarding the base for depreciation, depletion, and amortization (DD&A) of proved reserves, Rule 4–10(c)(3)(i) of Regulation S–X states that "[c]osts to be amortized shall include (A) all capitalized costs, less accumulated amortization, other than the cost of properties described in paragraph (ii) below;[3] (B) the estimated future expenditures (based on current costs) to be incurred in developing proved reserves; and (C) estimated dismantlement and abandonment costs, net of estimated salvage values." FASB ASC Subtopic 410–20 requires that upon initial recognition of an ARO, the associated asset retirement costs be included in the capitalized costs of the company. Therefore, the estimated dismantlement and abandonment costs described in (C) above may be included in the capitalized costs described in (A) above, at least to the extent that an ARO has been incurred as a result of acquisition, exploration and development activities to date. Future development activities on proved reserves may result in additional asset retirement obligations when such activities are performed and the associated asset retirement costs will be capitalized at that time.

*Question:* Should the costs to be amortized under Rule 4–10(c)(3) of Regulation S–X include an amount for estimated dismantlement and abandonment costs, net of estimated salvage values, that are expected to result from future development activities?

*Interpretive Response:* Yes. Companies should estimate the amount of dismantlement and abandonment costs that will be incurred as a result of future development activities on proved reserves and include those amounts in the costs to be amortized.

c. Removed by SAB 113

*E. Financial Statements of Royalty Trusts*

*Facts:* Several oil and gas exploration and production companies have created "royalty trusts." Typically, the creating company conveys a net profits interest in certain of its oil and gas properties to the newly created trust and then distributes units in the trust to its shareholders. The trust is a passive entity which is prohibited from entering into or engaging in any business or commercial activity of any kind and from acquiring any oil and gas lease, royalty or other mineral interest. The function of the trust is to serve as an agent to distribute the income from the net profits interest. The amount to be periodically distributed to the unitholders is defined in the trust agreement and is typically determined based on the cash received from the net profits interest less expenses of the trustee. Royalty trusts have typically reported their earnings on the basis of cash distributions to unitholders. The net profits interest paid to the trust for any month is based on production from a preceding month; therefore, the method of accounting followed by the trust for the net profits interest income is different from the creating company's method of accounting for the related revenue.

*Question:* Will the staff accept a statement of distributable income which reflects the amounts to be distributed for the period in question under the terms of the trust agreement in lieu of a statement of income prepared under GAAP?

*Interpretive Response:* Yes. Although financial statements filed with the Commission are normally required to be prepared in accordance with GAAP, the Commission's rules provide that other presentations may be acceptable in unusual situations. Since the operations of a royalty trust are limited to the distribution of income from the net profits interests contributed to it, the staff believes that the item of primary importance to the reader of the financial statements of the royalty trust is the amount of the cash distributions to the unitholders for the period reported. Should there be any change in the nature of the trust's operations due to revisions in the tax laws or other factors,

[1] If an obligation for expected asset retirement costs has not been accrued under FASB ASC Subtopic 410–20 for certain asset retirement costs required to be included in the full cost ceiling calculation under Rule 4–10(c)(4) of Regulation S–X, such costs should continue to be included in the full cost ceiling calculation.

[2] This approach is consistent with the guidance in FASB ASC Subtopic 410–20 on testing for impairment under FASB ASC Section 360–10–35, Property, Plant, and Equipment—Overall—Subsequent Measurement. Under that guidance, the asset tested should include capitalized asset retirement costs. The estimated cash flows related to the associated ARO that has been recognized in the financial statements are to be excluded from both the undiscounted cash flows used to test for recoverability and the discounted cash flows used to measure the asset's fair value.

[3] The reference to "cost of properties described in paragraph (ii) below" relates to the costs of investments in unproved properties and major development projects, as defined.

[4] Rule 4–10(c)(8) of Regulation S–X defines current price as the average price during the 12-month period prior to the ending date of the period covered by the report, determined as an unweighted

the staff's interpretation would be reexamined.

A note to the financial statements should disclose the method used in determining distributable income and should also describe how distributable income as reported differs from income determined on the basis of GAAP.

*F. Gross Revenue Method of Amortizing Capitalized Costs*

*Facts:* Rule 4–10(c)(3)(iii) of Regulation S–X states in part:

"Amortization shall be computed on the basis of physical units, with oil and gas converted to a common unit of measure on the basis of their approximate relative energy content, unless economic circumstances (related to the effects of regulated prices) indicate that use of units of revenue is a more appropriate basis of computing amortization. In the latter case, amortization shall be computed on the basis of current gross revenues (excluding royalty payments and net profits disbursements) from production in relation to future gross revenues based on current prices (including consideration of changes in existing prices provided only by contractual arrangements), from estimated production of proved oil and gas reserves." [4]

*Question:* May entities using the full cost method of accounting for oil and gas producing activities compute amortization based on the gross revenue method described in the above rule when substantial production is not subject to pricing regulation?

*Interpretive Response:* Yes. Under the existing rules for cost amortization adopted in ASR 258, the use of the gross revenue method of amortization was permitted in those circumstances where, because of the effect of existing pricing regulations, the use of the units of production method would result in an amortization provision that would be inconsistent with the current sales prices being received. While the effect of regulation on gas prices has lessened, factors other than price regulation (such as changes in typical contract lengths and methods of marketing natural gas) have caused oil and gas prices to be disproportionate to their relative energy content. The staff therefore believes that it may be more appropriate for registrants to compute amortization based on the gross revenue method whenever oil and gas sales prices are disproportionate to their relative energy content to the extent that the use of the units of production method would result in an improper matching of the costs of oil and gas production against the related revenue received. The method should be consistently applied and appropriately disclosed within the financial statements.

*G. Removed by SAB 113*

## TOPIC 13: REVENUE RECOGNITION

*A. Selected Revenue Recognition Issues*

1. *Revenue Recognition—General*

The accounting literature on revenue recognition includes both broad conceptual discussions as well as certain industry-specific guidance.[1] If a transaction is within the scope of specific authoritative literature that provides revenue recognition guidance, that literature should be applied. However, in the absence of authoritative literature addressing a specific arrangement or a specific industry, the staff will consider the existing authoritative accounting standards as well as the broad revenue recognition criteria specified in the FASB's conceptual framework that contain basic guidelines for revenue recognition.

Based on these guidelines, revenue should not be recognized until it is realized or realizable and earned.[2] Concepts Statement 5, *Recognition and Measurement in Financial Statements of Business Enterprises,* paragraph 83(b) states that "an entity's revenue-earning activities involve delivering or producing goods, rendering services, or other activities that constitute its ongoing major or central operations, and revenues are considered to have been earned when the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues" [footnote reference omitted]. Paragraph 84(a) continues "the two conditions (being realized or realizable and being earned) are usually met by the time product or merchandise is delivered or services are rendered to customers, and revenues from manufacturing and selling activities and gains and losses from sales of other assets are commonly recognized at time of sale (usually meaning delivery)" [footnote reference omitted]. In addition, paragraph 84(d) states that "If services are rendered or rights to use assets extend continuously over time (for example, interest or rent), reliable measures based on contractual prices established in advance are commonly available, and revenues may be recognized as earned as time passes."

The staff believes that revenue generally is realized or realizable and earned when all of the following criteria are met:

- Persuasive evidence of an arrangement exists,[3]
- Delivery has occurred or services have been rendered,[4]
- The seller's price to the buyer is fixed or determinable,[5] and
- Collectibility is reasonably assured.[6]

Some revenue arrangements contain multiple revenue-generating activities. The staff believes that the determination of the units of accounting within an arrangement should be made prior to the application of the guidance in this SAB Topic by reference to the applicable accounting literature.[7]

[4] Rule 4–10(c)(8) of Regulation S–X defines current price as the average price during the 12-month period prior to the ending date of the period covered by the report, determined as an unweighted arithmetic average of the first-day-of-the-month price for each month within such period, unless prices are defined by contractual arrangements, excluding escalations based upon future conditions.

[1] The February 1999 AICPA publication "Audit Issues in Revenue Recognition" provides an overview of the authoritative accounting literature and auditing procedures for revenue recognition and identifies indicators of improper revenue recognition.

[2] Concepts Statement 5, paragraphs 83–84; FASB ASC paragraph 605–10–25–1 (Revenue Recognition Topic); FASB ASC paragraph 605–10–25–3; FASB ASC paragraph 605–10–25–5. The citations provided herein are not intended to present the complete population of citations where a particular criterion is relevant. Rather, the citations are intended to provide the reader with additional reference material.

[3] Concepts Statement 2, paragraph 63 states "Representational faithfulness is correspondence or agreement between a measure or description and the phenomenon it purports to represent." The staff believes that evidence of an exchange arrangement must exist to determine if the accounting treatment represents faithfully the transaction. *See also* FASB ASC paragraph 985–605–25–3 (Software Topic). The use of the term "arrangement" in this SAB Topic is meant to identify the final understanding between the parties as to the specific nature and terms of the agreed-upon transaction.

[4] Concepts Statement 5, paragraph 84(a), (b), and (d). Revenue should not be recognized until the seller has substantially accomplished what it must do pursuant to the terms of the arrangement, which usually occurs upon delivery or performance of the services.

[5] Concepts Statement 5, paragraph 83(a); FASB ASC subparagraph 605–15–25–1(a); FASB ASC paragraph 985–605–25–3. The FASB ASC Master Glossary defines a "fixed fee" as a "fee required to be paid at a set amount that is not subject to refund or adjustment. A fixed fee includes amounts designated as minimum royalties." FASB ASC paragraphs 985–605–25–30 through 985–605–25–40 discuss how to apply the fixed or determinable fee criterion in software transactions. The staff believes that the guidance in FASB ASC paragraphs 985–605–25–30 through 985–605–25–31 and 985–605–25–36 through 985–605–25–40 is appropriate for other sales transactions where authoritative guidance does not otherwise exist. The staff notes that FASB ASC paragraphs 985–605–25–33 through 985–605–25–35 specifically consider software transactions, however, the staff believes that guidance should be considered in other sales transactions in which the risk of technological obsolescence is high.

[6] FASB ASC paragraph 605–10–25–3 through 605–10–25–5. *See also* Concepts Statement 5, paragraph 84(g) and FASB ASC paragraph 985–605–25–3.

[7] *See* FASB ASC paragraph 605–25–15–2 through 605–25–15–3 for additional discussion.

2. *Persuasive Evidence of an Arrangement*

*Question 1*

*Facts:* Company A has product available to ship to customers prior to the end of its current fiscal quarter. Customer Beta places an order for the product, and Company A delivers the product prior to the end of its current fiscal quarter. Company A's normal and customary business practice for this class of customer is to enter into a written sales agreement that requires the signatures of the authorized representatives of the Company and its customer to be binding. Company A prepares a written sales agreement, and its authorized representative signs the agreement before the end of the quarter. However, Customer Beta does not sign the agreement because Customer Beta is awaiting the requisite approval by its legal department. Customer Beta's purchasing department has orally agreed to the sale and stated that it is highly likely that the contract will be approved the first week of Company A's next fiscal quarter.

*Question:* May Company A recognize the revenue in the current fiscal quarter for the sale of the product to Customer Beta when (1) the product is delivered by the end of its current fiscal quarter and (2) the final written sales agreement is executed by Customer Beta's authorized representative within a few days after the end of the current fiscal quarter?

*Interpretive Response:* No. Generally the staff believes that, in view of Company A's business practice of requiring a written sales agreement for this class of customer, persuasive evidence of an arrangement would require a final agreement that has been executed by the properly authorized personnel of the customer. In the staff's view, Customer Beta's execution of the sales agreement after the end of the quarter causes the transaction to be considered a transaction of the subsequent period.[8] Further, if an arrangement is subject to subsequent approval (*e.g.,* by the management committee or board of directors) or execution of another agreement, revenue recognition would be inappropriate until that subsequent approval or agreement is complete.

Customary business practices and processes for documenting sales transactions vary among companies and industries. Business practices and processes may also vary within individual companies (*e.g.,* based on the class of customer, nature of product or service, or other distinguishable factors). If a company does not have a standard or customary business practice of relying on written contracts to document a sales arrangement, it usually would be expected to have other forms of written or electronic evidence to document the transaction. For example, a company may not use written contracts but instead may rely on binding purchase orders from third parties or on-line authorizations that include the terms of the sale and that are binding on the customer. In that situation, that documentation could represent persuasive evidence of an arrangement.

The staff is aware that sometimes a customer and seller enter into "side" agreements to a master contract that effectively amend the master contract. Registrants should ensure that appropriate policies, procedures, and internal controls exist and are properly documented so as to provide reasonable assurances that sales transactions, including those affected by side agreements, are properly accounted for in accordance with GAAP and to ensure compliance with Section 13 of the Securities Exchange Act of 1934 (*i.e.,* the Foreign Corrupt Practices Act). Side agreements could include cancellation, termination, or other provisions that affect revenue recognition. The existence of a subsequently executed side agreement may be an indicator that the original agreement was not final and revenue recognition was not appropriate.

*Question 2*

*Facts:* Company Z enters into an arrangement with Customer A to deliver Company Z's products to Customer A on a consignment basis. Pursuant to the terms of the arrangement, Customer A is a consignee, and title to the products does not pass from Company Z to Customer A until Customer A consumes the products in its operations. Company Z delivers product to Customer A under the terms of their arrangement.

*Question:* May Company Z recognize revenue upon delivery of its product to Customer A?

*Interpretive Response:* No. Products delivered to a consignee pursuant to a consignment arrangement are not sales and do not qualify for revenue recognition until a sale occurs. The staff believes that revenue recognition is not appropriate because the seller retains the risks and rewards of ownership of the product and title usually does not pass to the consignee.

Other situations may exist where title to delivered products passes to a buyer, but the substance of the transaction is that of a consignment or a financing. Such arrangements require a careful analysis of the facts and circumstances of the transaction, as well as an understanding of the rights and obligations of the parties, and the seller's customary business practices in such arrangements. The staff believes that the presence of one or more of the following characteristics in a transaction precludes revenue recognition even if title to the product has passed to the buyer:

1. The buyer has the right to return the product and:

(a) The buyer does not pay the seller at the time of sale, and the buyer is not obligated to pay the seller at a specified date or dates,[9]

(b) The buyer does not pay the seller at the time of sale but rather is obligated to pay at a specified date or dates, and the buyer's obligation to pay is contractually or implicitly excused until the buyer resells the product or subsequently consumes or uses the product,[10]

(c) The buyer's obligation to the seller would be changed (*e.g.,* the seller would forgive the obligation or grant a refund) in the event of theft or physical destruction or damage of the product,[11]

(d) The buyer acquiring the product for resale does not have economic substance apart from that provided by the seller,[12] or

(e) The seller has significant obligations for future performance to directly bring about resale of the product by the buyer.[13]

2. The seller is required to repurchase the product (or a substantially identical product or processed goods of which the product is a component) at specified prices that are not subject to change except for fluctuations due to finance and holding costs,[14] and the amounts to be paid by the seller will be adjusted, as necessary, to cover substantially all

[8] AU Section 560.05.

[9] FASB ASC subparagraph 605–15–25–1(b).

[10] FASB ASC subparagraph 605–15–25–1(b). The arrangement may not specify that payment is contingent upon subsequent resale or consumption. However, if the seller has an established business practice permitting customers to defer payment beyond the specified due date(s) until the products are resold or consumed, then the staff believes that the seller's right to receive cash representing the sales price is contingent.

[11] FASB ASC subparagraph 605–15–25–1(c).

[12] FASB ASC subparagraph 605–15–25–1(d).

[13] FASB ASC subparagraph 605–15–25–1(e).

[14] FASB ASC subparagraph 470–40–15–2(a) (Debt Topic). This paragraph provides examples of circumstances that meet this requirement. As discussed further therein, this condition is present if (a) a resale price guarantee exists, (b) the seller has an option to purchase the product, the economic effect of which compels the seller to purchase the product, or (c) the buyer has an option whereby it can require the seller to purchase the product.

fluctuations in costs incurred by the buyer in purchasing and holding the product (including interest).[15] The staff believes that indicators of the latter condition include:

(a) The seller provides interest-free or significantly below market financing to the buyer beyond the seller's customary sales terms and until the products are resold,

(b) The seller pays interest costs on behalf of the buyer under a third-party financing arrangement, or

(c) The seller has a practice of refunding (or intends to refund) a portion of the original sales price representative of interest expense for the period from when the buyer paid the seller until the buyer resells the product.

3. The transaction possesses the characteristics set forth in FASB ASC paragraphs 840–10–55–12 through 840–10–55–21 (Leases Topic) and does not qualify for sales-type lease accounting.

4. The product is delivered for demonstration purposes.[16]

This list is not meant to be a checklist of all characteristics of a consignment or financing arrangement, and other characteristics may exist. Accordingly, the staff believes that judgment is necessary in assessing whether the substance of a transaction is a consignment, a financing, or other arrangement for which revenue recognition is not appropriate. If title to the goods has passed but the substance of the arrangement is not a sale, the consigned inventory should be reported separately from other inventory in the consignor's financial statements as "inventory consigned to others" or another appropriate caption.

*Question 3*

*Facts:* The laws of some countries do not provide for a seller's retention of a security interest in goods in the same manner as established in the U.S. Uniform Commercial Code (UCC). In these countries, it is common for a seller to retain a form of title to goods delivered to customers until the customer makes payment so that the seller can recover the goods in the event of customer default on payment.

*Question:* Is it acceptable to recognize revenue in these transactions before payment is made and title has transferred?

*Interpretive Response:* Presuming all other revenue recognition criteria have been met, the staff would not object to revenue recognition at delivery if the only rights that a seller retains with the title are those enabling recovery of the goods in the event of customer default on payment. This limited form of ownership may exist in some foreign jurisdictions where, despite technically holding title, the seller is not entitled to direct the disposition of the goods, cannot rescind the transaction, cannot prohibit its customer from moving, selling, or otherwise using the goods in the ordinary course of business, and has no other rights that rest with a titleholder of property that is subject to a lien under the U.S. UCC. On the other hand, if retaining title results in the seller retaining rights normally held by an owner of goods, the situation is not sufficiently different from a delivery of goods on consignment. In this particular case, revenue should not be recognized until payment is received. Registrants and their auditors may wish to consult legal counsel knowledgeable of the local law and customs outside the U.S. to determine the seller's rights.

3. Delivery and Performance

a. Bill and Hold Arrangements

*Facts:* Company A receives purchase orders for products it manufactures. At the end of its fiscal quarters, customers may not yet be ready to take delivery of the products for various reasons. These reasons may include, but are not limited to, a lack of available space for inventory, having more than sufficient inventory in their distribution channel, or delays in customers' production schedules.

*Question:* May Company A recognize revenue for the sale of its products once it has completed manufacturing if it segregates the inventory of the products in its own warehouse from its own products?

May Company A recognize revenue for the sale if it ships the products to a third-party warehouse but (1) Company A retains title to the product and (2) payment by the customer is dependent upon ultimate delivery to a customer-specified site?

*Interpretative Response:* Generally, no. The staff believes that delivery generally is not considered to have occurred unless the customer has taken title and assumed the risks and rewards of ownership of the products specified in the customer's purchase order or sales agreement. Typically this occurs when a product is delivered to the customer's delivery site (if the terms of the sale are "FOB destination") or when a product is shipped to the customer (if the terms are "FOB shipping point").

The Commission has set forth criteria to be met in order to recognize revenue when delivery has not occurred.[17] These include:

1. The risks of ownership must have passed to the buyer;

2. The customer must have made a fixed commitment to purchase the goods, preferably in written documentation;

3. The buyer, not the seller, must request that the transaction be on a bill and hold basis.[18] The buyer must have a substantial business purpose for ordering the goods on a bill and hold basis;

4. There must be a fixed schedule for delivery of the goods. The date for delivery must be reasonable and must be consistent with the buyer's business purpose (*e.g.,* storage periods are customary in the industry);

5. The seller must not have retained any specific performance obligations such that the earning process is not complete;

6. The ordered goods must have been segregated from the seller's inventory and not be subject to being used to fill other orders; and

7. The equipment [product] must be complete and ready for shipment.

The above listed conditions are the important conceptual criteria that should be used in evaluating any purported bill and hold sale. This listing is not intended as a checklist. In some circumstances, a transaction may meet all factors listed above but not meet the requirements for revenue recognition. The Commission also has noted that in applying the above criteria to a purported bill and hold sale, the individuals responsible for the preparation and filing of financial statements also should consider the following factors:[19]

1. The date by which the seller expects payment, and whether the seller has modified its normal billing and credit terms for this buyer;[20]

[15] FASB ASC subparagraph 470–40–15–2(b).

[16] *See* FASB ASC paragraphs 985–605–25–28 through 985–605–25–29.

[17] *See* In the Matter of Stewart Parness, AAER 108 (August 5, 1986); SEC v. Bollinger Industries, Inc., *et al.,* LR 15093 (September 30, 1996); In the Matter of Laser Photonics, Inc., AAER 971 (September 30, 1997); In the Matter of Cypress Bioscience Inc., AAER 817 (September 19, 1996). *See also* Concepts Statement 5, paragraph 84(a) and FASB ASC paragraph 985–605–25–25.

[18] Such requests typically should be set forth in writing by the buyer.

[19] *See* Note 17, *supra.*

[20] Such individuals should consider whether FASB ASC Subtopic 835–30, Interest—Imputation of Interest, pertaining to the need for discounting the related receivable, is applicable. FASB ASC subparagraph 835–30–15–3(a) indicates that the requirements of that Subtopic to record receivables at a discounted value are not intended to apply to "receivables and payables arising from transactions with customers or suppliers in the *normal course of business which are due in customary trade terms* not exceeding approximately one year" (emphasis added).

2. The seller's past experiences with and pattern of bill and hold transactions;

3. Whether the buyer has the expected risk of loss in the event of a decline in the market value of goods;

4. Whether the seller's custodial risks are insurable and insured;

5. Whether extended procedures are necessary in order to assure that there are no exceptions to the buyer's commitment to accept and pay for the goods sold (*i.e.,* that the business reasons for the bill and hold have not introduced a contingency to the buyer's commitment).

Delivery generally is not considered to have occurred unless the product has been delivered to the customer's place of business or another site specified by the customer. If the customer specifies an intermediate site but a substantial portion of the sales price is not payable until delivery is made to a final site, then revenue should not be recognized until final delivery has occurred.[21]

b. Customer Acceptance

After delivery of a product or performance of a service, if uncertainty exists about customer acceptance, revenue should not be recognized until acceptance occurs.[22] Customer acceptance provisions may be included in a contract, among other reasons, to enforce a customer's rights to (1) test the delivered product, (2) require the seller to perform additional services subsequent to delivery of an initial product or performance of an initial service (*e.g.,* a seller is required to install or activate delivered equipment), or (3) identify other work necessary to be done before accepting the product. The staff presumes that such contractual customer acceptance provisions are substantive, bargained-for terms of an arrangement. Accordingly, when such contractual customer acceptance provisions exist, the staff generally believes that the seller should not recognize revenue until customer acceptance occurs or the acceptance provisions lapse.

*Question 1*

*Question:* Do circumstances exist in which formal customer sign-off (that a contractual customer acceptance provision is met) is unnecessary to meet the requirements to recognize revenue?

*Interpretive Response:* Yes. Formal customer sign-off is not always necessary to recognize revenue provided that the seller objectively demonstrates that the criteria specified in the acceptance provisions are satisfied. Customer acceptance provisions generally allow the customer to cancel the arrangement when a seller delivers a product that the customer has not yet agreed to purchase or delivers a product that does not meet the specifications of the customer's order. In those cases, revenue should not be recognized because a sale has not occurred. In applying this concept, the staff observes that customer acceptance provisions normally take one of four general forms. Those forms, and how the staff generally assesses whether customer acceptance provisions should result in revenue deferral, are described below:

(a) *Acceptance provisions in arrangements that purport to be for trial or evaluation purposes.*[23] In these arrangements, the seller delivers a product to a customer, and the customer agrees to receive the product, solely to give the customer the ability to evaluate the delivered product prior to acceptance. The customer does not agree to purchase the delivered product until it accepts the product. In some cases, the acceptance provisions lapse by the passage of time without the customer rejecting the delivered product, and in other cases affirmative acceptance from the customer is necessary to trigger a sales transaction. Frequently, the title to the product does not transfer and payment terms are not established prior to customer acceptance. These arrangements are, in substance, consignment arrangements until the customer accepts the product as set forth in the contract with the seller. Accordingly, in arrangements where products are delivered for trial or evaluation purposes, revenue should not be recognized until the earlier of when acceptance occurs or the acceptance provisions lapse.

In contrast, other arrangements do not purport to be for trial or evaluation purposes. In these instances, the seller delivers a specified product pursuant to a customer's order, establishes payment terms, and transfers title to the delivered product to the customer. However, customer acceptance provisions may be included in the arrangement to give the purchaser the ability to ensure the delivered product meets the criteria set forth in its order. The staff evaluates these provisions as follows:

(b) *Acceptance provisions that grant a right of return or exchange on the basis of subjective matters.* An example of such a provision is one that allows the customer to return a product if the customer is dissatisfied with the product.[24] The staff believes these provisions are not different from general rights of return and should be accounted for in accordance with FASB ASC Subtopic 605–15, Revenue Recognition—Products. This Subtopic requires that the amount of future returns must be reasonably estimable in order for revenue to be recognized prior to the expiration of return rights.[25] That estimate may not be made in the absence of a large volume of homogeneous transactions or if customer acceptance is likely to depend on conditions for which sufficient historical experience is absent.[26] Satisfaction of these requirements may vary from product-to-product, location-to-location, customer-to-customer, and vendor-to-vendor.

(c) *Acceptance provisions based on seller-specified objective criteria.* An example of such a provision is one that gives the customer a right of return or replacement if the delivered product is defective or fails to meet the vendor's published specifications for the product.[27] Such rights are generally identical to those granted to all others within the same class of customer and for which satisfaction can be generally assured without consideration of conditions specific to the customer. Provided the seller has previously demonstrated that the product meets the specified criteria, the staff believes that these provisions are not different from general or specific warranties and should be accounted for as warranties in accordance with FASB ASC Subtopic 450–20, Contingencies—Loss Contingencies. In this case, the cost of potentially defective goods must be reliably estimable based on a demonstrated history of substantially similar transactions.[28] However, if the seller has not previously demonstrated that the delivered product meets the seller's specifications, the staff believes that revenue should be deferred until the specifications have been objectively achieved.

[21] FASB ASC paragraph 985–605–25–25.

[22] FASB ASC paragraph 985–605–25–21. Also, Concepts Statement 5, paragraph 83(b) states "revenues are considered to have been earned when the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues." If an arrangement expressly requires customer acceptance, the staff generally believes that customer acceptance should occur before the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues, especially when the seller is obligated to perform additional steps.

[23] *See,* for example, FASB ASC paragraphs 985–605–25–28 through 985–605–25–29.

[24] FASB ASC paragraph 605–15–05–3.

[25] FASB ASC subparagraph 605–15–25–1(f).

[26] FASB ASC subparagraphs 605–15–25–3(c) and 605–15–25–3(d).

[27] FASB ASC paragraph 460–10–25–5 (Guarantees Topic) and FASB ASC subparagraph 605–15–15–3(c).

[28] FASB ASC paragraph 460–10–25–6.

(d) *Acceptance provisions based on customer-specified objective criteria.* These provisions are referred to in this document as "customer-specific acceptance provisions" against which substantial completion and contract fulfillment must be evaluated. While formal customer sign-off provides the best evidence that these acceptance criteria have been met, revenue recognition also would be appropriate, presuming all other revenue recognition criteria have been met, if the seller reliably demonstrates that the delivered products or services meet all of the specified criteria prior to customer acceptance. For example, if a seller reliably demonstrates that a delivered product meets the customer-specified objective criteria set forth in the arrangement, the delivery criterion would generally be satisfied when title and the risks and rewards of ownership transfers unless product performance may reasonably be different under the customer's testing conditions specified by the acceptance provisions. Further, the seller should consider whether it would be successful in enforcing a claim for payment even in the absence of formal sign-off. Whether the vendor has fulfilled the terms of the contract before customer acceptance is a matter of contract law, and depending on the facts and circumstances, an opinion of counsel may be necessary to reach a conclusion.

*Question 2*

*Facts:* Consider an arrangement that calls for the transfer of title to equipment upon delivery to a customer's site. However, customer-specific acceptance provisions permit the customer to return the equipment unless the equipment satisfies certain performance tests. The arrangement calls for the vendor to perform the installation. Assume the equipment and the installation are separate units of accounting under FASB ASC Subtopic 605–25, Revenue Recognition—Multiple-Element Arrangements.[29]

*Question:* Must revenue allocated to the equipment always be deferred until installation and on-site testing are successfully completed?

*Interpretive Response:* No. The staff would not object to revenue recognition for the equipment upon delivery (presuming all other revenue recognition criteria have been met for the equipment) if the seller demonstrates that, at the time of delivery, the equipment already meets all of the criteria and specifications in the customer-specific acceptance provisions. This may be demonstrated if conditions under which the customer intends to operate the equipment are replicated in pre-shipment testing, unless the performance of the equipment, once installed and operated at the customer's facility, may reasonably be different from that tested prior to shipment.

Determining whether the delivered equipment meets all of a product's criteria and specifications is a matter of judgment that must be evaluated in light of the facts and circumstances of a particular transaction. Consultation with knowledgeable project managers or engineers may be necessary in such circumstances.

For example, if the customer acceptance provisions were based on meeting certain size and weight characteristics, it should be possible to determine whether those criteria have been met before shipment. Historical experience with the same specifications and functionality of a particular machine that demonstrates that the equipment meets the customer's specifications also may provide sufficient evidence that the currently shipped equipment satisfies the customer-specific acceptance provisions.

If an arrangement includes customer acceptance criteria or specifications that cannot be effectively tested before delivery or installation at the customer's site, the staff believes that revenue recognition should be deferred until it can be demonstrated that the criteria are met. This situation usually will exist when equipment performance can vary based on how the equipment works in combination with the customer's other equipment, software, or environmental conditions. In these situations, testing to determine whether the criteria are met cannot be reasonably performed until the products are installed or integrated at the customer's facility.

Although the following questions provide several examples illustrating how the staff evaluates customer acceptance, the determination of when customer-specific acceptance provisions of an arrangement are met in the absence of the customer's formal notification of acceptance depends on the weight of the evidence in the particular circumstances. Different conclusions could be reached in similar circumstances that vary only with respect to a single variable, such as complexity of the equipment, nature of the interface with the customer's environment, extent of the seller's experience with the same type of transactions, or a particular clause in the agreement. The staff believes management and auditors are uniquely positioned to evaluate the facts and arrive at a reasoned conclusion. The staff will not object to a determination that is well reasoned on the basis of this guidance.

*Question 3*

*Facts:* Company E is an equipment manufacturer whose main product is generally sold in a standard model. The contracts for sale of that model provide for customer acceptance to occur after the equipment is received and tested by the customer. The acceptance provisions state that if the equipment does not perform to Company E's published specifications, the customer may return the equipment for a full refund or a replacement unit, or may require Company E to repair the equipment so that it performs up to published specifications. Customer acceptance is indicated by either a formal sign-off by the customer or by the passage of 90 days without a claim under the acceptance provisions. Title to the equipment passes upon delivery to the customer. Company E does not perform any installation or other services on the equipment it sells and tests each piece of equipment against its specifications before shipment. Payment is due under Company E's normal payment terms for that product 30 days after customer acceptance.

Company E receives an order from a new customer for a standard model of its main product. Based on the customer's intended use of the product, location and other factors, there is no reason that the equipment would operate differently in the customer's environment than it does in Company E's facility.

*Question:* Assuming all other revenue recognition criteria are met (other than the issue raised with respect to the acceptance provision), when should Company E recognize revenue from the sale of this piece of equipment?

*Interpretive Response:* While the staff presumes that customer acceptance provisions are substantive provisions that generally result in revenue deferral, that presumption can be overcome as discussed above. Although the contract includes a customer acceptance clause, acceptance is based on meeting Company E's published specifications for a standard model. Company E demonstrates that the equipment shipped meets the specifications before shipment, and the equipment is expected to operate the same in the customer's environment as it does in

[29] This fact is provided as an assumption to facilitate an analysis of revenue recognition in this fact pattern. No interpretation of FASB ASC Subtopic 605–25 is intended.

Company E's. In this situation, Company E should evaluate the customer acceptance provision as a warranty under FASB ASC Subtopic 450–20. If Company E can reasonably and reliably estimate the amount of warranty obligations, the staff believes that it should recognize revenue upon delivery of the equipment, with an appropriate liability for probable warranty obligations.

*Question 4*

*Facts:* Assume the same facts about Company E's equipment, contract terms and customary practices as in Question 3 above. Company E enters into an arrangement with a new customer to deliver a version of its standard product modified as necessary to fit into a space of specific dimensions while still meeting all of the published vendor specifications with regard to performance. In addition to the customer acceptance provisions relating to the standard performance specifications, the customer may reject the equipment if it does not conform to the specified dimensions. Company E creates a testing chamber of the exact same dimensions as specified by the customer and makes simple design changes to the product so that it fits into the testing chamber. The equipment still meets all of the standard performance specifications.

*Question:* Assuming all other revenue recognition criteria are met (other than the issue raised with respect to the acceptance provision), when should Company E recognize revenue from the sale of this piece of equipment?

*Interpretive Response:* Although the contract includes a customer acceptance clause that is based, in part, on a customer specific criterion, Company E demonstrates that the equipment shipped meets that objective criterion, as well as the published specifications, before shipment. The staff believes that the customer acceptance provisions related to the standard performance specifications should be evaluated as a warranty under FASB ASC Subtopic 450–20. If Company E can reasonably and reliably estimate the amount of warranty obligations, it should recognize revenue upon delivery of the equipment, with an appropriate liability for probable warranty obligations.

*Question 5*

*Facts:* Assume the same facts about Company E's equipment, contract terms and customary practices as in Question 3 above. Company E enters into an arrangement with a new customer to deliver a version of its standard product modified as necessary to be integrated into the customer's new assembly line while still meeting all of the standard published vendor specifications with regard to performance. The customer may reject the equipment if it fails to meet the standard published performance specifications or cannot be satisfactorily integrated into the new line. Company E has never modified its equipment to work on an integrated basis in the type of assembly line the customer has proposed. In response to the request, Company E designs a version of its standard equipment that is modified as believed necessary to operate in the new assembly line. The modified equipment still meets all of the standard published performance specifications, and Company E believes the equipment will meet the requested specifications when integrated into the new assembly line. However, Company E is unable to replicate the new assembly line conditions in its testing.

*Question:* Assuming all other revenue recognition criteria are met (other than the issue raised with respect to the acceptance provision), when should Company E recognize revenue from the sale of this piece of equipment?

*Interpretive Response:* This contract includes a customer acceptance clause that is based, in part, on a customer specific criterion, and Company E cannot demonstrate that the equipment shipped meets that criterion before shipment. Accordingly, the staff believes that the contractual customer acceptance provision has not been met at shipment. Therefore, the staff believes that Company E should wait until the product is successfully integrated at its customer's location and meets the customer-specific criteria before recognizing revenue. While this is best evidenced by formal customer acceptance, other objective evidence that the equipment has met the customer-specific criteria may also exist (*e.g.,* confirmation from the customer that the specifications were met).

c. Inconsequential or Perfunctory Performance Obligations

*Question 1*

*Question:* Does the failure to complete all activities related to a unit of accounting preclude recognition of revenue for that unit of accounting?

*Interpretive Response:* No. Assuming all other recognition criteria are met, revenue for the unit of accounting may be recognized in its entirety if the seller's remaining obligation is inconsequential or perfunctory.

A seller should substantially complete or fulfill the terms specified in the arrangement related to the unit of accounting at issue in order for delivery or performance to have occurred.[30] When applying the substantially complete notion, the staff believes that only inconsequential or perfunctory actions may remain incomplete such that the failure to complete the actions would not result in the customer receiving a refund or rejecting the delivered products or services performed to date. In addition, the seller should have a demonstrated history of completing the remaining tasks in a timely manner and reliably estimating the remaining costs. If revenue is recognized upon substantial completion of the terms specified in the arrangement related to the unit of accounting at issue, all related costs of performance or delivery should be accrued.

Question 2

*Question:* What factors should be considered in the evaluation of whether a remaining obligation related to a unit of accounting is inconsequential or perfunctory?

*Interpretive Response:* A remaining performance obligation is not inconsequential or perfunctory if it is essential to the functionality of the delivered products or services. In addition, remaining activities are not inconsequential or perfunctory if failure to complete the activities would result in the customer receiving a full or partial refund or rejecting (or a right to a refund or to reject) the products delivered or services performed to date. The terms of the sales contract regarding both the right to a full or partial refund and the right of return or rejection should be considered when evaluating whether a portion of the purchase price would be refundable. If the company has a historical pattern of granting such rights, that historical pattern should also be considered even if the current contract expressly precludes such rights. Further, other factors should be considered in assessing whether remaining obligations are inconsequential or perfunctory. For example, the staff also considers the following factors, which are not all-inclusive, to be indicators that a remaining performance obligation is substantive rather than inconsequential or perfunctory:

- The seller does not have a demonstrated history of completing the remaining tasks in a timely manner and reliably estimating their costs.

[30] Concepts Statement 5, paragraph 83(b) states "revenues are considered to have been earned when the entity has substantially accomplished what it must do to be entitled the benefits represented by the revenues."

• The cost or time to perform the remaining obligations for similar contracts historically has varied significantly from one instance to another.

• The skills or equipment required to complete the remaining activity are specialized or are not readily available in the marketplace.

• The cost of completing the obligation, or the fair value of that obligation, is more than insignificant in relation to such items as the contract fee, gross profit, and operating income allocable to the unit of accounting.

• The period before the remaining obligation will be extinguished is lengthy. Registrants should consider whether reasonably possible variations in the period to complete performance affect the certainty that the remaining obligations will be completed successfully and on budget.

• The timing of payment of a portion of the sales price is coincident with completing performance of the remaining activity.

Registrants' determinations of whether remaining obligations are inconsequential or perfunctory should be consistently applied.

*Question 3*

*Facts:* Consider a unit of accounting that includes both equipment and installation because the two deliverables do not meet the separation criteria under FASB ASC Subtopic 605–25. This may be because the equipment does not have value to the customer on a standalone basis, there is no objective and reliable evidence of fair value for the installation or there is a general right of return when the installation is not considered probable and in control of the vendor.

*Question:* In this situation, must all revenue be deferred until installation is performed?

*Interpretive Response:* Yes, if installation is essential to the functionality of the equipment.[31] Examples of indicators that installation is essential to the functionality of equipment include:

• The installation involves significant changes to the features or capabilities of the equipment or building complex interfaces or connections;

• The installation services are unavailable from other vendors.[32]

Conversely, examples of indicators that installation is not essential to the functionality of the equipment include:

• The equipment is a standard product;

• Installation does not significantly alter the equipment's capabilities;

• Other companies are available to perform the installation.[33]

If it is determined that the undelivered service is not essential to the functionality of the delivered product but a portion of the contract fee is not payable until the undelivered service is delivered, the staff would not consider that obligation to be inconsequential or perfunctory. Generally, the portion of the contract price that is withheld or refundable should be deferred until the outstanding service is delivered because that portion would not be realized or realizable.[34]

d. License Fee Revenue

*Facts:* Assume that intellectual property is physically delivered and payment is received on December 20, upon the registrant's consummation of an agreement granting its customer a license to use the intellectual property for a term beginning on the following January 1.

*Question:* Should the license fee be recognized in the period ending December 31?

*Interpretive Response:* No. In licensing and similar arrangements (*e.g.,* licenses of motion pictures, software, technology, and other intangibles), the staff believes that delivery does not occur for revenue recognition purposes until the license term begins.[35] Accordingly, if a licensed product or technology is physically delivered to the customer, but the license term has not yet begun, revenue should not be recognized prior to inception of the license term. Upon inception of the license term, revenue should be recognized in a manner consistent with the nature of the transaction and the earnings process.

e. Layaway Sales Arrangements

*Facts:* Company R is a retailer that offers "layaway" sales to its customers. Company R retains the merchandise, sets it aside in its inventory, and collects a cash deposit from the customer. Although Company R may set a time period within which the customer must finalize the purchase, Company R does not require the customer to enter into an installment note or other fixed payment commitment or agreement when the initial deposit is received. The merchandise generally is not released to the customer until the customer pays the full purchase price. In the event that the customer fails to pay the remaining purchase price, the customer forfeits its cash deposit. In the event the merchandise is lost, damaged, or destroyed, Company R either must refund the cash deposit to the customer or provide replacement merchandise.

*Question:* In the staff's view, when may Company R recognize revenue for merchandise sold under its layaway program?

*Interpretive Response:* Provided that the other criteria for revenue recognition are met, the staff believes that Company R should recognize revenue from sales made under its layaway program upon delivery of the merchandise to the customer. Until then, the amount of cash received should be recognized as a liability entitled such as "deposits received from customers for layaway sales" or a similarly descriptive caption. Because Company R retains the risks of ownership of the merchandise, receives only a deposit from the customer, and does not have an enforceable right to the remainder of the purchase price, the staff would object to Company R recognizing any revenue upon receipt of the cash deposit. This is consistent with item two (2) in the Commission's criteria for bill-and-hold transactions which states "the customer must have made a fixed commitment to purchase the goods."

f. Nonrefundable Up-front Fees

*Question 1*

*Facts:* Registrants may negotiate arrangements pursuant to which they may receive nonrefundable fees upon entering into arrangements or on certain specified dates. The fees may ostensibly be received for conveyance of a license or other intangible right or for delivery of particular products or services. Various business factors may influence how the registrant and customer structure the payment terms. For example, in exchange for a greater up-front fee for an intangible right, the registrant may be willing to receive lower unit prices for related products to be delivered in the future. In some circumstances, the right, product, or service conveyed in conjunction with the nonrefundable fee has no utility to the purchaser separate and independent of the registrant's performance of the other elements of the arrangement. Therefore, in the absence of the registrant's continuing involvement under the arrangement, the customer would not have paid the fee. Examples of this type of arrangement include the following:

[31] FASB ASC paragraph 985–605–25–12.

[32] *See* FASB ASC paragraphs 985–605–25–81 through 985–605–25–85 for analogous guidance.

[33] *Ibid.*

[34] Concepts Statement 5, paragraph 83(a) and FASB ASC subparagraph 605–15–25–1(b).

[35] FASB ASC paragraph 926–605–25–1 (Entertainment—Films Topic).

• A registrant sells a lifetime membership in a health club. After paying a nonrefundable "initiation fee," the customer is permitted to use the health club indefinitely, so long as the customer also pays an additional usage fee each month. The monthly usage fees collected from all customers are adequate to cover the operating costs of the health club.

• A registrant in the biotechnology industry agrees to provide research and development activities for a customer for a specified term. The customer needs to use certain technology owned by the registrant for use in the research and development activities. The technology is not sold or licensed separately without the research and development activities. Under the terms of the arrangement, the customer is required to pay a nonrefundable "technology access fee" in addition to periodic payments for research and development activities over the term of the contract.

• A registrant requires a customer to pay a nonrefundable "activation fee" when entering into an arrangement to provide telecommunications services. The terms of the arrangement require the customer to pay a monthly usage fee that is adequate to recover the registrant's operating costs. The costs incurred to activate the telecommunications service are nominal.

• A registrant charges users a fee for non-exclusive access to its Web site that contains proprietary databases. The fee allows access to the Web site for a one-year period. After the customer is provided with an identification number and trained in the use of the database, there are no incremental costs that will be incurred in serving this customer.

• A registrant charges a fee to users for advertising a product for sale or auction on certain pages of its Web site. The company agrees to maintain the listing for a period of time. The cost of maintaining the advertisement on the Web site for the stated period is minimal.

• A registrant charges a fee for hosting another company's Web site for one year. The arrangement does not involve exclusive use of any of the hosting company's servers or other equipment. Almost all of the projected costs to be incurred will be incurred in the initial loading of information on the host company's Internet server and setting up appropriate links and network connections.

*Question:* Assuming these arrangements qualify as single units of accounting under FASB ASC Subtopic 605–25,[36] when should the revenue relating to nonrefundable, up-front fees in these types of arrangements be recognized?

*Interpretive Response:* The staff believes that registrants should consider the specific facts and circumstances to determine the appropriate accounting for nonrefundable, up-front fees. Unless the up-front fee is in exchange for products delivered or services performed that represent the culmination of a separate earnings process,[37] the deferral of revenue is appropriate.

In the situations described above, the staff does not view the activities completed by the registrants (*i.e.,* selling the membership, signing the contract, enrolling the customer, activating telecommunications services or providing initial set-up services) as discrete earnings events.[38] The terms, conditions, and amounts of these fees typically are negotiated in conjunction with the pricing of all the elements of the arrangement, and the customer would ascribe a significantly lower, and perhaps no, value to elements ostensibly associated with the up-front fee in the absence of the registrant's performance of other contract elements. The fact that the registrants do not sell the initial rights, products, or services separately (*i.e.,* without the registrants' continuing involvement) supports the staff's view. The staff believes that the customers are purchasing the on-going rights, products, or services being provided through the registrants' continuing involvement. Further, the staff believes that the earnings process is completed by performing under the terms of the arrangements, not simply by originating a revenue-generating arrangement.

While the incurrence of nominal up-front costs helps make it clear that there is not a separate earnings event in the telecommunications example above, incurrence of substantive costs, such as in the Web hosting example above, does not necessarily indicate that there is a separate earnings event. Whether there is a separate earnings event should be evaluated on a case-by-case basis. Some have questioned whether revenue may be recognized in these transactions to the extent of the incremental direct costs incurred in the activation. Because there is no separable deliverable or earnings event, the staff would generally object to that approach, except where it is provided for in the authoritative literature (*e.g.,* FASB ASC Subtopic 922–605, Entertainment—Cable Television—Revenue Recognition).

Supply or service transactions may involve the charge of a nonrefundable initial fee with subsequent periodic payments for future products or services. The initial fees may, in substance, be wholly or partly an advance payment for future products or services. In the examples above, the on-going rights or services being provided or products being delivered are essential to the customers receiving the expected benefit of the up-front payment. Therefore, the up-front fee and the continuing performance obligation related to the services to be provided or products to be delivered are assessed as an integrated package. In such circumstances, the staff believes that up-front fees, even if nonrefundable, are earned as the products and/or services are delivered and/or performed over the term of the arrangement or the expected period of performance[39] and generally should be deferred and recognized systematically over the periods that the fees are earned.[40]

Some propose that revenue should be recognized when the initial set-up is completed in cases where the on-going obligation involves minimal or no cost or effort and should, therefore, be considered perfunctory or inconsequential. However, the staff believes that the substance of each of these transactions indicates that the purchaser is paying for a service that is delivered over time. Therefore, revenue recognition should occur over time, reflecting the provision of service.[41]

*Question 2*

*Facts:* Company A provides its customers with activity tracking or

[36] The staff believes that the vendor activities associated with the up-front fee, even if considered a deliverable to be evaluated under FASB ASC Subtopic 605–25, will rarely provide value to the customer on a standalone basis.

[37] *See* Concepts Statement 5, footnote 51, for a description of the "earning process."

[38] In a similar situation, lenders may collect nonrefundable loan origination fees in connection with lending activities. The FASB concluded in FASB ASC Subtopic 310–20, Receivables—Nonrefundable Fees and Other Costs, that loan origination is not a separate revenue-producing activity of a lender, and therefore, those nonrefundable fees collected at the outset of the loan arrangement are not recognized as revenue upon receipt but are deferred and recognized over the life of the loan (FASB ASC paragraph 310–20–35–2).

[39] The revenue recognition period should extend beyond the initial contractual period if the relationship with the customer is expected to extend beyond the initial term and the customer continues to benefit from the payment of the up-front fee (*e.g.,* if subsequent renewals are priced at a bargain to the initial up-front fee).

[40] A systematic method would be on a straight-line basis, unless evidence suggests that revenue is earned or obligations are fulfilled in a different pattern, in which case that pattern should be followed.

[41] Concepts Statement 5, paragraph 84(d).

similar services (*e.g.,* tracking of property tax payment activity, sending delinquency letters on overdue accounts, *etc.*) for a ten-year period. Company A requires customers to prepay for all the services for the term specified in the arrangement. The on-going services to be provided are generally automated after the initial customer set-up. At the outset of the arrangement, Company A performs set-up procedures to facilitate delivery of its on-going services to the customers. Such procedures consist primarily of establishing the necessary records and files in Company A's pre-existing computer systems in order to provide the services. Once the initial customer set-up activities are complete, Company A provides its services in accordance with the arrangement. Company A is not required to refund any portion of the fee if the customer terminates the services or does not utilize all of the services to which it is entitled. However, Company A is required to provide a refund if Company A terminates the arrangement early. Assume Company A's activities are not within the scope of FASB ASC Subtopic 310–20, Receivables—Nonrefundable Fees and Other Costs, and that this arrangement qualifies as a single unit of accounting under FASB ASC Subtopic 605–25.[42]

*Question:* When should Company A recognize the service revenue?

*Interpretive Response:* The staff believes that, provided all other revenue recognition criteria are met, service revenue should be recognized on a straight-line basis, unless evidence suggests that the revenue is earned or obligations are fulfilled in a different pattern, over the contractual term of the arrangement or the expected period during which those specified services will be performed,[43] whichever is longer. In this case, the customer contracted for the on-going activity tracking service, not for the set-up activities. The staff notes that the customer could not, and would not, separately purchase the set-up services without the on-going services. The services specified in the arrangement are performed continuously over the contractual term of the arrangement (and any subsequent renewals). Therefore, the staff believes that Company A should recognize revenue on a straight-line basis, unless evidence suggests that the revenue is earned or obligations are fulfilled in a different pattern, over the contractual term of the arrangement or the expected period during which those specified services will be performed, whichever is longer.

In this situation, the staff would object to Company A recognizing revenue in proportion to the costs incurred because the set-up costs incurred bear no direct relationship to the performance of services specified in the arrangement. The staff also believes that it is inappropriate to recognize the entire amount of the prepayment as revenue at the outset of the arrangement by accruing the remaining costs because the services required by the contract have not been performed.

*Question 3*

*Facts:* Assume the same facts as in Question 2 above.

*Question:* Are the initial customer set-up costs incurred by Company A within the scope of FASB ASC Subtopic 720–15, Other Expenses—Start-Up Costs?

*Interpretive Response:* FASB ASC paragraph 720–15–15–4 states that the guidance does not address the financial reporting of costs incurred related to "ongoing customer acquisition costs, such as policy acquisition costs" addressed in FASB ASC Subtopic 944–30, Financial Services—Insurance—Acquisition Costs, and "loan origination costs" addressed in FASB ASC Subtopic 310–20. This guidance addresses the more substantive one-time efforts to establish business with an entirely new class of customers (for example, a manufacturer who does all of its business with retailers attempts to sell merchandise directly to the public). As such, the set-up costs incurred in this example are not within the scope of FASB ASC Subtopic 720–15.

The staff believes that the incremental direct costs (the FASB ASC Master Glossary provides a definition) incurred related to the acquisition or origination of a customer contract in a transaction that results in the deferral of revenue, unless specifically provided for in the authoritative literature, may be either expensed as incurred or accounted for in accordance with FASB ASC paragraph 605–20–25–4 or FASB ASC paragraph 310–20–25–2. The staff believes the accounting policy chosen for these costs should be disclosed and applied consistently.

*Question 4*

*Facts:* Assume the same facts as in Question 2 above.

*Question:* What is the staff's view of the pool of contract acquisition and origination costs that are eligible for capitalization?

*Interpretive Response:* As noted in Question 3 above, the FASB ASC Master Glossary includes a definition of incremental direct costs. FASB ASC Subtopic 310–10, Receivables—Overall, provides further guidance on the types of costs eligible for capitalization as customer acquisition costs indicating that only costs that result from successful loan origination efforts are capitalized. Further, FASB ASC Subtopic 605–20, Revenue Recognition—Services, also requires capitalization of incremental direct customer acquisition costs. Although the facts of a particular situation should be analyzed closely to capture those costs that are truly direct and incremental, the staff generally would not object to an accounting policy that results in the capitalization of costs in accordance with FASB ASC Subtopic 310–20, Receivables—Nonrefundable Fees and Other Costs, or FASB ASC Subtopic 605–20. Registrants should disclose their policies for determining which costs to capitalize as contract acquisition and origination costs.

*Question 5*

*Facts:* Assume the same facts as in Question 2 above. Based on the guidance in Questions 2, 3 and 4 above, Company A has capitalized certain direct and incremental customer set-up costs associated with the deferred revenue.

*Question:* Over what period should Company A amortize these costs?

*Interpretive Response:* When both costs and revenue (in an amount equal to or greater than the costs) are deferred, the staff believes that the capitalized costs should be charged to expense proportionally and over the same period that deferred revenue is recognized as revenue.[44]

g. Deliverables Within an Arrangement

*Question:* If a company (the seller) has a patent to its intellectual property which it licenses to customers, the seller may represent and warrant to its licensees that it has a valid patent, and will defend and maintain that patent. Does that obligation to maintain and defend patent rights, in and of itself, constitute a deliverable to be evaluated under FASB ASC Subtopic 605–25?

*Interpretive Response:* No. Provided the seller has legal and valid patents upon entering the license arrangement, existing GAAP on licenses of intellectual property (*e.g.,* FASB ASC Subtopic 985–605, Software—Revenue Recognition, FASB ASC Subtopic 926–605, Entertainment—Films—Revenue Recognition, and FASB ASC Subtopic 928–605, Entertainment—Music—Revenue Recognition) does not indicate

[42] *See* Note 36, *supra.*

[43] *See* Note 39, *supra.*

[44] FASB ASC paragraph 605–20–25–4.

that an obligation to defend valid patents represents an additional deliverable to which a portion of an arrangement fee should be allocated in an arrangement that otherwise qualifies for sales-type accounting. While this clause may obligate the licenser to incur costs in the defense and maintenance of the patent, that obligation does not involve an additional deliverable to the customer. Defending the patent is generally consistent with the seller's representation in the license that such patent is legal and valid. Therefore, the staff would not consider a clause like this to represent an additional deliverable in the arrangement.[45]

4. Fixed or Determinable Sales Price

a. Refundable Fees for Services

A company's contracts may include customer cancellation or termination clauses. Cancellation or termination provisions may be indicative of a demonstration period or an otherwise incomplete transaction. Examples of transactions that financial management and auditors should be aware of and where such provisions may exist include "side" agreements and significant transactions with unusual terms and conditions. These contractual provisions raise questions as to whether the sales price is fixed or determinable. The sales price in arrangements that are cancelable by the customer is neither fixed nor determinable until the cancellation privileges lapse.[46] If the cancellation privileges expire ratably over a stated contractual term, the sales price is considered to become determinable ratably over the stated term.[47] Short-term rights of return, such as thirty-day money-back guarantees, and other customary rights to return products are not considered to be cancellation privileges, but should be accounted for in accordance with FASB ASC Subtopic 605–15, Revenue Recognition—Products.[48]

*Question 1*

*Facts:* Company M is a discount retailer. It generates revenue from annual membership fees it charges customers to shop at its stores and from the sale of products at a discount price to those customers. The membership arrangements with retail customers require the customer to pay the entire membership fee (*e.g.,* $35) at the outset of the arrangement. However, the customer has the unilateral right to cancel the arrangement at any time during its term and receive a full refund of the initial fee. Based on historical data collected over time for a large number of homogeneous transactions, Company M estimates that approximately 40% of the customers will request a refund before the end of the membership contract term. Company M's data for the past five years indicates that significant variations between actual and estimated cancellations have not occurred, and Company M does not expect significant variations to occur in the foreseeable future.

*Question:* May Company M recognize in earnings the revenue for the membership fees and accrue the costs to provide membership services at the outset of the arrangement?

*Interpretive Response:* No. In the staff's view, it would be inappropriate for Company M to recognize the membership fees as earned revenue upon billing or receipt of the initial fee with a corresponding accrual for estimated costs to provide the membership services. This conclusion is based on Company M's remaining and unfulfilled contractual obligation to perform services (*i.e.,* make available and offer products for sale at a discounted price) throughout the membership period. Therefore, the earnings process, irrespective of whether a cancellation clause exists, is not complete.

In addition, the ability of the member to receive a full refund of the membership fee up to the last day of the membership term raises an uncertainty as to whether the fee is fixed or determinable at any point before the end of the term. Generally, the staff believes that a sales price is not fixed or determinable when a customer has the unilateral right to terminate or cancel the contract and receive a cash refund. A sales price or fee that is variable until the occurrence of future events (other than product returns that are within the scope of FASB ASC Subtopic 605–15) generally is not fixed or determinable until the future event occurs. The revenue from such transactions should not be recognized in earnings until the sales price or fee becomes fixed or determinable. Moreover, revenue should not be recognized in earnings by assessing the probability that significant, but unfulfilled, terms of a contract will be fulfilled at some point in the future. Accordingly, the revenue from such transactions should not be recognized in earnings prior to the refund privileges expiring. The amounts received from customers or subscribers (*i.e.,* the $35 fee mentioned above) should be credited to a monetary liability account such as "customers' refundable fees."

The staff believes that if a customer has the unilateral right to receive both (1) the seller's substantial performance under an arrangement (*e.g.,* providing services or delivering product) and (2) a cash refund of prepaid fees, then the prepaid fees should be accounted for as a monetary liability. In consideration of whether the monetary liability can be derecognized, FASB ASC Topic 860, Transfers and Servicing, provides that liabilities may be derecognized only if (1) the debtor pays the creditor and is relieved of its obligation for the liability (paying the creditor includes delivery of cash, other financial assets, goods, or services or reacquisition by the debtor of its outstanding debt securities) or (2) the debtor is legally released from being the primary obligor under the liability.[49] If a customer has the unilateral right to receive both (1) the seller's substantial performance under the arrangement and (2) a cash refund of prepaid fees, then the refund obligation is not relieved upon performance of the service or delivery of the products. Rather, the seller's refund obligation is relieved only upon refunding the cash or expiration of the refund privilege.

Some have argued that there may be a limited exception to the general rule that revenue from membership or other service transaction fees should not be recognized in earnings prior to the refund privileges expiring. Despite the fact that FASB ASC Subtopic 605–15 expressly does not apply to the accounting for service revenue if part or all of the service fee is refundable under cancellation privileges granted to the buyer,[50] they believe that in certain circumstances a potential refund of a membership fee may be seen as being similar to a right of return of products under FASB ASC Subtopic 605–15. They argue that revenue from membership fees, net of estimated refunds, may be recognized ratably over the period the services are performed whenever pertinent conditions of FASB ASC Subtopic 605–15 are met, namely, there is a large population of transactions that grant customers the same unilateral termination or cancellation rights and reasonable estimates can be made of how many customers likely will exercise those rights.

[45] Note, however, the staff believes that this obligation qualifies as a guarantee within the scope of FASB ASC Topic 460, subject to a scope exception from the initial recognition and measurement provisions.

[46] FASB ASC paragraph 985–605–25–37.

[47] *Ibid.*

[48] *Ibid.*

[49] FASB ASC paragraph 405–20–40–1 (Liabilities Topic).

[50] FASB ASC paragraph 605–15–15–3.

The staff believes that, because service arrangements are specifically excluded from the scope of FASB ASC Subtopic 605–15, the most direct authoritative literature to be applied to the extinguishment of obligations under such contracts is FASB ASC Topic 860. As noted above, because the refund privilege extends to the end of the contract term irrespective of the amount of the service performed, FASB ASC Topic 860 indicates that the liability would not be extinguished (and therefore no revenue would be recognized in earnings) until the cancellation or termination and related refund privileges expire. Nonetheless, the staff recognizes that over the years the accounting for membership refunds evolved based on analogy to FASB ASC Subtopic 605–15 and that practice did not change when FASB ASC Topic 860 became effective. Reasonable people held, and continue to hold, different views about the application of the accounting literature.

Pending further action in this area by the FASB, the staff will not object to the recognition of refundable membership fees, net of estimated refunds, as earned revenue over the membership term in the limited circumstances where all of the following criteria have been met: [51]

The estimates of terminations or cancellations and refunded revenues are being made for a large pool of homogeneous items (*e.g.,* membership or other service transactions with the same characteristics such as terms, periods, class of customers, nature of service, *etc.*).

• Reliable estimates of the expected refunds can be made on a timely basis.[52] Either of the following two items would be considered indicative of an inability to make reliable estimates: (1) recurring, significant differences between actual experience and estimated cancellation or termination rates (*e.g.,* an actual cancellation rate of 40% versus an estimated rate of 25%) even if the impact of the difference on the amount of estimated refunds is not material to the consolidated financial statements [53] or (2) recurring variances between the actual and estimated amount of refunds that are material to either revenue or net income in quarterly or annual financial statements. In addition, the staff believes that an estimate, for purposes of meeting this criterion, would not be reliable unless it is remote [54] that material adjustments (both individually and in the aggregate) to previously recognized revenue would be required. The staff presumes that reliable estimates cannot be made if the customer's termination or cancellation and refund privileges exceed one year.

• There is a sufficient company-specific historical basis upon which to estimate the refunds,[55] and the company believes that such historical experience is predictive of future events. In assessing these items, the staff believes that estimates of future refunds should take into consideration, among other things, such factors as historical experience by service type and class of customer, changing trends in historical experience and the basis thereof (*e.g.,* economic conditions), the impact or introduction of competing services or products, and changes in the customer's "accessibility" to the refund (*i.e.,* how easy it is for customers to obtain the refund).

• The amount of the membership fee specified in the agreement at the outset of the arrangement is fixed, other than the customer's right to request a refund.

If Company M does not meet all of the foregoing criteria, the staff believes that Company M should not recognize in earnings any revenue for the membership fee until the cancellation privileges and refund rights expire.

If revenue is recognized in earnings over the membership period pursuant to the above criteria, the initial amounts received from customer or subscribers (*i.e.,* the $35 fee mentioned above) should be allocated to two liability accounts. The amount of the fee representing estimated refunds should be credited to a monetary liability account, such as "customers' refundable fees," and the remaining amount of the fee representing unearned revenue should be credited to a nonmonetary liability account, such as "unearned revenues." For each income statement presented, registrants should disclose in the footnotes to the financial statements the amounts of (1) the unearned revenue and (2) refund obligations as of the beginning of each period, the amount of cash received from customers, the amount of revenue recognized in earnings, the amount of refunds paid, other adjustments (with an explanation thereof), and the ending balance of (1) unearned revenue and (2) refund obligations.

If revenue is recognized in earnings over the membership period pursuant to the above criteria, the staff believes that adjustments for changes in estimated refunds should be recorded using a retrospective approach whereby the unearned revenue and refund obligations are remeasured and adjusted at each balance sheet date with the offset being recorded as earned revenue.[56]

Companies offering memberships often distribute membership packets describing and discussing the terms, conditions, and benefits of membership. Packets may include vouchers, for example, that provide new members with discounts or other benefits from third parties. The costs associated with the vouchers should be expensed when distributed. Advertising costs to solicit members should be accounted for in accordance with FASB ASC Subtopic 720–35, Other Expenses—Advertising Costs. Incremental direct costs incurred in connection with enrolling customers (*e.g.,* commissions paid to agents) should be accounted for as follows: (1) If revenue is deferred until the cancellation or termination privileges expire, incremental direct costs should be either (a) charged to expense when incurred if the costs are not refundable to the company in the event the customer obtains a refund of the membership fee, or (b) if the costs are refundable to the company in the event the customer obtains a refund of the membership fee, recorded as an asset until the earlier of termination or cancellation or refund; or (2) if revenue, net of estimated refunds, is recognized in earnings over the membership period, a like percentage of incremental direct costs should be deferred and recognized in earnings in the same pattern as revenue is recognized, and the

[51] The staff will question further analogies to the guidance in FASB ASC Subtopic 605–15 for transactions expressly excluded from its scope.

[52] Reliability is defined in Concepts Statement 2 as "the quality of information that assures that information is reasonably free from error and bias and faithfully represents what it purports to represent." Paragraph 63 of Concepts Statement 5 reiterates the definition of reliability, requiring that "the information is representationally faithful, verifiable, and neutral."

[53] For example, if an estimate of the expected cancellation rate varies from the actual cancellation rate by 100% but the dollar amount of the error is immaterial to the consolidated financial statements, some would argue that the estimate could still be viewed as reliable. The staff disagrees with that argument.

[54] The term "remote" is used here with the same definition as used in the FASB ASC Master Glossary.

[55] FASB ASC paragraph 605–15–25–3 notes various factors that may impair the ability to make a reasonable estimate of returns, including the lack of sufficient historical experience. The staff typically expects that the historical experience be based on the particular registrant's historical experience for a service and/or class of customer. In general, the staff typically expects a start-up company, a company introducing new services, or a company introducing services to a new class of customer to have at least two years of experience to be able to make reasonable and reliable estimates.

[56] The staff believes deferred costs being amortized on a basis consistent with the deferred revenue should be similarly adjusted. Such an approach is generally consistent with the amortization methodology in FASB ASC paragraph 310–20–35–26.

remaining portion should be either (a) charged to expense when incurred if the costs are not refundable to the company in the event the customer obtains a refund of the membership fee, or (b) if the costs are refundable to the company in the event the customer obtains a refund of the membership fee, recorded as an asset until the refund occurs.[57] All costs other than incremental direct costs (*e.g.,* indirect costs) should be expensed as incurred.

*Question 2*

*Question:* Will the staff accept an analogy to FASB ASC Subtopic 605–15 for service transactions subject to customer cancellation privileges other than those specifically addressed in the previous question?

*Interpretive Response:* The staff has accepted the analogy in limited circumstances due to the existence of a large pool of homogeneous transactions and satisfaction of the criteria in the previous question. Examples of other arrangements involving customer cancellation privileges and refundable service fees that the staff has addressed include the following:

- A leasing broker whose commission from the lessor upon a commercial tenant's signing of a lease agreement is refundable (or in some cases, is not due) under lessor cancellation privileges if the tenant fails to move into the leased premises by a specified date.
- A talent agent whose fee receivable from its principal (*i.e.,* a celebrity) for arranging a celebrity endorsement for a five-year term is cancelable by the celebrity if the celebrity breaches the endorsement contract with its customer.
- An insurance agent whose commission received from the insurer upon selling an insurance policy is refundable in whole for the 30-day period that state law permits the consumer to repudiate the contract and then refundable on a declining pro rata basis until the consumer has made six monthly payments.

In the first two of these cases, the staff advised the registrants that the portion of revenue subject to customer cancellation and refund must be deferred until no longer subject to that contingency because the registrants did not have an ability to make reliable estimates of customer cancellations due to the lack of a large pool of homogeneous transactions. In the case of the insurance agent, however, the particular registrant demonstrated that it had a sufficient history of homogeneous transactions with the same characteristics from which to reliably estimate contract cancellations and satisfy all the criteria specified in the previous question. Accordingly, the staff did not object to that registrant's policy of recognizing its sales commission as revenue when its performance was complete, with an appropriate allowance for estimated cancellations.

*Question 3*

*Question:* Must a registrant analogize to FASB ASC Subtopic 605–15, or may it choose to defer all revenue until the refund period lapses as suggested by FASB ASC Topic 860 even if the criteria above for analogy to FASB ASC Subtopic 605–15 are met?

*Interpretive Response:* The analogy to FASB ASC Subtopic 605–15 is presented as an alternative that would be acceptable to the staff when the listed conditions are met. However, a registrant may choose to defer all revenue until the refund period lapses. The policy chosen should be disclosed and applied consistently.

*Question 4*

*Question:* May a registrant that meets the above criteria for reliable estimates of cancellations choose at some point in the future to change from the FASB ASC Subtopic 605–15 method to the FASB ASC Topic 860 method of accounting for these refundable fees? May a registrant change from the FASB ASC Topic 860 method to the FASB ASC Subtopic 605–15 method?

*Interpretive Response:* The staff believes that FASB ASC Topic 860 provides a preferable accounting model for service transactions subject to potential refunds. Therefore, the staff would not object to a change from the FASB ASC Subtopic 605–15 method to the FASB ASC Topic 860 method. However, if a registrant had previously chosen the FASB ASC Topic 860 method, the staff would object to a change to the FASB ASC Subtopic 605–15 method.

*Question 5*

*Question:* Is there a minimum level of customers that must be projected not to cancel before use of FASB ASC Subtopic 605–15 type accounting is appropriate?

*Interpretive Response:* FASB ASC Subtopic 605–15 does not include any such minimum. Therefore, the staff does not believe that a minimum must apply in service transactions either. However, as the refund rate increases, it may be increasingly difficult to make reasonable and reliable estimates of cancellation rates.

*Question 6*

*Question:* When a registrant first determines that reliable estimates of cancellations of service contracts can be made (*e.g.,* two years of historical evidence becomes available), how should the change from the complete deferral method to the method of recognizing revenue, net of estimated cancellations, over time be reflected?

*Interpretive Response:* Changes in the ability to meet the criteria set forth above should be accounted for in the manner described in FASB ASC paragraph 605–15–25–1, which addresses the accounting when a company experiences a change in the ability to make reasonable estimates of future product returns.

b. Estimates and Changes in Estimates

Accounting for revenues and costs of revenues requires estimates in many cases; those estimates sometimes change. Registrants should ensure that they have appropriate internal controls and adequate books and records that will result in timely identification of necessary changes in estimates that should be reflected in the financial statements and notes thereto.

*Question 1*

*Facts:* FASB ASC paragraph 605–15–25–3 lists a number of factors that may impair the ability to make a reasonable estimate of product returns in sales transactions when a right of return exists.[58] The paragraph concludes by stating "other factors may preclude a reasonable estimate."

*Question:* What "other factors," in addition to those listed in FASB ASC paragraph 605–15–25–3, has the staff identified that may preclude a registrant from making a reasonable and reliable estimate of product returns?

*Interpretive Response:* The staff believes that the following additional

[57] FASB ASC paragraphs 310–20–25–2 and 605–20–25–4 both provide for the deferral of incremental direct costs associated with acquiring a revenue-producing contract. Even though the revenue discussed in this example is refundable, if a registrant meets the aforementioned criteria for revenue recognition over the membership period, the staff would analogize to this guidance. However, if neither a nonrefundable contract nor a reliable basis for estimating net cash inflows under refundable contracts exists to provide a basis for recovery of incremental direct costs, the staff believes that such costs should be expensed as incurred. *See* SAB Topic 13.A.3.f. Question 3.

[58] These factors include "(a) the susceptibility of the product to significant external factors, such as technological obsolescence or changes in demand, (b) relatively long periods in which a particular product may be returned, (c) absence of historical experience with similar types of sales of similar products, or inability to apply such experience because of changing circumstances, for example, changes in the selling enterprise's marketing policies and relationships with its customers, and (d) absence of a large volume of relatively homogeneous transactions."

factors, among others, may affect or preclude the ability to make reasonable and reliable estimates of product returns: (1) Significant increases in or excess levels of inventory in a distribution channel (sometimes referred to as "channel stuffing"), (2) lack of "visibility" into or the inability to determine or observe the levels of inventory in a distribution channel and the current level of sales to end users, (3) expected introductions of new products that may result in the technological obsolescence of and larger than expected returns of current products, (4) the significance of a particular distributor to the registrant's (or a reporting segment's) business, sales and marketing, (5) the newness of a product, (6) the introduction of competitors' products with superior technology or greater expected market acceptance, and (7) other factors that affect market demand and changing trends in that demand for the registrant's products. Registrants and their auditors should carefully analyze all factors, including trends in historical data, which may affect registrants' ability to make reasonable and reliable estimates of product returns.

The staff reminds registrants that if a transaction fails to meet all of the conditions of FASB ASC paragraphs 605–15–25–1 and 605–15–25–3, no revenue may be recognized until those conditions are subsequently met or the return privilege has substantially expired, whichever occurs first.[59] Simply deferring recognition of the gross margin on the transaction is not appropriate.

*Question 2*

*Question:* Is the requirement cited in the previous question for "reliable" estimates meant to imply a new, higher requirement than the "reasonable" estimates discussed in FASB ASC Subtopic 605–15?

*Interpretive Response:* No. "Reliability" of financial information is one of the qualities of accounting information discussed in Concepts Statement 2, *Qualitative Characteristics of Accounting Information.* The staff's expectation that estimates be reliable does not change the existing requirement of FASB ASC Subtopic 605–15. If management cannot develop an estimate that is sufficiently reliable for use by investors, the staff believes it cannot make a reasonable estimate meeting the requirements of that standard.

[59] FASB ASC paragraph 605–15–25–1.

*Question 3*

*Question:* Does the staff expect registrants to apply the guidance in Question 1 of Topic 13.A.4(a) above to sales of tangible goods and other transactions specifically within the scope of FASB ASC Subtopic 605–15?

*Interpretive Response:* The specific guidance above does not apply to transactions within the scope of FASB ASC Subtopic 605–15. The views set forth in Question 1 of Topic 13.A.4(a) are applicable to the service transactions discussed in that Question. Service transactions are explicitly outside the scope of FASB ASC Subtopic 605–15.

*Question 4*

*Question:* Question 1 of Topic 13.A.4(a) above states that the staff would expect a two-year history of selling a new service in order to be able to make reliable estimates of cancellations. How long a history does the staff believe is necessary to estimate returns in a product sale transaction that is within the scope of FASB ASC Subtopic 605–15?

*Interpretive Response:* The staff does not believe there is any specific length of time necessary in a product transaction. However, FASB ASC Subtopic 605–15 states that returns must be subject to reasonable estimation. Preparers and auditors should be skeptical of estimates of product returns when little history with a particular product line exists, when there is inadequate verifiable evidence of historical experience, or when there are inadequate internal controls that ensure the reliability and timeliness of the reporting of the appropriate historical information. Start-up companies and companies selling new or significantly modified products are frequently unable to develop the requisite historical data on which to base estimates of returns.

*Question 5*

*Question:* If a company selling products subject to a right of return concludes that it cannot reasonably estimate the actual return rate due to its limited history, but it can conservatively estimate the maximum possible returns, does the staff believe that the company may recognize revenue for the portion of the sales that exceeds the maximum estimated return rate?

*Interpretive Response:* No. If a reasonable estimate of future returns cannot be made, FASB ASC Subtopic 605–15 requires that revenue not be recognized until the return period lapses or a reasonable estimate can be made.[60] Deferring revenue recognition based on the upper end of a wide range of potential return rates is inconsistent with the provisions of FASB ASC Subtopic 605–15.

c. Contingent Rental Income

*Facts:* Company A owns and leases retail space to retailers. Company A (lessor) renews a lease with a customer (lessee) that is classified as an operating lease. The lease term is one year and provides that the lease payments are $1.2 million, payable in equal monthly installments on the first day of each month, plus one percent of the lessee's net sales in excess of $25 million if the net sales exceed $25 million during the lease term (*i.e.,* contingent rental). The lessee has historically experienced annual net sales in excess of $25 million in the particular space being leased, and it is probable that the lessee will generate in excess of $25 million net sales during the term of the lease.

*Question:* In the staff's view, should the lessor recognize any rental income attributable to the one percent of the lessee's net sales exceeding $25 million before the lessee actually achieves the $25 million net sales threshold?

*Interpretive Response:* No. The staff believes that contingent rental income "accrues" (*i.e.,* it should be recognized as revenue) when the changes in the factor(s) on which the contingent lease payments is (are) based actually occur.[61]

FASB ASC paragraph 840–20–25–1 states that "[r]ent shall be charged to expense by lessees (reported as income by lessors) over the lease term as it becomes payable (receivable). If rental payments are not made on a straight-line basis, rental expense nevertheless shall be recognized on a straight-line basis unless another systematic and rational basis is more representative of the time pattern in which use benefit is derived from the leased property, in which case that basis shall be used."

FASB ASC paragraph 840–10–25–4 clarifies that "lease payments that depend on a factor that does not exist or is not measurable at the inception of the lease, such as future sales volume, would be contingent rentals in their entirety and, accordingly, would be excluded from minimum lease payments and included in the determination of income as they accrue." FASB ASC paragraph 840–10–55–38 provides the following example of determining contingent rentals:

Assume that a lease agreement for retail store space stipulates a monthly base rental of

[60] FASB ASC subparagraph 605–15–25–1(f).

[61] Lessees should follow the guidance established in FASB ASC Subtopic 840–10.

$200 and a monthly supplemental rental of one-fourth of one percent of monthly sales volume during the lease term. Even if the lease agreement is a renewal for store space that had averaged monthly sales of $25,000 for the past 2 years, minimum lease payments would include only the $200 monthly base rental; the supplemental rental is a contingent rental that is excluded from minimum lease payments. The future sales for the lease term do not exist at the inception of the lease, and future rentals would be limited to $200 per month if the store were subsequently closed and no sales were made thereafter.

FASB ASC Section 840–20–25 addresses whether it is appropriate for lessors in operating leases to recognize scheduled rent increases on a basis other than as required in FASB ASC paragraph 840–20–25–1. FASB ASC subparagraph 840–20–25–2(a) states "using factors such as the time value of money, anticipated inflation, or *expected future revenues* [emphasis added] to allocate scheduled rent increases is inappropriate because these factors do not relate to the *time pattern* of the physical usage of the leased property. However, such factors may affect the periodic reported rental income or expense if the lease agreement involves contingent rentals, which are excluded from minimum lease payments and accounted for separately." In developing the basis for why scheduled rent increases should be recognized on a straight-line basis, the FASB distinguishes the accounting for scheduled rent increases from contingent rentals. FASB ASC subparagraph 840–20–25–2(b) states "[i]f the lessee and lessor eliminate the risk of variable payments inherent in contingent rentals by agreeing to scheduled rent increases, the accounting shall reflect those different circumstances."

The example provided in FASB ASC paragraph 840–10–55–39 implies that contingent rental income in leases classified as sales-type or direct-financing leases becomes "accruable" when the changes in the factors on which the contingent lease payments are based actually occur. FASB ASC paragraph 840–20–25–2 indicates that contingent rental income in operating leases should not be recognized in a manner consistent with scheduled rent increases (*i.e.,* on a straight-line basis over the lease term or another systematic and rational allocation basis if it is more representative of the time pattern in which the leased property is physically employed) because the risk of variable payments inherent in contingent rentals is substantively different than scheduled rent increases. The staff believes that the reasoning in FASB ASC Section 840–20–25 supports the conclusion that the risks inherent in variable payments associated with contingent rentals should be reflected in financial statements on a basis different than rental payments that adjust on a scheduled basis and, therefore, operating lease income associated with contingent rents would not be recognized as time passes or as the leased property is physically employed. Furthermore, prior to the lessee's achievement of the target upon which contingent rentals are based, the lessor has no legal claims on the contingent amounts. Consequently, the staff believes that it is inappropriate to anticipate changes in the factors on which contingent rental income in operating leases is based and recognize rental income prior to the resolution of the lease contingencies.

Because Company A's contingent rental income is based upon whether the customer achieves net sales of $25 million, the contingent rentals, which may not materialize, should not be recognized until the customer's net sales actually exceed $25 million. Once the $25 million threshold is met, Company A would recognize the contingent rental income as it becomes accruable, in this case, as the customer recognizes net sales. The staff does not believe that it is appropriate to recognize revenue based upon the probability of a factor being achieved. The contingent revenue should be recorded in the period in which the contingency is resolved.

d. Claims Processing and Billing Services

*Facts:* Company M performs claims processing and medical billing services for healthcare providers. In this role, Company M is responsible for preparing and submitting claims to third-party payers, tracking outstanding billings, and collecting amounts billed. Company M's fee is a fixed percentage (*e.g.,* five percent) of the amount collected. If no collections are made, no fee is due to Company M. Company M has historical evidence indicating that the third-party payers pay 85 percent of the billings submitted with no further effort by Company M. Company M has determined that the services performed under the arrangement are a single unit of accounting.

*Question:* May Company M recognize as revenue its five percent fee on 85 percent of the gross billings at the time it prepares and submits billings, or should it wait until collections occur to recognize any revenue?

*Interpretive Response:* The staff believes that Company M must wait until collections occur before recognizing revenue. Before the third-party payer has remitted payment to Company M's customers for the services billed, Company M is not entitled to any revenue. That is, its revenue is not yet realized or realizable.[62] Until Company M's customers collect on the billings, Company M has not performed the requisite activity under its contract to be entitled to a fee.[63] Further, no amount of the fee is fixed or determinable or collectible until Company M's customers collect on the billings.

*B. Disclosures*

*Question:* What disclosures are required with respect to the recognition of revenue?

*Interpretive Response:* A registrant should disclose its accounting policy for the recognition of revenue pursuant to FASB ASC Topic 235, Notes to Financial Statements. FASB ASC paragraph 235–10–50–3 thereof states that "the disclosure should encompass important judgments as to appropriateness of principles relating to recognition of revenue * * *." Because revenue recognition generally involves some level of judgment, the staff believes that a registrant should always disclose its revenue recognition policy. If a company has different policies for different types of revenue transactions, including barter sales, the policy for each material type of transaction should be disclosed. If sales transactions have multiple units of accounting, such as a product and service, the accounting policy should clearly state the accounting policy for each unit of accounting as well as how units of accounting are determined and valued. In addition, the staff believes that changes in estimated returns recognized in accordance with FASB ASC Subtopic 605–15 should be disclosed, if material (*e.g.,* a change in estimate from two percent of sales to one percent of sales).

Regulation S–X requires that revenue from the sales of products, services, and other products each be separately disclosed on the face of the income statement.[64] The staff believes that costs relating to each type of revenue similarly should be reported separately on the face of the income statement.

MD&A requires a discussion of liquidity, capital resources, results of operations and other information necessary to an understanding of a registrant's financial condition, changes in financial condition and results of operations.[65] This includes unusual or

[62] Concepts Statement 5, paragraph 83(a).

[63] Concepts Statement 5, paragraph 83(b).

[64] *See* Regulation S–X, Article 5–03(1) and (2).

[65] *See* Regulation S–K, Item 303 and FRR 36.

infrequent transactions, known trends or uncertainties that have had, or might reasonably be expected to have, a favorable or unfavorable material effect on revenue, operating income or net income and the relationship between revenue and the costs of the revenue. Changes in revenue should not be evaluated solely in terms of volume and price changes, but should also include an analysis of the reasons and factors contributing to the increase or decrease. The Commission stated in FRR 36 that MD&A should "give investors an opportunity to look at the registrant through the eyes of management by providing a historical and prospective analysis of the registrant's financial condition and results of operations, with a particular emphasis on the registrant's prospects for the future." [66] Examples of such revenue transactions or events that the staff has asked to be disclosed and discussed in accordance with FRR 36 are:

- Shipments of product at the end of a reporting period that significantly reduce customer backlog and that reasonably might be expected to result in lower shipments and revenue in the next period.
- Granting of extended payment terms that will result in a longer collection period for accounts receivable (regardless of whether revenue has been recognized) and slower cash inflows from operations, and the effect on liquidity and capital resources. (The fair value of trade receivables should be disclosed in the footnotes to the financial statements when the fair value does not approximate the carrying amount.)[67]
- Changing trends in shipments into, and sales from, a sales channel or separate class of customer that could be expected to have a significant effect on future sales or sales returns.
- An increasing trend toward sales to a different class of customer, such as a reseller distribution channel that has a lower gross profit margin than existing sales that are principally made to end users. Also, increasing service revenue that has a higher profit margin than product sales.
- Seasonal trends or variations in sales.
- A gain or loss from the sale of an asset(s).[68]

[66] FRR 36; *See also* In the Matter of Caterpillar Inc., AAER 363 (March 31, 1992).

[67] FASB ASC Subtopic 825–10, Financial Instruments—Overall.

[68] Gains or losses from the sale of assets should be reported as "other general expenses" pursuant to Regulation S–X, Article 5–03(6). Any material item should be stated separately.

**TOPIC 14: SHARE–BASED PAYMENT**

The interpretations in this SAB express views of the staff regarding the interaction between FASB ASC Topic 718, Compensation—Stock Compensation, and certain SEC rules and regulations and provide the staff's views regarding the valuation of share-based payment arrangements for public companies. FASB ASC Topic 718 is based on the underlying accounting principle that compensation cost resulting from share-based payment transactions be recognized in financial statements at fair value.[1] Recognition of compensation cost at fair value will provide investors and other users of financial statements with more complete and comparable financial information.[2]

FASB ASC Topic 718 addresses a wide range of share-based compensation arrangements including share options, restricted share plans, performance-based awards, share appreciation rights, and employee share purchase plans.

FASB ASC Topic 718 replaces guidance as originally issued in 1995, that established as preferable, but did not require, a fair-value-based method of accounting for share-based payment transactions with employees.

The staff believes the guidance in this SAB will assist issuers in their initial implementation of FASB ASC Topic 718 and enhance the information received by investors and other users of financial statements, thereby assisting them in making investment and other decisions. This SAB includes interpretive guidance related to share-based payment transactions with nonemployees, the transition from nonpublic to public entity [3] status, valuation methods (including assumptions such as expected volatility and expected term), the accounting for certain redeemable financial instruments issued under share-based payment arrangements, the classification of compensation expense, non-GAAP financial measures, first-time adoption of FASB ASC Topic 718 in an interim period, capitalization of compensation cost related to share-based payment arrangements, the accounting for income tax effects of share-based payment arrangements upon adoption of FASB ASC Topic 718, the modification of employee share options prior to adoption of FASB ASC Topic 718 and disclosures in MD&A subsequent to adoption of FASB ASC Topic 718.

The staff recognizes that there is a range of conduct that a reasonable issuer might use to make estimates and valuations and otherwise implement FASB ASC Topic 718, and the interpretive guidance provided by this SAB, particularly during the period of the Topic's initial implementation. Thus, throughout this SAB the use of the terms "reasonable" and "reasonably" is not meant to imply a single conclusion or methodology, but to encompass the full range of potential conduct, conclusions or methodologies upon which an issuer may reasonably base its valuation decisions. Different conduct, conclusions or methodologies by different issuers in a given situation does not of itself raise an inference that any of those issuers is acting unreasonably. While the zone of reasonable conduct is not unlimited, the staff expects that it will be rare when there is only one acceptable choice in estimating the fair value of share-based payment arrangements under the provisions of FASB ASC Topic 718 and the interpretive guidance provided by this SAB in any given situation. In addition, as discussed in the Interpretive Response to Question 1 of Section C, Valuation Methods, estimates of fair value are not intended to predict actual future events, and subsequent events are not indicative of the reasonableness of the original estimates of fair value made under FASB ASC Topic 718. Over time, as issuers and accountants gain more experience in applying FASB ASC Topic 718 and the guidance provided in this SAB, the staff anticipates that particular approaches may begin to emerge as best practices and that the range of reasonable conduct, conclusions and methodologies will likely narrow.

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*A. Share-Based Payment Transactions with Nonemployees*

*Question:* Are share-based payment transactions with nonemployees included in the scope of FASB ASC Topic 718?

*Interpretive Response:* Only certain aspects of the accounting for share-based payment transactions with nonemployees are explicitly addressed by FASB ASC Topic 718. This Topic explicitly:

- Establishes fair value as the measurement objective in accounting for all share-based payments; [4] and
- Requires that an entity record the value of a transaction with a

[1] FASB ASC paragraphs 718–10–30–2 through 718–10–30–4.

[2] [Original footnote removed by SAB 114.]

[3] Defined in the FASB ASC Master Glossary.

[4] FASB ASC paragraph 718–10–30–2.

nonemployee based on the more reliably measurable fair value of either the good or service received or the equity instrument issued.[5]

FASB ASC Topic 718 does not supersede any of the authoritative literature that specifically addresses accounting for share-based payments with nonemployees. For example, FASB ASC Topic 718 does not specify the measurement date for share-based payment transactions with nonemployees when the measurement of the transaction is based on the fair value of the equity instruments issued.[6] For determining the measurement date of equity instruments issued in share-based transactions with nonemployees, a company should refer to FASB ASC Subtopic 505–50, Equity—Equity Based Payments to Non-Employees.

With respect to questions regarding nonemployee arrangements that are not specifically addressed in other authoritative literature, the staff believes that the application of guidance in FASB ASC Topic 718 would generally result in relevant and reliable financial statement information. As such, the staff believes it would generally be appropriate for entities to apply the guidance in FASB ASC Topic 718 by analogy to share-based payment transactions with nonemployees unless other authoritative accounting literature more clearly addresses the appropriate accounting, or the application of the guidance in FASB ASC Topic 718 would be inconsistent with the terms of the instrument issued to a nonemployee in a share-based payment arrangement.[7] For example, the staff believes the guidance in FASB ASC Topic 718 on certain transactions with related parties or other holders of an economic interest in the entity would generally be applicable to share-based payment transactions with nonemployees. The staff encourages registrants that have additional questions related to accounting for share-based payment transactions with nonemployees to discuss those questions with the staff.

*B. Transition From Nonpublic to Public Entity Status*

*Facts:* Company A is a nonpublic entity[8] that first files a registration statement with the SEC to register its equity securities for sale in a public market on January 2, 20X8.[9] As a nonpublic entity, Company A had been assigning value to its share options[10] under the calculated value method prescribed by FASB ASC Topic 718, Compensation—Stock Compensation,[11] and had elected to measure its liability awards based on intrinsic value. Company A is considered a public entity on January 2, 20X8 when it makes its initial filing with the SEC in preparation for the sale of its shares in a public market.

*Question 1:* How should Company A account for the share options that were granted to its employees prior to January 2, 20X8 for which the requisite service has not been rendered by January 2, 20X8?

*Interpretive Response:* Prior to becoming a public entity, Company A had been assigning value to its share options under the calculated value method. The staff believes that Company A should continue to follow that approach for those share options that were granted prior to January 2, 20X8, unless those share options are subsequently modified, repurchased or cancelled.[12] If the share options are subsequently modified, repurchased or cancelled, Company A would assess the event under the public company provisions of FASB ASC Topic 718. For example, if Company A modified the share options on February 1, 20X8, any incremental compensation cost would be measured under FASB ASC subparagraph 718–20–35–3(a), as the fair value of the modified share options over the fair value of the original share options measured immediately before the terms were modified.[13]

*Question 2:* How should Company A account for its liability awards granted to its employees prior to January 2, 20X8 which are fully vested but have not been settled by January 2, 20X8?

*Interpretive Response:* As a nonpublic entity, Company A had elected to measure its liability awards subject to FASB ASC Topic 718 at intrinsic value.[14] When Company A becomes a public entity, it should measure the liability awards at their fair value determined in accordance with FASB ASC Topic 718.[15] In that reporting period there will be an incremental amount of measured cost for the difference between fair value as determined under FASB ASC Topic 718 and intrinsic value. For example, assume the intrinsic value in the period ended December 31, 20X7 was $10 per award. At the end of the first reporting period ending after January 2, 20X8 (when Company A becomes a public entity), assume the intrinsic value of the award is $12 and the fair value as determined in accordance with FASB ASC Topic 718 is $15. The measured cost in the first reporting period after December 31, 20X7 would be $5.[16]

*Question 3:* After becoming a public entity, may Company A retrospectively apply the fair-value-based method to its awards that were granted prior to the date Company A became a public entity?

*Interpretive Response:* No. Before becoming a public entity, Company A did not use the fair-value-based method for either its share options or its liability awards granted to the Company's employees. The staff does not believe it is appropriate for Company A to apply the fair-value-based method on a retrospective basis, because it would require the entity to make estimates of a prior period, which, due to hindsight, may vary significantly from estimates

[5] *Ibid.*

[6] [Original footnote removed by SAB 114.]

[7] For example, due to the nature of specific terms in employee share options, including nontransferability, nonhedgability and the truncation of the contractual term due to post-vesting service termination, FASB ASC Topic 718 requires that when valuing an employee share option under the Black-Scholes-Merton framework, the fair value of an employee share option be based on the option's expected term rather than the contractual term. If these features (*i.e.,* nontransferability, nonhedgability and the truncation of the contractual term) were not present in a nonemployee share option arrangement, the use of an expected term assumption shorter than the contractual term would generally not be appropriate in estimating the fair value of the nonemployee share options.

[8] Defined in the FASB ASC Master Glossary.

[9] For the purposes of these illustrations, assume all of Company A's equity-based awards granted to its employees were granted after the adoption of FASB ASC Topic 718.

[10] For purposes of this staff accounting bulletin, the phrase "share options" is used to refer to "share options or similar instruments."

[11] FASB ASC paragraph 718–10–30–20 requires a nonpublic entity to use the calculated value method when it is not able to reasonably estimate the fair value of its equity share options and similar instruments because it is not practicable for it to estimate the expected volatility of its share price. FASB ASC paragraph 718–10–55–51 indicates that a nonpublic entity may be able to identify similar public entities for which share or option price information is available and may consider the historical, expected, or implied volatility of those entities' share prices in estimating expected volatility. The staff would expect an entity that becomes a public entity and had previously measured its share options under the calculated value method to be able to support its previous decision to use calculated value and to provide the disclosures required by FASB ASC subparagraph 718–10–50–2(f)(2)(ii).

[12] This view is consistent with the FASB's basis for rejecting full retrospective application of FASB ASC Topic 718 as described in the basis for conclusions of Statement 123R, paragraph B251.

[13] FASB ASC paragraph 718–20–55–94. The staff believes that because Company A is a public entity as of the date of the modification, it would be inappropriate to use the calculated value method to measure the original share options immediately before the terms were modified.

[14] FASB ASC paragraph 718–30–30–2.

[15] FASB ASC paragraph 718–30–35–3.

[16] $15 fair value less $10 intrinsic value equals $5 of incremental cost.

that would have been made contemporaneously in prior periods.[17]

*Question 4:* Upon becoming a public entity, what disclosures should Company A consider in addition to those prescribed by FASB ASC Topic 718?[18]

*Interpretive Response:* In the registration statement filed on January 2, 20X8, Company A should clearly describe in MD&A the change in accounting policy that will be required by FASB ASC Topic 718 in subsequent periods and the reasonably likely material future effects.[19] In subsequent filings, Company A should provide financial statement disclosure of the effects of the changes in accounting policy. In addition, Company A should consider the applicability of SEC Release No. FR–60[20] and Section V, "Critical Accounting Estimates," in SEC Release No. FR–72[21] regarding critical accounting policies and estimates in MD&A.

*C. Valuation Methods*

FASB ASC paragraph 718–10–30–6 (Compensation—Stock Compensation Topic) indicates that the measurement objective for equity instruments awarded to employees is to estimate at the grant date the fair value of the equity instruments the entity is obligated to issue when employees have rendered the requisite service and satisfied any other conditions necessary to earn the right to benefit from the instruments. The Topic also states that observable market prices of identical or similar equity or liability instruments in active markets are the best evidence of fair value and, if available, should be used as the basis for the measurement for equity and liability instruments awarded in a share-based payment transaction with employees.[22] However, if observable market prices of identical or similar equity or liability instruments are not available, the fair value shall be estimated by using a valuation technique or model that complies with the measurement objective, as described in FASB ASC Topic 718.[23]

*Question 1:* If a valuation technique or model is used to estimate fair value, to what extent will the staff consider a company's estimates of fair value to be materially misleading because the estimates of fair value do not correspond to the value ultimately realized by the employees who received the share options?

*Interpretive Response:* The staff understands that estimates of fair value of employee share options, while derived from expected value calculations, cannot predict actual future events.[24] The estimate of fair value represents the measurement of the cost of the employee services to the company. The estimate of fair value should reflect the assumptions marketplace participants would use in determining how much to pay for an instrument on the date of the measurement (generally the grant date for equity awards). For example, valuation techniques used in estimating the fair value of employee share options may consider information about a large number of possible share price paths, while, of course, only one share price path will ultimately emerge. If a company makes a good faith fair value estimate in accordance with the provisions of FASB ASC Topic 718 in a way that is designed to take into account the assumptions that underlie the instrument's value that marketplace participants would reasonably make, then subsequent future events that affect the instrument's value do not provide meaningful information about the quality of the original fair value estimate. As long as the share options were originally so measured, changes in an employee share option's value, no matter how significant, subsequent to its grant date do not call into question the reasonableness of the grant date fair value estimate.

*Question 2:* In order to meet the fair value measurement objective in FASB ASC Topic 718, are certain valuation techniques preferred over others?

*Interpretive Response:* FASB ASC paragraph 718–10–55–17 clarifies that the Topic does not specify a preference for a particular valuation technique or model. As stated in FASB ASC paragraph 718–10–55–11 in order to meet the fair value measurement objective, a company should select a valuation technique or model that (a) is applied in a manner consistent with the fair value measurement objective and other requirements of FASB ASC Topic 718, (b) is based on established principles of financial economic theory and generally applied in that field and (c) reflects all substantive characteristics of the instrument.

The chosen valuation technique or model must meet all three of the requirements stated above. In valuing a particular instrument, certain techniques or models may meet the first and second criteria but may not meet the third criterion because the techniques or models are not designed to reflect certain characteristics contained in the instrument. For example, for a share option in which the exercisability is conditional on a specified increase in the price of the underlying shares, the Black-Scholes-Merton closed-form model would not generally be an appropriate valuation model because, while it meets both the first and second criteria, it is not designed to take into account that type of market condition.[25]

Further, the staff understands that a company may consider multiple techniques or models that meet the fair value measurement objective before making its selection as to the appropriate technique or model. The staff would not object to a company's choice of a technique or model as long as the technique or model meets the fair value measurement objective. For example, a company is not required to use a lattice model simply because that model was the most complex of the models the company considered.

*Question 3:* In subsequent periods, may a company change the valuation technique or model chosen to value instruments with similar characteristics?[26]

*Interpretive Response:* As long as the new technique or model meets the fair value measurement objective as described in Question 2 above, the staff would not object to a company changing its valuation technique or model.[27] A change in the valuation technique or model used to meet the fair value

[17] This view is consistent with the FASB's basis for rejecting full retrospective application of FASB ASC Topic 718 as described in the basis for conclusions of Statement 123R, paragraph B251.

[18] FASB ASC Section 718–10–50.

[19] *See generally* SEC Release No. FR–72, "Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations."

[20] SEC Release No. FR–60, "Cautionary Advice Regarding Disclosure About Critical Accounting Policies."

[21] SEC Release No. FR–72, "Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations."

[22] FASB ASC paragraph 718–10–55–10.

[23] FASB ASC paragraph 718–10–55–11.

[24] FASB ASC paragraph 718–10–55–15 states "The fair value of those instruments at a single point in time is not a forecast of what the estimated fair value of those instruments may be in the future."

[25] *See* FASB ASC paragraphs 718–10–55–16 and 718–10–55–20.

[26] FASB ASC paragraph 718–10–55–17 indicates that an entity may use different valuation techniques or models for instruments with different characteristics.

[27] The staff believes that a company should take into account the reason for the change in technique or model in determining whether the new technique or model meets the fair value measurement objective. For example, changing a technique or model from period to period for the sole purpose of lowering the fair value estimate of a share option would not meet the fair value measurement objective of the Topic.

measurement objective would not be considered a change in accounting principle. As such, a company would not be required to file a preferability letter from its independent accountants as described in Rule 10–01(b)(6) of Regulation S–X when it changes valuation techniques or models.[28] However, the staff would not expect that a company would frequently switch between valuation techniques or models, particularly in circumstances where there was no significant variation in the form of share-based payments being valued. Disclosure in the footnotes of the basis for any change in technique or model would be appropriate.[29]

*Question 4:* Must every company that issues share options or similar instruments hire an outside third party to assist in determining the fair value of the share options?

*Interpretive Response:* No. However, the valuation of a company's share options or similar instruments should be performed by a person with the requisite expertise.

*D. Certain Assumptions Used in Valuation Methods*

FASB ASC Topic 718's (Compensation—Stock Compensation Topic) fair value measurement objective for equity instruments awarded to employees is to estimate the grant-date fair value of the equity instruments that the entity is obligated to issue when employees have rendered the requisite service and satisfied any other conditions necessary to earn the right to benefit from the instruments.[30] In order to meet this fair value measurement objective, management will be required to develop estimates regarding the expected volatility of its company's share price and the exercise behavior of its employees. The staff is providing guidance in the following sections related to the expected volatility and expected term assumptions to assist public entities in applying those requirements.

The staff understands that companies may refine their estimates of expected volatility and expected term as a result of the guidance provided in FASB ASC Topic 718 and in sections (1) and (2) below. Changes in assumptions during the periods presented in the financial statements should be disclosed in the footnotes.[31]

1. Expected Volatility

FASB ASC paragraph 718–10–55–36 states, "Volatility is a measure of the amount by which a financial variable, such as share price, has fluctuated (historical volatility) or is expected to fluctuate (expected volatility) during a period. Option-pricing models require an estimate of expected volatility as an assumption because an option's value is dependent on potential share returns over the option's term. The higher the volatility, the more the returns on the share can be expected to vary—up or down. Because an option's value is unaffected by expected negative returns on the shares, other things [being] equal, an option on a share with higher volatility is worth more than an option on a share with lower volatility."

*Facts:* Company B is a public entity whose common shares have been publicly traded for over twenty years. Company B also has multiple options on its shares outstanding that are traded on an exchange ("traded options"). Company B grants share options on January 2, 20X6.

*Question 1:* What should Company B consider when estimating expected volatility for purposes of measuring the fair value of its share options?

*Interpretive Response:* FASB ASC Topic 718 does not specify a particular method of estimating expected volatility. However, the Topic does clarify that the objective in estimating expected volatility is to ascertain the assumption about expected volatility that marketplace participants would likely use in determining an exchange price for an option.[32] FASB ASC Topic 718 provides a list of factors entities should consider in estimating expected volatility.[33] Company B may begin its process of estimating expected volatility by considering its historical volatility.[34] However, Company B should also then consider, based on available information, how the expected volatility of its share price may differ from historical volatility.[35] Implied volatility[36] can be useful in estimating expected volatility because it is generally reflective of both historical volatility and expectations of how future volatility will differ from historical volatility.

The staff believes that companies should make good faith efforts to identify and use sufficient information in determining whether taking historical volatility, implied volatility or a combination of both into account will result in the best estimate of expected volatility. The staff believes companies that have appropriate traded financial instruments from which they can derive an implied volatility should generally consider this measure. The extent of the ultimate reliance on implied volatility will depend on a company's facts and circumstances; however, the staff believes that a company with actively traded options or other financial instruments with embedded options[37] generally could place greater (or even exclusive) reliance on implied volatility. (*See* the Interpretive Responses to Questions 3 and 4 below.)

The process used to gather and review available information to estimate expected volatility should be applied consistently from period to period. When circumstances indicate the availability of new or different information that would be useful in estimating expected volatility, a company should incorporate that information.

*Question 2:* What should Company B consider if computing historical volatility?[38]

*Interpretive Response:* The following should be considered in the computation of historical volatility:

1. Method of Computing Historical Volatility—

The staff believes the method selected by Company B to compute its historical volatility should produce an estimate that is representative of Company B's expectations about its future volatility over the expected (if using a Black-Scholes-Merton closed-form model) or contractual (if using a lattice model) term[39] of its employee share options. Certain methods may not be appropriate

[28] FASB ASC paragraph 718–10–55–27.

[29] *See generally* FASB ASC paragraph 718–10–50–1.

[30] FASB ASC paragraph 718–10–55–4.

[31] FASB ASC paragraph 718–10–50–2.

[32] FASB ASC paragraph 718–10–55–35.

[33] FASB ASC paragraph 718–10–55–37.

[34] FASB ASC paragraph 718–10–55–40.

[35] *Ibid.*

[36] Implied volatility is the volatility assumption inherent in the market prices of a company's traded options or other financial instruments that have option-like features. Implied volatility is derived by entering the market price of the traded financial instrument, along with assumptions specific to the financial options being valued, into a model based on a constant volatility estimate (*e.g.,* the Black-Scholes-Merton closed-form model) and solving for the unknown assumption of volatility.

[37] The staff believes implied volatility derived from embedded options can be utilized in determining expected volatility if, in deriving the implied volatility, the company considers all relevant features of the instruments (*e.g.,* value of the host instrument, value of the option, *etc.*). The staff believes the derivation of implied volatility from other than simple instruments (*e.g.,* a simple convertible bond) can, in some cases, be impracticable due to the complexity of multiple features.

[38] *See* FASB ASC paragraph 718–10–55–37.

[39] For purposes of this staff accounting bulletin, the phrase "expected or contractual term, as applicable" has the same meaning as the phrase "expected (if using a Black-Scholes-Merton closed-form model) or contractual (if using a lattice model) term of an employee share option."

for longer term employee share options if they weight the most recent periods of Company B's historical volatility much more heavily than earlier periods.[40] For example, a method that applies a factor to certain historical price intervals to reflect a decay or loss of relevance of that historical information emphasizes the most recent historical periods and thus would likely bias the estimate to this recent history.[41]

2. Amount of Historical Data—

FASB ASC subparagraph 718–10–55–37(a) indicates entities should consider historical volatility over a period generally commensurate with the expected or contractual term, as applicable, of the share option. The staff believes Company B could utilize a period of historical data longer than the expected or contractual term, as applicable, if it reasonably believes the additional historical information will improve the estimate. For example, assume Company B decided to utilize a Black-Scholes-Merton closed-form model to estimate the value of the share options granted on January 2, 20X6 and determined that the expected term was six years. Company B would not be precluded from using historical data longer than six years if it concludes that data would be relevant.

3. Frequency of Price Observations—

FASB ASC subparagraph 718–10–55–37(d) indicates an entity should use appropriate and regular intervals for price observations based on facts and circumstances that provide the basis for a reasonable fair value estimate. Accordingly, the staff believes Company B should consider the frequency of the trading of its shares and the length of its trading history in determining the appropriate frequency of price observations. The staff believes using daily, weekly or monthly price observations may provide a sufficient basis to estimate expected volatility if the history provides enough data points on which to base the estimate.[42] Company B should select a consistent point in time within each interval when selecting data points.[43]

4. Consideration of Future Events—

The objective in estimating expected volatility is to ascertain the assumptions that marketplace participants would likely use in determining an exchange price for an option.[44] Accordingly, the staff believes that Company B should consider those future events that it reasonably concludes a marketplace participant would also consider in making the estimation. For example, if Company B has recently announced a merger with a company that would change its business risk in the future, then it should consider the impact of the merger in estimating the expected volatility if it reasonably believes a marketplace participant would also consider this event.

5. Exclusion of Periods of Historical Data—

In some instances, due to a company's particular business situations, a period of historical volatility data may not be relevant in evaluating expected volatility.[45] In these instances, that period should be disregarded. The staff believes that if Company B disregards a period of historical volatility, it should be prepared to support its conclusion that its historical share price during that previous period is not relevant to estimating expected volatility due to one or more discrete and specific historical events and that similar events are not expected to occur during the expected term of the share option. The staff believes these situations would be rare.

*Question 3:* What should Company B consider when evaluating the extent of its reliance on the implied volatility derived from its traded options?

*Interpretive Response:* To achieve the objective of estimating expected volatility as stated in FASB ASC paragraphs 718–10–55–35 through 718–10–55–41, the staff believes Company B generally should consider the following in its evaluation: 1) the volume of market activity of the underlying shares and traded options; 2) the ability to synchronize the variables used to derive implied volatility; 3) the similarity of the exercise prices of the traded options to the exercise price of the employee share options; and 4) the similarity of the length of the term of the traded and employee share options.[46]

1. Volume of Market Activity—

The staff believes Company B should consider the volume of trading in its underlying shares as well as the traded options. For example, prices for instruments in actively traded markets are more likely to reflect a marketplace participant's expectations regarding expected volatility.

2. Synchronization of the Variables—

Company B should synchronize the variables used to derive implied volatility. For example, to the extent reasonably practicable, Company B should use market prices (either traded prices or the average of bid and asked quotes) of the traded options and its shares measured at the same point in time. This measurement should also be synchronized with the grant of the employee share options; however, when this is not reasonably practicable, the staff believes Company B should derive implied volatility as of a point in time as close to the grant of the employee share options as reasonably practicable.

3. Similarity of the Exercise Prices—

The staff believes that when valuing an at-the-money employee share option, the implied volatility derived from at- or near-the-money traded options generally would be most relevant.[47] If, however, it is not possible to find at- or near-the-money traded options, Company B should select multiple traded options with an average exercise price close to the exercise price of the employee share option.[48]

[40] FASB ASC subparagraph 718–10–55–37(a) states that entities should consider historical volatility over a period generally commensurate with the expected or contractual term, as applicable, of the share option. Accordingly, the staff believes methods that place extreme emphasis on the most recent periods may be inconsistent with this guidance.

[41] Generalized Autoregressive Conditional Heteroskedasticity ("GARCH") is an example of a method that demonstrates this characteristic.

[42] Further, if shares of a company are thinly traded the staff believes the use of weekly or monthly price observations would generally be more appropriate than the use of daily price observations. The volatility calculation using daily observations for such shares could be artificially inflated due to a larger spread between the bid and asked quotes and lack of consistent trading in the market.

[43] FASB ASC paragraph 718–10–55–40 states that a company should establish a process for estimating expected volatility and apply that process consistently from period to period. In addition, FASB ASC paragraph 718–10–55–27 indicates that assumptions used to estimate the fair value of instruments granted to employees should be determined in a consistent manner from period to period.

[44] FASB ASC paragraph 718–10–55–35.

[45] FASB ASC paragraph 718–10–55–37.

[46] *See generally* Options, Futures, and Other Derivatives by John C. Hull (Prentice Hall, 5th Edition, 2003).

[47] Implied volatilities of options differ systematically over the "moneyness" of the option. This pattern of implied volatilities across exercise prices is known as the "volatility smile" or "volatility skew." Studies such as "Implied Volatility" by Stewart Mayhew, Financial Analysts Journal, July-August 1995, have found that implied volatilities based on near-the-money options do as well as sophisticated weighted implied volatilities in estimating expected volatility. In addition, the staff believes that because near-the-money options are generally more actively traded, they may provide a better basis for deriving implied volatility.

[48] The staff believes a company could use a weighted-average implied volatility based on traded options that are either in-the-money or out-of-the-money. For example, if the employee share option has an exercise price of $52, but the only traded options available have exercise prices of $50 and

Continued

4. Similarity of Length of Terms—

The staff believes that when valuing an employee share option with a given expected or contractual term, as applicable, the implied volatility derived from a traded option with a similar term would be the most relevant. However, if there are no traded options with maturities that are similar to the share option's contractual or expected term, as applicable, then the staff believes Company B could consider traded options with a remaining maturity of six months or greater.[49] However, when using traded options with a term of less than one year,[50] the staff would expect the company to also consider other relevant information in estimating expected volatility. In general, the staff believes more reliance on the implied volatility derived from a traded option would be expected the closer the remaining term of the traded option is to the expected or contractual term, as applicable, of the employee share option.

The staff believes Company B's evaluation of the factors above should assist in determining whether the implied volatility appropriately reflects the market's expectations of future volatility and thus the extent of reliance that Company B reasonably places on the implied volatility.

*Question 4:* Are there situations in which it is acceptable for Company B to rely exclusively on either implied volatility or historical volatility in its estimate of expected volatility?

*Interpretive Response:* As stated above, FASB ASC Topic 718 does not specify a method of estimating expected volatility; rather, it provides a list of factors that should be considered and requires that an entity's estimate of expected volatility be reasonable and supportable.[51] Many of the factors listed in FASB ASC Topic 718 are discussed in Questions 2 and 3 above. The objective of estimating volatility, as stated in FASB ASC Topic 718, is to ascertain the assumption about expected volatility that marketplace participants would likely use in determining a price for an option.[52] The staff believes that a company, after considering the factors listed in FASB ASC Topic 718, could, in certain situations, reasonably conclude that exclusive reliance on either historical or implied volatility would provide an estimate of expected volatility that meets this stated objective.

The staff would not object to Company B placing exclusive reliance on implied volatility when the following factors are present, as long as the methodology is consistently applied:

- Company B utilizes a valuation model that is based upon a constant volatility assumption to value its employee share options;[53]
- The implied volatility is derived from options that are actively traded;
- The market prices (trades or quotes) of both the traded options and underlying shares are measured at a similar point in time to each other and on a date reasonably close to the grant date of the employee share options;
- The traded options have exercise prices that are both (a) near-the-money and (b) close to the exercise price of the employee share options;[54] and
- The remaining maturities of the traded options on which the estimate is based are at least one year.

The staff would not object to Company B placing exclusive reliance on historical volatility when the following factors are present, so long as the methodology is consistently applied:

- Company B has no reason to believe that its future volatility over the expected or contractual term, as applicable, is likely to differ from its past;[55]
- The computation of historical volatility uses a simple average calculation method;
- A sequential period of historical data at least equal to the expected or contractual term of the share option, as applicable, is used; and
- A reasonably sufficient number of price observations are used, measured at a consistent point throughout the applicable historical period.[56]

*Question 5:* What disclosures would the staff expect Company B to include in its financial statements and MD&A regarding its assumption of expected volatility?

*Interpretive Response:* FASB ASC paragraph 718–10–50–2 prescribes the minimum information needed to achieve the Topic's disclosure objectives.[57] Under that guidance, Company B is required to disclose the expected volatility and the method used to estimate it.[58] Accordingly, the staff expects that at a minimum Company B would disclose in a footnote to its financial statements how it determined the expected volatility assumption for purposes of determining the fair value of its share options in accordance with FASB ASC Topic 718. For example, at a minimum, the staff would expect Company B to disclose whether it used only implied volatility, historical volatility, or a combination of both.

In addition, Company B should consider the applicability of SEC Release No. FR–60 and Section V, "Critical Accounting Estimates," in SEC Release No. FR–72 regarding critical accounting policies and estimates in MD&A. The staff would expect such disclosures to include an explanation of the method used to estimate the expected volatility of its share price. This explanation generally should include a discussion of the basis for the company's conclusions regarding the extent to which it used historical volatility, implied volatility or a combination of both. A company could consider summarizing its evaluation of the factors listed in Questions 2 and 3 of this section as part of these disclosures in MD&A.

*Facts:* Company C is a newly public entity with limited historical data on the

$55, then the staff believes that it is appropriate to use a weighted average based on the implied volatilities from the two traded options; for this example, a 40% weight on the implied volatility calculated from the option with an exercise price of $55 and a 60% weight on the option with an exercise price of $50.

[49] The staff believes it may also be appropriate to consider the entire term structure of volatility provided by traded options with a variety of remaining maturities. If a company considers the entire term structure in deriving implied volatility, the staff would expect a company to include some options in the term structure with a remaining maturity of six months or greater.

[50] The staff believes the implied volatility derived from a traded option with a term of one year or greater would typically not be significantly different from the implied volatility that would be derived from a traded option with a significantly longer term.

[51] FASB ASC paragraphs 718–10–55–36 through 718–10–55–37.

[52] FASB ASC paragraph 718–10–55–35.

[53] FASB ASC paragraphs 718–10–55–18 and 718–10–55–39 discuss the incorporation of a range of expected volatilities into option pricing models. The staff believes that a company that utilizes an option pricing model that incorporates a range of expected volatilities over the option's contractual term should consider the factors listed in FASB ASC Topic 718, and those discussed in the Interpretive Responses to Questions 2 and 3 above, to determine the extent of its reliance (including exclusive reliance) on the derived implied volatility.

[54] When near-the-money options are not available, the staff believes the use of a weighted-average approach, as noted in a previous footnote, may be appropriate.

[55] *See* FASB ASC paragraph 718–10–55–38. A change in a company's business model that results in a material alteration to the company's risk profile is an example of a circumstance in which the company's future volatility would be expected to differ from its past volatility. Other examples may include, but are not limited to, the introduction of a new product that is central to a company's business model or the receipt of U.S. Food and Drug Administration approval for the sale of a new prescription drug.

[56] If the expected or contractual term, as applicable, of the employee share option is less than three years, the staff believes monthly price observations would not provide a sufficient amount of data.

[57] FASB ASC Section 718–10–50.

[58] FASB ASC subparagraph 718–10–50–2(f) (2) (ii).

price of its publicly traded shares and no other traded financial instruments. Company C believes that it does not have sufficient company specific information regarding the volatility of its share price on which to base an estimate of expected volatility.

*Question 6:* What other sources of information should Company C consider in order to estimate the expected volatility of its share price?

*Interpretive Response:* FASB ASC Topic 718 provides guidance on estimating expected volatility for newly public and nonpublic entities that do not have company specific historical or implied volatility information available.[59] Company C may base its estimate of expected volatility on the historical, expected or implied volatility of similar entities whose share or option prices are publicly available. In making its determination as to similarity, Company C would likely consider the industry, stage of life cycle, size and financial leverage of such other entities.[60]

The staff would not object to Company C looking to an industry sector index (*e.g.,* NASDAQ Computer Index) that is representative of Company C's industry, and possibly its size, to identify one or more similar entities.[61] Once Company C has identified similar entities, it would substitute a measure of the individual volatilities of the similar entities for the expected volatility of its share price as an assumption in its valuation model.[62] Because of the effects of diversification that are present in an industry sector index, Company C should not substitute the volatility of an index for the expected volatility of its share price as an assumption in its valuation model.[63]

After similar entities have been identified, Company C should continue to consider the volatilities of those entities unless circumstances change such that the identified entities are no longer similar to Company C. Until Company C has sufficient information available, the staff would not object to Company C basing its estimate of expected volatility on the volatility of similar entities for those periods for which it does not have sufficient information available.[64] Until Company C has either a sufficient amount of historical information regarding the volatility of its share price or other traded financial instruments are available to derive an implied volatility to support an estimate of expected volatility, it should consistently apply a process as described above to estimate expected volatility based on the volatilities of similar entities.[65]

2. Expected Term

FASB ASC paragraph 718–10–55–29 states "The fair value of a traded (or transferable) share option is based on its contractual term because rarely is it economically advantageous to exercise, rather than sell, a transferable share option before the end of its contractual term. Employee share options generally differ from transferable [or tradable] share options in that employees cannot sell (or hedge) their share options—they can only exercise them; because of this, employees generally exercise their options before the end of the options' contractual term. Thus, the inability to sell or hedge an employee share option effectively reduces the option's value [compared to a transferable option] because exercise prior to the option's expiration terminates its remaining life and thus its remaining time value." Accordingly, FASB ASC Topic 718 requires that when valuing an employee share option under the Black-Scholes-Merton framework the fair value of employee share options be based on the share options' expected term rather than the contractual term.

The staff believes the estimate of expected term should be based on the facts and circumstances available in each particular case. Consistent with our guidance regarding reasonableness immediately preceding Topic 14.A, the fact that other possible estimates are later determined to have more accurately reflected the term does not necessarily mean that the particular choice was unreasonable. The staff reminds registrants of the expected term disclosure requirements described in FASB ASC subparagraph 718–10–50–2(f)(2)(i).

*Facts:* Company D utilizes the Black-Scholes-Merton closed-form model to value its share options for the purposes of determining the fair value of the options under FASB ASC Topic 718. Company D recently granted share options to its employees. Based on its review of various factors, Company D determines that the expected term of the options is six years, which is less than the contractual term of ten years.

*Question 1:* When determining the fair value of the share options in accordance with FASB ASC Topic 718, should Company D consider an additional discount for nonhedgability and nontransferability?

*Interpretive Response:* No. FASB ASC paragraph 718–10–55–29 indicates that nonhedgability and nontransferability have the effect of increasing the likelihood that an employee share option will be exercised before the end of its contractual term. Nonhedgability and nontransferability therefore factor into the expected term assumption (in this case reducing the term assumption from ten years to six years), and the expected term reasonably adjusts for the effect of these factors. Accordingly, the staff believes that no additional reduction in the term assumption or other discount to the estimated fair value is appropriate for these particular factors.[66]

*Question 2:* Should forfeitures or terms that stem from forfeitability be factored into the determination of expected term?

*Interpretive Response:* No. FASB ASC Topic 718 indicates that the expected term that is utilized as an assumption in a closed-form option-pricing model or a resulting output of a lattice option pricing model when determining the fair value of the share options should not incorporate restrictions or other terms that stem from the pre-vesting forfeitability of the instruments. Under FASB ASC Topic 718, these pre-vesting restrictions or other terms are taken into account by ultimately recognizing compensation cost only for awards for

[59] FASB ASC paragraphs 718–10–55–25 and 718–10–55–51.

[60] FASB ASC paragraph 718–1055–25.

[61] If a company operates in a number of different industries, it could look to several industry indices. However, when considering the volatilities of multiple companies, each operating only in a single industry, the staff believes a company should take into account its own leverage, the leverages of each of the entities, and the correlation of the entities' stock returns.

[62] FASB ASC paragraph 718–10–55–51.

[63] FASB ASC paragraph 718–10–55–25.

[64] FASB ASC paragraph 718–10–55–37. The staff believes that at least two years of daily or weekly historical data could provide a reasonable basis on which to base an estimate of expected volatility if a company has no reason to believe that its future volatility will differ materially during the expected or contractual term, as applicable, from the volatility calculated from this past information. If the expected or contractual term, as applicable, of a share option is shorter than two years, the staff believes a company should use daily or weekly historical data for at least the length of that applicable term.

[65] FASB ASC paragraph 718–10–55–40.

[66] The staff notes the existence of academic literature that supports the assertion that the Black-Scholes-Merton closed-form model, with expected term as an input, can produce reasonable estimates of fair value. Such literature includes J. Carpenter, "The exercise and valuation of executive stock options," Journal of Financial Economics, May 1998, pp.127–158; C. Marquardt, "The Cost of Employee Stock Option Grants: An Empirical Analysis," Journal of Accounting Research, September 2002, p. 1191–1217); and J. Bettis, J. Bizjak and M. Lemmon, "Exercise behavior, valuation, and the incentive effect of employee stock options," Journal of Financial Economics, forthcoming, 2005.

which employees render the requisite service.[67]

*Question 3:* Can a company's estimate of expected term ever be shorter than the vesting period?

*Interpretive Response:* No. The vesting period forms the lower bound of the estimate of expected term.[68]

*Question 4:* FASB ASC paragraph 718–10–55–34 indicates that an entity shall aggregate individual awards into relatively homogenous groups with respect to exercise and post-vesting employment termination behaviors for the purpose of determining expected term, regardless of the valuation technique or model used to estimate the fair value. How many groupings are typically considered sufficient?

*Interpretive Response:* As it relates to employee groupings, the staff believes that an entity may generally make a reasonable fair value estimate with as few as one or two groupings.[69]

*Question 5:* What approaches could a company use to estimate the expected term of its employee share options?

*Interpretive Response:* A company should use an approach that is reasonable and supportable under FASB ASC Topic 718's fair value measurement objective, which establishes that assumptions and measurement techniques should be consistent with those that marketplace participants would be likely to use in determining an exchange price for the share options.[70] If, in developing its estimate of expected term, a company determines that its historical share option exercise experience is the best estimate of future exercise patterns, the staff will not object to the use of the historical share option exercise experience to estimate expected term.[71]

A company may also conclude that its historical share option exercise experience does not provide a reasonable basis upon which to estimate expected term. This may be the case for a variety of reasons, including, but not limited to, the life of the company and its relative stage of development, past or expected structural changes in the business, differences in terms of past equity-based share option grants,[72] or a lack of variety of price paths that the company may have experienced.[73]

FASB ASC Topic 718 describes other alternative sources of information that might be used in those cases when a company determines that its historical share option exercise experience does not provide a reasonable basis upon which to estimate expected term. For example, a lattice model (which by definition incorporates multiple price paths) can be used to estimate expected term as an input into a Black-Scholes-Merton closed-form model.[74] In addition, FASB ASC paragraph 718–10–55–32 states "* * * expected term might be estimated in some other manner, taking into account whatever relevant and supportable information is available, including industry averages and other pertinent evidence such as published academic research." For example, data about exercise patterns of employees in similar industries and/or situations as the company's might be used. While such comparative information may not be widely available at present, the staff understands that various parties, including actuaries, valuation professionals and others are gathering such data.

*Facts:* Company E grants equity share options to its employees that have the following basic characteristics:[75]

- The share options are granted at-the-money;
- Exercisability is conditional only on performing service through the vesting date;[76]
- If an employee terminates service prior to vesting, the employee would forfeit the share options;
- If an employee terminates service after vesting, the employee would have a limited time to exercise the share options (typically 30–90 days); and
- The share options are nontransferable and nonhedgeable.

Company E utilizes the Black-Scholes-Merton closed-form model for valuing its employee share options.

*Question 6:* As share options with these "plain vanilla" characteristics have been granted in significant quantities by many companies in the past, is the staff aware of any "simple" methodologies that can be used to estimate expected term?

*Interpretive Response:* As noted above, the staff understands that an entity that is unable to rely on its historical exercise data may find that certain alternative information, such as exercise data relating to employees of other companies, is not easily obtainable. As such, some companies may encounter difficulties in making a refined estimate of expected term. Accordingly, if a company concludes that its historical share option exercise experience does not provide a reasonable basis upon which to estimate expected term, the staff will accept the following "simplified" method for "plain vanilla" options consistent with those in the fact set above: expected term = ((vesting term + original contractual term)/2). Assuming a ten year original contractual term and graded vesting over four years (25% of the options in each grant vest annually) for the share options in the fact set described above, the resultant expected term would be 6.25 years.[77] Academic research on the exercise of options issued to executives provides some general support for outcomes that would be produced by the application of this method.[78]

[67] FASB ASC paragraph 718–10–30–11.

[68] FASB ASC paragraph 718–10–55–31.

[69] The staff believes the focus should be on groups of employees with significantly different expected exercise behavior. Academic research suggests two such groups might be executives and non-executives. A study by S. Huddart found executives and other senior managers to be significantly more patient in their exercise behavior than more junior employees. (Employee rank was proxied for by the number of options issued to that employee.) *See* S. Huddart, "Patterns of stock option exercise in the United States," in: J. Carpenter and D. Yermack, eds., Executive Compensation and Shareholder Value: Theory and Evidence (Kluwer, Boston, MA, 1999), pp. 115–142. *See also* S. Huddart and M. Lang, "Employee stock option exercises: An empirical analysis," Journal of Accounting and Economics, 1996, pp. 5–43.

[70] FASB ASC paragraph 718–10–55–13.

[71] Historical share option exercise experience encompasses data related to share option exercise, post-vesting termination, and share option contractual term expiration.

[72] For example, if a company had historically granted share options that were always in-the-money, and will grant at-the-money options prospectively, the exercise behavior related to the in-the-money options may not be sufficient as the sole basis to form the estimate of expected term for the at-the-money grants.

[73] For example, if a company had a history of previous equity-based share option grants and exercises only in periods in which the company's share price was rising, the exercise behavior related to those options may not be sufficient as the sole basis to form the estimate of expected term for current option grants.

[74] FASB ASC paragraph 718–10–55–30.

[75] Employee share options with these features are sometimes referred to as "plain vanilla" options.

[76] In this fact pattern the requisite service period equals the vesting period.

[77] Calculated as [[[1 year vesting term (for the first 25% vested) plus 2 year vesting term (for the second 25% vested) plus 3 year vesting term (for the third 25% vested) plus 4 year vesting term (for the last 25% vested)] divided by 4 total years of vesting] plus 10 year contractual life] divided by 2; that is, (((1+2+3+4)/4) + 10)/2 = 6.25 years.

[78] J.N. Carpenter, "The exercise and valuation of executive stock options," Journal of Financial Economics, 1998, pp.127–158 studies a sample of 40 NYSE and AMEX firms over the period 1979–1994 with share option terms reasonably consistent to the terms presented in the fact set and example. The mean time to exercise after grant was 5.83 years and the median was 6.08 years. The "mean time to exercise" is shorter than expected term since the study's sample included only exercised options. Other research on executive options includes (but is not limited to) J. Carr Bettis; John M. Bizjak; and Michael L. Lemmon, "Exercise behavior, valuation, and the incentive effects of employee stock options," forthcoming in the Journal of Financial Economics. One of the few studies on nonexecutive employee options the staff is aware of is S. Huddart, "Patterns of stock option exercise in the United States," in: J. Carpenter and D. Yermack, eds., Executive Compensation and Shareholder Value: Theory and Evidence (Kluwer, Boston, MA, 1999), pp. 115–142.

Examples of situations in which the staff believes that it may be appropriate to use this simplified method include the following:

- A company does not have sufficient historical exercise data to provide a reasonable basis upon which to estimate expected term due to the limited period of time its equity shares have been publicly traded.
- A company significantly changes the terms of its share option grants or the types of employees that receive share option grants such that its historical exercise data may no longer provide a reasonable basis upon which to estimate expected term.
- A company has or expects to have significant structural changes in its business such that its historical exercise data may no longer provide a reasonable basis upon which to estimate expected term.

The staff understands that a company may have sufficient historical exercise data for some of its share option grants but not for others. In such cases, the staff will accept the use of the simplified method for only some but not all share option grants. The staff also does not believe that it is necessary for a company to consider using a lattice model before it decides that it is eligible to use this simplified method. Further, the staff will not object to the use of this simplified method in periods prior to the time a company's equity shares are traded in a public market.

If a company uses this simplified method, the company should disclose in the notes to its financial statements the use of the method, the reason why the method was used, the types of share option grants for which the method was used if the method was not used for all share option grants, and the periods for which the method was used if the method was not used in all periods. Companies that have sufficient historical share option exercise experience upon which to estimate expected term may not apply this simplified method. In addition, this simplified method is not intended to be applied as a benchmark in evaluating the appropriateness of more refined estimates of expected term.

Also, as noted above in Question 5, the staff believes that more detailed external information about exercise behavior will, over time, become readily available to companies. As such, the staff does not expect that such a simplified method would be used for share option grants when more relevant detailed information becomes widely available.

*E. FASB ASC Topic 718, Compensation—Stock Compensation, and Certain Redeemable Financial Instruments*

Certain financial instruments awarded in conjunction with share-based payment arrangements have redemption features that require settlement by cash or other assets upon the occurrence of events that are outside the control of the issuer.[79] FASB ASC Topic 718 provides guidance for determining whether instruments granted in conjunction with share-based payment arrangements should be classified as liability or equity instruments. Under that guidance, most instruments with redemption features that are outside the control of the issuer are required to be classified as liabilities; however, some redeemable instruments will qualify for equity classification.[80] SEC Accounting Series Release No. 268, Presentation in Financial Statements of "Redeemable Preferred Stocks,"[81] ("ASR 268") and related guidance[82] address the classification and measurement of certain redeemable equity instruments.

*Facts:* Under a share-based payment arrangement, Company F grants to an employee shares (or share options) that all vest at the end of four years (cliff vest). The shares (or shares underlying the share options) are redeemable for cash at fair value at the holder's option, but only after six months from the date of share issuance (as defined in FASB ASC Topic 718). Company F has determined that the shares (or share options) would be classified as equity instruments under the guidance of FASB ASC Topic 718. However, under ASR 268 and related guidance, the instruments would be considered to be redeemable for cash or other assets upon the occurrence of events (*e.g.,* redemption at the option of the holder) that are outside the control of the issuer.

*Question 1:* While the instruments are subject to FASB ASC Topic 718,[83] is ASR 268 and related guidance applicable to instruments issued under share-based payment arrangements that are classified as equity instruments under FASB ASC Topic 718?

*Interpretive Response:* Yes. The staff believes that registrants must evaluate whether the terms of instruments granted in conjunction with share-based payment arrangements with employees that are not classified as liabilities under FASB ASC Topic 718 result in the need to present certain amounts outside of permanent equity (also referred to as being presented in "temporary equity") in accordance with ASR 268 and related guidance.[84]

When an instrument ceases to be subject to FASB ASC Topic 718 and becomes subject to the recognition and measurement requirements of other applicable GAAP, the staff believes that the company should reassess the classification of the instrument as a liability or equity at that time and consequently may need to reconsider the applicability of ASR 268.

*Question 2:* How should Company F apply ASR 268 and related guidance to the shares (or share options) granted under the share-based payment arrangements with employees that may be unvested at the date of grant?

*Interpretive Response:* Under FASB ASC Topic 718, when compensation cost is recognized for instruments classified as equity instruments, additional paid-in-capital[85] is increased. If the award is not fully vested at the grant date, compensation cost is recognized and additional paid-in-capital is increased over time as services are rendered over the requisite

[79] The terminology "outside the control of the issuer" is used to refer to any of the three redemption conditions described in Rule 5–02.28 of Regulation S–X that would require classification outside permanent equity. That rule requires preferred securities that are redeemable for cash or other assets to be classified outside of permanent equity if they are redeemable (1) at a fixed or determinable price on a fixed or determinable date, (2) at the option of the holder, or (3) upon the occurrence of an event that is not solely within the control of the issuer.

[80] FASB ASC paragraphs 718–10–25–6 through 718–10–25–19.

[81] ASR 268, July 27, 1979, Rule 5–02.28 of Regulation S–X.

[82] Related guidance includes FASB ASC paragraph 480–10–S99–3 (Distinguishing Liabilities from Equity Topic).

[83] FASB ASC paragraph 718–10–35–13 states that an instrument ceases to be subject to this Topic when "the rights conveyed by the instrument to the holder are no longer dependent on the holder being an employee of the entity (that is, no longer dependent on providing service)."

[84] Instruments granted in conjunction with share-based payment arrangements with employees that do not by their terms require redemption for cash or other assets (at a fixed or determinable price on a fixed or determinable date, at the option of the holder, or upon the occurrence of an event that is not solely within the control of the issuer) would not be assumed by the staff to require net cash settlement for purposes of applying ASR 268 in circumstances in which FASB ASC Section 815–40–25, Derivatives and Hedging—Contracts in Entity's Own Equity—Recognition, would otherwise require the assumption of net cash settlement. *See* FASB ASC paragraph 815–40–25–11, which states, in part: "* * *the events or actions necessary to deliver registered shares are not controlled by an entity and, therefore, except under the circumstances described in FASB ASC paragraph 815–40–25–16, if the contract permits the entity to net share or physically settle the contract only by delivering registered shares, it is assumed that the entity will be required to net cash settle the contract." *See also* FASB ASC subparagraph 718–10–25–15(a).

[85] Depending on the fact pattern, this may be recorded as common stock and additional paid in capital.

service period. A similar pattern of recognition should be used to reflect the amount presented as temporary equity for share-based payment awards that have redemption features that are outside the issuer's control but are classified as equity instruments under FASB ASC Topic 718. The staff believes Company F should present as temporary equity at each balance sheet date an amount that is based on the redemption amount of the instrument, but takes into account the proportion of consideration received in the form of employee services. Thus, for example, if a nonvested share that qualifies for equity classification under FASB ASC Topic 718 is redeemable at fair value more than six months after vesting, and that nonvested share is 75% vested at the balance sheet date, an amount equal to 75% of the fair value of the share should be presented as temporary equity at that date. Similarly, if an option on a share of redeemable stock that qualifies for equity classification under FASB ASC Topic 718 is 75% vested at the balance sheet date, an amount equal to 75% of the intrinsic [86] value of the option should be presented as temporary equity at that date.

*Question 3:* Would the methodology described for employee awards in the Interpretive Response to Question 2 above apply to nonemployee awards to be issued in exchange for goods or services with similar terms to those described above?

*Interpretive Response: See* Topic 14.A for a discussion of the application of the principles in FASB ASC Topic 718 to nonemployee awards. The staff believes it would generally be appropriate to apply the methodology described in the Interpretive Response to Question 2 above to nonemployee awards.

*F. Classification of Compensation Expense Associated with Share-Based Payment Arrangements*

*Facts:* Company G utilizes both cash and share-based payment arrangements to compensate its employees and nonemployee service providers. Company G would like to emphasize in its income statement the amount of its compensation that did not involve a cash outlay.

*Question:* How should Company G present in its income statement the non-cash nature of its expense related to share-based payment arrangements?

*Interpretive Response:* The staff believes Company G should present the expense related to share-based payment arrangements in the same line or lines as cash compensation paid to the same employees.[87] The staff believes a company could consider disclosing the amount of expense related to share-based payment arrangements included in specific line items in the financial statements. Disclosure of this information might be appropriate in a parenthetical note to the appropriate income statement line items, on the cash flow statement, in the footnotes to the financial statements, or within MD&A.

*G. Removed by SAB 114* [88,89]

*H. Removed by SAB 114* [90,91,92,93]

*I. Capitalization of Compensation Cost Related to Share-Based Payment Arrangements*

*Facts:* Company K is a manufacturing company that grants share options to its production employees. Company K has determined that the cost of the production employees' service is an inventoriable cost. As such, Company K is required to initially capitalize the cost of the share option grants to these production employees as inventory and later recognize the cost in the income statement when the inventory is consumed.[94]

*Question:* If Company K elects to adjust its period end inventory balance for the allocable amount of share-option cost through a period end adjustment to its financial statements, instead of incorporating the share-option cost through its inventory costing system, would this be considered a deficiency in internal controls?

[86] The potential redemption amount of the share option in this illustration is its intrinsic value because the holder would pay the exercise price upon exercise of the option and then, upon redemption of the underlying shares, the company would pay the holder the fair value of those shares. Thus, the net cash outflow from the arrangement would be equal to the intrinsic value of the share option. In situations where there would be no cash inflows from the share option holder, the cash required to be paid to redeem the underlying shares upon the exercise of the put option would be the redemption value.

[87] FASB ASC Topic 718 does not identify a specific line item in the income statement for presentation of the expense related to share-based payment arrangements.

[88] [Original footnote removed by SAB 114.]

[89] [Original footnote removed by SAB 114.]

[90] [Original footnote removed by SAB 114.]

[91] [Original footnote removed by SAB 114.]

[92] [Original footnote removed by SAB 114.]

[93] [Original footnote removed by SAB 114.]

[94] FASB ASC paragraph 718–10–25–2.

*Interpretive Response:* No. FASB ASC Topic 718, Compensation—Stock Compensation, does not prescribe the mechanism a company should use to incorporate a portion of share-option costs in an inventory-costing system. The staff believes Company K may accomplish this through a period end adjustment to its financial statements. Company K should establish appropriate controls surrounding the calculation and recording of this period end adjustment, as it would any other period end adjustment. The fact that the entry is recorded as a period end adjustment, by itself, should not impact management's ability to determine that the internal control over financial reporting, as defined by the SEC's rules implementing Section 404 of the Sarbanes-Oxley Act of 2002,[95] is effective.

*J. Removed by SAB 114*[96] [97] [98]

*K. Removed by SAB 114*[99] [100] [101] [102] [103]

*L. Removed by SAB 114*[104] [105] [106]

*M. Removed by SAB 114*

[FR Doc. 2011–5584 Filed 3–25–11; 8:45 am]

BILLING CODE 8011–01–P

[95] Release No. 34–47986, June 5, 2003, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Period Reports.

[96] [Original footnote removed by SAB 114.]

[97] [Original footnote removed by SAB 114.]

[98] [Original footnote removed by SAB 114.]

[99] [Original footnote removed by SAB 114.]

[100] [Original footnote removed by SAB 114.]

[101] [Original footnote removed by SAB 114.]

[102] [Original footnote removed by SAB 114.]

[103] [Original footnote removed by SAB 114.]

[104] [Original footnote removed by SAB 114.]

[105] [Original footnote removed by SAB 114.]

[106] [Original footnote removed by SAB 114.]

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Part III

## Environmental Protection Agency

40 CFR Parts 72 and 75

Protocol Gas Verification Program and Minimum Competency Requirements for Air Emission Testing; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 72 and 75**

**[EPA–HQ–OAR–2009–0837; FRL–9280–9]**

**RIN 2060–AQ06**

## Protocol Gas Verification Program and Minimum Competency Requirements for Air Emission Testing

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

**ACTION:** Final rule; Reconsideration.

**SUMMARY:** EPA is finalizing rule revisions that modify existing requirements for sources affected by the federally administered emission trading programs including the $NO_X$ Budget Trading Program, the Acid Rain Program, and the Clean Air Interstate Rule.

EPA is amending its Protocol Gas Verification Program (PGVP) and the minimum competency requirements for air emission testing (formerly air emission testing body requirements) to improve the accuracy of emissions data. EPA is also amending other sections of the Acid Rain Program continuous emission monitoring system regulations by adding and clarifying certain recordkeeping and reporting requirements, removing the provisions pertaining to mercury monitoring and reporting, removing certain requirements associated with a class-approved alternative monitoring system, disallowing the use of a particular quality assurance option in EPA Reference Method 7E, adding two incorporation by references that were inadvertently left out of the January 24, 2008 final rule, adding two new definitions, revising certain compliance dates, and clarifying the language and applicability of certain provisions.

**DATES:** This final rule is effective on April 27, 2011. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of April 27, 2011.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2009–0837 (which includes Docket ID No. EPA–HQ–OAR–2005–0132, and Docket ID No. EPA–HQ–OAR–2008–0800). 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 Air and Radiation Docket, EPA/DC, EPA West Building, EPA Headquarters Library, Room 3334, 1301 Constitution Avenue, 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 Air and Radiation Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** John Schakenbach, U.S. Environmental Protection Agency, Clean Air Markets Division, MC 6204J, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone (202) 343–9158, e-mail at *schakenbach.john@epa.gov.* Electronic copies of this document can be accessed through the EPA Web site at: *http://epa.gov/airmarkets.*

**SUPPLEMENTARY INFORMATION:** *Regulated Entities.* Entities regulated by this action primarily are fossil fuel-fired boilers, turbines, and combined cycle units that serve generators that produce electricity for sale or cogenerate electricity for sale and steam. Regulated categories and entities include:

| Category | NAICS code | Examples of potentially regulated industries |
|---|---|---|
| Industry | 221112 and others | Electric service providers. |

This table is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities which EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine the applicability provisions in §§ 72.6, 72.7, and 72.8 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*World Wide Web (WWW).* In addition to being available in the docket, an electronic copy of the final rule is also available on the WWW through the Technology Transfer Network Web site (TTN Web). Following signature, a copy of the rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

*Judicial Review.* Under CAA section 307(b), judicial review of this final action is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit on or before May 27, 2011. Under CAA section 307(d)(7)(B), only those objections to the final rule that were raised with specificity during the period for public comment may be raised during judicial review. Moreover, under CAA section 307(b)(2), the requirements established by today's final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements. Section 307(d)(7)(B) also provides a mechanism for the EPA to convene a proceeding for reconsideration if the petitioner demonstrates that it was impracticable to raise an objection during the public comment period or if the grounds for such objection arose after the comment period (but within the time for judicial review) and if the objection is of central relevance to the rule. Any person seeking to make such a demonstration to EPA should submit a Petition for Reconsideration, clearly labeled as such, to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., Washington, DC 20460, with a copy to the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel, Mail Code 2344A, U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

*Outline.* The following outline is provided to aid in locating information in this preamble.

I. Detailed Discussion of Rule Revisions and Responses to Major Comments
A. Amendments to the Protocol Gas Verification Program (PGVP)
1. Need for the PGVP
2. Cost
3. Effective Dates

4. Recordkeeping/Reporting
5. ISO 17025
6. Credit/Invoice Cancellation
7. Gas Type Codes
8. Use of 95% Confidence Interval in Tag Values
9. Uncertainty of Results
10. Implementation Options
11. Use of Existing Cylinders
12. If NIST Withdraws From Participation
B. Amendments to the Minimum Competency Requirements for Air Emission Testing
1. Need for the Minimum Competency Requirements
2. Cost
3. Effective Dates
4. Accreditation
5. Scope of Testing
6. Affect on Validity of Test Data
7. Exams
8. Posting Non-Compliant Air Emission Testing Body (AETB) Names
C. Other Amendments
1. Compliance Dates for Units Adding New Stack or Control Device
2. Reference Method 7E
3. Removal of Mercury Provisions
4. Miscellaneous Amendments
II. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
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 and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
L. Petitions for Judicial Review

## I. Detailed Discussion of Rule Revisions and Responses to Major Comments

On January 24, 2008, revisions to 40 CFR part 75, the Acid Rain Program continuous emission monitoring regulations, were published in the **Federal Register** (*see* 73 FR 4340, January 24, 2008). To better ensure the accuracy of EPA Protocol gases used for Part 75 purposes, these amendments required that these gases be obtained from specialty gas producers that participate in a Protocol Gas Verification Program (PGVP). The final rule further provided that only PGVP participants were allowed to market calibration gas as "EPA Protocol gas". The January 24, 2008 rulemaking also included a provision requiring minimum competency requirements for air emission testing bodies (AETBs). The PGVP and AETB provisions became effective on January 1, 2009.

The Administrator received a Petition for Review, and a Petition for Reconsideration, claiming that EPA had not properly promulgated the PGVP. The Agency also received a Petition for Review challenging the AETB requirements. Subsequently, EPA published a final rule in the **Federal Register** staying the AETB requirements (73 FR 65554, November 4, 2008). EPA also posted a notice on an Agency Web site stating that the PGVP is not in effect, and a revised PGVP would not be effective until EPA goes through notice and comment rulemaking on any revised procedure. EPA is today announcing its reconsideration of the PGVP provisions of the January 24, 2008 final rule and is finalizing amendments to both the PGVP and AETB requirements. Today's final rule replaces the existing AETB requirements, effectively removing the stay.

EPA is also finalizing amendments to other sections of Part 75 by adding several data elements associated with EPA's Emissions Collection and Monitoring Plan System (ECMPS) software, clarifying the requirements for including cover letters with monitoring plan submittals, certification applications, and recertification applications, removing the 90 unit operating days provision pertaining to the monitoring system certification deadline for new Acid Rain Program (ARP) units and newly-affected units that lose their ARP-exempt status, removing the provisions pertaining to mercury monitoring and reporting, removing certain requirements associated with a class-approved alternative monitoring system, disallowing the use of a particular quality assurance option in EPA Reference Method 7E, adding two incorporation by references that were inadvertently left out of the January 24, 2008 final rule and updating others, adding two new definitions, updating recordkeeping/reporting formats, and clarifying the language and applicability of certain provisions.

Today's preamble provides responses to the major comments received on the proposed rule and discusses any resulting rule changes. The response to comments document (*see* Docket EPA–HQ–OAR–2009–0837) provides Agency responses to all of the relevant comments received on the proposed rule.

### *A. Amendments to the Protocol Gas Verification Program*

EPA encourages any EPA Protocol gas production site that is interested in participating in the PGVP to notify EPA as soon as possible after this final rule is published in the **Federal Register** by submitting the contact information described in 75.21(g)(1) by following the instructions on the CAMD Web site: *http://www.epa.gov/airmarkets/emissions/pgvp.html.*

#### 1. Need for the PGVP

Background

EPA proposed to add § 75.21(g) to establish a refined EPA Protocol gas verification program to better ensure the accuracy of EPA Protocol gases.

Every recent audit of EPA Protocol gases has found cylinders that fail the part 75 required ± 2% performance specification. A 2003 EPA audit (see Document ID#s EPA–HQ–OAR–2009–0837–0011, –0074, –0075, and –0076 in the docket) of EPA Protocol gases found an unacceptably high failure rate (11% of all components analyzed, with 57% of the production sites failing at least one gaseous component) with respect to the ± 2% standard in Part 75. A 2009 EPA Inspector General (IG) audit (see Document ID# EPA–HQ–OAR–2009–0837–0064 in the docket) also found an 11% failure rate over all components analyzed, with 39% of the production sites failing at least one gaseous component. The IG recommended that EPA implement an ongoing PGVP. A 2010 audit of EPA Protocol gases found a 10% failure rate over all components analyzed, with 40% of the production sites failing at least one gaseous component.

These failures were found using a small blind sample of cylinders from each specialty gas company in the U.S. There is no reason to think these samples were not random. Therefore, it is likely that for the companies that had failed audited cylinders, other cylinders from those companies would fail.

Summary of Comments and Responses

*Comment:* Eleven commenters, including one representing seven specialty gas companies that provide the vast majority of EPA Protocol gases in the U.S., supported the PGVP, and three commenters opposed it. The accuracy of EPA Protocol gases is important because these gases are used to help ensure that the national emission reduction goals of the Clean Air Act are met.

*Response:* Many of the proposed rule provisions of § 75.21(g) have been finalized as proposed. Significant

changes to the PGVP provisions in § 75.21(g) are discussed below.

2. Cost

Background

EPA proposed several rule changes that added a small number of PGVP-related recordkeeping and reporting requirements. An information collection request (ICR) supporting statement was developed, as required by the Paperwork Reduction Act.

EPA Protocol gas production sites selling EPA Protocol gases to part 75 affected sources will be required to have a small number of their cylinders analyzed each year, and provide annual notification to EPA with basic information on their facility and other information relevant to the PGVP. EPA anticipates that these costs will be passed through to the customers, which are generally sources subject to part 75, including large electric utility and industrial companies.

Summary of Comments and Responses

*Comment:* Several commenters suggested that the ICR for the proposed rule did not include sufficient detail and omitted certain costs associated with part 75 recordkeeping and reporting requirements. Another commenter stated that the proposed PGVP program was "exorbitantly expensive because it uses the analytical services of NIST."

*Response:* No rule changes were required to address the commenter's concerns. However, the Agency has revised the ICR for the final rule to include additional details and costs associated with part 75 recordkeeping and reporting requirements. For a more detailed discussion of this issue, refer to the ICR for the final rule.

EPA performed an audit of EPA Protocol gases in 2010 and the National Institute of Standards and Technology (NIST) analyzed the cylinders EPA collected in the audit. NIST provided an initial estimate of $2,000 per cylinder to analyze tri-blend gas mixtures in the 2010 audit. The following costs for the PGVP are based on assumptions similar to those made for the 2010 audit. These assumptions are: (a) That only NO, $SO_2$ and $CO_2$ will be analyzed; (b) that only these compounds are within the gas mixture along with balance gas nitrogen (additional compounds within the gas mixture, even if they are not analyzed, complicate the analysis of the primary components); and (c) that the concentrations will all fall within a relatively narrow band that can be defined in the low, mid and high ranges. EPA notes that these assumptions may not hold from year-to-year, but believes that the following cost estimates are generally conservative. The 2010 audit consumed 715 hours of time to analyze and report on 57 cylinders. NIST believes they have designed a better sampling system and can reduce that time to 550 hours for the same 57 cylinders. This amount of resources equals $1,500 per cylinder analysis and report production, and is NIST's estimate for those activities for a similar PGVP audit in 2011. Assuming the above assumptions hold, NIST has agreed to commit to this cost estimate for three years, until 2013 (*see* Document ID# EPA–HQ–OAR–2009–0837–0058 in the docket).

The following costs are based on EPA's 2010 Protocol gas audit. If NIST analyzes 4 cylinders from each production site, the total annual cost due to the PGVP would be approximately $7,200 per production site (*see* Document ID# EPA–HQ–OAR–2009–0837–0007 in the docket). This cost includes cylinder analysis and report production by NIST ($1,667/cylinder), average one-way shipping costs back to the production site ($91/cylinder), and average rental cost ($7/cylinder/month). The $1,667/cylinder cost estimate covers some deviations, *e.g.,* there may be carbon monoxide in the gas mixtures, from the assumptions made for the 2010 audit, and is therefore higher than the $1,500/cylinder NIST commitment. The total cost of NIST analysis, report production, six months cylinder rental, and shipping back to the production site is approximately $1,800 per cylinder (*see* Document ID# EPA–HQ–OAR–2009–0837–0007 in the docket).

EPA estimates that the average increased cost due to the PGVP will be approximately $2 per cylinder (*see* Table 3 in the ICR for the final rule, in Docket EPA–HQ–OAR–2009–0837). This estimate was derived from correspondence with both large and small specialty gas companies, which based their estimates on the number of cylinders they sold per year and the above cost estimates. For a small company that sells fewer cylinders per year, the cost per cylinder will be higher than for a larger company. However, even for a small company, the increased $2.00 per cylinder cost due to the PGVP is insignificant in comparison to the wide range of cost for the same type of EPA Protocol gas cylinder (EPA found the 2010 cost of the same tri-blend EPA Protocol cylinder ranged from approximately $225–$665 in the U.S. (*see* Document ID# EPA–HQ–OAR–2009–0837–0009 in the docket)).

To maintain these costs, scheduling of the PGVP audit activity during the year must be strictly followed by all the companies involved in the audit. Economy of batching similar gas cylinders and receipt of all similar cylinders within a specific time frame will enable NIST to control costs. Those cylinders with the appropriate funding documents that arrive within that time frame will be part of the audit. Those that do not will be excluded. That is the only way NIST will be able to control costs.

The costs are minimized by the 4 cylinder limit per production site, and the cost containment measures implemented by NIST and described in the preamble to the proposed rule.

3. Effective Dates

Background

EPA proposed to add § 75.59(a)(9)(x)(A) to require that PGVP recordkeeping start on and after the date that is six months from the effective date of the final rule. The PGVP reporting would start prior to or concurrent with the submittal of the relevant quarterly electronic data report on and after January 1, 2011.

Summary of Comments, Responses and Rule Changes

*Comment:* Several commenters requested clarification of the effective dates for the PGVP provisions. One commenter requested that the Agency provide enough time for production sites to submit the information required to participate in the PGVP and for EPA to notify Part 75 sources of the participating production sites.

*Response:* EPA agrees that the wording in the proposed rule should be clearer. The effective date of the final rule will be 30 days from the date it is published in the **Federal Register.**

To provide more time for production sites to submit necessary information to participate in the PGVP and for the Agency to inform Part 75 sources of the PGVP participants, EPA has amended § 75.21(g)(6) to take effect 60 days from publication of the final rule in the **Federal Register.** On and after that date, sources subject to Part 75 that use EPA Protocol gas will need to purchase such gas from PGVP participants (or from a reseller that sells unaltered gas from a PGVP participant). However, § 75.21(g)(7) allows EPA Protocol gas cylinders certified by or ordered from any production site prior to 60 days from publication of the final rule in the **Federal Register** to be used up.

Section 75.59(a)(9)(x)(A) and § 75.64(a)(5) of the final rule require

PGVP recordkeeping and reporting for sources subject to part 75 to commence 180 calendar days from the date of publication of the final rule in the **Federal Register.**

4. Recordkeeping/Reporting

Background

EPA proposed to add § 75.59(a)(9)(x)(A) and to revise § 75.64(a)(5) to require Part 75 affected sources using EPA Protocol gas to record and report, respectively: (1) Gas level code; (2) a code for the type of EPA Protocol gas used; (3) start date and hour for EPA Protocol gas type code; (4) end date and hour (if applicable) for EPA Protocol gas type code; (5) the PGVP vendor ID issued by EPA for the EPA Protocol gas production site that supplied the gas cylinder; (6) start date and hour for PGVP vendor ID; and (7) end date and hour (if applicable) for PGVP vendor ID. EPA also proposed to revise § 75.59(a)(9)(x)(B) and § 75.64(a)(5) to require the recording and reporting, respectively, of the information in (1), (2) and (5) above for each usage of Reference Method 3A or Method 6C or 7E performed using EPA Protocol gas for the certification, recertification, routine quality assurance or diagnostic testing (reportable diagnostics only) of a Part 75 monitoring system.

Summary of Comments, Responses and Rule Changes

*Comment:* One commenter requested that EPA explain why such detailed reporting of start and end dates and hours corresponding to use of a particular type of Protocol gas is required and why the reporting of Protocol gas type codes is important. The commenter generally believes that tracking of information on individual gas cylinders is not necessary and EPA has provided no justification for it. The commenter is also concerned that the level of specificity may result in implementation issues or errors that complicate reporting. For example, EPA proposes to require sources to record not only the start and end date, but also the hour corresponding to use of a particular type of protocol gas and a particular PGVP vendor. In the past, recorded start and end dates and hours have been problematic because of differences between the way sources interpret the rule and the way EPA's software has been programmed.

*Response:* It was originally envisioned that the PGVP related information would be reported in the monitoring plan. However, § 75.64(a)(5) of the final rule requires reporting of this information in the quarterly electronic reports. Therefore, start and end dates and times are not needed. Further, the reporting of low, mid or high-level gas concentrations is already required by § 75.59(a)(3). In view of these considerations, the only additional ECMPS reporting required by the final rule consists of: (a) A code for the type of EPA Protocol gas used; (b) the PGVP vendor ID; (c) the cylinder expiration date; and (d) the cylinder number. The reporting of Protocol gas type code is important for informing future PGVP audits. The reporting of the PGVP vendor ID is essential to allow EPA to determine that each EPA Protocol gas cylinder used by a Part 75 source is from a participating EPA Protocol gas production site. See the response to the next comment for the reasons why we are requiring cylinder expiration dates and cylinder numbers to be reported.

*Comment:* Two commenters desired the PGVP program to be more rigorous.

*Response:* With respect to recordkeeping and reporting, EPA has added electronic recordkeeping and reporting of cylinder expiration dates and cylinder numbers for all cylinders used for any certification, recertification, diagnostic, or quality assurance test required under Part 75. The Agency believes that this will strengthen the PGVP by reducing or eliminating the use of expired cylinders, and by improving the tracking of cylinder information. It also will assist inspectors in their preparation for field audits of the CEMS. Sections 75.59(a)(7)(iv)(X) and 75.59(a)(9)(v) already require these two items to be recorded in limited situations or in hardcopy only, and section 75.60(b)(6) already requires these two items to be provided to the State, local agency or EPA Regional Office in hardcopy RATA and emission test reports, when such reports are requested.

5. ISO 17025

Background

The Agency proposed to add § 75.21(g) to establish a refined PGVP rather than relying on ISO 17025.

Summary of Comments, Responses and Rule Changes

*Comment:* One commenter suggested that EPA rely on ISO 17025 instead of establishing a refined PGVP.

*Response:* The Agency disagrees with the commenter and has decided to finalize a refined PGVP in § 75.21(g) instead of requiring compliance with ISO 17025.

EPA has no objection to specialty gas companies certifying or accrediting to ISO 17025 "General Requirements for the Competence of Testing and Calibration Laboratories", but encourages companies to participate in the PGVP. Certifying or accrediting to ISO 17025 can be beneficial. However, the purpose of the ISO standard is different from the purpose of the PGVP. The purpose of ISO 17025 is to better assure that a laboratory has proper quality assurance and quality control (QA/QC) practices in place. The idea is that if proper QA/QC practices are in place, better products will result. However, this may not always be the case. As a matter of fact, one manufacturer (Scott Specialty Gases, now a part of Air Liquide) pointed out that ISO 17025 certification is not only extremely expensive, but it does not guarantee that a better protocol product will be manufactured. For example, one gas manufacturer which held certification to the ISO standard registered at least 1 failure in a blind audit (see Document ID#s EPA–HQ–OAR–2009–0837–0069 and –0070_in the docket).

The only audits that ISO 17025 requires are internal audits of procedures, not products. The ISO standard states that these internal audits are to be conducted "periodically", with no time frame specified. The results of these audits are to be provided to clients of the laboratory, but it is not clear that the results would be publicly available. Thus potential future clients may not be aware of how the laboratory was performing. The Agency believes that the PGVP audit results should be publicly available to allow potential EPA Protocol gas customers to make a more informed purchasing decision.

The accuracy of EPA Protocol gases is important because these gases are used to help ensure that the national emission reduction goals of the Clean Air Act are met. The Agency's goal is to implement a cylinder audit program to better ensure the quality of these gases. EPA believes the best way to do that is to implement a PGVP and have a blind sample of cylinders analyzed by an independent, nationally recognized laboratory such as the National Institute of Standards and Technology. A blind sample is necessary to ensure that the cylinders analyzed are more representative of routine production at each production site rather than representative of the best possible performance that would likely occur if the production site knew that its cylinder was being audited.

Small and large specialty gas companies commented that requiring conformance to ISO 17025 would be significantly more expensive than

complying with the PGVP (see Document ID#s EPA–HQ–OAR–2009–0837–0057, –0065, –0066, –0067, –0068, –0069, –0070, and –0073 in the docket). One large specialty gas company stated that the PGVP would be more cost effective and would provide an actual representation of the quality of EPA Protocol gas cylinders.

6. Credit/Invoice Cancellation

Background

We proposed to add § 75.21(g)(5)(ii) to require that EPA receive written proof of a credit receipt or of cancellation of the invoice for the cylinders being audited from the EPA Protocol gas production site within two weeks of notifying the EPA Protocol gas production site that its cylinders are being audited by EPA.

Summary of Comments, Responses and Rule Changes

*Comment:* Several commenters requested that EPA allow 30–45 days for submittal of the invoice nullification or credit receipt, claiming that two weeks is insufficient time for large organizations handling hundreds of transactions and multiple accounts. One commenter suggested that if EPA does not allow 30–45 days it should include the cost of purchasing the cylinders in the bill that is presented to the Protocol gas manufacturers instead of a credit being issued to them. Another commenter added that because a producer's participation in the PGVP is contingent on meeting this requirement in a timely manner, the time period should not be so short as to jeopardize a producer's status as an EPA protocol gas producer. In addition, the commenter opined that the rule should expressly permit the electronic transmission of proof of cancellation of the invoice or crediting the purchaser's account.

*Response:* EPA agrees that two weeks for submitting a credit receipt or a cancellation of the invoice is insufficient time, and that electronic as well as written credit receipt or cancellation of the invoice is acceptable. Section 75.21(g)(5)(ii) of the final rule allows up to 45 calendar days for production sites to provide EPA with electronic or written credit receipt or invoice cancellation.

7. Gas Type Codes

Background

EPA proposed to include EPA Protocol gas type codes in the ECMPS electronic reporting instructions to inform cylinder selection for the annual PGVP audits.

Summary of Comments, Responses and Rule Changes

*Comment:* Several commenters suggested that EPA use the code "C" for a single-blend CO, "C2" for a single-blend $CO_2$, and "NSCC" for an EPA Protocol gas quad-blend standard consisting of four certified components, $NO_X$, $SO_2$, $CO_2$, and CO, and a balance gas.

*Response:* Under Part 75, carbon monoxide is not required to be recorded or reported. Therefore, a code for that single blend gas cylinder will not be included in the reporting instructions. EPA must use "CO2" as the code for $CO_2$ because it is used thoughout EPA's database to describe that parameter and EPA wants to maintain consistent code conventions in the ECMPS reporting software. Because $NO_X$ can be certified as NO, $NO_2$ or NO and $NO_2$, EPA has added three codes to the list to represent the quad blend $NO_X$, $CO_2$, $SO_2$ and CO and a balance gas: SNCC representing $SO_2$, NO, CO and $CO_2$ and a balance gas, SN2CC representing $SO_2$, $NO_2$, CO and $CO_2$ and a balance gas, and SNXCC representing $SO_2$, NO, $NO_2$, CO and $CO_2$ and a balance gas.

*Comment:* Several commenters suggested that EPA should make clear in the electronic reporting instructions that the list of Protocol gas codes is not exclusive, meaning that these are not the only formulations of EPA Protocols, and that other types of EPA Protocols could be made to meet customer needs.

*Response:* EPA agrees and will provide this clarification in the ECMPS electronic reporting instructions.

*Comment:* Several commenters requested that EPA provide an option for "other," which would indicate a formulation other than those identified on the list.

*Response:* The Protocol gas type codes have been revised to include an "Other EPA-Approved EPA Protocol Gas Blend" category. However, sources will need to receive EPA approval to use it. EPA has found that if an "Other" category is allowed, sources will sometimes simply use that category instead of selecting the correct one. EPA will add new codes to ECMPS as needed. The ECMPS system allows these types of additions to be made quickly and easily.

*Comment:* One commenter questioned the need for EPA Protocol gas type codes.

*Response:* The reporting of Protocol gas type code is important for informing the cylinder selection for the annual PGVP audits.

*Comment:* One commenter requested that EPA clarify that it is still allowing the use of a blend of gases as both zero gas and span gas.

*Response:* Section 6.3.1 of Appendix A to Part 75 has been revised to clarify that a Protocol gas blend may be used as both a zero gas and span gas where appropriate.

*Comment:* One commenter objected to certain multiple combination codes for Protocol gas mixtures, especially code SN1, which represents a bi-blend of $SO_2$ and $NO_X$ because this gas mixture could potentially include sulfur dioxide and nitrogen dioxide in the same cylinder. According to the commenter, the combination of nitrogen dioxide and sulfur dioxide mixtures cannot be manufactured because the nitrogen dioxide and sulfur dioxide will react with each other causing stability issues with the mixture. The commenter questioned whether the SN1 mixture means sulfur dioxide, and nitric oxide with the oxides of nitrogen reported.

*Response:* Based on an August 2, 2010 telephone call from EPA to a specialty gas company, the Agency believes that an $SO_2$ and $NO_2$ combination may be possible. However, if an $SO_2$ and $NO_2$ combination cannot be properly manufactured, it probably will not be, and any such cylinders that are improperly manufactured will likely fail if audited in the PGVP. To clarify the meaning of the "SN1" code that was in the proposed rule preamble, the ECMPS PGVP reporting instructions at *http://www.epa.gov/airmarkets/business/ecmps/docs/pgvp_aetb.pdf* now include cylinder gas type codes: "SN" for $SO_2$ and NO, "SN2" for $SO_2$ and $NO_2$, and "SNX" for $SO_2$, NO, and $NO_2$ instead of "SN1".

8. Use of 95% Confidence Interval in Tag Values

Background

EPA proposed to revise section 5.1.4 (EPA Protocol Gases) of Appendix A to Part 75 to remove the reference to the 95-percent confidence interval, and to revise sections 5.1.4 and 5.1.5 (Research Gas Mixtures) to remove the reference to calculating uncertainty using the statistical procedures (or equivalent statistical techniques) that are listed in Section 2.1.8 of the "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards" (EPA Traceability Protocol), September 1997, as amended August 25, 1999, EPA–600/R–97/121.

Summary of Comments, Responses and Rule Changes

*Comment:* Several commenters suggested that the current provisions regarding uncertainty in sections 5.1.4 and 5.1.5 of Appendix A to part 75 are scientifically defensible and should remain. To tighten the confidence

interval would require the enlargement of the uncertainty which the entire gas industry (including NIST and specialty gas manufacturers) have long encountered. For example, instead of +/−2% at the 95% confidence interval it might change to +/-3% at the 99% confidence interval.

*Response:* The Agency is persuaded by these comments and has decided to retain the references in sections 5.1.4 and 5.1.5 to a 95% confidence interval and calculation of uncertainty using the statistical procedures (or equivalent statistical techniques) that are listed in Section 2.1.8 of the EPA Traceability Protocol.

9. Uncertainty of Results

Background

The Agency proposed to add § 75.21(g)(9)(ii) to require that the concentration of each audited cylinder be analyzed by NIST with an uncertainty of plus or minus 1.0 percent (inclusive) or better, unless otherwise approved by EPA. EPA also proposed to add a Figure 3 in Appendix B to part 75 with explanatory text at the bottom of the figure stating that "A gaseous component is said to fail only if all available analytical techniques used in the audit indicate greater than a 2.0% difference from the cylinder tag value."

Summary of Comments, Responses and Rule Changes

*Comment:* One commenter suggested that EPA revise the text at the bottom of Figure 3 of Appendix B of Part 75 so that any overlap between the original tag error band and the audit analysis error band be considered when determining the pass/fail basis of a cylinder. For example, if the original tag had an error band of 2%, and the audit analysis had an error band of 1%, then more than a 3% difference would fail the PGVP. If the error band concept is not used, the assumption is there is no propagation of the two errors and the NIST audit analysis is error free (has an uncertainty of zero). The uncertainty of the PGVP begins at the NIST metrological institute level where even their internal standards have uncertainties associated with the tag value. The Protocol gas manufacturer's uncertainties and the NIST uncertainties must be propagated in order to achieve a combined error band. We cannot assume one or the other analytical process is error free.

*Response:* EPA has amended the statement at the bottom of Figure 3 in part to read: A gaseous component is said to fail when the absolute value of the difference between the audit and vendor concentration values is greater than 2.2%. The 2.2% value is determined by using the "paired t test" at 95% confidence, with an uncertainty of plus or minus 2.0% (fixed by Part 75, Appendix A, section 5.1.4(b)) and plus or minus 1.0% (expanded uncertainty with coverage factor k=2) for the gas vendor and audit, respectively. If the plus or minus 1.0% audit expanded uncertainty value changes, the 2.2% value may change.

*Comment:* "EPA should adopt a 2% uncertainty for the NIST analysis of the cylinders."

*Response:* The Agency disagrees. An expanded uncertainty (coverage factor k=2) of plus or minus 1.0 percent (calculated combined standard uncertainty of plus or minus 0.5%), inclusive, or better in the NIST analysis was assumed when the PGVP costs were estimated in the proposed rule. A 2010 EPA audit of EPA Protocol gases required a 0.5% uncertainty in the NIST analysis for gas concentrations commonly used by Part 75 sources. If EPA were to allow the uncertainty of the NIST analysis to be up to ±2.0%, the audit results would need to allow for approximately a 4.0% difference between the NIST result and the vendor result before a cylinder could be said to fail. A ±2.0% uncertainty for the NIST audit results defeats the purpose of the PGVP. The Part 75 accuracy standard for EPA Protocol gases is ±2.0% (*see* Part 75, Appendix A, section 5.1.4(b)). To verify that a gas meets this standard, ideally NIST would need to have a 0.0% uncertainty. The further away the NIST audit results are from a 0.0% uncertainty, the less certain it is that this standard is achieved. Section 75.21(g)(9)(ii) in the final rule allows EPA to approve a greater NIST analytical uncertainty if required, *e.g.,* for certain low concentration gases. EPA has added two new definitions in section 72.2 to help clarify the terms "expanded uncertainty" and "coverage factor" (*see http://physics.nist.gov/cuu/Uncertainty/coverage.html*).

10. Implementation Options

Background

EPA proposed four implementation options for the PGVP in the preamble to the June 11, 2010 proposed rule regarding the number of production sites and cylinders that are audited each year and the length of time allotted to NIST to analyze the cylinders and to report the results.

Summary of Comments, Responses and Rule Changes

*Comment:* One commenter stated that Option 1 could result in a specialty gas company, which is removed after December 31, being unable to be relisted for a length of time that is more than intended.

*Response:* EPA agrees that if the NIST audit report takes longer than one year to complete so that EPA receives the audit report in the first half of a calendar year and a production site was not in the audit report, that production site might not be re-listed for up to two years. In this situation, section 75.21(g)(5)(iii) of the proposed rule did not allow re-listing until December 31 of the next year. This period of time before relisting is longer than was intended. In addition, EPA understands that it would be unfair not to re-list a production site due to circumstances beyond the production site's control. Therefore, the Agency has revised sections 75.21(g)(5)(ii) and (iii) to address these concerns. For the two relevant situations in sections 75.21(g)(5)(ii) and (iii), a production site is eligible for relisting 180 calendar days after the date of notice of its delisting, provided that the information required by § 75.21(g)(1) is submitted to EPA.

*Comment:* One commenter opposed Option 2 because it reduced the number of cylinders per site selected for verification. This commenter also stated that while the proposed four cylinders do not constitute a representative sample, two cylinders would be even less so. Two commenters opposed Option 3 stating that it would benefit large specialty gas companies and would assume that all production sites for a specialty gas company would have equivalent capabilities. This commenter also stated as was shown in the IG's report it is possible, indeed, likely, that a manufacturer with multiple sites will have some production sites that pass and some that fail.

*Response:* While the Agency understands the shortcomings of Option 1, 2 and 3, EPA believes that these options are necessary to preserve the ability of producers to sell EPA Protocol gases in possible (but unlikely) situations where cylinder procurement, shipping, or analyses take longer than expected to complete, and for EPA to implement the PGVP under a variety of possible conditions. However, note that all three of these options are incorporated in Option 4. Two commenters supported Option 4 and two commenters supported Option 4 but without Option 1. For the reasons previously stated, EPA will retain the

maximum flexibility of Option 4 when implementing the final rule. Consistent with the preamble discussion in the proposed rule (*see* 75 FR 33395, June 11, 2010), the Agency has also revised section 75.21(g)(10) to allow a participating EPA Protocol gas production site to continue to sell EPA Protocol gas cylinders in the event that none of its cylinders are audited.

*Comment:* Two commenters preferred that the PGVP be more rigorous.

*Response:* With respect to implementation options, EPA has added the following text in section 75.21(g)(9)(iv) to expedite the posting of audit results: "To be considered in the final posted audit report, EPA must receive comments, and any cylinder re-analyses from participating EPA Protocol gas production sites within 45 days of the participating EPA Protocol gas production site's receipt of the draft redacted audit report sent by EPA."

11. Use of Existing Cylinders

Background

The Agency proposed to add § 75.21(g)(6) and to revise section 6.5.10 in Appendix A to Part 75 to allow for the situation when an EPA Protocol gas production site is removed from the list of PGVP participants after their gases are procured, but before the gases have been consumed. In that event, the gas cylinders may continue to be used for the purposes of this part until the earlier of the cylinder's expiration date or the date on which the cylinder gas pressure reaches 150 psig. EPA also proposed to add Section 75.21(g)(7) and to revise section 6.5.10 in Appendix A to Part 75 to allow EPA Protocol gas cylinders purchased prior to the effective date of the final rule from a production site that is not participating in the PGVP to be used for the purposes of this part until the earlier of the cylinder's expiration date or the date on which the cylinder gas pressure reaches 150 psig.

Summary of Comments, Responses and Rule Changes

*Comment:* Several commenters supported these provisions, but requested that the Agency clarify that all cylinders ordered before the effective date of the final rule be allowed for part 75 purposes through their stated expiration date or a final pressure of 150 psi. Clear, definitive wording on this subject will prevent the waste—both economic and environmental—of potentially thousands of cylinders that may be in use or may have valid service lives as of the effective date of the final rule.

*Response:* EPA agrees and has revised § 75.21(g)(7) and section 6.5.10 in Appendix A to part 75 to state that an EPA Protocol gas cylinder certified by or ordered from any production site no later than 60 days after the date of publication of the final rule in the **Federal Register** may be used for the purposes of this part until the earlier of the cylinder's expiration date or the date on which the cylinder gas pressure reaches 150 psig. The Agency chose to use "certified by" instead of "manufactured by" because a cylinder could be manufactured and certified for, *e.g.,* two years, and then re-certified for up to another two years if it was not consumed. EPA does not want cylinders to be re-certified by an EPA Protocol gas production site that was not participating in the PGVP and continue to be used for potentially four years or more after the PGVP takes effect.

Section 75.21(g)(7) and section 6.5.10 in Appendix A to part 75 have also been slightly revised to allow that in the event that an EPA Protocol gas production site is removed from the list of PGVP participants on the same date as or after the date on which a particular cylinder has been certified or ordered, that gas cylinder may continue to be used for the purposes of this part until the earlier of the cylinder's expiration date or the date on which the cylinder gas pressure reaches 150 psig.

As an example, a gas cylinder can be certified for two years and then be re-certified for another two years, if it has not been consumed and its pressure is still above 500 psig. EPA does not want cylinders obtained from production sites that are not participating in the PGVP to potentially be used for four years (or more) after the PGVP takes effect. To prevent this from occurring, statements have been added to § 75.21(g)(7) and section 6.5.10 of Appendix A, prohibiting a production site that is not participating in the PGVP from recertifying such cylinders to extend their useful life and providing those cylinders to a source subject to part 75.

12. If NIST Withdraws From Participation

Request for Comment

In the unlikely event that the National Institute of Standards and Technology (NIST) withdraws from participation in the PGVP, EPA requests comments on how an analytical lab should be selected to analyze cylinders collected under the PGVP. Comments should be sent to Docket ID No. EPA–HQ–OAR–2009–0837. The Agency suggests that such an analytical lab should meet the following minimum criteria:

(A) Have no conflict of interest with any participating EPA Protocol gas production site;

(B) Be capable of analyzing EPA Protocol gas cylinders with an expanded uncertainty (coverage factor k=2) of plus or minus 1.0 percent (calculated combined standard uncertainty of plus or minus 0.5%) or better;

(C) Use NIST-certified analytical reference standards of appropriate mixtures;

(D) Have no analytical interferences or correct for them;

(E) Identify equipment and calibration procedures that will be used to conduct the testing;

(F) Provide credentials of key personnel conducting the testing and analysis;

(G) Provide assurances that the analytical lab will adhere to cost-containment provisions in any contract it signs, and a description of the cost containment provisions it would agree to; and

(H) Provide a date on which the analytical lab will be available to begin PGVP cylinder analyses.

EPA is interested in determining: (a) Whether the above acceptance criteria are sufficient; (b) how many labs could meet the above criteria or other suggested criteria; (c) how compliance with the acceptance criteria can be verified; and (d) contact information for the labs that could meet appropriate criteria.

Would use of multiple labs be appropriate under the PGVP? Please consider that use of multiple labs would mean: (a) Different analysts, reference material, equipment, and analytical techniques would be used by the different labs; (b) possible logistical problems with EPA contractors mistakenly shipping cylinders to the wrong lab, causing delays and possibly lost cylinders; (c) possible problem with intercomparison of results because there would not be a common reference standard, analyst, equipment, or analytical technique; and (d) possible increase in the chance of collusion between a lab and a production site that pays the lab.

*B. Amendments to the Minimum Competency Requirements for Air Emission Testing*

1. Need for the AETB Requirements

Background

EPA proposed to add § 75.21(f) and to revise section 6.1.2 of Appendix A to part 75 to replace the existing air emission testing body (AETB) requirements.

Summary of Comments, Responses and Rule Changes

*Comment:* Several commenters supported the AETB minimum competency requirements. However, several commenters questioned the need for these requirements. These commenters suggested that the ASTM D 7036–04 provisions are subjective, arbitrary or unclear and are not designed such that each provision could be a federally enforceable regulatory requirement; and that there is no evidence that compliance with the ASTM standard will prevent mistakes. These commenters suggested a more appropriate approach is to encourage voluntary compliance.

*Response:* Small and large stack testing companies, sources subject to part 75, and State and EPA regulators in the ASTM D 7036–04 work group believe that implementation of the ASTM Practice will result in improved data quality. EPA believes the evidence is strong that unqualified, under-trained and inexperienced testers are routinely deployed on testing projects. EPA has had experiences with tests that have been invalidated or called into question due to poor performance by testing contractors (see Document ID#s EPA–HQ–OAR–2009–0837–0015, –0016, –0062, and –0063, and Document ID# EPA–HQ–OAR–2005–0132–0035 in the dockets). For example, an EPA Office of Inspector General Audit Report "Report of EPA's Oversight of State Stack Testing Programs", Report Number 2000–P–00019, September 11, 2000, states that the New Jersey Department of Environmental Protection (NJDEP) made significant corrections to 57 percent of stack tests, that 86 percent of the test protocols were deficient, 28 percent of the test programs had to be repeated for at least one parameter, and 26 percent of the test reports required significant correction, clarification, or were rejected by the NJDEP. The NJDEP states they have seen errors in approximately 50 percent of recent stack tests.

While EPA believes that meeting the requirements of ASTM D7036 and having a Qualified Individual on site during testing does not guarantee proper performance of any individual test, these actions will likely result in proper test execution and high quality data generation. EPA also believes that third party (*e.g.,* State agency) oversight helps ensure that testing is properly conducted and strongly encourages such oversight to continue. Although there might be no evidence that compliance with the ASTM standard will prevent mistakes, there is also no evidence that compliance with the ASTM standard will not prevent mistakes.

Voluntary compliance with any minimum competency standard has not worked for the past 30 years, which is how long EPA and other organizations have tried to develop an acceptable standard for stack testers. There are many reasons why voluntary compliance has not worked, including disagreement among stack test companies on a minimum competency standard, and the sources' often used practice of hiring the lowest bidder. The lack of voluntary compliance with a minimum competency standard is also why various States, including Louisiana, have developed their own stack testing regulatory standards. A driving force for the development of the ASTM standard was to prevent the patchwork of standards that was beginning to occur throughout the U.S. If each State were to develop its own standard for stack testing, testing costs would increase as stack testers performing work in multiple States would have to qualify in and abide by differing requirements in multiple jurisdictions. EPA notes that the Louisiana DEQ has agreed to cancel its stack testing accreditation program (*see* Document ID# EPA–HQ–OAR–2009–0837–0072 in the docket) and in its place substitute accreditation to ASTM D 7036–04. Louisiana DEQ also agrees to recognize third party accreditors such as the Stack Testing Accreditation Council.

Many of the proposed rule provisions of § 75.21(f) and section 6.1.2 have been finalized as proposed. Significant changes to these sections are discussed below.

2. Cost

Background

EPA proposed to add § 75.21(f) and to revise section 6.1.2 of Appendix A to part 75 to require AETBs that perform certain part 75 QA tests to provide a certification that they conform with ASTM D 7036–04. EPA also revised § 75.59 and § 75.64 to include a small number of AETB-related recordkeeping and reporting requirements. For these requirements, an information collection request (ICR) supporting statement was developed, as required by the Paperwork Reduction Act.

Summary of Comments, Responses and Rule Changes

*Comments:* Several commenters suggested that AETB costs were underestimated. One commenter stated that EPA's economic analysis is highly flawed and was clearly prepared by someone unfamiliar with the business side of the industry, but this commenter did not provide any supporting data. This commenter further stated that the proposed AETB requirements will not drive prices down, and whatever increase in price there is cannot necessarily be passed on to the customer. In addition, smaller testing firms suffer more from this increased cost, even though they may be the better choice in many cases. The same commenter noted that EPA "assumes in its economic analysis that the majority of tests done are for part 75. That is patently false, at least for many if not most companies."

*Response:* The economic analysis only included Part 75 tests because the proposed rule only applies to Part 75 sources. Unless a stack test company accredits to ASTM D 7036–04 through, *e.g.,* the Stack Testing Accreditation Council, the stack test company does not have to meet ASTM D 7036–04 for non-part 75 testing. The Agency notes that if a company chooses to accredit to the ASTM standard, it may be possible to limit the scope of accreditation to Part 75 testing. In any case, the proposed rule does not require accreditation. A letter of certification signed by senior management of the AETB will suffice.

*Comment:* One commenter suggested that EPA include: (1) The cost for staff time to develop and implement the quality manual required by the ASTM practice, including document control procedures, hiring of additional personnel, performance of annual audits, and documentation of corrective action, (2) application fees and the cost of preparing applications for accreditation and/or QI qualification, (3) the cost of QI exams, including tuition for preparatory courses, exam fees, and travel expenses, (4) any new costs associated with preparation of test plans and reports to comply with the specific criteria in the practice, and (5) cost of required records storage and backup.

*Response:* The Agency believes that AETBs should already be operating in a manner consistent with ASTM D 7036–04. However, EPA revised the ICR to include additional supporting detail for the estimated burden associated with increased annual quality-assurance and maintenance costs that would be passed on to a unit subject to Part 75. Based on information provided by stack testing firms, a conservative one percent increase was applied to the previously established annual O&M costs per unit at each respondent facility. This is based on the average stack testing industry costs of preparing a QA/QC manual ($6,000), obtaining QSTI

certification ($1,200), and annual operating costs of maintaining the quality control system ($5,000–$50,000 depending on size). The increased stack testing overhead costs translate into an increased performance test cost of $68 to $549 per RATA test depending on the size of the company. The increased cost per test drops even further if applied to all types of tests performed by typical stack testing companies. EPA assumes that the costs will be passed through to the customers, which are generally sources subject to part 75, including large electric utility and industrial companies.

3. Effective Dates

Background

EPA proposed to add § 75.59(a)(9)(xi), § 75.59(a)(15), § 75.59(b)(6), and § 75.59(d)(4) to require that AETB-related recordkeeping start on and after the date that is six months from the effective date of the final rule. The Agency proposed to revise Section 75.64(a)(5) to require the AETB-related reporting to start prior to or concurrent with the submittal of the relevant quarterly electronic data report on and after January 1, 2011.

Summary of Comments, Responses and Rule Changes

*Comment:* The Agency received requests to extend the AETB compliance deadline from three commenters. One of those commenters suggested that EPA extend the AETB compliance deadline to January 2012. None of the commenters thought that EPA was providing too much time. Several commenters requested that EPA clarify the effective dates of the AETB-related provisions.

*Response:* EPA agrees that the wording in the proposed rule could be clearer. The effective date of the final rule is 30 days from the date it is published in the **Federal Register.** The Agency agrees that a compliance deadline for the AETB-related provisions of 365 days from publication of the final rule in the **Federal Register** is more reasonable for several reasons. There are approximately 400 stack test companies in the U.S. Only about 30 percent of them have at least one qualified individual. But even these companies may not yet be fully compliant with ASTM D 7036–04. Further, the large amount of near term stack testing that must be performed to respond to the Agency's requests for information collection under Section 114 of the Clean Air Act to assess the emissions of hazardous air pollutants from electric generating units provides even less time for companies to come into compliance with the AETB provisions. Therefore, to better ensure that every stack test company has a reasonable time to comply with ASTM D 7036–04, EPA has extended both the compliance date in § 75.21(f) and the commencement date in section 6.1.2(a) of Appendix A to 365 days after the date of publication of the final rule in the **Federal Register**. Section 75.64(a)(5) has also been revised to require the information in §§ 75.59(a)(15), (b)(6), and (d)(4) to be provided commencing 365 days after the publication date of the final rule in the **Federal Register**.

4. Accreditation

Background

EPA proposed to revise section 6.1.2(b) in Appendix A to part 75 to require a part 75 source owner or operator to obtain from an AETB a certification that as of the time of testing the AETB is operating in conformance with ASTM D 7036–04. This certification must be provided in the form of either (1) a certificate of accreditation for the relevant test methods issued by a recognized, national accreditation body; or (2) a letter of certification for the relevant test methods signed by a member of the senior management staff of the AETB. EPA also requested comment on whether the Agency should require accreditation.

Summary of Comments, Responses and Rule Changes

*Comment:* Several commenters opposed requiring accreditation. One commenter requested that EPA eventually require third party accreditation for all AETBs. The commenter recognizes, however, that the U.S. accreditation program is just beginning and that the requirement for all AETBs to be accredited may be premature, and suggested the following approach: Section 6.1.2(b)(2) should be amended to include a "sunset clause" for self-certified AETBs. Specifically, five years after the effective date of the final rule AETBs should not have the option to self-certify and must have a certificate of accreditation from a third party accreditation body. This five year period provides more than ample time for the maturation of U.S. AETB accreditation programs.

*Response:* The commenter did not provide any evidence to suggest that accreditation is any better at assuring compliance with ASTM D 7036–04 than self-certification. Over time, if evidence is found that self-certification is no longer appropriate, then at that time the Agency could consider proposing revisions of the rule to require accreditation.

5. Scope of Testing

Background

EPA proposed to add § 75.21(f) and to revise section 6.1.2(b) in Appendix A to Part 75, among other things, to limit the scope of testing required to be performed by AETBs, as defined in § 72.2 of this chapter. Section 75.21(f) and section 6.1.2(b) would require AETBs that perform relative accuracy testing under 75.74(c)(2)(ii), section 6.5 of Appendix A to Part 75, and section 2.3.1 of Appendix B to Part 75, and stack testing under § 75.19 and section 2.1 of Appendix E to Part 75 to provide a certification that they conform with ASTM D 7036–04. Conformance to the requirements of ASTM D 7036–04 would apply only to these tests performed on Part 75 affected sources.

Summary of Comments, Responses and Rule Changes

*Comment:* One commenter suggested that if an AETB fails to declare a limit on the applicability of ASTM D 7036–04 and fails to perform any work in full conformance to ASTM D 7036–04, this would jeopardize even that work that may have been performed in accordance with the standard. The preamble to the proposed rule indicates that an AETB would be evaluated against its quality manual when assessing AETB conformance to the standard. The commenter recommends that the final rule clarify the limits of applicability of ASTM D 7036–04 when evaluating an AETB's conformance to ASTM D 7036–04.

*Response:* Section 4.1, Note 3 in ASTM D 7036–04 states: "There is no requirement to define a scope of testing. It is a requirement of this practice that prior to performing a test method for the first time, the AETB has in place resources, training, and QA/QC consistent with this practice to insure data of acceptable quality are produced." It is EPA's intent in this rulemaking that the ASTM D 7036–04 scope of testing be limited to Part 75 relative accuracy test audits, and Part 75 stack tests related to Appendix E and low mass emitters. However, EPA understands the concern of the commenter and has revised section 6.1.2(a) of Appendix A to part 75 to allow an AETB to limit its conformance to ASTM D 7036–04 to units subject to this part and to the test methods required by this part. Section 6.1.2(b) has been similarly revised. Unless a stack test company accredits to ASTM D

7036–04 through, *e.g.,* the Stack Testing Accreditation Council, the stack test company does not have to meet ASTM D 7036–04 for non-part 75 testing. The Agency notes that even if a company chooses to accredit to the ASTM standard, it may be possible to limit the scope of accreditation to Part 75 testing. In any case, the proposed rule does not require accreditation. A letter of certification signed by senior management of the AETB will suffice.

6. Effect on Validity of Test Data

Background

EPA proposed to add section 6.1.2(f) in Appendix A to Part 75, which states that meeting two conditions (1) providing to the owner or operator of a part 75 source with a certificate of accreditation or letter of certification that an AETB is operating in conformance with ASTM D 7036–04; and (2) having at least one Qualified Individual on site conducting or overseeing the applicable tests would be sufficient proof of validity of test data that otherwise meet the requirements of part 75.

Summary of Comments, Responses and Rule Changes

*Comment:* One commenter strongly supported section 6.1.2(f), but explained that the provision should not be understood to validate data that do not otherwise meet the requirements of part 75. Another commenter strongly objected to inclusion of the provision in the rule and requested that EPA remove section 6.1.2(f). This commenter provided the following rationale:

"(1) This section has no legal consequence and no benefit. Certification of testers and of a Qualified Individual on or leading the test team will not change evaluations and use of tests and test reports: with or without it, regulators should evaluate tests and test reports, and, if they find the work and records valid, accept the 'validity of test data that otherwise meet the requirements of this part'. This rule accomplishes requiring certified people to do the test. Once such people have performed the test, it has no more legal effect.

"(2) This section will give the false impression to those who do not know that Part 75 requires correct test performance that review is superseded by tester accreditation and QI participation, that their testing must be accepted as valid.

"(a) It is unfair and a disservice to all to give this impression to facilities and testers. It will lead to substandard testing, which may get approved anyway and costs everyone involved extra effort, time, and expense.

"(b) Many regulatory agencies will have this impression and will not reject invalid testing performed by accredited testers with QIs on their teams because they will believe that this section says they have to accept the test results. Do not give this false impression. It will lead to worse testing and more acceptance of invalid testing.

"(3) Accreditation does not mean a test is valid. Some regulatory agencies will believe this section means this. This section then leads to lack of review and of enforcement of valid testing; the incentive for testers will be to get accreditation, then cut corners. We all know unplanned things happen while source testing that may require method modification. However, source testers seem to forget or not realize they are actually modifying the test method."

*Response:* EPA understands that it may be unfair to hold an owner or operator of a source subject to Part 75 responsible for certain actions (or inactions) related to an external AETB's compliance with ASTM D7036–04 and attempted to address this in section 6.1.2(f) of the proposed rule by limiting the responsibility of the owner or operator of a part 75 source.

As the commenter states, several sections of Part 75 require units subject to part 75 to meet certification and ongoing QA/QC requirements: § 75.4(f) requires sources using Appendix E to meet those requirements. Section 75.4(j) requires successful completion of certification tests or use of maximum potential concentration, maximum potential flow, maximum potential $NO_X$ emission rate, or use appropriate reference methods or another procedure approved by the Administrator. Section 75.5(b) states that no affected unit shall be operated without complying with the requirements of §§ 75.2–75.75 and Appendices A–G to part 75. Section 75.10(b) requires that sources meet the performance specifications in Appendix A to part 75. (The Appendix A relative accuracy performance specifications are also required for the ongoing relative accuracy tests in Appendix B to part 75.)

EPA believes that the language in Appendix A, section 6.1.2(f) is clear that all part 75 testing requirements must be met. However, the Agency understands the concern of the commenter, and has amended 6.1.2(f) in the final rule to read as follows: "Except as provided in paragraph (e), no RATA performed pursuant to § 75.74(c)(2)(ii), section 6.5 of appendix A to this part or section 2.3.1 of appendix B to this part, and no stack test under § 75.19 or Appendix E to this part (or portion of such a RATA or stack test) conducted by an AETB (as defined in § 72.2) shall be invalidated under this part as a result of the failure of the AETB to conform to ASTM D 7036–04. Validation of such tests is determined based on the other part 75 testing requirements. EPA recommends that proper observation of tests and review of test results continue, regardless of whether an AETB fully conforms to ASTM D7036–04."

The Agency also wishes to clarify that an AETB's failure to conform to ASTM D 7036–04 with respect to testing at a particular unit does not affect its ability to certify conformance prior to conducting testing at another unit as long as it is following the procedures in ASTM D 7036–04 for addressing nonconformance.

7. Exams

Background

EPA proposed to add section 6.1.2(e) in Appendix A to Part 75 to require having at least one Qualified Individual (QI) on site conducting or overseeing applicable tests. A QI must pass appropriate exam(s), described in ASTM D 7036–04, covering the test methods the QI will perform.

Summary of Comments and Responses

No rule changes were required.

*Comment:* Several commenters requested that the QI exams be better targeted to the test methods the QI will actually perform, and not include additional test methods. A representative comment stated that the test program developed for QIs is excessive. The methods are grouped, and may not represent the type of work an individual or firm will conduct. For example, if a company elects not to perform 3–D probe work in Method 2F, there is no way to exclude these questions from the current QI test which puts this individual at a disadvantage if there are questions on the exam concerning a method the firm will not conduct.

*Response:* The QI exams provided by the Source Evaluation Society (SES) are created with the knowledge and wisdom of many experienced stack testers. Periodically, these exams are modified using feedback from people who have taken the exams.

The interdependency of emissions testing methods is inherent in any emissions testing program. EPA and the SES membership, which includes large and small stack test companies, believe that an individual who can pass a multiple method group exam is one who understands emissions testing principles broadly enough to lead a test team and can be expected to address the myriad of complicating issues that arise during a source test.

It is EPA's understanding that the SES membership can and has evaluated and adjusted the qualifications approach from time to time. Commenters are welcome to work with SES to address concerns they may have. While

recognizing that there might be opportunities for improvement, the Agency supports the QI qualification exam program in its current form.

*Comment:* Several commenters stated that it makes no sense for an individual to sit for an exam that covers material for which the candidate is not qualified to perform or intends to perform. This means that an AETB that performs a limited scope of testing may legitimately argue that a qualified external exam provider is not available and may choose to offer internal exams. The current language in the preamble to the proposed rule favors an external exam provider. EPA should recognize the validity of internal examination providers when suggesting that sources obtain information about examination providers.

*Response:* Three comments were received on the subject of external as opposed to internal exams. Internally administered exams are allowed only if an external exam for that test method is not available. The current format of external exams covers a group of related test methods. If a QI desires to be certified for a particular test method and that test method is part of an external exam for a group of methods, that QI must take that external exam. An individual that has been qualified with an internal exam must re-qualify with an external exam within three years of the availability of an external exam or when a re-test is required, whichever is sooner. The ASTM D 7036–04 workgroup (in part, made up of small and large stack test companies) confirmed that, in general, an external exam is a better indication of qualification than an internal exam. The Agency agrees with this view because an externally administered exam may be more impartial, provide exam questions that have been better vetted, and may be less subject to abuse than an internally developed and administered exam.

8. Posting Non-Compliant AETB Names

Background

In section 6.1.2(g) of Appendix A to Part 75, EPA proposed that if the Administrator finds that the information submitted to an affected source by an AETB under this section or the information requested by an affected source under this section is either incomplete or inaccurate, the Administrator could post the name of the offending AETB on Agency Web sites, and provide the AETB a description of the failures to be remedied. The AETB name would be removed from the EPA Web sites once the failures were remedied.

Summary of Comments, Responses and Rule Changes

*Comment:* Several commenters agreed with the concept of posting the name of an offending AETB on Agency Web sites. One commenter agreed that posting the names of offending AETBs on the EPA Web site would provide a deterrent for non-conformance with ASTM D7036–04 and generally agrees with this approach. However, the commenter asserted that paragraph 6.1.2(g) should be amended to ensure that an AETB is notified and has the opportunity to correct any deficiencies before the name is posted on the Web site. The commenter was also concerned about the responsiveness of EPA in updating this list once the AETB has provided EPA with the required information. Therefore, the commenter suggested that a requirement should be added for EPA to respond to an AETB's submittal within 30 days, indicating whether the submittal is sufficient to remedy the problem. If so, the name of the AETB would be removed from the list. If EPA failed to respond within 30 days, the submittal would be assumed to be sufficient to remedy the problem and the name is removed from the list. Another commenter requested that the determination of accuracy and completeness in section 6.1.2(g) be solely based on the provisions of ASTM D 7036–04.

*Response:* EPA believes that the determination of accuracy and completeness should be based on ASTM D7036–04 and Part 75 taken together because Part 75 limits the application of ASTM D 7036–04 to only certain tests performed on part 75 sources. The Agency agrees that an AETB should have the opportunity to correct any deficiencies before its name is posted on the Web site and has therefore revised section 6.1.2(g) accordingly. If an owner or operator has requested information from an AETB and believes that the information provided by the AETB is either incomplete or inaccurate, the owner or operator may request the Administrator's assistance in remedying the alleged deficiencies. Upon such request, if the Administrator concurs that the information submitted to the source is either incomplete or inaccurate, the Administrator will provide the AETB a description of the deficiencies to be remedied. The Administrator's determination of completeness and accuracy of the information will be solely based on the provisions of ASTM D 7036–04 and this part. The Administrator may post the name of the offending AETB on Agency Web sites if, within 30 days of having provided the AETB a description of the deficiencies to be remedied, the AETB does not satisfactorily respond to the source and notify the Administrator of the response via electronic mail. The AETB need not submit the information it provides to the owner or operator to the Administrator, unless specifically requested by the Administrator. If after the AETB's name is posted, the Administrator determines that the AETB's response is sufficient, the AETB's name will be removed from the EPA Web sites.

If, upon request by the Administrator, the AETB or the owner or operator provides to the Administrator any information identified as confidential business information (CBI), the Administrator will treat the information according to the provisions of 40 CFR part 2, subpart B. Note that the modifications to section 6.1.2(g) make section 6.1.2(h) redundant and it has been removed.

*C. Other Amendments*

1. Compliance Dates for Units Adding New Stack or Control Device

Background

Section 75.4(e)(2) only applies to *existing* Acid Rain Program units that are building a new stack, or adding control equipment. EPA proposed to extend the provision to include both existing and new units. For a project involving both a new stack or flue and installation of add-on emission controls, EPA proposed to revise § 75.4(e)(2) to require that the compliance window for required CEMS certification and/or recertification and/or diagnostic tests start on the date that emissions first exit to the atmosphere through the new stack or flue. The end of the compliance window would be the 90th operating day or the 180th calendar day (whichever occurs first) after the start date.

Summary of Comments, Responses and Rule Changes

*Comment:* One commenter stated that the proposed revisions to § 75.4(e) are consistent with the original intent of the provision, which was to address compliance deadlines for units that must relocate, replace, or retest monitoring systems as a result of the addition of new controls, regardless of when the unit commenced construction. This commenter further stated that the provision was never intended to draw a distinction between "existing" units as that term is defined under § 72.2 and other units with previously certified monitoring systems. The commenter suggested that the addition of

recertification and diagnostic tests also is consistent with EPA's intent and past implementation of the provision through guidance. However, the commenter objected to EPA's proposal to hold units that are constructing both a new stack and a control device to a single testing deadline based on use of the new stack. The commenter concluded that although most sources likely would try to meet the testing deadline under § 75.4(e) associated with the use of the new stack by timing the initial operation of the control device to coincide as closely as possible with the time that gases first exit to the atmosphere through the new stack, there is no valid reason for limiting an owner or operator to a single deadline or set of tests to validate data from the monitoring systems.

*Response:* EPA agrees in part with the commenter. As noted above, § 75.4(e)(2), on its face, applies only to existing units (which are generally units commencing commercial operation before November 1, 1990 and serving a generator with a nameplate capacity greater than 25 MWe) and thus was not intended to cover new units. However, EPA agrees that it is appropriate to expand § 75.4(e)(2) to provide a similar approach for monitoring compliance deadlines and missing data substitution for new stack construction and add-on $SO_2$ or $NO_X$ control installation at both existing and new units and to cover recertification and diagnostic tests, in addition to the certification tests covered by the existing provision. In addition, EPA agrees that in cases where a project involves both new stack construction and installation of add-on $SO_2$ or $NO_X$ controls, the initial routing of flue gas through the new stack and the initial operation of an add-on control device (*i.e.,* when reagent is first injected) should, if necessary, be treated as two separate events, each of which is allotted a flexible 90 operating day/180 calendar day window to complete all required certification and/or recertification and/or diagnostic testing of the monitoring systems installed on the new stack. Two separate compliance windows may be needed in cases where there is a long interval of time between the starting dates of the two events. Therefore, a new paragraph, (e)(3), has been added to § 75.4(e) to allow for completion of CEMS certification and/or recertification and/or diagnostic testing requirements for both new stack construction and new add-on $SO_2$ or $NO_X$ controls either: (a) Within the window of time provided for new stack construction; or (b) within the separate window of time applicable to such event provided under § 75.4 (e)(1).

EPA also revised § 75.4(e) to address the reporting of CEMS data, in cases where only one compliance window is used, and where both windows are used. Section 75.4(e)(2), as revised, addresses how to report emissions or flow rate data after emissions first pass through the new stack or flue, or reagent is first injected into the flue gas desulfurization system or add-on $NO_X$ emission controls, until all required certification and/or recertification and/or diagnostic tests are successfully completed. For example, if section 2 of Appendix A to Part 75 requires two spans and ranges for the monitor that measures the pollutant being removed by the add-on $SO_2$ or $NO_X$ controls, certification of the high measurement scale is sufficient to initiate reporting of quality-assured data from that monitor. All data recorded on the certified high scale, including data that would ordinarily be required to be recorded on the low scale, may be reported as quality-assured for up to 60 unit or stack operating days after the first injection of reagent into the control device. Then, all required tests of the low measurement scale must be completed within the 90 operating day/180 calendar day compliance window of time associated with the first injection of reagent into the control device.

EPA believes that it is appropriate to allow temporary reporting of data on a certified high measurement scale in the case of installing and operating new add-on $SO_2$ or $NO_X$ controls, primarily because it often takes several days or weeks to stabilize a new add-on emissions control device so that the desired percentage reduction in the $SO_2$ or $NO_X$ emission levels is consistently achieved. During this period of time (known as the "shakedown" period), a significant percentage of the data from the $SO_2$ or $NO_X$ monitor (as applicable) is likely to be too high to be read on the low scale. Further, even data that can be recorded on the low scale during the shakedown period cannot be reported as quality-assured, because a RATA must be performed on the low scale in order to certify it, and this test cannot be done until the control device has been stabilized. The Agency believes that accepting low readings recorded on a certified high scale for a short period of time will not adversely impact the overall accuracy of the emissions data. Other certified CEMS that have only one (high) measurement scale record data on the lower part of the scale during short-term events such as startup and shutdown, and these data are accepted as quality-assured.

Revised § 75.4(e)(2)(ii) allows conditional data validation procedures in § 75.20(b)(3) to be used for the entire 90 operating day/180 calendar day window associated with new stack construction or addition of a new emissions control device, rather than limiting the amount of time available to complete the required testing to the shorter timelines in § 75.20(b)(3)(iv). This is appropriate for new stack construction because the monitoring systems on the new stack are brand new systems that must undergo certification testing. The provisions of § 75.20(b)(3) and sections 6.3.1(a), 6.3.2(a), 6.6.4(a), and 6.5(f) of Appendix A to Part 75 clearly allow conditional data validation to be used for the entire window of time specified in § 75.4, for the initial certification of monitoring systems. For the installation and operation of add-on emissions controls, it is also appropriate to allow the use of conditional data validation for the entire 90 operating day/180 calendar day window, because instability during the shakedown period prevents the required RATAs associated with the control device addition from being done during that time period, and the shakedown period often extends beyond the shorter conditional data validation timelines provided in § 75.20(b)(3)(iv).

A new paragraph, (e)(4), has also been added to § 75.4(e) to address special requirements that apply, in addition to the requirements in paragraph (e)(2), to a project involving both a new stack and a new add-on $SO_2$ or $NO_X$ control device. For such a project, the emissions data recorded by each CEMS on the new stack, starting on the date and hour on which emissions first exit to the atmosphere through the new stack and ending on the hour before the date and hour on which reagent is first injected into the control device, may be reported as quality assured (as provided in paragraph (e)(2)(ii) and (iv)) only if (1) a RATA of the CEMS (as described in paragraph (e)(4)(i)(A) or (ii)(A), depending on the CEMS involved) is successfully completed either prior to the first injection of reagent into the control device or in a period after the first injection when the control device is not operating; and (2) the rest of the required certification tests are successfully completed within the 90 operating day/180 calendar day compliance window that begins with the initial routing of flue gas through the new stack. For example, if the certification testing is done this way and conditional data validation is used in accordance with paragraph (e)(2)(ii), the CEMS data may be reported as quality-

assured, starting at the hour of the probationary calibration error test, provided that all of the major tests are passed in sequence, with no failures. The RATA must be performed prior to the initial injection of reagent into the control device, or in a period after the first injection when the control device is not operating, because the characteristics of the stack gas matrix (*e.g.,* gas concentrations, temperature, moisture content, and concentration and flow profiles) when the control device is brought on-line will differ significantly from the stack characteristics of the uncontrolled unit. Therefore, to validate CEMS data in the uncontrolled time period between the first use of the new stack and the initial injection of reagent, a RATA that represents the actual stack conditions during that time interval must be performed and passed. The other, required certification tests, *i.e.,* 7-day calibration error tests, cycle time tests, and linearity checks, are not affected by the characteristics of the stack gas matrix, and can be performed at any time during the allotted window of time, whether or not reagent is being injected.

Of course, under § 75.4(e)(2), to the extent additional testing requirements are triggered by the installation of the new add-on $SO_2$ or $NO_X$ controls in a project involving both a new stack and such new controls, these tests must be successfully completed during the 90 unit operating day/180 calendar day window that begins with the initial injection of reagent. Note that EPA intends to revise Questions 15.4, 15.6, and 15.7 in the "Part 75 Emissions Monitoring Policy Manual" to be consistent with today's revisions to § 75.4(e).

2. Reference Method 7E

Background

EPA proposed to add § 75.22(a)(5)(v) to disallow multiple sampling runs to be conducted before performing the post-run system bias check or system calibration error check described in section 8.5 of EPA Reference Method 7E (40 CFR part 60, Appendix A–4), when this method is used to perform testing on part 75 affected sources.

Summary of Comments and Responses

*Comment:* One commenter thought that although drift corrections at some point may become less accurate following multiple runs, it is not significant enough to require a post-run check after every run. A requirement to perform a post run bias or system calibration error check after every three runs would be sufficient to ensure accurate drift corrections without needlessly adding to the length of the test. EPA should limit the number of runs allowed before performing a post-run check to three, rather than prohibiting multiple runs altogether.

Two other commenters stated that Method 7E already requires all test runs conducted since the previous bias check to be invalidated if the subsequent bias check reveals drift in excess of the required specification. These commenters further stated that invalidation of multiple test runs would extend the duration of the test period, leading to additional expense and potential operational difficulties (*i.e.,* billing of additional hours by the test contractor, overtime for plant employees responsible for monitoring the testing, continuing to run the unit at the specified operating level rather than releasing the unit back to load control, and in some cases continuing to run the unit solely for the purpose of conducting the required test). According to the commenters, the potential for invalidation of multiple test runs is enough of a deterrent to discourage the use of equipment and/or testing firms that would have difficulty meeting the applicable bias and drift specifications. These two commenters also thought that the ability to validate multiple runs with one pair of bias and drift checks is of great value to facilities that are required to conduct both RATA and compliance tests. The ability through this provision to combine RATA and compliance testing reduces the overall amount of time required for testing and is of value to the industry as it prevents additional expense and potential operational difficulties. The commenters thought that the existing provision does not complicate the bias and drift correction calculations. Once these calculations are programmed into a spreadsheet, they are easy to apply. The commenters stated that EPA has not provided any substantive evidence for its reasoning that less accurate results will occur other than the statement that "less accurate gas concentration measurements are likely to result" (75 FR 33400). Finally, the commenters asserted that EPA should provide field evidence which shows that less accurate results have occurred as a result of this less time-consuming procedure before it proceeds with any rulemaking on this issue.

*Response:* No rule changes were required. The Agency understands that under an existing provision of Method 7E, multiple test runs may be quality assured for bias and drift as a group, rather than individually. This provision allows the user to conduct bias and drift checks only at the beginning and end of a series of test runs, rather than conducting these checks before and after each individual run. The rationale is that if the tester can pass the quality assurance at the beginning and end of the series of runs, then the intermediate runs must be valid, and the quality of the reference method data has not been compromised. However this assumption is not necessarily true; therefore, multiple runs should not be allowed between bias and drift checks, as further explained in the response to the next comment, immediately below.

*Comment:* Two commenters favor allowing 63 minutes of continuous sampling time between bias and drift checks. According to the commenters, sampling for 63 consecutive minutes at a time is desirable because 63 minutes corresponds to the time needed to perform three 21-minute runs of a CEMS relative accuracy test audit (RATA) and also is long enough to obtain a complete compliance test (*i.e.,* stack test) run. Compliance tests often consist of three one-hour runs, and many sources have both RATA requirements and compliance test requirements. The commenters favor eliminating the bias and drift checks after each RATA run because it reduces the amount of time required to perform the testing.

*Response:* No rule changes were required. Generally speaking, it is good practice to perform emission testing in the most efficient manner possible without sacrificing data quality. However, EPA believes that the added assurance of data quality provided by performing bias and drift checks after each 21-minute RATA run far outweighs the small amount of time that could be saved by skipping the intermediate QA checks. Further, there is no reason why three 21-minute RATA runs cannot be averaged together to make one 63-minute compliance test run.

For typical compliance test applications of the method where the user is only concerned with showing compliance with an emissions limit, the accuracy of the individual test runs is not as essential as it is for Part 75 applications. The Agency does not object to the change made to Method 7E when the method is used for compliance test applications. Since the average of all test runs is used to assess compliance, the run-by-run percent inaccuracies due to changing bias and drift over the course of the testing will tend to cancel, resulting in acceptable overall average that is only slightly different from the average value that would have been obtained had the more stringent run-by-run quality assurance procedures been followed. Thus, for

compliance testing purposes, the commenters are correct in asserting that little is gained from performing the quality assurance testing before and after each run, so long as the overall specifications for bias and drift are met at the beginning and end of each test series.

However, under Part 75 the reference method measurements are generally used for a very different purpose and the inaccuracy that can be introduced by not following the run-by-run quality assurance is unacceptable. For Part 75, the reference methods are primarily used to directly assess the accuracy of a continuous emissions monitoring system on a run-by-run basis. The purpose of the relative accuracy test audits (RATA) is to conduct at least nine quality-assured independent reference measurements and compare those measurements to nine simultaneous measurements made by a continuous emissions monitoring system in its normal mode of operation. Since each run directly compares CEMS measurements to reference method measurements, any drift in the reference monitor during the course of the run must be assessed and accounted for. Method 7E provides a means of adjusting the reference method measurements for moderate drift (less than 3.0% of the span gas value over the course of a run). This correction is intended to tie the resulting reference value more closely to the EPA Protocol calibration gas standards which are traceable to the National Institute of Standards and Technology (NIST). The correction assumes that over the duration of the test run, the profile of any drift observed is linear. The longer the interval between bias/drift checks, the less likely it is that this linear approximation will hold true. Because the RATA is intended to compare nine independent, quality-assured reference measurements to nine simultaneous measurements from a CEMS, EPA finds that performing a bias and drift evaluation before and after a series of runs increases the uncertainty in the individual run measurements and has the potential to introduce error that would otherwise be eliminated by performing the bias and drift evaluation before and after each run. EPA believes that mass-based regulatory programs, such as the trading programs supported by Part 75 monitoring, need the added assurance of data quality provided by run-by-run bias and drift evaluations. The run-by-run quality assurance is consistent with Method 7E as it was originally written, and avoids the risk of adding bias and uncertainty to the CEMS data through the RATA process.

EPA does not collect the actual reference method test data for Method 7E electronically in a manner that can be further analyzed. Therefore, we cannot properly assess how reducing the number of required bias and drift checks will impact data quality. We have no way of knowing how many test runs that should be invalidated would be assumed to be valid if we were to allow bias and drift checks to be done only before and after a series of runs. However, we do know that we can avoid that issue entirely by requiring the quality assurance checks to be performed before and after each run for part 75 applications.

In summary, EPA maintains that in view of the way that Method 7E data are used in the part 75 programs, run-by-run system bias and drift checks are necessary to eliminate measurement error that would otherwise be introduced by not quality-assuring each run individually. This QA approach also applies to Method 6C (the instrumental reference method for $SO_2$) and to Method 3A (the instrumental method for $O_2$ and $CO_2$), when those methods are used for part 75 applications. For a more detailed discussion of this issue, refer to the Response to Comments document.

3. Removal of Mercury Provisions

Background

As a result of the Clean Air Mercury Rule (CAMR) having been vacated by the DC Circuit in *New Jersey* v. *EPA,* 517 F.3d 574 (D.C. Cir. 2008), EPA proposed to remove provisions of part 75 that were adopted in support of CAMR. To achieve this, sections dealing exclusively with mercury monitoring (CEMS and sorbent trap systems) would be removed, and other sections that applied both to mercury monitoring systems and other types of CEMS would be revised and re-promulgated, minus the references to mercury.

Summary of Comments, Responses and Rule Changes

*Comment:* One commenter found two provisions not included in EPA's proposal that should be re-promulgated because the portions referencing mercury (Hg) monitoring were vacated in CAMR. The provisions in question are found at § 75.53(e)(1)(iv), which refers to reporting of information on Hg monitors and sorbent trap monitoring systems, and § 75.53(e)(1)(x), which refers to information on each stack using an Hg component monitor. Although the Hg portions of these provisions are no longer in effect, to be consistent with the other proposed revisions and to avoid confusion, the commenter stated that EPA should revise and re-promulgate these provisions again without the references to Hg. The commenter also requested that EPA ensure that these requirements are removed from the electronic data reporting format, schema, and instructions.

*Response:* The proposed rule revisions that would remove all references to mercury (Hg) monitoring from Part 75 have been finalized without modification. However, the commenter has correctly identified two references to Hg monitoring in § 75.53(e) which EPA apparently overlooked. In addition, the Agency has identified a third reference in § 75.53(e) and one other reference in § 75.57 that were inadvertently overlooked. Section 75.53(e)(1)(i)(E) refers to Hg emission controls, and Method of Determination Code (MODC) "15" in Table 4a in § 75.57 refers to "Hg concentration". The final rule removes all four of these references to Hg monitoring from part 75. All references to Hg monitoring and reporting have also been removed from the "ECMPS Reporting Instructions" (*see* the June 17, 2009 version and September 16, 2009 addendum, which are posted on the Clean Air Markets Division Web site at the following address: *http://www.epa.gov/airmarkets/business/ecmps/reporting-instructions.html.* However, certain schema elements had already been incorporated by the time of the court vacatur of CAMR, (*e.g.,* the <CalibrationStandardData> record, which indicates whether elemental or oxidized mercury standards are used for daily calibration). EPA continues to affirm that it is unnecessary to remove such records from the reporting format (or schema) since there are no requirements to use these fields or any of the mercury specific codes. As such these records are essentially vestigial and need not be revised.

Finally, note that minor changes have been made to a few of the rule sections in which the Hg monitoring provisions were found. These changes were described under "Miscellaneous Corrections and Additions" in the preamble to the proposed rule, and have been finalized without modification.

4. Miscellaneous Amendments

EPA proposed to revise the Incorporation by Reference section 75.6(f)(3) to add Section 3—Small Volume Provers, First Edition, but inadvertently omitted the publication date, and failed to revise section 2.1.5.1

of appendix D to part 75 to include Section 3 in the American Petroleum Institute (API) Manual of Petroleum Measurement Standards citation. The final rule includes the Section 3 publication dates of July 1988, reaffirmed Oct 1993, and includes Section 3 in the API citation in section 2.1.5.1 of appendix D to part 75.

EPA has added definitions in section 72.2 for "Coverage Factor k" and "Expanded Uncertainty". These definitions are consistent with the language used by the National Institute of Standards and Technology.

## II. 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 (Oct. 4, 1993)) and is therefore not subject to review under the Executive Order.

### *B. Paperwork Reduction Act*

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2203.04. The currently approved Information Collection Request (ICR) document prepared by EPA reflects the January 24, 2008 rule (EPA ICR Number 2203.02; OMB No.: 2060–0626). (OMB control numbers for EPA regulations are listed in 40 CFR part 9.) The information requirements covered by EPA ICR Number 2203.04 reflect the revisions to the requirements in 40 CFR Parts 72, and 75 that are being finalized in this action.

Basic information on the identity of EPA Protocol gas production sites and on the type of cylinders used by sources subject to part 75 will be collected by the Agency. These data will allow the Agency to verify that a source subject to part 75 is using EPA Protocol gases from EPA Protocol gas production sites that are participating in the Protocol Gas Verification Program (PGVP), and to inform the gas cylinder selection for the PGVP audits. This same type of information will be collected when EPA Protocol gases are used to perform certain EPA test methods. The Agency anticipates that this will help improve the quality of results when these test methods are used.

EPA has added simple recordkeeping and reporting requirements to enable the Agency to verify that Qualified Individuals and Air Emission Testing Bodies meet the requirements of this rule. EPA maintains that the main costs for air emission testing bodies to comply with the minimum competency requirements in ASTM D7036–04 are associated with taking qualified individual (QI) competency exams, and the development and revision of quality assurance manuals. The costs will be passed through to the customers (sources subject to part 75, primarily large electric utility and industrial companies), and the Agency notes that these costs will be partially offset by the savings generated by fewer failed or incorrectly performed relative accuracy test audits (RATAs), and fewer repeat tests required.

EPA is also requiring certain recordkeeping and reporting provisions for various data elements that were inadvertently left out of the August 22, 2006 proposed rule and the January 24, 2008 final rule. These data elements have already been incorporated in the data acquisition and handling systems of units subject to part 75, and are required to make EPA's new reporting software data requirements consistent with the regulatory requirements.

All of the above data collections are mandatory under 40 CFR part 75. None of the data are considered confidential business information under 40 CFR part 2, subpart B.

EPA received several comments that the costs were underestimated in the ICR and that more supporting detail was needed. The Agency has revised the ICR for the final rule to include (a) 600 hours of contractor time in Agency costs to account for ECMPS software changes, (b) additional one time DAHS upgrade respondent costs of $378,500, and (c) additional supporting detail.

The final rule does not significantly change the existing requirements in 40 CFR parts 72, and 75 and thus does not significantly change the existing information collection burden. The total annual respondent burden is estimated to be 2,254 hours, with total annual labor and O&M costs estimated to be $1,460,489. This estimate includes the burden associated with the increase in fees from AETBs and PGVP vendors resulting from their compliance with the new requirements in the rule as well as the small labor burden for sources to review the new requirements and comply with the modified recordkeeping and reporting requirements (*See* Exhibits 1 and 2). Burden is defined at 5 CFR 1320.3(b). The respondent burden for this collection of information is estimated to be a small fraction of both the 124,976 labor hours, and the $8,581,420 total cost that were calculated for the existing supporting statement (ICR 2203.02) for revisions to 40 CFR parts 72 and 75.

Most of these costs are expected to be borne by the private sector and will be passed through to the customers (sources subject to part 75, primarily large electric utility and industrial companies, or the rate payers). The Agency notes that some of the overall cost will be offset by the savings generated by fewer failed or incorrectly performed daily calibration error tests, quarterly linearity checks, and relative accuracy test audits (RATAs), and fewer repeat tests required.

Exhibits 1 and 2 summarize the respondent burden and cost estimates performed for the ICR (2203.04) supporting statement for revisions to 40 CFR parts 72 and 75. EPA estimates that: (a) 1,249 ARP sources and 253 additional CAIR sources will need to review the revised requirements and comply with the modified reporting requirements; and (b) 3,736 ARP sources and 777 additional CAIR sources will need to perform quality assurance testing and maintenance tasks. Low mass emissions units will not have to modify their DAHS, and sources with only new units already have their initial startup burdens and costs accounted for in the underlying program ICRs. Exhibit 1 shows the total burden and total cost based on this respondent universe.

EXHIBIT 1—INCREASED RESPONDENT BURDEN/COST (LABOR ONLY) ESTIMATES RELATED TO REVISIONS OF 40 CFR PARTS 72 AND 75

| Information collection activity | Mean hourly rate | Hours per activity/ year | Number of respondents (facilities) | Respondent hours/year | Total labor cost/year |
|---|---|---|---|---|---|
| ARP Respondents One Time Rule Review | $80.71/Hr | 1 | 1,249 | 1,249 | $100,807 |

EXHIBIT 1—INCREASED RESPONDENT BURDEN/COST (LABOR ONLY) ESTIMATES RELATED TO REVISIONS OF 40 CFR PARTS 72 AND 75—Continued

| Information collection activity | Mean hourly rate | Hours per activity/ year | Number of respondents (facilities) | Respondent hours/year | Total labor cost/year |
|---|---|---|---|---|---|
| ARP Respondents Compliance with Modified Reporting Requirements. | $80.71/Hr | 0.5 | 1,249 | 624.5 | 50,444 |
| CAIR Respondents One Time Rule Review | $80.71/Hr | 1 | 253 | 253 | 20,420 |
| CAIR Respondents Compliance with Modified Reporting Requirements. | $80.71/Hr | 0.5 | 253 | 126.5 | 10,210 |
| Total | | | 1,502 | 2,254 | 181,881 |

EXHIBIT 2—INCREASED RESPONDENT BURDEN/COST (QA AND MAINTENANCE) ESTIMATES RELATED TO REVISIONS OF 40 CFR PARTS 72 AND 75

| Information collection activity | Previously established cont./O&M cost | Increased cont./O&M cost per respondent | Number of respondents (units) | Increased total cost/year |
|---|---|---|---|---|
| **ARP Perform QA Testing and Maintenance** | | | | |
| Model A (CEMS) | $31,949 | $319 | 1,046 | $333,674 |
| Model C (App D—$NO_X$ CEM) | 17,818 | 178 | 2,107 | 375,046 |
| Model D (App D and E) | 1,843 | 19 | 438 | 8,322 |
| Model E (LME) | 1,991 | 20 | 145 | 2,900 |
| One Time DAHS Upgrade[1] | | 500 | 631 | 315,500 |
| **CAIR Perform QA Testing and Maintenance** | | | | |
| • Non ARP Sources in PM/$O_3$ and PM Only States: | | | | |
| —Solid Fuel: $SO_2$, $NO_X$, and Flow CEMS (units) | 31,200 | 312 | 102 | 31,824 |
| —Gas-Oil: $NO_X$ CEMS and App D (units) | 17,400 | 174 | 493 | 85,782 |
| —Gas-Oil Peaking Units: App D, App E, or LME methods (units) | 1,800 | 18 | 150 | 2,700 |
| One Time DAHS Upgrade[1] | | 500 | 119 | 59,500 |
| • Non ARP Sources in $O_3$ Only States: | | | | |
| —Solid Fuel: $SO_2$, $NO_X$, and Flow CEMS (units) | 20,800 | 208 | 4 | 832 |
| —Gas-Oil: $NO_X$ CEMS and App D (units) | 17, 400 | 174 | 28 | 4,872 |
| One Time DAHS Upgrade[1] | | 500 | 7 | 3,500 |
| —Gas-Oil Peaking Units: App D, App E, or LME methods (units) | 1,800 | 18 | 0 | 0 |
| **PGVP Increased Costs** | | | | |
| ($2 per cylinder at an assumed average of 6 cylinders per year) | | 12 | 4,513 | 54,156 |
| Total | | | | 1,278,608 |

[1] To calculate the number of units required to perform a DAHS upgrade, it was assumed that 80% of applicable CEMS units would be covered by an existing service contract and not subject to the annualized $1500 fee.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of 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; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

EPA conducted a screening analysis of today's rule on small entities in the following manner. The SBA defines small utilities as any entity and associated affiliates whose total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. The SBA 4 million megawatt hour threshold was applied to the Energy Information Administration (EIA) Annual Form EIA–923, "Power Plant Operations Report" 2008 net generation megawatt hour data and results in an estimated 1169 facilities. This data is

then paired with facility owner and associated affiliates data (owners with net generation over 4 million were disregarded) resulting in a total of 620 small entities with a 2008 average net generation of 650,169 megawatt hours. Multiplying net generation by the 2009 EIA average retail price of electricity (9.72 cents per kilowatt hour), the average revenue stream per small entity was determined to be $63,196,427 dollars. In contrast the average respondent costs burden for this rule was determined to be $972.36 per year, which is considerably less than one percent of the estimated average revenue stream per entity. All of the 620 small entities except for one had respondent costs that were less than one percent of the estimated revenue stream.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. All but one of the 620 small electric utilities directly affected by this final rule are expected to experience costs that are well under one percent of their estimated revenues.

The rule revisions represent minor changes to existing monitoring requirements under part 75. There will be some small level of annual costs to participate in a gas audit program, taking a qualified stack test individual competency exam and developing or revising a quality assurance manual, and a slight up-front cost to reprogram existing electronic data reporting software used under Part 75. The Agency notes that these costs will be partially offset by the savings generated by fewer failed or incorrectly performed daily calibration error tests, quarterly linearity checks, and relative accuracy test audits (RATAs), and fewer repeat tests required.

*D. Unfunded Mandates Reform Act*

This rule 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 total annual respondent burden is estimated to be 2,254 hours, with total annual labor and O&M costs estimated to be $1,460,489. This estimate includes the burden associated with the increase in fees from AETBs and PGVP vendors resulting from their compliance with the new requirements in the rule as well as the small labor burden for sources to review the new requirements and comply with the modified recordkeeping and reporting requirements (*See* Exhibits 1 and 2). The respondent burden for this collection of information is estimated to be a small fraction of both the 124,976 labor hours, and the $8,581,420 total cost that were calculated for the existing supporting statement (ICR 2203.02) for revisions to 40 CFR parts 72 and 75. The costs incurred by AETBs and PGVP vendors will be passed through to their customers (sources subject to Part 75, primarily large electric utility and industrial companies, or the rate payers). The Agency notes that much of the costs will be offset by the savings generated by fewer failed or incorrectly performed daily calibration error tests, quarterly linearity checks, and relative accuracy test audits (RATAs), and fewer repeat tests required. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule would generally affect large electric utility or industrial companies.

*E. Executive Order 13132: Federalism*

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This final rule primarily amends the Protocol Gas Verification Program, and the minimum competency requirements for air emission testing (first promulgated on January 24, 2008 (*See* 73 FR 4340, 4364, and 4365)) by having specialty gas company funds go to the National Institute of Standards and Technology, who has statutory authority to receive such funds, to fund gas cylinder analyses, by changing the rule language to rely on certain documentation provided at the time of stack testing as sufficient proof of validity of test data that otherwise meets the requirements of Part 75, by adding simple recordkeeping/reporting requirements, and by extending relevant compliance deadlines. Thus, Executive Order 13132 does not apply to this final rule.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This final rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This final rule primarily amends the Protocol Gas Verification Program, and the minimum competency requirements for air emission testing (first promulgated on January 24, 2008 (*See* 73 FR 4340, 4364, and 4365)) by having specialty gas company funds go to the National Institute of Standards and Technology, who has statutory authority to receive such funds, to fund gas cylinder analyses, by changing the rule language to rely on certain documentation provided at the time of stack testing as sufficient proof of validity of test data that otherwise meets the requirements of part 75, by adding simple recordkeeping/reporting requirements, and by extending relevant compliance deadlines. Thus, Executive Order 13175 does not apply to this final rule.

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

EPA interprets EO 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 EO has the potential to influence the regulation. This final rule is not subject to EO 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 rule is not subject to Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking involves technical standards. Therefore, the Agency conducted a search to identify

potentially applicable voluntary consensus standards. The Agency found an applicable voluntary consensus standard, ASTM D 7036–04, Standard Practice for Competence of Air Emission Testing Bodies, for use with the air emission testing body provisions of the final rule. However, EPA could not identify any applicable voluntary consensus standard for the Protocol Gas Verification Program. Therefore, for the PGVP, EPA has decided to use "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards," September 1997, as amended August 25, 1999, EPA–600/R–97/121 or such revised procedure as approved by the Administrator.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This final rule primarily amends the Protocol Gas Verification Program, and the minimum competency requirements for air emission testing (first promulgated on January 24, 2008 (*See* 73 FR 4340, 4364, and 4365)) by having specialty gas company funds go to the National Institute of Standards and Technology, who has statutory authority to receive such funds, to fund gas cylinder analyses, by changing the rule language to rely on certain documentation provided at the time of stack testing as sufficient proof of validity of test data that otherwise meets the requirements of Part 75, by adding simple recordkeeping/reporting requirements, and by extending relevant compliance deadlines.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on April 27, 2011.

*L. Petitions for Judicial Review*

Under Clean Air Act section 307(b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 27, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such a rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2) of the Administrative Procedures Act.)

**List of Subjects**

*40 CFR Part 72*

Environmental protection, Acid rain, Administrative practice and procedure, Air pollution control, Electric utilities, Carbon dioxide, Continuous emission monitoring, Intergovernmental relations, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur oxides, Reference test methods, Incorporation by reference.

*40 CFR Part 75*

Environmental protection, Acid rain, Administrative practice and procedure, Air pollution control, Electric utilities, Carbon dioxide, Continuous emission monitoring, Intergovernmental relations, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur oxides, Reference test methods, Incorporation by reference.

Dated: March 10, 2011.

**Lisa P. Jackson,**

*Administrator.*

For the reasons set forth in the preamble, parts 72 and 75 of chapter I of title 40 of the Code of Federal Regulations are amended as follows:

## PART 72—PERMITS REGULATION

■ 1. The authority citation for part 72 continues to read as follows:

**Authority:** 42 U.S.C. 7601 and 7651, *et seq.*

■ 2. Section 72.2 is amended by:

■ a. Revising the definitions of "Air Emission Testing Body (AETB)", "EPA Protocol Gas", "EPA Protocol Gas Verification Program", and "Qualified individual";

■ b. Revising the introductory text of the definition of "Continuous emission monitoring system or CEMS";

■ c. Removing paragraph (7) of the definition of "Continuous emission monitoring system or CEMS";

■ d. Removing the definitions of "NIST traceable elemental Hg standards", "NIST traceable source of oxidized Hg", "Sorbent trap monitoring system", and "Specialty Gas Producer"; and

■ e. Adding in alphabetical order definitions for "Coverage Factor k", "EPA Protocol Gas Production Site", "Expanded uncertainty", and "Specialty Gas Company", to read as follows:

**§ 72.2 Definitions.**

* * * * *

*Air Emission Testing Body (AETB)* means a company or other entity that provides to the owner or operator the certification required by section 6.1.2(b) of appendix A to part 75 of this chapter.

* * * * *

*Continuous emission monitoring system or CEMS* means the equipment required by part 75 of this chapter used to sample, analyze, measure, and provide, by means of readings recorded at least once every 15 minutes (using an automated data acquisition and handling system (DAHS)), a permanent record of $SO_2$, $NO_X$, or $CO_2$ emissions or stack gas volumetric flow rate. The following are the principal types of continuous emission monitoring systems required under part 75 of this chapter. Sections 75.10 through 75.18, and § 75.71(a) of this chapter indicate which type(s) of CEMS is required for specific applications:

* * * * *

*Coverage Factor k* means, in general, a value chosen on the basis of the desired level of confidence to be associated with the interval defined by $U = ku_c$. Typically, k is in the range 2 to 3. When the normal distribution applies and $u_c$ is a reliable estimate of the standard deviation of y, $U = 2\ u_c$ (*i.e.,* k = 2) defines an interval having a level of confidence of approximately 95%, and $U = 3\ u_c$ (*i.e.,* k = 3) defines

an interval having a level of confidence greater than 99%.

* * * * *

*EPA Protocol Gas* means a calibration gas mixture prepared and analyzed according to section 2 of the "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards," September 1997, as amended August 25, 1999, EPA–600/R–97/121 (incorporated by reference, see § 72.13) or such revised procedure as approved by the Administrator.

*EPA Protocol Gas Production Site* means a site that produces or blends calibration gas mixtures prepared and analyzed according to section 2 of the "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards," September 1997, as amended August 25, 1999, EPA–600/R–97/121 (incorporated by reference, *see* § 72.13) or such revised procedure as approved by the Administrator.

*EPA Protocol Gas Verification Program or PGVP* means a calibration gas audit program described in § 75.21(g) of this chapter and implemented by EPA in cooperation with the National Institute of Standards and Technology (NIST).

* * * * *

*Expanded uncertainty* means a measure of uncertainty that defines an interval about the measurement result y within which the value of the measurand Y can be confidently asserted to lie. Although the combined standard uncertainty $u_c$ is used to express the uncertainty of many measurement results, for some commercial, industrial, and regulatory applications (*e.g.,* when health and safety are concerned), what is often required is an expanded uncertainty, suggested symbol U, and is obtained by multiplying $u_c(y)$ by a coverage factor, suggested symbol k. Thus $U = ku_c(y)$ and it is confidently believed that Y is greater than or equal to $y - U$, and is less than or equal to $y + U$, which is commonly written as $Y = y \pm U$.

* * * * *

*Qualified individual (QI)* means an individual who is identified by an AETB as meeting the requirements described in ASTM D 7036–04 "Standard Practice for Competence of Air Emission Testing Bodies" (incorporated by reference, see § 72.13), as of the date of testing.

* * * * *

*Specialty Gas Company* means an organization that wholly or partially owns or operates one or more EPA Protocol gas production sites.

* * * * *

■ 3. Section 72.13 is amended by:

■ a. Revising paragraph (a) introductory text;

■ b. Adding paragraph (a)(5); and

■ c. Adding paragraph (b), to read as follows:

### § 72.13 Incorporation by reference.

* * * * *

(a) The following materials are available for purchase from the following address: American Society for Testing and Material (ASTM) International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, Pennsylvania 19428–2959, phone: 610–832–9585, *http://www.astm.org/DIGITAL_LIBRARY/index.shtml.*

* * * * *

(5) ASTM D 7036–04, Standard Practice for Competence of Air Emission Testing Bodies, for § 72.2.

(b) A copy of the following material is available from *http://www.epa.gov/ttn/emc/news.html* (*see* postings for Sections 1, 2, 3, 4, Appendices, Spreadsheets, and the "Read before downloading Section 2" revision posted August 27, 1999): EPA–600/R–97/121, EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards, September 1997, as amended August 25, 1999, U.S. Environmental Protection Agency, for § 72.2.

## PART 75—CONTINUOUS EMISSION MONITORING

■ 4. The authority citation for part 75 continues to read as follows:

**Authority:** 42 U.S.C. 7601, 7651k, and 7651k note.

### § 75.2 [Amended]

■ 5. Section 75.2 is amended by removing paragraph (d).

■ 6. Section 75.4 is amended by:

■ a. Revising paragraphs (b)(2) and (c)(2);

■ b. Revising paragraph (d) introductory text; and

■ c. Revising paragraphs (d)(1) and (e), to read as follows:

### § 75.4 Compliance dates.

* * * * *

(b) * * *

(2) 180 calendar days after the date the unit commences commercial operation, notice of which date shall be provided under subpart G of this part.

(c) * * *

(2) 180 calendar days after the date on which the unit becomes subject to the requirements of the Acid Rain Program, notice of which date shall be provided under subpart G of this part.

(d) This paragraph (d) applies to affected units under the Acid Rain Program and to units subject to a State or Federal pollutant mass emissions reduction program that adopts the emission monitoring and reporting provisions of this part. In accordance with § 75.20, for an affected unit which, on the applicable compliance date, is either in long-term cold storage (as defined in § 72.2 of this chapter) or is shut down as the result of a planned outage or a forced outage, thereby preventing the required continuous monitoring system certification tests from being completed by the compliance date, the owner or operator shall provide notice of such unit storage or outage in accordance with § 75.61(a)(3) or § 75.61(a)(7), as applicable. For the planned and unplanned unit outages described in this paragraph (d), the owner or operator shall ensure that all of the continuous monitoring systems for $SO_2$, $NO_X$, $CO_2$, opacity, and volumetric flow rate required under this part (or under the applicable State or Federal mass emissions reduction program) are installed and that all required certification tests are completed no later than 90 unit operating days or 180 calendar days (whichever occurs first) after the date that the unit recommences commercial operation, notice of which date shall be provided under § 75.61(a)(3) or § 75.61(a)(7), as applicable. The owner or operator shall determine and report $SO_2$ concentration, $NO_X$ emission rate, $CO_2$ concentration, and flow rate data (as applicable) for all unit operating hours after the applicable compliance date until all of the required certification tests are successfully completed, using either:

(1) The maximum potential concentration of $SO_2$ (as defined in section 2.1.1.1 of appendix A to this part), the maximum potential $NO_X$ emission rate, as defined in § 72.2 of this chapter, the maximum potential flow rate, as defined in section 2.1.4.1 of appendix A to this part, or the maximum potential $CO_2$ concentration, as defined in section 2.1.3.1 of appendix A to this part; or

* * * * *

(e) In accordance with § 75.20, if the owner or operator of an affected unit completes construction of a new stack or flue, or a flue gas desulfurization system or add-on $NO_X$ emission controls, after the applicable deadline in paragraph (a), (b), or (c) of this section:

(1) Except as otherwise provided in paragraph (e)(3) of this section, the owner or operator shall ensure that all required certification and/or recertification and/or diagnostic tests of the monitoring systems required under this part (*i.e.,* the $SO_2$, $NO_X$, $CO_2$,

opacity, and volumetric flow rate monitoring systems, as applicable) are completed not later than 90 unit operating days or 180 calendar days (whichever occurs first) after:

(i) For the event of construction of a new stack or flue, the date that emissions first exit to the atmosphere through the new stack or flue, notice of which date shall be provided under subpart G of this part; or

(ii) For the event of installation of a flue gas desulfurization system or add-on $NO_X$ emission controls, the date that reagent is first injected into the flue gas desulfurization system or the add-on $NO_X$ emission controls, as applicable, notice of which date shall be provided under subpart G of this part.

(2) The owner or operator shall determine and report $SO_2$ concentration, $NO_X$ emission rate, $CO_2$ concentration, and volumetric flow rate data for all unit or stack operating hours after emissions first pass through the new stack or flue, or reagent is first injected into the flue gas desulfurization system or add-on $NO_X$ emission controls, as applicable, until all required certification and/or recertification and/or diagnostic tests are successfully completed, using:

(i) The applicable missing data substitution procedures under §§ 75.31 through 75.37;

(ii) The conditional data validation procedures of § 75.20(b)(3), except that conditional data validation may, if necessary, be used for the entire window of time provided under paragraph (e)(1) of this section in lieu of the periods specified in § 75.20(b)(3)(iv);

(iii) Reference methods under § 75.22(b);

(iv) Quality-assured data recorded on the high measurement scale of the monitor that measures the pollutant being removed by the add-on emission controls (*i.e.,* $SO_2$ or $NO_X$, as applicable), if, pursuant to section 2 of appendix A to this part, two spans and ranges are required for that monitor and if the high measurement scale of the monitor has been certified according to § 75.20(c), section 6 of appendix A to this part, and, if applicable, paragraph (e)(4)(i) of this section. Data recorded on the certified high scale, including data that ordinarily would be required to be recorded on the low scale, pursuant to section 2.1.1.4(g) or 2.1.2.4(f) of appendix A to this part, may be reported as quality-assured for a period not to exceed 60 unit or stack operating days after the date and hour that reagent is first injected into the control device. In order for the high and low scale readings from the monitor to be reported as quality-assured for more than 60 unit or stack operating days after the date and hour that reagent is first injected into the control device, all required tests of the low measurement scale must be performed and passed within the window of time provided under paragraph (e)(1)(ii) of this section; or

(v) Another procedure approved by the Administrator pursuant to a petition under § 75.66.

(3) If a particular project involves both the event of new stack or flue construction and the event of installation of a flue gas desulfurization system or add-on $NO_X$ emission controls, the owner or operator shall either:

(i) Complete all of the monitoring system certification and/or recertification and/or diagnostic testing requirements of both events within the window of time provided under paragraph (e)(1)(i) of this section; or

(ii) Complete all of the monitoring system certification and/or recertification and/or diagnostic testing requirements of each event within the separate window of time applicable to such event provided under paragraph (e)(1) of this section.

(4) For the project described in paragraph (e)(3) of this section, the emissions data from each CEMS installed on the new stack recorded in the interval of time starting on the date and hour on which emissions first exit to the atmosphere through the new stack and ending on the hour before the date and hour on which reagent is first injected into the control device may be reported as quality assured:

(i) For the CEMS that includes the monitor that measures the pollutant being removed by the add-on emission controls (*i.e.,* $SO_2$ or $NO_X$, as applicable):

(A) Only if the relative accuracy test audit (RATA) of the high measurement scale of the monitor is successfully completed either prior to the date and hour of the first injection of reagent into the emission control device, or after that date and hour during a period when the control device is not operating, but still within the window of time provided under paragraph (e)(1)(i) of this section, and the rest of the certification tests required under § 75.20(c) and section 6 of appendix A to this part for the high measurement scale of the monitor are successfully completed within the window of time provided under paragraph (e)(1)(i) of this section;

(B) Beginning with:

(*1*) The first unit or stack operating hour after successful completion of all of the certification tests in accordance with paragraph (e)(4)(i)(A) of this section; or

(*2*) The hour of the probationary calibration error test (see § 75.20(b)(3)(ii)), if conditional data validation is used and all of the certification tests are successfully completed in accordance with paragraph (e)(4)(i)(A) of this section, with no test failures. If any required test is failed or aborted or is otherwise not in accordance with paragraph (e)(4)(i)(A) of this section, data validation shall be done according to § 75.20(b)(3)(vii).

(ii) For a CEMS other than one addressed in paragraph (e)(4)(i) of this section:

(A) Only if the relative accuracy test audit (RATA) of the CEMS is successfully completed either prior to the date and hour of the first injection of reagent into the emission control device, or after that date and hour during a period when the control device is not operating, but still within the window of time provided under paragraph (e)(1)(i) of this section, and the rest of the certification tests required under § 75.20(c) and section 6 of appendix A to this part for the CEMS are successfully completed within the window of time provided under paragraph (e)(1)(i) of this section;

(B) Beginning with:

(*1*) The first unit or stack operating hour after successful completion of all of the certification tests in accordance with paragraph (e)(4)(ii)(A) of this section; or

(*2*) The hour of the probationary calibration error test (*see* § 75.20(b)(3)(ii)), if conditional data validation is used and all of the certification tests are successfully completed in accordance with paragraph (e)(4)(ii)(A) of this section, with no test failures. If any required test is failed or aborted or is otherwise not in accordance with paragraph (e)(4)(ii)(A) of this section, data validation shall be done according to § 75.20(b)(3)(vii).

* * * * *

■ 7. Section 75.6 is amended by:

■ a. Revising paragraph (a) introductory text;

■ b. Removing and reserving paragraphs (a)(38), (a)(43), and (a)(44);

■ c. Revising paragraphs (a)(48) and (f)(3); and

■ d. Adding paragraph (g), to read as follows:

**§ 75.6 Incorporation by reference.**

* * * * *

(a) The following materials are available for purchase from the following address: American Society for Testing and Material (ASTM)

International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, Pennsylvania, 19428–2959, phone: 610–832–9585, *http://www.astm.org/DIGITAL_LIBRARY/index.shtml.*

* * * * *

(38) [Reserved]

* * * * *

(43) [Reserved]

(44) [Reserved]

* * * * *

(48) ASTM D7036–04, Standard Practice for Competence of Air Emission Testing Bodies, for § 75.21, § 75.59, and appendix A to this part.

* * * * *

(f) * * *

(3) American Petroleum Institute (API) Manual of Petroleum Measurement Standards, Chapter 4—Proving Systems, Section 2—Pipe Provers (Provers Accumulating at Least 10,000 Pulses), Second Edition, March 2001, Section 3—Small Volume Provers, First Edition, July 1988, Reaffirmed Oct 1993, and Section 5—Master-Meter Provers, Second Edition, May 2000, for appendix D to this part.

* * * * *

(g) A copy of the following material is available from *http://www.epa.gov/ttn/emc/news.html* (*see* postings for Sections 1, 2, 3, 4, Appendices, Spreadsheets, and the "Read before downloading Section 2" revision posted August 27, 1999): EPA–600/R–97/121, EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards, September 1997, as amended August 25, 1999, U.S. Environmental Protection Agency, for § 75.21, and appendix A to this part.

■ 8. Section 75.10 is amended by:

■ a. Revising the second sentence of paragraph (d)(1); and

■ b. Revising the first sentence of paragraph (d)(3), to read as follows:

**§ 75.10 General operating requirements.**

* * * * *

(d) * * *

(1) * * * The owner or operator shall reduce all $SO_2$ concentrations, volumetric flow, $SO_2$ mass emissions, $CO_2$ concentration, $O_2$ concentration, $CO_2$ mass emissions (if applicable), $NO_X$ concentration, and $NO_X$ emission rate data collected by the monitors to hourly averages. * * *

* * * * *

(3) Failure of an $SO_2$, $CO_2$, or $O_2$ emissions concentration monitor, $NO_X$ concentration monitor, flow monitor, moisture monitor, or $NO_X$-diluent continuous emission monitoring system to acquire the minimum number of data points for calculation of an hourly average in paragraph (d)(1) of this section shall result in the failure to obtain a valid hour of data and the loss of such component data for the entire hour. * * *

* * * * *

**§ 75.15 [Removed and reserved]**

■ 9. Section 75.15 is removed and reserved.

■ 10. Section 75.20 is amended by:

■ a. Revising paragraph (a)(5)(i);

■ b. Revising the first sentence of paragraph (b) introductory text;

■ c. Revising paragraph (c)(1) introductory text;

■ d. Revising paragraphs (c)(1)(ii) and (c)(1)(iii);

■ e. Removing paragraph (c)(1)(vi);

■ f. Removing and reserving paragraph (c)(9); and

■ g. Removing paragraph (d)(2)(ix), to read as follows:

**§ 75.20 Initial certification and recertification procedures.**

(a) * * *

(5) * * *

(i) Until such time, date, and hour as the continuous emission monitoring system can be adjusted, repaired, or replaced and certification tests successfully completed (or, if the conditional data validation procedures in paragraphs (b)(3)(ii) through (b)(3)(ix) of this section are used, until a probationary calibration error test is passed following corrective actions in accordance with paragraph (b)(3)(ii) of this section), the owner or operator shall substitute the following values, as applicable, for each hour of unit operation during the period of invalid data specified in paragraph (a)(4)(iii) of this section or in § 75.21: the maximum potential concentration of $SO_2$, as defined in section 2.1.1.1 of appendix A to this part, to report $SO_2$ concentration; the maximum potential $NO_X$ emission rate, as defined in § 72.2 of this chapter, to report $NO_X$ emissions in lb/mmBtu; the maximum potential concentration of $NO_X$, as defined in section 2.1.2.1 of appendix A to this part, to report $NO_X$ emissions in ppm (when a $NO_X$ concentration monitoring system is used to determine $NO_X$ mass emissions, as defined under § 75.71(a)(2)); the maximum potential flow rate, as defined in section 2.1.4.1 of appendix A to this part, to report volumetric flow; the maximum potential concentration of $CO_2$, as defined in section 2.1.3.1 of appendix A to this part, to report $CO_2$ concentration data; and either the minimum potential moisture percentage, as defined in section 2.1.5 of appendix A to this part or, if Equation 19–3, 19–4 or 19–8 in Method 19 in appendix A to part 60 of this chapter is used to determine $NO_X$ emission rate, the maximum potential moisture percentage, as defined in section 2.1.6 of appendix A to this part; and

* * * * *

(b) *Recertification approval process.* Whenever the owner or operator makes a replacement, modification, or change in a certified continuous emission monitoring system or continuous opacity monitoring system that may significantly affect the ability of the system to accurately measure or record the $SO_2$ or $CO_2$ concentration, stack gas volumetric flow rate, $NO_X$ emission rate, $NO_X$ concentration, percent moisture, or opacity, or to meet the requirements of § 75.21 or appendix B to this part, the owner or operator shall recertify the continuous emission monitoring system or continuous opacity monitoring system, according to the procedures in this paragraph. * * *

* * * * *

(c) * * *

(1) For each $SO_2$ pollutant concentration monitor, each $NO_X$ concentration monitoring system used to determine $NO_X$ mass emissions, as defined under § 75.71(a)(2), and each $NO_X$-diluent continuous emission monitoring system:

* * * * *

(ii) A linearity check, where, for the $NO_X$-diluent continuous emission monitoring system, the test is performed separately on the $NO_X$ pollutant concentration monitor and the diluent gas monitor;

(iii) A relative accuracy test audit. For the $NO_X$-diluent continuous emission monitoring system, the RATA shall be done on a system basis, in units of lb/mmBtu. For the $NO_X$ concentration monitoring system, the RATA shall be done on a ppm basis;

* * * * *

(9) [Reserved]

* * * * *

■ 11. Section 75.21 is amended by:

■ a. Revising paragraph (a)(3); and

■ b. Adding paragraphs (f) and (g), to read as follows:

**§ 75.21 Quality assurance and quality control requirements.**

(a) * * *

(3) The owner or operator shall perform quality assurance upon a reference method backup monitoring system according to the requirements of Method 2, 6C, 7E, or 3A in Appendices A–1, A–2 and A–4 to part 60 of this chapter (supplemented, as necessary, by guidance from the Administrator),

instead of the procedures specified in appendix B to this part.

* * * * *

(f) *Requirements for Air Emission Testing.* On and after March 27, 2012, relative accuracy testing under § 75.74(c)(2)(ii), section 6.5 of appendix A to this part, and section 2.3.1 of appendix B to this part, and stack testing under § 75.19 and section 2.1 of appendix E to this part shall be performed by an "Air Emission Testing Body", as defined in § 72.2 of this chapter. Conformance to the requirements of ASTM D7036–04 (incorporated by reference, see § 75.6), referred to in section 6.1.2 of appendix A to this part, shall apply only to these tests. Section 1.1.4 of appendix B to this part, and section 2.1 of appendix E to this part require compliance with section 6.1.2 of appendix A to this part. Tests and activities under this part not required to be performed by an AETB as defined in § 72.2 of this chapter include daily CEMS operation, daily calibration error checks, daily flow interference checks, quarterly linearity checks, routine maintenance of CEMS, voluntary emissions testing, or emissions testing required under other regulations.

(g) *Requirements for EPA Protocol Gas Verification Program.* Any EPA Protocol gas production site that chooses to participate in the EPA Protocol Gas Verification Program (PGVP) must notify the Administrator of its intent to participate. An EPA Protocol gas production site's participation shall commence immediately upon notification to EPA and shall extend through the end of the calendar year in which notification is provided. EPA will issue a vendor ID to each participating EPA Protocol gas production site. In each year of the PGVP, EPA may audit up to four EPA Protocol gas cylinders from each participating EPA Protocol gas production site.

(1) A production site participating in the PGVP shall provide the following information in its initial and ongoing notifications to EPA in an electronic format prescribed by the Administrator (*see* the CAMD Web site *http://www.epa.gov/airmarkets/emissions/pgvp.html*):

(i) The specialty gas company name which owns or operates the participating production site;

(ii) The name, e-mail address, and telephone number of a contact person for that specialty gas company;

(iii) The name and address of that participating EPA Protocol gas production site, owned or operated by the specialty gas company; and

(iv) The name, e-mail address, and telephone number of a contact person for that participating EPA Protocol gas production site.

(2) An EPA Protocol gas production site that elects to continue participating in the PGVP in the next calendar year must notify the Administrator of its intent to continue in the program by December 31 of the current year by submitting to EPA the information described in paragraph (g)(1) of this section.

(3) A list of the names, contact information, and vendor IDs of EPA Protocol gas production sites participating in the PGVP will be made publicly available by posting on EPA Web sites (*see* the CAMD Web site *http://www.epa.gov/airmarkets/emissions/pgvp.html*).

(4) EPA may remove an EPA Protocol gas production site from the list of PGVP participants and give notice to the production site for any of the following reasons:

(i) If the EPA Protocol gas production site fails to provide all of the information required by paragraph (g)(1) of this section in accordance with paragraph (g)(2) of this section;

(ii) If, after being notified that its EPA Protocol gas cylinders are being audited by EPA, the EPA Protocol gas production site fails to cancel its invoice or to credit the purchaser's account for the cylinders within 45 calendar days of such notification; or

(iii) If, after being notified that its EPA Protocol gas cylinders are being audited by EPA, the EPA Protocol gas production site cannot provide to EPA upon demand proof of payment to the National Institute of Standards and Technology (NIST) and a valid contract with NIST;

(5) EPA may relist an EPA Protocol gas production site as follows:

(i) An EPA Protocol gas production site may be relisted immediately after its failure is remedied if the only reason for removal from the list of PGVP participants is failure to provide all of the information required by paragraph (g)(1) of this section;

(ii) If EPA does not receive hardcopy or electronic proof of a credit receipt or of cancellation of the invoice for the cylinders from the EPA Protocol gas production site within 45 calendar days of notifying the EPA Protocol gas production site that its cylinders are being audited by EPA, the cylinders shall be returned to the EPA Protocol gas production site free of any demurrage, and that EPA Protocol gas production site shall not be eligible for relisting for 180 calendar days from the date of notice that it was removed from the list and until it submits to EPA the information required by paragraph (g)(1) of this section;

(iii) For any EPA Protocol gas production site which is notified by EPA that its cylinders are being audited and cannot provide to EPA upon demand proof of payment to NIST and a valid contract with NIST, the cylinders may either be kept by NIST or returned to the EPA Protocol gas production site free of any demurrage and at no cost to NIST, and that EPA Protocol gas production site shall not be eligible for relisting for 180 calendar days from the date of notice that it was removed from the list and until it submits to EPA the information required by paragraph (g)(1) of this section.

(6) On and after May 27, 2011 for each unit subject to this part that uses EPA Protocol gases, the owner or operator must obtain such gases from either an EPA Protocol gas production site that is on the EPA list of sites participating in the PGVP on the date the owner or operator procures such gases or from a reseller that sells to the owner or operator unaltered EPA Protocol gases produced by an EPA Protocol gas production site that was on the EPA list of participating sites on the date the reseller procured such gases.

(7) An EPA Protocol gas cylinder certified by or ordered from any non-participating EPA Protocol gas production site no later than May 27, 2011 may be used for the purposes of this part until the earlier of the cylinder's expiration date or the date on which the cylinder gas pressure reaches 150 psig. In the event that an EPA Protocol gas production site is removed from the list of PGVP participants on the same date as or after the date on which a particular cylinder has been certified or ordered, that gas cylinder may continue to be used for the purposes of this part until the earlier of the cylinder's expiration date or the date on which the cylinder gas pressure reaches 150 psig. However, in no case shall a cylinder described in this paragraph (g)(7) be recertified by a non-participating EPA Protocol gas production site to extend its useful life and be used by a source subject to this part.

(8) If EPA notifies a participating EPA Protocol gas production site that its EPA Protocol gas cylinders are being audited and identifies the purchaser as an EPA representative or contractor participating in the audit process, the production site shall:

(i) Either cancel that purchaser's invoice or credit that purchaser's account for the purchase of those EPA Protocol gas cylinders;

(ii) Not charge for demurrage for those EPA Protocol gas cylinders;

(iii) Arrange for and pay for the return shipment of its cylinders from NIST; and

(iv) Provide sufficient funding to NIST for:

(A) The analysis of those EPA Protocol gas cylinders by NIST;

(B) The production site's pro rata share of draft and final NIST electronic audit reports as specified in paragraphs (g)(9)(ii) through (g)(9)(v) of this section on all cylinders in the current audit; and

(C) The full cost of a draft redacted electronic audit report containing just that production site's results and the information as specified in paragraphs (g)(9)(ii) through (g)(9)(v) of this section;

(9) If EPA notifies a participating EPA Protocol gas production site that its EPA Protocol gas cylinders are being audited then:

(i) Each participating EPA Protocol gas production site must have NIST analyze its EPA Protocol gas cylinders provided for audit as soon after NIST receives the batch containing those cylinders as possible, preferably within two weeks of NIST's receipt, using analytical procedures consistent with metrology institute practices and at least as rigorous as the "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards" (Traceability Protocol), September 1997, as amended August 25, 1999, EPA–600/R–97/121, (incorporated by reference, see § 75.6) or equivalent written cylinder analysis protocol that has been approved by EPA.

(ii) Each cylinder's concentration must be determined by NIST and the results compared to each cylinder's certification documentation and tag value to establish conformance with section 5.1 of appendix A to this part. After NIST analysis, each cylinder must be provided with a NIST analyzed concentration with an expanded uncertainty, as defined in § 72.2, (coverage factor, as defined in § 72.2, k=2) of plus or minus 1.0 percent (calculated combined standard uncertainty of plus or minus 0.5%), inclusive, or better, unless otherwise approved by EPA.

(iii) The certification documentation accompanying each cylinder must be verified in the audit report as meeting the requirements of "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards," September 1997, as amended August 25, 1999, EPA–600/R–97/121 (incorporated by reference, *see* § 75.6) or a revised procedure approved by the Administrator.

(iv) Each participating EPA Protocol gas production site shall have NIST provide all of the information required by paragraphs (g)(9)(ii) through (g)(9)(v) of this section in draft and final electronic audit reports on all cylinders in the current audit, and in a draft redacted electronic audit report containing just that production site's information. The draft audit report on all cylinders in the current audit and each draft redacted version of the audit report shall be submitted electronically by NIST to *pgvp@epa.gov,* unless otherwise provided by the Administrator, within four weeks of completion of all cylinder analyses or as soon as possible thereafter. The draft and final audit report on all cylinders in the current audit shall only be sent to EPA. EPA will send the applicable draft redacted audit report to each participating production site for comment. To be considered in the final posted audit report, EPA must receive comments, and any cylinder re-analyses from participating EPA Protocol gas production sites within 60 days of the participating EPA Protocol gas production site's receipt of the draft redacted audit report. All comments from production sites, including any cylinder re-analyses, on the draft redacted versions of the audit report shall be submitted electronically to *pgvp@epa.gov,* unless otherwise provided by the Administrator. The final audit report on all cylinders in the current audit shall be submitted electronically by NIST to *pgvp@epa.gov,* unless otherwise provided by the Administrator, within 90 days of the participating EPA Protocol gas production site's receipt of the draft redacted audit report sent by EPA or as soon as possible thereafter. EPA will post the final results of the NIST analyses on EPA Web sites (*see* the CAMD Web site *http://www.epa.gov/airmarkets/emissions/pgvp.html).* Each audit report shall include:

(A) A table with the information and in the format specified by Figure 3 (or the Note below Figure 3, as applicable) of appendix B to this part or such revised format as approved by the Administrator; and

(B) Complete documentation of the NIST procedures used to analyze the cylinders, including the analytical reference standards, analytical method, analytical method uncertainty, analytical instrumentation, and instrument calibration procedures.

(v) For EPA Protocol gas production sites that produce EPA Protocol gas cylinders claiming NIST traceability for both NO and $NO_X$ concentrations in the same cylinder, if analyzed by NIST for the PGVP, such cylinders must be analyzed by NIST for both the NO and $NO_X$ components (where total $NO_X$ is determined by NO plus $NO_2$) and the results of the analyses shall be included in the audit report.

(10) An EPA Protocol gas production site shall continue to be on the EPA list of sites participating in the PGVP and may continue to sell EPA Protocol gases to sources subject to part 75 if it is not notified by EPA that its cylinders are being audited under the PGVP if it provides the information described in paragraph (g)(1) of this section in accordance with paragraph (g)(2) of this section.

(11) The data validation procedures under §§ 2.1.4, 2.2.3, and 2.3.2 of appendix B to this part apply.

■ 12. Section 75.22 is amended by:

■ a. Revising paragraph (a) introductory text;

■ b. Revising paragraph (a)(5)(iv);

■ c. Adding paragraph (a)(5)(v)

■ d. Removing paragraph (a)(7);

■ e. Revising paragraph (b) introductory text; and

■ f. Removing paragraphs (b)(5) through (b)(8), to read as follows:

**§ 75.22 Reference test methods.**

(a) The owner or operator shall use the following methods, which are found in appendices A–1 through A–4 to part 60 of this chapter, to conduct the following tests: Monitoring system tests for certification or recertification of continuous emission monitoring Systems; $NO_X$ emission tests of low mass emission units under § 75.19(c)(1)(iv); $NO_X$ emission tests of excepted monitoring systems under appendix E to this part; and required quality assurance and quality control tests:

* * * * *

(5) * * *

(iv) Section 8.6 of the method allowing for the use of "Dynamic Spiking" as an alternative to the interference and system bias checks of the method. Dynamic spiking may be conducted (optionally) as an additional quality assurance check; and

(v) That portion of Section 8.5 of the method allowing multiple sampling runs to be conducted before performing the post-run system bias check or system calibration error check.

* * * * *

(b) The owner or operator may use any of the following methods, which are found in appendices A–1 through A–4 to part 60 of this chapter, as a reference method backup monitoring system to provide quality-assured monitor data:

* * * * *

■ 13. Section 75.24 is amended by revising paragraph (d) to read as follows:

**§ 75.24 Out-of-control periods and adjustment for system bias.**

* * * * *

(d) When the bias test indicates that an $SO_2$ monitor, a flow monitor, a $NO_X$-diluent continuous emission monitoring system, or a $NO_X$ concentration monitoring system used to determine $NO_X$ mass emissions, as defined in § 75.71(a)(2), is biased low (*i.e.,* the arithmetic mean of the differences between the reference method value and the monitor or monitoring system measurements in a relative accuracy test audit exceed the bias statistic in section 7 of appendix A to this part), the owner or operator shall adjust the monitor or continuous emission monitoring system to eliminate the cause of bias such that it passes the bias test or calculate and use the bias adjustment factor as specified in section 2.3.4 of appendix B to this part.

* * * * *

■ 14. Section 75.31 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 75.31 Initial missing data procedures.**

(a) During the first 720 quality-assured monitor operating hours following initial certification of the required $SO_2$, $CO_2$, $O_2$, or moisture monitoring system(s) at a particular unit or stack location (*i.e.,* the date and time at which quality assured data begins to be recorded by CEMS(s) installed at that location), and during the first 2,160 quality assured monitor operating hours following initial certification of the required $NO_X$-diluent, $NO_X$ concentration, or flow monitoring system(s) at the unit or stack location, the owner or operator shall provide substitute data required under this subpart according to the procedures in paragraphs (b) and (c) of this section. The owner or operator of a unit shall use these procedures for no longer than three years (26,280 clock hours) following initial certification.

(b) $SO_2$, $CO_2$, or $O_2$ concentration data, and moisture data. For each hour of missing $SO_2$ or $CO_2$ emissions concentration data (including $CO_2$ data converted from $O_2$ data using the procedures in appendix F of this part), or missing $O_2$ or $CO_2$ diluent concentration data used to calculate heat input, or missing moisture data, the owner or operator shall calculate the substitute data as follows:

(1) Whenever prior quality-assured data exist, the owner or operator shall substitute, by means of the data acquisition and handling system, for each hour of missing data, the average of the hourly $SO_2$, $CO_2$, or $O_2$ concentrations or moisture percentages recorded by a certified monitor for the unit operating hour immediately before and the unit operating hour immediately after the missing data period.

(2) Whenever no prior quality assured $SO_2$, $CO_2$, or $O_2$ concentration data or moisture data exist, the owner or operator shall substitute, as applicable, for each hour of missing data, the maximum potential $SO_2$ concentration or the maximum potential $CO_2$ concentration or the minimum potential $O_2$ concentration or (unless Equation 19–3, 19–4 or 19–8 in Method 19 in appendix A–7 to part 60 of this chapter is used to determine $NO_X$ emission rate) the minimum potential moisture percentage, as specified, respectively, in sections 2.1.1.1, 2.1.3.1, 2.1.3.2 and 2.1.5 of appendix A to this part. If Equation 19–3, 19–4 or 19–8 in Method 19 in appendix A–7 to part 60 of this chapter is used to determine $NO_X$ emission rate, substitute the maximum potential moisture percentage, as specified in section 2.1.6 of appendix A to this part.

* * * * *

■ 15. Section 75.32 is amended by revising the first sentence of paragraph (a) introductory text, to read as follows:

**§ 75.32 Determination of monitor data availability for standard missing data procedures.**

(a) Following initial certification of the required $SO_2$, $CO_2$, $O_2$, or moisture monitoring system(s) at a particular unit or stack location (*i.e.,* the date and time at which quality assured data begins to be recorded by CEMS(s) at that location), the owner or operator shall begin calculating the percent monitor data availability as described in paragraph (a)(1) of this section, and shall, upon completion of the first 720 quality-assured monitor operating hours, record, by means of the automated data acquisition and handling system, the percent monitor data availability for each monitored parameter.* * *

* * * * *

■ 16. Section 75.33 is amended by:

■ a. Revising the section heading; and

■ b. Revising Table 1 and the footnotes below Table 1, to read as follows:

**§ 75.33 Standard missing data procedures for $SO_2$, $NO_X$, and flow rate.**

* * * * *

TABLE 1—MISSING DATA PROCEDURE FOR $SO_2$ CEMS, $CO_2$ CEMS, MOISTURE CEMS, AND DILUENT ($CO_2$ OR $O_2$) MONITORS FOR HEAT INPUT DETERMINATION

| Trigger conditions | | Calculation routines | |
|---|---|---|---|
| Monitor data availability (percent) | Duration (N) of CEMS outage (hours)[2] | Method | Lookback period |
| 95 or more | N ≤ 24 | Average | HB/HA. |
| | N > 24 | For $SO_2$, $CO_2$, and $H_2O$**, the greater of: | |
| | | Average | HB/HA. |
| | | 90th percentile | 720 hours.* |
| | | For $O_2$ and $H_2O^X$, the lesser of: | HB/HA. |
| | | 10th percentile | 720 hours.* |
| 90 or more, but below 95 | N ≤ 8 | Average | HB/HA. |
| | N > 8 | For $SO_2$, $CO_2$, and $H_2O$**, the greater of: | |
| | | Average | HB/HA. |
| | | 95th percentile | 720 hours.* |
| | | For $O_2$ and $H_2O^X$, the lesser of: | |
| | | Average | HB/HA. |
| | | 5th Percentile | 720 hours.* |
| 80 or more, but below 90 | N > 0 | For $SO_2$, $CO_2$, and $H_2O$**, | |
| | | Maximum value[1] | 720 hours.* |
| | | For $O_2$ and $H_2O^X$: | |

TABLE 1—MISSING DATA PROCEDURE FOR $SO_2$ CEMS, $CO_2$ CEMS, MOISTURE CEMS, AND DILUENT ($CO_2$ OR $O_2$) MONITORS FOR HEAT INPUT DETERMINATION—Continued

| Trigger conditions | | Calculation routines | |
|---|---|---|---|
| Monitor data availability (percent) | Duration (N) of CEMS outage (hours)[2] | Method | Lookback period |
| Below 80 | N > 0 | Minimum value[1]<br>Maximum potential concentration[3] or % (for $SO_2$, $CO_2$, and $H_2O$**) *or*<br>Minimum potential concentration or % (for $O_2$ and $H_2O^X$). | 720 hours.*<br><br>None. |

HB/HA = hour before and hour after the CEMS outage.

* Quality-assured, monitor operating hours, during unit operation. May be either fuel-specific or non-fuel-specific. For units that report data only for the ozone season, include only quality assured monitor operating hours within the ozone season in the lookback period. Use data from no earlier than 3 years prior to the missing data period.

[1] Where a unit with add-on $SO_2$ emission controls can demonstrate that the controls are operating properly during the missing data period, as provided in § 75.34, the unit may use the maximum controlled concentration from the previous 720 quality-assured monitor operating hours.

[2] During unit operating hours.

[3] Where a unit with add-on $SO_2$ emission controls can demonstrate that the controls are operating properly during the missing data period, the unit may report the greater of: (a) the maximum expected $SO_2$ concentration or (b) 1.25 times the maximum controlled value from the previous 720 quality-assured monitor operating hours (see § 75.34).

[X] Use this algorithm for moisture except when Equation 19–3, 19–4 or 19–8 in Method 19 in appendix A–7 to part 60 of this chapter is used for $NO_X$ emission rate.

** Use this algorithm for moisture *only* when Equation 19–3, 19–4 or 19–8 in Method 19 in appendix A–7 to part 60 of this chapter is used for $NO_X$ emission rate.

* * * * *

■ 17. Section 75.34 is amended by:

■ a. Revising paragraph (a)(2)(ii); and

■ b. Revising the first sentence of paragraph (d), to read as follows:

**§ 75.34 Units with add-on emission controls.**

(a) * * *

(2) * * *

(ii) For the purposes of the missing data lookback periods described under §§ 75.33 (c)(1), (c)(2), (c)(3) and (c)(5) of this section, the substitute data values shall be taken from the appropriate database, depending on the date(s) and hour(s) of the missing data period. That is, if the missing data period occurs inside the ozone season, the ozone season data shall be used to provide substitute data. If the missing data period occurs outside the ozone season, data from outside the ozone season shall be used to provide substitute data.

* * * * *

(d) In order to implement the options in paragraphs (a)(1), (a)(3) and (a)(5) of this section; and §§ 75.31(c)(3) and 75.72(c)(3), the owner or operator shall keep records of information as described in § 75.58(b)(3) to verify the proper operation of all add-on $SO_2$ or $NO_X$ emission controls, during all periods of $SO_2$ or $NO_X$ emission missing data.

* * *

**§§ 75.38–75.39 [Removed and reserved]**

■ 18. Sections 75.38 and 75.39 are removed and reserved.

■ 19. Section 75.47 is amended by:

■ a. Revising paragraph (b)(2); and

■ b. Removing paragraphs (b)(3) and (c), to read as follows:

**§ 75.47 Criteria for a class of affected units.**

* * * * *

(b) * * *

(2) A description of the class of affected units, including data describing all of the affected units that will comprise the class.

■ 20. Section 75.53 is amended by:

■ a. Revising paragraphs (e)(1)(i)(E), (e)(1)(iv) introductory text, (e)(1)(x), (g)(1)(i)(A), (g)(1)(i)(C), (g)(1)(i)(E), (g)(1)(i)(F), (g)(1)(iii) introductory text, (g)(1)(v)(F), (g)(1)(v)(G), (g)(1)(vi)(H), and (g)(1)(vi)(I);

■ b. Adding paragraph (g)(1)(vi)(J); and

■ c. Revising paragraphs (h)(2)(i) and (h)(5), to read as follows:

**§ 75.53 Monitoring plan.**

* * * * *

(e) * * *

(1) * * *

(i) * * *

(E) Type(s) of emission controls for $SO_2$, $NO_X$, and particulates installed or to be installed, including specifications of whether such controls are pre-combustion, post-combustion, or integral to the combustion process; control equipment code, installation date, and optimization date; control equipment retirement date (if applicable); primary/secondary controls indicator; and an indicator for whether the controls are an original installation;

* * * * *

(iv) Identification and description of each monitoring system component (including each monitor and its identifiable components, such as analyzer and/or probe) in the CEMS (*e.g.,* $SO_2$ pollutant concentration monitor, flow monitor, moisture monitor; $NO_X$ pollutant concentration monitor, and diluent gas monitor), the continuous opacity monitoring system, or the excepted monitoring system (*e.g.,* fuel flowmeter, data acquisition and handling system), including:

* * * * *

(x) For each parameter monitored: Scale, maximum potential concentration (and method of calculation), maximum expected concentration (if applicable) (and method of calculation), maximum potential flow rate (and method of calculation), maximum potential $NO_X$ emission rate, span value, full-scale range, daily calibration units of measure, span effective date/hour, span inactivation date/hour, indication of whether dual spans are required, default high range value, flow rate span, and flow rate span value and full scale value (in scfh) for each unit or stack using $SO_2$, $NO_X$, $CO_2$, $O_2$, or flow component monitors.

* * * * *

(g) * * *

(1) * * *

(i) * * *

(A) A representation of the exhaust configuration for the units in the monitoring plan. On and after April 27, 2011, provide the activation date and deactivation date (if applicable) of the configuration. Provide the ID number of each unit and assign a unique ID number to each common stack, common pipe multiple stack and/or multiple pipe associated with the unit(s)

represented in the monitoring plan. For common and multiple stacks and/or pipes, provide the activation date and deactivation date (if applicable) of each stack and/or pipe;

* * * * *

(C) The stack exit height (ft) above ground level and ground level elevation above sea level, and the inside cross-sectional area ($ft^2$) at the flue exit and at the flow monitoring location (for units with flow monitors, only). Also use appropriate codes to indicate the material(s) of construction and the shape(s) of the stack or duct cross-section(s) at the flue exit and (if applicable) at the flow monitor location. On and after April 27, 2011, provide the activation date and deactivation date (if applicable) for the information in this paragraph (g)(1)(i)(C);

* * * * *

(E) The type(s) of emission controls that are used to reduce $SO_2$, $NO_X$, and particulate emissions from each unit. Also provide the installation date, optimization date, and retirement date (if applicable) of the emission controls, and indicate whether the controls are an original installation;

(F) Maximum hourly heat input capacity of each unit. On and after April 27, 2011, provide the activation date and deactivation date (if applicable) for this parameter; and

* * * * *

(iii) For each required continuous emission monitoring system, each fuel flowmeter system, and each continuous opacity monitoring system, identify and describe the major monitoring components in the monitoring system (*e.g.,* gas analyzer, flow monitor, opacity monitor, moisture sensor, fuel flowmeter, DAHS software, *etc.*). Other important components in the system (*e.g.,* sample probe, PLC, data logger, *etc.*) may also be represented in the monitoring plan, if necessary. Provide the following specific information about each component and monitoring system:

* * * * *

(v) * * *

(F) Effective date/hour, and (if applicable) inactivation date/hour of each span value. On and after April 27, 2011, provide the activation date and deactivation date (if applicable) for the measurement scale and dual span information in paragraphs (g)(1)(v)(A), (g)(1)(v)(G), and (g)(1)(v)(H) of this section;

(G) An indication of whether dual spans are required. If two span values are required, then, on and after April 27, 2011, indicate whether an autoranging analyzer is used to represent the two measurement scales; and

* * * * *

(vi) * * *

(H) Date and hour that the value is no longer effective (if applicable);

(I) For units using the excepted methodology under § 75.19, the applicable $SO_2$ emission factor; and

(J) On and after April 27, 2011, group identification code.

* * * * *

(h) * * *

(2) * * *

(i) *Electronic.* Unit operating and capacity factor information demonstrating that the unit qualifies as a peaking unit, as defined in § 72.2 of this chapter for the current calendar year or ozone season, including: capacity factor data for three calendar years (or ozone seasons) as specified in the definition of peaking unit in § 72.2 of this chapter; the method of qualification used; and an indication of whether the data are actual or projected data. On and after April 27, 2011, provide the activation date and deactivation date (if applicable) for the peaking unit qualification information in this paragraph (h)(2)(i).

* * * * *

(5) For qualification as a gas-fired unit, as defined in § 72.2 of this part, the designated representative shall include in the monitoring plan, in electronic format, the following: current calendar year, fuel usage data for three calendar years (or ozone seasons) as specified in the definition of gas-fired in § 72.2 of this chapter, the method of qualification used, and an indication of whether the data are actual or projected data. On and after April 27, 2011, provide the activation date and deactivation date (if applicable) for the gas-fired unit qualification information in this paragraph (h)(5).

* * * * *

■ 21. Section 75.57 is amended by:

■ a. Revising paragraph (a)(5);

■ b. Revising paragraph (a)(6);

■ c. Adding paragraph (a)(7);

■ d. Revising Table 4a; and

■ e. Removing paragraphs (i) and (j), to read as follows:

**§ 75.57 General recordkeeping provisions.**

* * * * *

(a) * * *

(5) The current monitoring plan as specified in § 75.53, beginning with the initial submission required by § 75.62;

(6) The quality control plan as described in section 1 of appendix B to this part, beginning with the date of provisional certification; and

(7) The information required by sections 6.1.2(b) and (c) of appendix A to this part.

* * * * *

TABLE 4A—CODES FOR METHOD OF EMISSIONS AND FLOW DETERMINATION

| Code | Hourly emissions/flow measurement or estimation method |
|---|---|
| 1 | Certified primary emission/flow monitoring system. |
| 2 | Certified backup emission/flow monitoring system. |
| 3 | Approved alternative monitoring system. |
| 4 | Reference method:<br>$SO_2$: Method 6C.<br>Flow: Method 2 or its allowable alternatives under appendix A to part 60 of this chapter.<br>$NO_X$: Method 7E.<br>$CO_2$ or $O_2$: Method 3A. |
| 5 | For units with add-on $SO_2$ and/or $NO_X$ emission controls: $SO_2$ concentration or $NO_X$ emission rate estimate from Agency preapproved parametric monitoring method. |
| 6 | Average of the hourly $SO_2$ concentrations, $CO_2$ concentrations, $O_2$ concentrations, $NO_X$ concentrations, flow rates, moisture percentages or $NO_X$ emission rates for the hour before and the hour following a missing data period. |
| 7 | Initial missing data procedures used. Either: (a) the average of the hourly $SO_2$ concentration, $CO_2$ concentration, $O_2$ concentration, or moisture percentage for the hour before and the hour following a missing data period; or (b) the arithmetic average of all $NO_X$ concentration, $NO_X$ emission rate, or flow rate values at the corresponding load range (or a higher load range), or at the corresponding operational bin (non-load-based units, only); or (c) the arithmetic average of all previous $NO_X$ concentration, $NO_X$ emission rate, or flow rate values (non-load-based units, only). |

TABLE 4A—CODES FOR METHOD OF EMISSIONS AND FLOW DETERMINATION—Continued

| Code | Hourly emissions/flow measurement or estimation method |
|---|---|
| 8 | 90th percentile hourly $SO_2$ concentration, $CO_2$ concentration, $NO_X$ concentration, flow rate, moisture percentage, or $NO_X$ emission rate or 10th percentile hourly $O_2$ concentration or moisture percentage in the applicable lookback period (moisture missing data algorithm depends on which equations are used for emissions and heat input). |
| 9 | 95th percentile hourly $SO_2$ concentration, $CO_2$ concentration, $NO_X$ concentration, flow rate, moisture percentage, or $NO_X$ emission rate or 5th percentile hourly $O_2$ concentration or moisture percentage in the applicable lookback period (moisture missing data algorithm depends on which equations are used for emissions and heat input). |
| 10 | Maximum hourly $SO_2$ concentration, $CO_2$ concentration, $NO_X$ concentration, flow rate, moisture percentage, or $NO_X$ emission rate or minimum hourly $O_2$ concentration or moisture percentage in the applicable lookback period (moisture missing data algorithm depends on which equations are used for emissions and heat input). |
| 11 | Average of hourly flow rates, $NO_X$ concentrations or $NO_X$ emission rates in corresponding load range, for the applicable lookback period. For non-load-based units, report either the average flow rate, $NO_X$ concentration or $NO_X$ emission rate in the applicable lookback period, or the average flow rate or $NO_X$ value at the corresponding operational bin (if operational bins are used). |
| 12 | Maximum potential concentration of $SO_2$, maximum potential concentration of $CO_2$, maximum potential concentration of $NO_X$ maximum potential flow rate, maximum potential $NO_X$ emission rate, maximum potential moisture percentage, minimum potential $O_2$ concentration or minimum potential moisture percentage, as determined using § 72.2 of this chapter and section 2.1 of appendix A to this part (moisture missing data algorithm depends on which equations are used for emissions and heat input). |
| 13 | Maximum expected concentration of $SO_2$, maximum expected concentration of $NO_X$,, or maximum controlled $NO_X$ emission rate. (*See* § 75.34(a)(5)). |
| 14 | Diluent cap value (if the cap is replacing a $CO_2$ measurement, use 5.0 percent for boilers and 1.0 percent for turbines; if it is replacing an $O_2$ measurement, use 14.0 percent for boilers and 19.0 percent for turbines). |
| 15 | 1.25 times the maximum hourly controlled $SO_2$ concentration, $NO_X$ concentration at the corresponding load or operational bin, or $NO_X$ emission rate at the corresponding load or operational bin, in the applicable lookback period (*See* § 75.34(a)(5)). |
| 16 | $SO_2$ concentration value of 2.0 ppm during hours when only "very low sulfur fuel", as defined in § 72.2 of this chapter, is combusted. |
| 17 | Like-kind replacement non-redundant backup analyzer. |
| 19 | 200 percent of the MPC; default high range value. |
| 20 | 200 percent of the full-scale range setting (full-scale exceedance of high range). |
| 21 | Negative hourly $CO_2$ concentration, $SO_2$ concentration, $NO_X$ concentration, percent moisture, or $NO_X$ emission rate replaced with zero. |
| 22 | Hourly average $SO_2$ or $NO_X$ concentration, measured by a certified monitor at the control device inlet (units with add-on emission controls only). |
| 23 | Maximum potential $SO_2$ concentration, $NO_X$ concentration, $CO_2$ concentration, or $NO_X$ emission rate, or minimum potential $O_2$ concentration or moisture percentage, for an hour in which flue gases are discharged through an unmonitored bypass stack. |
| 24 | Maximum expected $NO_X$ concentration, or maximum controlled $NO_X$ emission rate for an hour in which flue gases are discharged downstream of the $NO_X$ emission controls through an unmonitored bypass stack, and the add-on $NO_x$ emission controls are confirmed to be operating properly. |
| 25 | Maximum potential $NO_X$ emission rate (MER). (Use only when a $NO_X$ concentration full-scale exceedance occurs and the diluent monitor is unavailable.) |
| 26 | 1.0 mmBtu/hr substituted for Heat Input Rate for an operating hour in which the calculated Heat Input Rate is zero or negative. |
| 40 | Fuel specific default value (or prorated default value) used for the hour. |
| 53 | Other quality-assured data approved through petition. These are treated as available hours for percent monitor availability calculations and are included in missing data lookback. |
| 54 | Other quality assured methodologies approved through petition. These hours are included in missing data lookback and are treated as unavailable hours for percent monitor availability calculations. |
| 55 | Other substitute data approved through petition. These hours are not included in missing data lookback and are treated as unavailable hours for percent monitor availability calculations. |

* * * * *

■ 22. Section 75.58 is amended by:

■ a. Revising paragraphs (b)(3) and (d)(4)(ii); and

■ b. Adding paragraph (d)(4)(iii), to read as follows:

**§ 75.58 General recordkeeping provisions for specific situations.**

* * * * *

(b) * * *

(3) Except as otherwise provided in § 75.34(d), for units with add-on $SO_2$ or $NO_X$ emission controls following the provisions of §§ 75.34(a)(1), (a)(2), (a)(3) or (a)(5), the owner or operator shall record:

(i) Parametric data which demonstrate, for each hour of missing $SO_2$ or $NO_X$ emission data, the proper operation of the add-on emission controls, as described in the quality assurance/quality control program for the unit. The parametric data shall be maintained on site and shall be submitted, upon request, to the Administrator, EPA Regional office, State, or local agency;

(ii) A flag indicating, for each hour of missing $SO_2$ or $NO_X$ emission data, either that the add-on emission controls are operating properly, as evidenced by all parameters being within the ranges specified in the quality assurance/quality control program, or that the add-on emission controls are not operating properly.

* * * * *

(d) * * *

(4) * * *

(ii) For boilers, hourly average boiler $O_2$ reading (percent, rounded to the nearest tenth) (flag if value exceeds by more than 2 percentage points the $O_2$ level recorded at the same heat input during the previous $NO_X$ emission rate test); and

(iii) On and after April 27, 2011, operating condition codes for the following:

(A) Unit operated on emergency fuel;

(B) Correlation curve for the fuel mixture has expired;

(C) Operating parameter is outside of normal limits;

(D) Uncontrolled hour;

(E) Operation above highest tested heat input rate point on the curve;

(F) Operating parameter data missing or invalid;

(G) Designated operational and control equipment parameters within normal limits; and

(H) Operation below lowest tested heat input rate point on the curve.

* * * * *

■ 23. Section 75.59 is amended by:
■ a. Revising paragraph (a)(1) introductory text;
■ b. Revising paragraph (a)(1)(iii);
■ c. Revising paragraphs (a)(3) introductory text, (a)(5) introductory text, and (a)(5)(ii) introductory text;
■ d. Revising paragraph (a)(5)(ii)(L);
■ e. Revising paragraphs (a)(5)(iii)(F) and (G);
■ f. Adding paragraph (a)(5)(iii)(H);
■ g. Revising paragraph (a)(6) introductory text;
■ h. Removing and reserving paragraph (a)(7)(vii);
■ i. Removing the heading of reserved paragraph (a)(7)(viii);
■ j. Removing paragraph (a)(7)(x);
■ k. Revising paragraph (a)(9) introductory text;
■ l. Revising paragraph (a)(9)(vi);
■ m. Adding paragraphs (a)(9)(x) and (xi);
■ n. Revising paragraphs (a)(12)(iv)(E) and (F);
■ o. Adding paragraph (a)(12)(iv)(G);
■ p. Removing and reserving paragraph (a)(14);
■ q. Adding paragraph (a)(15);
■ r. Adding paragraph (b)(6);
■ s. Revising paragraph (c) introductory text;
■ t. Revising paragraphs (d)(3)(x) and (xi);
■ u. Adding paragraphs (d)(3)(xii) and (xiii);
■ v. Adding paragraph (d)(4);
■ w. Removing paragraph (e); and
■ x. Redesignating paragraph (f) as paragraph (e), to read as follows:

**§ 75.59 Certification, quality assurance, and quality control record provisions.**

* * * * *

(a) * * *

(1) For each $SO_2$ or $NO_X$ pollutant concentration monitor, flow monitor, $CO_2$ emissions concentration monitor (including $O_2$ monitors used to determine $CO_2$ emissions), or diluent gas monitor (including wet- and dry-basis $O_2$ monitors used to determine percent moisture), the owner or operator shall record the following for all daily and 7-day calibration error tests, and all off-line calibration demonstrations, including any follow-up tests after corrective action:

* * * * *

(iii) On and after April 27, 2011, date, hour, and minute;

* * * * *

(3) For each $SO_2$ or $NO_X$ pollutant concentration monitor, $CO_2$ emissions concentration monitor (including $O_2$ monitors used to determine $CO_2$ emissions), or diluent gas monitor (including wet- and dry-basis $O_2$ monitors used to determine percent moisture), the owner or operator shall record the following for the initial and all subsequent linearity check(s), including any follow-up tests after corrective action.

* * * * *

(5) For each $SO_2$ pollutant concentration monitor, flow monitor, each $CO_2$ emissions concentration monitor (including any $O_2$ concentration monitor used to determine $CO_2$ mass emissions or heat input), each $NO_X$-diluent continuous emission monitoring system, each $NO_X$ concentration monitoring system, each diluent gas ($O_2$ or $CO_2$) monitor used to determine heat input, each moisture monitoring system, and each approved alternative monitoring system, the owner or operator shall record the following information for the initial and all subsequent relative accuracy test audits:

* * * * *

(ii) Individual test run data from the relative accuracy test audit for the $SO_2$ concentration monitor, flow monitor, $CO_2$ emissions concentration monitor, $NO_X$-diluent continuous emission monitoring system, diluent gas ($O_2$ or $CO_2$) monitor used to determine heat input, $NO_X$ concentration monitoring system, moisture monitoring system, or approved alternative monitoring system, including:

* * * * *

(L) Average gross unit load, expressed as a total gross unit load, rounded to the nearest MWe, or as steam load, rounded to the nearest thousand lb/hr; on and after April 27, 2011, for units that do not produce electrical or thermal output, record, instead, the average stack gas velocity at the operating level being tested; and

* * * * *

(iii) * * *

(F) Bias test results as specified in section 7.6.4 of appendix A to this part;

(G) Bias adjustment factor from Equation A–12 in appendix A to this part for any monitoring system that failed the bias test (except as otherwise provided in section 7.6.5 of appendix A to this part) and 1.000 for any monitoring system that passed the bias test; and

(H) On and after April 27, 2011, RATA frequency code.

* * * * *

(6) For each $SO_2$, $NO_X$, or $CO_2$ pollutant concentration monitor, each component of a $NO_X$-diluent continuous emission monitoring system, and each $CO_2$ or $O_2$ monitor used to determine heat input, the owner or operator shall record the following information for the cycle time test:

* * * * *

(7) * * *

(vii) [Reserved]

(viii) [Reserved]

* * * * *

(9) When hardcopy relative accuracy test reports, certification reports, recertification reports, or semiannual or annual reports for gas or flow rate CEMS are required or requested under § 75.60(b)(6) or § 75.63, the reports shall include, at a minimum, the following elements (as applicable to the type(s) of test(s) performed):

* * * * *

(vi) Laboratory calibrations of the source sampling equipment.

* * * * *

(x) For testing involving use of EPA Protocol gases, the owner or operator shall record in electronic and hardcopy format the following information, as applicable:

(A) On and after September 26, 2011, for each gas monitor, for both low and high measurement ranges, record the following information for the mid-level or high-level EPA Protocol gas (as applicable) that is used for daily calibration error tests, and the low-, mid-, and high-level gases used for quarterly linearity checks. For $O_2$, if purified air is used as the high-level gas for daily calibrations or linearity checks, record the following information for the low- and mid-level EPA Protocol gas used for linearity checks, instead:

(*1*) Gas level code;

(*2*) A code for the type of EPA Protocol gas used;

(*3*) The PGVP vendor ID issued by EPA for the EPA Protocol gas production site that supplied the EPA Protocol gas cylinder;

(*4*) The expiration date for the EPA Protocol gas cylinder; and

(*5*) The cylinder number.

(B) On and after September 26, 2011, for each usage of Reference Method 3A in appendix A–2 to part 60 of this chapter, or Method 6C or 7E in appendix A–4 to part 60 of this chapter

performed using EPA Protocol gas for the certification, recertification, routine quality assurance or diagnostic testing (reportable diagnostics, only) of a Part 75 monitoring system, record the information required by paragraphs (a)(9)(x)(A)(*1*) through (*5*) of this section.

(xi) On and after March 27, 2012, for all RATAs performed pursuant to § 75.74(c)(2)(ii), section 6.5 of appendix A to this part and section 2.3.1 of appendix B to this part, and for all $NO_X$ emission testing performed pursuant to section 2.1 of appendix E to this part, or § 75.19(c)(1)(iv), the owner or operator shall record the following information as provided by the AETB:

(A) The name, telephone number and e-mail address of the Air Emission Testing Body;

(B) The name of each on-site Qualified Individual, as defined in § 72.2 of this chapter;

(C) For the reference method(s) that were performed, the date(s) that each on-site Qualified Individual took and passed the relevant qualification exam(s) required by ASTM D7036–04 (incorporated by reference, *see* § 75.6); and

(D) The name and e-mail address of each qualification exam provider.

* * * * *

(12) * * *

(iv) * * *

(E) Type of extension;

(F) Quarter and year; and

(G) On and after April 27, 2011, fuel code for Ozone Season Only reporters under § 75.74(c).

* * * * *

(14) [Reserved]

(15) On and after March 27, 2012, for all RATAs performed pursuant to § 75.74(c)(2)(ii), section 6.5 of appendix A to this part or section 2.3.1 of appendix B to this part, the owner or operator shall record in electronic format the following information as provided by the AETB:

(i) The name, telephone number and e-mail address of the Air Emission Testing Body;

(ii) The name of each on-site Qualified Individual, as defined in § 72.2 of this chapter;

(iii) For the reference method(s) that were performed, the date(s) that each on-site Qualified Individual took and passed the relevant qualification exam(s) required by ASTM D7036–04 (incorporated by reference, *see* § 75.6); and

(iv) The name and e-mail address of each qualification exam provider.

(b) * * *

(6) On and after March 27, 2012, for all stack testing performed pursuant to section 2.1 of appendix E to this part, the owner or operator shall record in electronic format the following information as provided by the AETB:

(i) The name, telephone number and e-mail address of the Air Emission Testing Body;

(ii) The name of each on-site Qualified Individual, as defined in § 72.2 of this chapter;

(iii) For the reference method(s) that were performed, the date(s) that each on-site Qualified Individual took and passed the relevant qualification exam(s) required by ASTM D7036–04 (incorporated by reference, *see* § 75.6); and

(iv) The name and e-mail address of each qualification exam provider.

(c) Except as otherwise provided in § 75.58(b)(3)(i), for units with add-on $SO_2$ or $NO_X$ emission controls following the provisions of § 75.34(a)(1) or (a)(2), the owner or operator shall keep the following records on-site in the quality assurance/quality control plan required by section 1 of appendix B to this part:

* * * * *

(d) * * *

(3) * * *

(x) Documentation supporting the qualification of all units in the group for reduced testing, in accordance with the criteria established in § 75.19(c)(1)(iv)(B)(*1*);

(xi) Purpose of group tests;

(xii) On and after April 27, 2011, the number of tests for group; and

(xiii) On and after April 27, 2011, the number of units in group.

(4) On and after March 27, 2012, for all $NO_X$ emission testing performed pursuant to § 75.19(c)(1)(iv), the owner or operator shall record in electronic format the following information as provided by the AETB:

(i) The name, telephone number and e-mail address of the Air Emission Testing Body;

(ii) The name of each on-site Qualified Individual, as defined in § 72.2 of this chapter;

(iii) For the reference method(s) that were performed, the date(s) that each on-site Qualified Individual took and passed the relevant qualification exam(s) required by ASTM D7036–04 (incorporated by reference, *see* § 75.6); and

(iv) The name and e-mail address of each qualification exam provider.

**§ 75.60 [Amended]**

■ 24. Section 75.60 is amended by removing paragraph (b)(8).

■ 25. Section 75.61 is amended by:

■ a. Revising paragraph (a)(1) introductory text;

■ b. Revising the first sentence of paragraph (a)(5) introductory text; and

■ c. Revising paragraph (a)(8), to read as follows:

**§ 75.61 Notifications.**

(a) * * *

(1) *Initial certification and recertification test notifications.* The owner or operator or designated representative for an affected unit shall submit written notification of initial certification tests and revised test dates as specified in § 75.20 for continuous emission monitoring systems, for alternative monitoring systems under subpart E of this part, or for excepted monitoring systems under appendix E to this part, except as provided in paragraphs (a)(1)(iii), (a)(1)(iv) and (a)(4) of this section. The owner or operator shall also provide written notification of testing performed under § 75.19(c)(1)(iv)(A) to establish fuel-and-unit-specific $NO_X$ emission rates for low mass emissions units. Such notifications are not required, however, for initial certifications and recertifications of excepted monitoring systems under appendix D to this part.

* * * * *

(5) *Periodic relative accuracy test audits, appendix E retests, and low mass emissions unit retests.* The owner or operator or designated representative of an affected unit shall submit written notice of the date of periodic relative accuracy testing performed under section 2.3.1 of appendix B to this part, of periodic retesting performed under section 2.2 of appendix E to this part, and of periodic retesting of low mass emissions units performed under § 75.19(c)(1)(iv)(D), no later than 21 days prior to the first scheduled day of testing. * * *

* * * * *

(8) *Certification deadline date for new or newly affected units.* The designated representative of a new or newly affected unit shall provide notification of the date on which the relevant deadline for initial certification is reached, either as provided in § 75.4(b) or § 75.4(c), or as specified in a State or Federal $SO_2$ or $NO_X$ mass emission reduction program that incorporates by reference, or otherwise adopts, the monitoring, recordkeeping, and reporting requirements of subpart F, G, or H of this part. The notification shall be submitted no later than 7 calendar days after the applicable certification deadline is reached.

* * * * *

■ 26. Section 75.62 is amended by adding paragraph (d) to read as follows:

**§ 75.62 Monitoring plan submittals.**

* * * * *

(d) On and after April 27, 2011, consistent with § 72.21 of this chapter, a hardcopy cover letter signed by the Designated Representative (DR) shall accompany each hardcopy monitoring plan submittal. The cover letter shall include the certification statement described in § 72.21(b) of this chapter, and shall be submitted to the applicable EPA Regional Office and to the appropriate State or local air pollution control agency. For electronic monitoring plan submittals to the Administrator, a cover letter is not required. However, at his or her discretion, the DR may include important explanatory text or comments with an electronic monitoring plan submittal, so long as the information is provided in an electronic format that is compatible with the other data required to be reported under this section.

■ 27. Section 75.63 is amended by adding paragraph (d) to read as follows:

**§ 75.63 Initial certification or recertification application.**

* * * * *

(d) Consistent with § 72.21 of this chapter, a hardcopy cover letter signed by the Designated Representative (DR) shall accompany the hardcopy portion of each certification or recertification application. The cover letter shall include the certification statement described in § 72.21(b) of this chapter, and shall be submitted to the applicable EPA Regional Office and to the appropriate State or local air pollution control agency. For the electronic portion of a certification or recertification application submitted to the Administrator, a cover letter is not required. However, at his or her discretion, the DR may include important explanatory text or comments with the electronic portion of a certification or recertification application, so long as the information is provided in an electronic format compatible with the other data required to be reported under this section.

■ 28. Section 75.64 is amended by:

■ a. Revising paragraph (a)(5);

■ b. Revising paragraph (a)(7)(xi);

■ c. Revising paragraph (a)(7)(xii)(D);

■ d. Adding paragraph (a)(7)(xiii);

■ e. Redesignating paragraph (a)(127) as paragraph (a)(12); and

■ f. Revising paragraph (g), to read as follows:

**§ 75.64 Quarterly reports.**

(a) * * *

(5) The daily calibration error test and daily interference check information required in § 75.59(a)(1) and (a)(2) must always be included in the electronic quarterly emissions report. All other certification, quality assurance, and quality control information in § 75.59 that is not excluded from electronic reporting under paragraph (a)(2) or (a)(7) of this section shall be submitted separately, either prior to or concurrent with the submittal of the relevant electronic quarterly emissions report. However, reporting of the information in § 75.59(a)(9)(x) is not required until September 26, 2011, and reporting of the information in § 75.59(a)(15), (b)(6), and (d)(4) is not required until March 27, 2012.

* * * * *

(7) * * *

(xi) Data and results of RATAs that are aborted or invalidated due to problems with the reference method or operational problems with the unit and data and results of linearity checks that are aborted or invalidated due to problems unrelated to monitor performance;

(xii) * * *

(D) The data under § 75.59(a)(7)(ix)(A) through (F) shall be reported for all flow RATAs at rectangular stacks or ducts in which Method 2 in appendices A–1 and A–2 to part 60 of this chapter is used and a wall effects adjustment factor is applied; and

(xiii) The certification required by section 6.1.2(b) of appendix A to this part and recorded under § 75.57(a)(7).

* * * * *

(g) At his or her discretion, the DR may include important explanatory text or comments with an electronic quarterly report submittal, so long as the information is provided in a format that is compatible with the other data required to be reported under this section.

## Subpart I—[Removed]

■ 29. Subpart I, consisting of §§ 75.80 through 75.84, is removed.

■ 30. Appendix A to part 75 is amended by:

■ a. Revising section 1.1;

■ b. Removing sections 2.1.7, 2.1.7.1 through 2.1.7.4, and 2.2.3;

■ c. Removing paragraph (c) of section 3.1 and paragraph (3) of section 3.2;

■ d. Removing sections 3.3.8 and 3.4.3;

■ e. Removing the introductory text of section 4 and adding paragraphs (a), (b), and (c) in its place;

■ f. Revising paragraph (6) of section 4;

■ g. Revising paragraphs (a) and (b) of Section 5.1.4;

■ h. Removing paragraphs (c) and (d) of Section 5.1.4;

■ i. Revising the first sentence in Section 5.1.5;

■ j. Removing section 5.1.9;

■ k. Revising section 6.1.2;

■ l. Revising the first sentence of section 6.2 introductory text;

■ m. Removing paragraphs (g) and (h) of section 6.2;

■ n. Revising the introductory text of section 6.3.1;

■ o. Revising the introductory text of sections 6.4 and 6.5;

■ p. Revising paragraphs (c), (e), and (g) of section 6.5;

■ q. Revising section 6.5.1;

■ r. Removing paragraph (c) of section 6.5.6;

■ s. Revising paragraphs (a) and (b) of section 6.5.7;

■ t. Revising section 6.5.10;

■ u. Revising the heading and introductory text of section 7.3;

■ v. Revising section 7.3.1;

■ w. Revising the introductory text of section 7.6;

■ x. Revising section 7.6.1; and

■ y. Revising paragraphs (b) and (f) of section 7.6.5, to read as follows:

## Appendix A to Part 75—Specifications and Procedures

**1. Installation and Measurement Location**

*1.1 Gas Monitors*

(a) Following the procedures in section 8.1.1 of Performance Specification 2 in appendix B to part 60 of this chapter, install the pollutant concentration monitor or monitoring system at a location where the pollutant concentration and emission rate measurements are directly representative of the total emissions from the affected unit. Select a representative measurement point or path for the monitor probe(s) (or for the path from the transmitter to the receiver) such that the $SO_2$, $CO_2$, $O_2$, or $NO_X$ concentration monitoring system or $NO_X$-diluent CEMS ($NO_X$ pollutant concentration monitor and diluent gas monitor) will pass the relative accuracy test (*see* section 6 of this appendix).

(b) It is recommended that monitor measurements be made at locations where the exhaust gas temperature is above the dew-point temperature. If the cause of failure to meet the relative accuracy tests is determined to be the measurement location, relocate the monitor probe(s).

* * * * *

**4. Data Acquisition and Handling Systems**

(a) Automated data acquisition and handling systems shall read and record the entire range of pollutant concentrations and volumetric flow from zero through full-scale and provide a continuous, permanent record of all measurements and required information in an electronic format. These systems also shall have the capability of interpreting and converting the individual output signals from an $SO_2$ pollutant concentration monitor, a flow monitor, a $CO_2$ monitor, an $O_2$ monitor, a $NO_X$ pollutant concentration monitor, a $NO_X$-diluent CEMS, and a moisture monitoring system to produce a continuous readout of pollutant emission

rates or pollutant mass emissions (as applicable) in the appropriate units (*e.g.,* lb/hr, lb/mmBtu, tons/hr).

(b) Data acquisition and handling systems shall also compute and record: Monitor calibration error; any bias adjustments to $SO_2$, $NO_X$, flow rate, or $NO_X$ emission rate data; and all missing data procedure statistics specified in subpart D of this part.

(c) For an excepted monitoring system under appendix D or E of this part, data acquisition and handling systems shall:

* * * * *

(6) Provide a continuous, permanent record of all measurements and required information in an electronic format.

* * * * *

*5.1 Reference Gases*

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*5.1.4 EPA Protocol Gases*

(a) An EPA Protocol gas is a calibration gas mixture prepared and analyzed according to Section 2 of the "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards," September 1997, as amended on August 25, 1999, EPA–600/R–97/121 (incorporated by reference, *see* § 75.6) or such revised procedure as approved by the Administrator.

(b) EPA Protocol gas concentrations must be certified by an EPA Protocol gas production site to have an analytical uncertainty (95-percent confidence interval) to be not more than plus or minus 2.0 percent (inclusive) of the certified concentration (tag value) of the gas mixture. The uncertainty must be calculated using the statistical procedures (or equivalent statistical techniques) that are listed in Section 2.1.8 of the "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards," September 1997, as amended on August 25, 1999, EPA–600/R–97/121 (incorporated by reference, *see* § 75.6).

*5.1.5 Research Gas Mixtures*

Concentrations of research gas mixtures, as defined in § 72.2 of this chapter, must be certified by the National Institute of Standards and Technology to have an analytical uncertainty (95-percent confidence interval) calculated using the statistical procedures (or equivalent statistical techniques) that are listed in Section 2.1.8 of the "EPA Traceability Protocol for Assay and Certification of Gaseous Calibration Standards," September 1997, as amended on August 25, 1999, EPA–600/R–97/121 (incorporated by reference, *see* § 75.6) to be not more than plus or minus 2.0 percent (inclusive) of the concentration specified on the cylinder label (*i.e.,* the tag value) in order to be used as calibration gas under this part.* * *

* * * * *

*6.1 General Requirements*

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*6.1.2 Requirements for Air Emission Testing*

(a) On and after March 27, 2012, all relative accuracy test audits (RATAs) of CEMS under this part, and stack testing under § 75.19 and Appendix E to this part shall be conducted by an Air Emission Testing Body (AETB) which has provided to the owner or operator of a unit subject to this part the documentation required in paragraph (b) of this section, demonstrating its conformance to ASTM D7036–04 (incorporated by reference, *see* § 75.6).

(b) The owner or operator shall obtain from the AETB a certification that as of the time of testing the AETB is operating in conformance with ASTM D7036–04 (incorporated by reference, *see* § 75.6). The AETB's certification may be limited in scope to the tests identified under paragraph (a). The AETB's certification need not extend to other work it may perform. This certification shall be provided in the form of either:

(1) A certificate of accreditation or interim accreditation for the relevant test methods issued by a recognized, national accreditation body; or

(2) A letter of certification for the relevant test methods signed by a member of the senior management staff of the AETB.

(c) The owner or operator shall obtain from the AETB the information required under §§ 75.59(a)(15), (b)(6), and (d)(4), as applicable.

(d) While under no obligation to request the following information from an AETB, to review the information provided by the AETB in response to such a request, or to take any other action related to the response, the owner or operator may find it useful to request that AETBs complying with paragraph (b)(2) of this section provide a copy of the following:

(1) The AETB's quality manual. For the purpose of application of 40 CFR part 2, subpart B, AETB's concerned about the potential for public access to confidential business information (CBI) may identify any information subject to such a claim in the copy provided;

(2) The results of any internal audits performed by the AETB and any external audits of the AETB during the 12 month period through the previous calendar quarter;

(3) Performance data (as defined in ASTM D7036–04 (incorporated by reference, *see* § 75.6)) collected by the AETB, including corrective actions implemented, during the 12 month period through the previous calendar quarter; and

(4) Training records for all on-site technical personnel, including any Qualified Individuals, for the 12 month period through the previous calendar quarter.

(e) All relative accuracy testing performed pursuant to § 75.74(c)(2)(ii), section 6.5 of appendix A to this part or section 2.3.1 of appendix B to this part, and stack testing under § 75.19 and Appendix E to this part shall be overseen and supervised on site by at least one Qualified Individual, as defined in § 72.2 of this chapter with respect to the methods employed in the test project. If the source owner or operator, or a State, local, or EPA observer, discovers while the test team is still on site, that at least one QI did not oversee and supervise the entire test (as qualified by this paragraph (e)), only those portions of the test that were overseen and supervised by at least one QI as described above may be used under this part. However, allowance is made for normal activities of a QI who is overseeing and supervising a test, *e.g.,* bathroom breaks, meal breaks, and emergencies that may arise during a test.

(f) Except as provided in paragraph (e), no RATA performed pursuant to § 75.74(c)(2)(ii), section 6.5 of appendix A to this part or section 2.3.1 of appendix B to this part, and no stack test under § 75.19 or Appendix E to this part (or portion of such a RATA or stack test) conducted by an AETB (as defined in § 72.2) shall be invalidated under this part as a result of the failure of the AETB to conform to ASTM D7036–04 (incorporated by reference, *see* § 75.6). Validation of such tests is determined based on the other part 75 testing requirements. EPA recommends that proper observation of tests and review of test results continue, regardless of whether an AETB fully conforms to ASTM D7036–04.

(g) An owner or operator who has requested information from an AETB under paragraph (d) of this part who believes that the information provided by the AETB was either incomplete or inaccurate may request the Administrator's assistance in remedying the alleged deficiencies. Upon such a request, if the Administrator concurs that the information submitted to a source subject to part 75 by an AETB under this section is either incomplete or inaccurate, the Administrator will provide the AETB a description of the deficiencies to be remedied. The Administrator's determination of completeness and accuracy of information will be solely based on the provisions of ASTM D7036–04 (incorporated by reference, *see* § 75.6) and this part. The Administrator may post the name of the offending AETB on Agency Web sites (including the CAMD Web site *http://www.epa.gov/airmarkets/emissions/aetb.html*) if within 30 days of the Administrator having provided the AETB a description of the deficiencies to be remedied, the AETB does not satisfactorily respond to the source and notify the Administrator of the response by submitting the notification to *aetb@epa.gov*, unless otherwise provided by the Administrator. The AETB need not submit the information it provides to the owner or operator to the Administrator, unless specifically requested by the Administrator. If after the AETB's name is posted, the Administrator, in consultation with the source, determines that the AETB's response is sufficient, the AETB's name will be removed from the EPA Web sites.

*6.2 Linearity Check (General Procedures)*

Check the linearity of each $SO_2$, $NO_X$, $CO_2$, and $O_2$ monitor while the unit, or group of units for a common stack, is combusting fuel at conditions of typical stack temperature and pressure; it is not necessary for the unit to be generating electricity during this test.

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*6.3* * * *

*6.3.1 Gas Monitor 7-Day Calibration Error Test*

The following monitors and ranges are exempted from the 7-day calibration error test requirements of this part: the $SO_2$, $NO_X$, $CO_2$ and $O_2$ monitors installed on peaking units (as defined in § 72.2 of this chapter);

and any $SO_2$ or $NO_X$ measurement range with a span value of 50 ppm or less. In all other cases, measure the calibration error of each $SO_2$ monitor, each $NO_X$ monitor, and each $CO_2$ or $O_2$ monitor while the unit is combusting fuel (but not necessarily generating electricity) once each day for 7 consecutive operating days according to the following procedures. (In the event that unit outages occur after the commencement of the test, the 7 consecutive unit operating days need not be 7 consecutive calendar days). Units using dual span monitors must perform the calibration error test on both high- and low-scales of the pollutant concentration monitor. The calibration error test procedures in this section and in section 6.3.2 of this appendix shall also be used to perform the daily assessments and additional calibration error tests required under sections 2.1.1 and 2.1.3 of appendix B to this part. Do not make manual or automatic adjustments to the monitor settings until after taking measurements at both zero and high concentration levels for that day during the 7-day test. If automatic adjustments are made following both injections, conduct the calibration error test such that the magnitude of the adjustments can be determined and recorded. Record and report test results for each day using the unadjusted concentration measured in the calibration error test prior to making any manual or automatic adjustments (*i.e.,* resetting the calibration). The calibration error tests should be approximately 24 hours apart, (unless the 7-day test is performed over nonconsecutive days). Perform calibration error tests at both the zero-level concentration and high-level concentration, as specified in section 5.2 of this appendix. Alternatively, a mid-level concentration gas (50.0 to 60.0 percent of the span value) may be used in lieu of the high-level gas, provided that the mid-level gas is more representative of the actual stack gas concentrations. A calibration gas blend may be used as both a zero-level gas and an upscale (mid- or high-level) gas, where appropriate. In addition, repeat the procedure for $SO_2$ and $NO_X$ pollutant concentration monitors using the low-scale for units equipped with emission controls or other units with dual span monitors. Use only calibration gas, as specified in section 5.1 of this appendix. Introduce the calibration gas at the gas injection port, as specified in section 2.2.1 of this appendix. Operate each monitor in its normal sampling mode. For extractive and dilution type monitors, pass the calibration gas through all filters, scrubbers, conditioners, and other monitor components used during normal sampling and through as much of the sampling probe as is practical. For in-situ type monitors, perform calibration, checking all active electronic and optical components, including the transmitter, receiver, and analyzer. Challenge the pollutant concentration monitors and $CO_2$ or $O_2$ monitors once with each calibration gas. Record the monitor response from the data acquisition and handling system. Using Equation A–5 of this appendix, determine the calibration error at each concentration once each day (at approximately 24-hour intervals) for 7 consecutive days according to the procedures given in this section. The results of a 7-day calibration error test are acceptable for monitor or monitoring system certification, recertification or diagnostic testing if none of these daily calibration error test results exceed the applicable performance specifications in section 3.1 of this appendix. The status of emission data from a gas monitor prior to and during a 7-day calibration error test period shall be determined as follows:

* * * * *

*6.4 Cycle Time Test*

Perform cycle time tests for each pollutant concentration monitor and continuous emission monitoring system while the unit is operating, according to the following procedures. Use a zero-level and a high-level calibration gas (as defined in section 5.2 of this appendix) alternately. To determine the downscale cycle time, measure the concentration of the flue gas emissions until the response stabilizes. Record the stable emissions value. Inject a zero-level concentration calibration gas into the probe tip (or injection port leading to the calibration cell, for in situ systems with no probe). Record the time of the zero gas injection, using the data acquisition and handling system (DAHS). Next, allow the monitor to measure the concentration of the zero gas until the response stabilizes. Record the stable ending calibration gas reading. Determine the downscale cycle time as the time it takes for 95.0 percent of the step change to be achieved between the stable stack emissions value and the stable ending zero gas reading. Then repeat the procedure, starting with stable stack emissions and injecting the high-level gas, to determine the upscale cycle time, which is the time it takes for 95.0 percent of the step change to be achieved between the stable stack emissions value and the stable ending high-level gas reading. Use the following criteria to assess when a stable reading of stack emissions or calibration gas concentration has been attained. A stable value is equivalent to a reading with a change of less than 2.0 percent of the span value for 2 minutes, or a reading with a change of less than 6.0 percent from the measured average concentration over 6 minutes. Alternatively, the reading is considered stable if it changes by no more than 0.5 ppm or 0.2% $CO_2$ or $O_2$ (as applicable) for two minutes. (Owners or operators of systems which do not record data in 1-minute or 3-minute intervals may petition the Administrator under § 75.66 for alternative stabilization criteria). For monitors or monitoring systems that perform a series of operations (such as purge, sample, and analyze), time the injections of the calibration gases so they will produce the longest possible cycle time. Refer to Figures 6a and 6b in this appendix for example calculations of upscale and downscale cycle times. Report the slower of the two cycle times (upscale or downscale) as the cycle time for the analyzer. Prior to January 1, 2009 for the $NO_X$-diluent continuous emission monitoring system test, either record and report the longer cycle time of the two component analyzers as the system cycle time or record the cycle time for each component analyzer separately (as applicable). On and after January 1, 2009, record the cycle time for each component analyzer separately. For time-shared systems, perform the cycle time tests at each probe locations that will be polled within the same 15-minute period during monitoring system operations. To determine the cycle time for time-shared systems, at each monitoring location, report the sum of the cycle time observed at that monitoring location plus the sum of the time required for all purge cycles (as determined by the continuous emission monitoring system manufacturer) at each of the probe locations of the time-shared systems. For monitors with dual ranges, report the test results for each range separately. Cycle time test results are acceptable for monitor or monitoring system certification, recertification or diagnostic testing if none of the cycle times exceed 15 minutes. The status of emissions data from a monitor prior to and during a cycle time test period shall be determined as follows:

* * * * *

*6.5 Relative Accuracy and Bias Tests (General Procedures)*

Perform the required relative accuracy test audits (RATAs) as follows for each $CO_2$ emissions concentration monitor (including $O_2$ monitors used to determine $CO_2$ emissions concentration), each $SO_2$ pollutant concentration monitor, each $NO_X$ concentration monitoring system used to determine $NO_X$ mass emissions, each flow monitor, each $NO_X$-diluent CEMS, each $O_2$ or $CO_2$ diluent monitor used to calculate heat input, and each moisture monitoring system. For $NO_X$ concentration monitoring systems used to determine $NO_X$ mass emissions, as defined in § 75.71(a)(2), use the same general RATA procedures as for $SO_2$ pollutant concentration monitors; however, use the reference methods for $NO_X$ concentration specified in section 6.5.10 of this appendix:

* * * * *

(c) For monitoring systems with dual ranges, perform the relative accuracy test on the range normally used for measuring emissions. For units with add-on $SO_2$ or $NO_X$ controls that operate continuously rather than seasonally, or for units that need a dual range to record high concentration "spikes" during startup conditions, the low range is considered normal. However, for some dual span units (*e.g.,* for units that use fuel switching or for which the emission controls are operated seasonally), provided that both monitor ranges are connected to a common probe and sample interface, either of the two measurement ranges may be considered normal; in such cases, perform the RATA on the range that is in use at the time of the scheduled test. If the low and high measurement ranges are connected to separate sample probes and interfaces, RATA testing on both ranges is required.

* * * * *

(e) Complete each single-load relative accuracy test audit within a period of 168 consecutive unit operating hours, as defined in § 72.2 of this chapter (or, for CEMS installed on common stacks or bypass stacks, 168 consecutive stack operating hours, as

defined in § 72.2 of this chapter). For 2-level and 3-level flow monitor RATAs, complete all of the RATAs at all levels, to the extent practicable, within a period of 168 consecutive unit (or stack) operating hours; however, if this is not possible, up to 720 consecutive unit (or stack) operating hours may be taken to complete a multiple-load flow RATA.

* * * * *

(g) For each $SO_2$ or $CO_2$ emissions concentration monitor, each flow monitor, each $CO_2$ or $O_2$ diluent monitor used to determine heat input, each $NO_X$ concentration monitoring system used to determine $NO_X$ mass emissions, as defined in § 75.71(a)(2), each moisture monitoring system, and each $NO_X$-diluent CEMS, calculate the relative accuracy, in accordance with section 7.3 or 7.4 of this appendix, as applicable. In addition (except for $CO_2$, $O_2$, or moisture monitors), test for bias and determine the appropriate bias adjustment factor, in accordance with sections 7.6.4 and 7.6.5 of this appendix, using the data from the relative accuracy test audits.

*6.5.1 Gas Monitoring System RATAs (Special Considerations)*

(a) Perform the required relative accuracy test audits for each $SO_2$ or $CO_2$ emissions concentration monitor, each $CO_2$ or $O_2$ diluent monitor used to determine heat input, each $NO_X$-diluent CEMS, and each $NO_X$ concentration monitoring system used to determine $NO_X$ mass emissions, as defined in § 75.71(a)(2), at the normal load level or normal operating level for the unit (or combined units, if common stack), as defined in section 6.5.2.1 of this appendix. If two load levels or operating levels have been designated as normal, the RATAs may be done at either load (or operating) level.

(b) For the initial certification of a gas monitoring system and for recertifications in which, in addition to a RATA, one or more other tests are required (*i.e.,* a linearity test, cycle time test, or 7-day calibration error test), EPA recommends that the RATA not be commenced until the other required tests of the CEMS have been passed.

* * * * *

*6.5.7 Sampling Strategy*

(a) Conduct the reference method tests allowed in section 6.5.10 of this appendix so they will yield results representative of the pollutant concentration, emission rate, moisture, temperature, and flue gas flow rate from the unit and can be correlated with the pollutant concentration monitor, $CO_2$ or $O_2$ monitor, flow monitor, and $SO_2$ or $NO_X$ CEMS measurements. The minimum acceptable time for a gas monitoring system RATA run or for a moisture monitoring system RATA run is 21 minutes. For each run of a gas monitoring system RATA, all necessary pollutant concentration measurements, diluent concentration measurements, and moisture measurements (if applicable) must, to the extent practicable, be made within a 60-minute period. For $NO_X$-diluent monitoring system RATAs, the pollutant and diluent concentration measurements must be made simultaneously. For flow monitor RATAs, the minimum time per run shall be 5 minutes. Flow rate reference method measurements allowed in section 6.5.10 of this appendix may be made either sequentially from port-to-port or simultaneously at two or more sample ports. The velocity measurement probe may be moved from traverse point to traverse point either manually or automatically. If, during a flow RATA, significant pulsations in the reference method readings are observed, be sure to allow enough measurement time at each traverse point to obtain an accurate average reading when a manual readout method is used (*e.g.,* a "sight-weighted" average from a manometer). Also, allow sufficient measurement time to ensure that stable temperature readings are obtained at each traverse point, particularly at the first measurement point at each sample port, when a probe is moved sequentially from port-to-port. A minimum of one set of auxiliary measurements for stack gas molecular weight determination (*i.e.,* diluent gas data and moisture data) is required for every clock hour of a flow RATA or for every three test runs (whichever is less restrictive). Alternatively, moisture measurements for molecular weight determination may be performed before and after a series of flow RATA runs at a particular load level (low, mid, or high), provided that the time interval between the two moisture measurements does not exceed three hours. If this option is selected, the results of the two moisture determinations shall be averaged arithmetically and applied to all RATA runs in the series. Successive flow RATA runs may be performed without waiting in between runs. If an $O_2$ diluent monitor is used as a $CO_2$ continuous emission monitoring system, perform a $CO_2$ system RATA (*i.e.,* measure $CO_2$, rather than $O_2$, with the applicable reference method allowed in section 6.5.10 of this appendix). For moisture monitoring systems, an appropriate coefficient, "K" factor or other suitable mathematical algorithm may be developed prior to the RATA, to adjust the monitoring system readings with respect to the applicable reference method allowed in section 6.5.10 of this appendix. If such a coefficient, K-factor or algorithm is developed, it shall be applied to the CEMS readings during the RATA and (if the RATA is passed), to the subsequent CEMS data, by means of the automated data acquisition and handling system. The owner or operator shall keep records of the current coefficient, K factor or algorithm, as specified in § 75.59(a)(5)(vii). Whenever the coefficient, K factor or algorithm is changed, a RATA of the moisture monitoring system is required.

(b) To properly correlate individual $SO_2$ or $NO_X$ CEMS data (in lb/mmBtu) and volumetric flow rate data with the applicable reference method data, annotate the beginning and end of each reference method test run (including the exact time of day) on the individual chart recorder(s) or other permanent recording device(s).

* * * * *

*6.5.10 Reference Methods*

The following methods are from appendix A to part 60 of this chapter, and are the reference methods for performing relative accuracy test audits under this part: Method 1 or 1A in appendix A–1 to part 60 of this chapter for siting; Method 2 in appendix A–1 to part 60 of this chapter or its allowable alternatives in appendices A–1 and A–2 to part 60 of this chapter (except for Methods 2B and 2E in appendix A–1 to part 60 of this chapter) for stack gas velocity and volumetric flow rate; Methods 3, 3A or 3B in appendix A–2 to part 60 of this chapter for $O_2$ and $CO_2$; Method 4 in appendix A–3 to part 60 of this chapter for moisture; Methods 6, 6A or 6C in appendix A–4 to part 60 of this chapter for $SO_2$; and Methods 7, 7A, 7C, 7D or 7E in appendix A–4 to part 60 of this chapter for $NO_X$, excluding the exceptions to Method 7E identified in § 75.22(a)(5). When using Method 7E for measuring $NO_X$ concentration, total $NO_X$, including both NO and $NO_2$, must be measured. When using EPA Protocol gas with Methods 3A, 6C, and 7E, the gas must be from an EPA Protocol gas production site that is participating in the EPA Protocol Gas Verification Program, pursuant to § 75.21(g)(6). An EPA Protocol gas cylinder certified by or ordered from a non-participating production site no later than May 27, 2011 may be used for the purposes of this part until the earlier of the cylinder's expiration date or the date on which the cylinder gas pressure reaches 150 psig; however, in no case shall the cylinder be recertified by a non-participating EPA Protocol gas production site to extend its useful life and be used by a source subject to this part. In the event that an EPA Protocol gas production site is removed from the list of PGVP participants on the same date as or after the date on which a particular cylinder is certified or ordered, that gas cylinder may continue to be used for the purposes of this part until the earlier of the cylinder's expiration date or the date on which the cylinder gas pressure reaches 150 psig; however, in no case shall the cylinder be recertified by a non-participating EPA Protocol gas production site to extend its useful life and be used by a source subject to this part.

* * * * *

*7.3 Relative Accuracy for $SO_2$ and $CO_2$ Emissions Concentration Monitors, $O_2$ Monitors, $NO_X$ Concentration Monitoring Systems, and Flow Monitors*

Analyze the relative accuracy test audit data from the reference method tests for $SO_2$ and $CO_2$ emissions concentration monitors, $CO_2$ or $O_2$ monitors used for heat input rate determination, $NO_X$ concentration monitoring systems used to determine $NO_X$ mass emissions under subpart H of this part, and flow monitors using the following procedures. Summarize the results on a data sheet. An example is shown in Figure 2. Calculate the mean of the monitor or monitoring system measurement values. Calculate the mean of the reference method values. Using data from the automated data acquisition and handling system, calculate the arithmetic differences between the reference method and monitor measurement data sets. Then calculate the arithmetic mean of the difference, the standard deviation, the confidence coefficient, and the monitor or monitoring system relative accuracy using the following procedures and equations.

*7.3.1 Arithmetic Mean*

Calculate the arithmetic mean of the differences of a data set as follows:

$$\bar{d} = \frac{1}{n}\sum_{i=1}^{n} d_i \qquad \text{(Eq. A-7)}$$

Where:

$\bar{d}$ = Arithmetic mean of the differences

n = Number of data points (test runs)

$\sum_{i=1}^{n} d_i$ = Algebraic sum of the individual differences $d_i$

$d_i$ = The difference between a reference method value and the corresponding continuous emission monitoring system value ($RM_i$ - $CEM_i$), for a given data point

* * * * *

*7.6 Bias Test and Adjustment Factor*

Test the following relative accuracy test audit data sets for bias: $SO_2$ pollutant concentration monitors; flow monitors; $NO_X$ concentration monitoring systems used to determine $NO_X$ mass emissions, as defined in 75.71(a)(2); and $NO_X$-diluent CEMS using the procedures outlined in sections 7.6.1 through 7.6.5 of this appendix. For multiple-load flow RATAs, perform a bias test at each load level designated as normal under section 6.5.2.1 of this appendix.

*7.6.1 Arithmetic Mean*

Calculate the arithmetic mean of the differences of the data set using Equation A–7 of this appendix. To calculate bias for an $SO_2$ or $NO_X$ pollutant concentration monitor, "$d_i$" is, for each paired data point, the difference between the $SO_2$ or $NO_X$ concentration value (in ppm) obtained from the reference method and the monitor. To calculate bias for a flow monitor, "$d_i$" is, for each paired data point, the difference between the flow rate values (in scfh) obtained from the reference method and the monitor. To calculate bias for a $NO_X$-diluent continuous emission monitoring system, "$d_i$" is, for each paired data point, the difference between the $NO_X$ emission rate values (in lb/mmBtu) obtained from the reference method and the monitoring system.

* * * * *

*7.6.5 * * **

(b) For single-load RATAs of $SO_2$ pollutant concentration monitors, $NO_X$ concentration monitoring systems, and $NO_X$-diluent monitoring systems, and for the single-load flow RATAs required or allowed under section 6.5.2 of this appendix and sections 2.3.1.3(b) and 2.3.1.3(c) of appendix B to this part, the appropriate BAF is determined directly from the RATA results at normal load, using Equation A–12. Notwithstanding, when a $NO_X$ concentration CEMS or an $SO_2$ CEMS or a $NO_X$-diluent CEMS installed on a low-emitting affected unit (*i.e.,* average $SO_2$ or $NO_X$ concentration during the RATA ≤ 250 ppm or average $NO_X$ emission rate ≤ 0.200 lb/mmBtu) meets the normal 10.0 percent relative accuracy specification (as calculated using Equation A–10) or the alternate relative accuracy specification in section 3.3 of this appendix for low-emitters, but fails the bias test, the BAF may either be determined using Equation A–12, or a default BAF of 1.111 may be used.

* * * * *

(f) Use the bias-adjusted values in computing substitution values in the missing data procedure, as specified in subpart D of this part, and in reporting the concentration of $SO_2$, the flow rate, the average $NO_X$ emission rate, the unit heat input, and the calculated mass emissions of $SO_2$ and $CO_2$ during the quarter and calendar year, as specified in subpart G of this part. In addition, when using a $NO_X$ concentration monitoring system and a flow monitor to calculate $NO_X$ mass emissions under subpart H of this part, use bias-adjusted values for $NO_X$ concentration and flow rate in the mass emission calculations and use bias-adjusted $NO_X$ concentrations to compute the appropriate substitution values for $NO_X$ concentration in the missing data routines under subpart D of this part.

* * * * *

■ 31. Appendix B to part 75 is amended by:

■ a. Revising section 1.1.4;

■ b. Removing sections 1.5 and 1.5.1 through 1.5.6;

■ c. Revising paragraph (a) of section 2.1.4;

■ d. Adding paragraph (c) to section 2.1.4;

■ e. Revising section 2.2.1;

■ f. Adding paragraph (i) to section 2.2.3;

■ g. Revising paragraph (a) of section 2.3.1.1, paragraph (a) of section 2.3.1.3, and paragraphs (d) and (i) of section 2.3.2;

■ h. Adding paragraph (k) to section 2.3.2;

■ i. Revising section 2.3.4;

■ j. Removing section 2.6;

■ k. Revising Figures 1 and 2; and

■ e. Adding Figure 3, to read as follows:

## Appendix B to Part 75—Quality Assurance and Quality Control Procedures

*1. Quality Assurance/Quality Control Program*

* * * * *

1.1.4 The provisions in section 6.1.2 of appendix A to this part shall apply to the annual RATAs described in § 75.74(c)(2)(ii) and to the semiannual and annual RATAs described in section 2.3 of this appendix.

* * * * *

*2. Frequency of Testing*

* * * * *

*2.1.4 Data Validation*

(a) An out-of-control period occurs when the calibration error of an $SO_2$ or $NO_X$ pollutant concentration monitor exceeds 5.0 percent of the span value, when the calibration error of a $CO_2$ or $O_2$ monitor (including $O_2$ monitors used to measure $CO_2$ emissions or percent moisture) exceeds 1.0 percent $O_2$ or $CO_2$, or when the calibration error of a flow monitor exceeds 6.0 percent of the span value, which is twice the applicable specification of appendix A to this part. Notwithstanding, a differential pressure-type flow monitor for which the calibration error exceeds 6.0 percent of the span value shall not be considered out-of-control if |R–A|, the absolute value of the difference between the monitor response and the reference value in Equation A–6 of appendix A to this part, is < 0.02 inches of water. In addition, an $SO_2$ or $NO_X$ monitor for which the calibration error exceeds 5.0 percent of the span value shall not be considered out-of-control if |R–A| in Equation A–6 does not exceed 5.0 ppm (for span values ≤ 50 ppm), or if |R–A|; does not exceed 10.0 ppm (for span values > 50 ppm, but ≤ 200 ppm). The out-of-control period begins upon failure of the calibration error test and ends upon completion of a successful calibration error test. Note, that if a failed calibration, corrective action, and successful calibration error test occur within the same hour, emission data for that hour recorded by the monitor after the successful calibration error test may be used for reporting purposes, provided that two or more valid readings are obtained as required by § 75.10. A $NO_X$-diluent CEMS is considered out-of-control if the calibration error of either component monitor exceeds twice the applicable performance specification in appendix A to this part. Emission data shall not be reported from an out-of-control monitor.

* * * * *

(c) The results of any certification, recertification, diagnostic, or quality assurance test required under this part may not be used to validate the emissions data required under this part, if the test is performed using EPA Protocol gas from a production site that is not participating in the PGVP, except as provided in § 75.21(g)(7) or if the cylinder(s) are analyzed by an independent laboratory and shown to meet the requirements of section 5.1.4(b) of appendix A to this part.

* * * * *

*2.2.1 Linearity Check*

Unless a particular monitor (or monitoring range) is exempted under this paragraph or under section 6.2 of appendix A to this part, perform a linearity check, in accordance with the procedures in section 6.2 of appendix A to this part, for each primary and redundant backup $SO_2$, and NOx pollutant concentration monitor and each primary and redundant backup $CO_2$ or $O_2$ monitor (including $O_2$ monitors used to measure $CO_2$ emissions or to continuously monitor moisture) at least once during each QA operating quarter, as defined in § 72.2 of this chapter. For units using both a low and high span value, a linearity check is required only on the range(s) used to record and report emission data during the QA operating quarter. Conduct the linearity checks no less than 30 days apart, to the extent practicable. The data validation procedures in section 2.2.3(e) of this appendix shall be followed.

* * * * *

*2.2.3 Data Validation*

* * * * *

(i) The results of any certification, recertification, diagnostic, or quality assurance test required under this part may not be used to validate the emissions data required under this part, if the test is performed using EPA Protocol gas that was not from an EPA Protocol gas production site participating in the PGVP on the date the gas was procured either by the tester or by a reseller that sold to the tester the unaltered EPA Protocol gas, except as provided in § 75.21(g)(7) or if the cylinder(s) are analyzed by an independent laboratory and shown to meet the requirements of section 5.1.4(b) of appendix A to this part.

* * * * *

*2.3.1.1 Standard RATA Frequencies*

(a) Except as otherwise specified in § 75.21(a)(6) or (a)(7) or in section 2.3.1.2 of this appendix, perform relative accuracy test audits semiannually, *i.e.,* once every two successive QA operating quarters (as defined in § 72.2 of this chapter) for each primary and redundant backup $SO_2$ pollutant concentration monitor, flow monitor, $CO_2$ emissions concentration monitor (including $O_2$ monitors used to determine $CO_2$ emissions), $CO_2$ or $O_2$ diluent monitor used to determine heat input, moisture monitoring system, $NO_X$ concentration monitoring system, or $NO_X$-diluent CEMS. A calendar quarter that does not qualify as a QA operating quarter shall be excluded in determining the deadline for the next RATA. No more than eight successive calendar quarters shall elapse after the quarter in which a RATA was last performed without a subsequent RATA having been conducted. If a RATA has not been completed by the end of the eighth calendar quarter since the quarter of the last RATA, then the RATA must be completed within a 720 unit (or stack) operating hour grace period (as provided in section 2.3.3 of this appendix) following the end of the eighth successive elapsed calendar quarter, or data from the CEMS will become invalid.

* * * * *

*2.3.1.3 RATA Load (or Operating) Levels and Additional RATA Requirements*

(a) For $SO_2$ pollutant concentration monitors, $CO_2$ emissions concentration monitors (including $O_2$ monitors used to determine $CO_2$ emissions), $CO_2$ or $O_2$ diluent monitors used to determine heat input, $NO_X$ concentration monitoring systems, and $NO_X$-diluent monitoring systems, the required semiannual or annual RATA tests shall be done at the load level (or operating level) designated as normal under section 6.5.2.1(d) of appendix A to this part. If two load levels (or operating levels) are designated as normal, the required RATA(s) may be done at either load level (or operating level).

* * * * *

*2.3.2 Data Validation*

* * * * *

(d) For single-load (or single-level) RATAs, if a daily calibration error test is failed during a RATA test period, prior to completing the test, the RATA must be repeated. Data from the monitor are invalidated prospectively from the hour of the failed calibration error test until the hour of completion of a subsequent successful calibration error test. The subsequent RATA shall not be commenced until the monitor has successfully passed a calibration error test in accordance with section 2.1.3 of this appendix. For multiple-load (or multiple-level) flow RATAs, each load level (or operating level) is treated as a separate RATA (*i.e.,* when a calibration error test is failed prior to completing the RATA at a particular load level (or operating level), only the RATA at that load level (or operating level) must be repeated; the results of any previously-passed RATA(s) at the other load level(s) (or operating level(s)) are unaffected, unless the monitor's polynomial coefficients or K-factor(s) must be changed to correct the problem that caused the calibration failure, in which case a subsequent 3-load (or 3-level) RATA is required), except as otherwise provided in section 2.3.1.3 (c)(5) of this appendix.

* * * * *

(i) Each time that a hands-off RATA of an $SO_2$ pollutant concentration monitor, a $NO_x$-diluent monitoring system, a $NO_X$ concentration monitoring system, or a flow monitor is passed, perform a bias test in accordance with section 7.6.4 of appendix A to this part. Apply the appropriate bias adjustment factor to the reported $SO_2$, $NO_X$, or flow rate data, in accordance with section 7.6.5 of appendix A to this part.

* * * * *

(k) The results of any certification, recertification, diagnostic, or quality assurance test required under this part may not be used to validate the emissions data required under this part, if the test is performed using EPA Protocol gas from a production site that is not participating in the PGVP, except as provided in § 75.21(g)(7) or if the cylinder(s) are analyzed by an independent laboratory and shown to meet the requirements of section 5.1.4(b) of appendix A to this part.

* * * * *

*2.3.4 Bias Adjustment Factor*

Except as otherwise specified in section 7.6.5 of appendix A to this part, if an $SO_2$ pollutant concentration monitor, a flow monitor, a $NO_X$-diluent CEMS, or a $NO_X$ concentration monitoring system used to calculate $NO_X$ mass emissions fails the bias test specified in section 7.6 of appendix A to this part, use the bias adjustment factor given in Equations A–11 and A–12 of appendix A to this part or the allowable alternative BAF specified in section 7.6.5(b) of appendix A of this part, to adjust the monitored data.

* * * * *

FIGURE 1 TO APPENDIX B OF PART 75—QUALITY ASSURANCE TEST REQUIREMENTS

| Test | Basic QA test frequency requirements | | |
|---|---|---|---|
| | Daily * | Quarterly * | Semiannual or annual * |
| Calibration Error Test (2 pt.) | X | | |
| Interference Check (flow) | X | | |
| Flow-to-Load Ratio | | X | |
| Leak Check (DP flow monitors) | | X | |
| Linearity Check * (3 pt.) | | X | |
| RATA ($SO_2$, $NO_X$, $CO_2$, $O_2$, $H_2O$)[1] | | | X |
| RATA (flow)[1 2] | | | X |

* "Daily" means operating days, only. "Quarterly" means once every QA operating quarter. "Semiannual" means once every two QA operating quarters. "Annual" means once every four QA operating quarters.

[1] Conduct RATA annually (i.e., once every four QA operating quarters) rather than semiannually, if monitor meets accuracy requirements to qualify for less frequent testing.

[2] For flow monitors installed on peaking units, bypass stacks, or units that qualify for single-level RATA testing under section 6.5.2(e) of this part, conduct all RATAs at a single, normal load (or operating level). For other flow monitors, conduct annual RATAs at two load levels (or operating levels). Alternating single-load and 2-load (or single-level and 2-level) RATAs may be done if a monitor is on a semiannual frequency. A single-load (or single-level) RATA may be done in lieu of a 2-load (or 2-level) RATA if, since the last annual flow RATA, the unit has operated at one load level (or operating level) for ≥ 85.0 percent of the time. A 3-level RATA is required at least once every five years (20 calendar quarters) and whenever a flow monitor is re-characterized, except for flow monitors exempted from 3-level RATA testing under section 6.5.2(b) or 6.5.2(e) of appendix A to this part.

FIGURE 2 TO APPENDIX B OF PART 75—RELATIVE ACCURACY TEST FREQUENCY INCENTIVE SYSTEM

| RATA | Semiannual [W] | Annual [W] |
|---|---|---|
| $SO_2$ or $NO_X$ [Y] | 7.5% < RA ≤ 10.0% or ± 15.0 ppm [X] | RA ≤ 7.5% or ± 12.0 ppm [X]. |
| $NO_X$-diluent | 7.5% < RA ≤ 10.0% or ± 0.020 lb/mmBtu [X] | RA ≤ 7.5% or ± 0. 015 lb/mmBtu [X]. |
| Flow | 7.5% < RA ≤ 10.0% or ± 2.0 fps [X] | RA ≤ 7.5% or ± 1.5 fps [X]. |
| $CO_2$ or $O_2$ | 7.5% < RA ≤ 10.0% or ± 1.0% $CO_2/O_2$ [X] | RA ≤ 7.5% or ± 0.7% $CO_2/O_2$ [X]. |
| Moisture | 7.5% < RA ≤ 10.0% or ± 1.5% $H_2O$ [X] | RA ≤ 7.5% or ± 1.0% $H_2O$ [X]. |

[W] The deadline for the next RATA is the end of the second (if semiannual) or fourth (if annual) successive QA operating quarter following the quarter in which the CEMS was last tested. Exclude calendar quarters with fewer than 168 unit operating hours (or, for common stacks and bypass stacks, exclude quarters with fewer than 168 stack operating hours) in determining the RATA deadline. For $SO_2$ monitors, QA operating quarters in which only very low sulfur fuel as defined in § 72.2 of this chapter, is combusted may also be excluded. However, the exclusion of calendar quarters is limited as follows: the deadline for the next RATA shall be no more than 8 calendar quarters after the quarter in which a RATA was last performed. A 720 operating hour grace period is available if the RATA cannot be completed by the deadline.

[X] The difference between monitor and reference method mean values applies to moisture monitors, $CO_2$, and $O_2$ monitors, low emitters of $SO_2$, $NO_X$, and low flow, only.

[Y] A $NO_X$ concentration monitoring system used to determine $NO_X$ mass emissions under § 75.71.

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FIGURE 3 TO APPENDIX B OF PART 75--SINGLE COMPONENT PLUS BALANCE GAS CYLINDERS
EPA PROTOCOL GAS VERIFICATION PROGRAM RESULTS
EPA CYLINDER GAS ASSAYS PERFORMED BY NIST [ NIST to Insert: Month, Year]

| Specialty Gas Company Name | EPA Protocol Gas Production Site Name | Vendor ID | Stamped Cylinder ID | Gas Component, e.g., SO2 | | | | | | | Supplied Complete Documentation (Yes/No) |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Tag Value (e.g., ppm SO2) | Audit Results | | | | | | |
| | | | | | Orig Tag Value (Pass/Fail) | Orig Tag (% dif) | Re-analyzed Value (Pass/Fail) | Re-analysis (% dif) | Vendor Analytical Method (e.g., FTIR) | Vendor Ref Std Used (e.g., NTRM) | |
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% dif = 100 x (Tag Value – NIST Value) / NIST Value

A gaseous component is said to fail when the absolute value of the difference between the audit and vendor concentration values is greater than 2.20%. The 2.20% value is determined by using the "paired t test" at 95% confidence, with an uncertainty of plus or minus 2.0% (fixed by Part 75, Appendix A, section 5.1.4(b)) for the gas vendor and an expanded uncertainty (coverage factor k=2) of plus or minus 1.0% (maximum acceptable) for the audit. If on future audits, e.g., for very low concentration gases, the plus or minus 1.0% audit expanded uncertainty value changes, the 2.20% value may change. If the difference between the audit value and the vendor value is plus or minus 2.20% or less, then (because of the uncertainties in the total measurement system) statistically there is no difference between the two values. Thus, a difference of 2.10% would be interpreted as being equal to one of, for example, 0.40%.

Nothing can be said regarding the performance of any EPA Protocol gas production site inadvertently not included in the audit. Any accuracy assessment is an instantaneous snapshot of the process being measured. These results should not be regarded as a final statement on the accuracy of EPA Protocol gases. They can be used as a general indicator of the current status of the accuracy of EPA Protocol gases as a whole. However, individual results should not be taken as definitive indicators of the analytical capabilities of individual producers. EPA presents this information without assigning a rating to the gas vendors, for example, who is the best, who is approved, or is not approved and specifically does not endorse any particular vendor.

**NOTE: For cylinders with more than one component plus balance gas, change the title appropriately, e.g., "FIGURE 3 TO APPENDIX B OF PART 75 – BI-BLEND PLUS BALANCE GAS CYLINDERS . . ." and add appropriate columns to Figure 3 for the additional components following the same format used in the columns for SO2 above.**

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■ 32. Appendix D to part 75 is amended by revising Section 2.1.5.1 to read as follows:

## Appendix D to Part 75—Optional $SO^2$ Emissions Data Protocol for Gas-Fired and Oil-Fired Peaking Units

* * * * *

2.1.5.1 Use the procedures in the following standards to verify flowmeter accuracy or design, as appropriate to the type of flowmeter: ASME MFC–3M–2004, Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi; ASME MFC–4M–1986 (Reaffirmed 1997), Measurement of Gas Flow by Turbine Meters; American Gas Association Report No. 3, Orifice Metering of Natural Gas and Other Related Hydrocarbon Fluids Part 1: General Equations and Uncertainty Guidelines (October 1990 Edition), Part 2: Specification and Installation Requirements (February 1991 Edition), and Part 3: Natural Gas Applications (August 1992 edition) (excluding the modified flow-calculation method in part 3); Section 8, Calibration from American Gas Association Transmission Measurement Committee Report No. 7: Measurement of Gas by Turbine Meters (Second Revision, April 1996); ASME–MFC–5M–1985 (Reaffirmed 1994), Measurement of Liquid Flow in Closed Conduits Using Transit-Time Ultrasonic Flowmeters; ASME MFC–6M–1998, Measurement of Fluid Flow in Pipes Using Vortex Flowmeters; ASME

MFC–7M–1987 (Reaffirmed 1992), Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles; ISO 8316: 1987(E) Measurement of Liquid Flow in Closed Conduits—Method by Collection of the Liquid in a Volumetric Tank; American Petroleum Institute (API) Manual of Petroleum Measurement Standards, Chapter 4—Proving Systems, Section 2—Pipe Provers (Provers Accumulating at Least 10,000 Pulses), Second Edition, March 2001, Section 3—Small Volume Provers, First Edition, July 1988, Reaffirmed October 1993, and Section 5—Master-Meter Provers, Second Edition, May 2000; American Petroleum Institute (API) Manual of Petroleum Measurement Standards, Chapter 22—Testing Protocol, Section 2—Differential Pressure Flow Measurement Devices, First Edition, August 2005; or ASME MFC–9M–1988 (Reaffirmed 2001), Measurement of Liquid Flow in Closed Conduits by Weighing Method, for all other flowmeter types (all incorporated by reference under § 75.6 of this part). The Administrator may also approve other procedures that use equipment traceable to National Institute of Standards and Technology standards. Document such procedures, the equipment used, and the accuracy of the procedures in the monitoring plan for the unit, and submit a petition signed by the designated representative under § 75.66(c). If the flowmeter accuracy exceeds 2.0 percent of the upper range value, the flowmeter does not qualify for use under this part.

* * * * *

■ 33. In Appendix E to Part 75, Section 2.1 is amended by revising the last sentence to read as follows:

## Appendix E to Part 75—Optional $NO_X$ Emissions Estimation Protocol for Gas-Fired Peaking Units and Oil-Fired Peaking Units

* * * * *

*2.1 Initial Performance Testing*

* * * The requirements in section 6.1.2 of appendix A to this part shall apply to any stack testing performed to obtain $O_2$ and $NO_X$ concentration measurements under this appendix, either for units using the excepted methodology in this appendix or for units using the low mass emissions excepted methodology in § 75.19.

* * * * *

■ 34. Appendix F to Part 75 is amended by removing and reserving section 9 to read as follows:

## Appendix F to Part 75—Conversion Procedures

* * * * *

9. [Reserved]

* * * * *

■ 35. Appendix K to part 75 is removed.

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